

# Memory as Power: Who Is To Decide?

John O. Beahrs, MD

The transactional aspects of human memory remain enigmatic: memory disputes carry intense affective charge; memory's effects vary with how content is framed or slanted by one's perspective; memory is vulnerable to suggestive influence; and these processes are seen at all levels of social scale from simple dyads to whole societies. These observations suggest that memory serves important functions in mediating interpersonal relationships. As hypotheses for further study, I propose that (1) memory mediates interpersonal power dynamics; (2) social legitimization countermands memory's truth value when the two conflict; (3) suggestibility protects otherwise disadvantaged individuals by rendering them more adaptable to dominant others' belief systems; and (4) mutual suggestion ties together all levels of scale within a given society. All of these hypotheses are discussed within a context of recent controversies surrounding hypnotically refreshed eyewitness testimony and adult delayed traumatic recall, which are worked out at the intersection of mental health and legal practice with a pivotal role given to the expert witness. The presumption of innocence dominates current trends in these areas. Cases that appear to violate this presumption, such as *Pennsylvania v. Crawford* (718 A.2d (Pa. 1998)), affirm another fundamental principle of democracy: that the ultimate issue of witness credibility is to be decided not by an expert, but by the citizenry itself—as represented in the jury.

Justice depends upon truthful testimony, which in turn depends upon witnesses' accurate recall. Memory is fallible. Therefore, to the extent that memory fails, justice itself may fail. This sobering fact illustrates what Daniel Schacter<sup>1</sup> terms memory's "fragile power." Explicit memory (that which is subject to voluntary retrieval) also defines human experi-

ence; one's sense of personal identity as an "entity" continuous in time, ability to master a trade, and ability to communicate using symbolic language. Knowledge is expanding rapidly concerning memory's neurobiological mechanisms<sup>2</sup> and the factors affecting its reliability.<sup>1,3</sup> Relatively neglected is an equally important dimension, which is memory's dominating role in interpersonal relatedness; more specifically, memory as power.

Four fundamental questions arise. First, why do close friends, colleagues, and intimates so often get into such heated arguments with one another about whose remembered version of some ut-

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Dr. Beahrs is Professor of Psychiatry, Oregon Health Sciences University, Portland, OR, and serves as Chair, Committee on Adult Delayed Recall, American Academy of Psychiatry and the Law. The views in this paper are the author's own and do not necessarily represent those of the U.S. Department of Veterans' Affairs. Address correspondence to: John O. Beahrs, MD (V-7-MHC), Portland Dept. of Veterans Affairs Medical Center, P.O. Box 1035, Portland, OR 97207.

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terly inconsequential past event is the more true? Second, when factual details are agreed upon, how can the same remembered event be experienced and/or reported with such differing perspectives that the accounts appear to oppose one another as do night and day? Third, why is memory so vulnerable to suggestive falsification? Fourth, and finally, by what means do these questions gain such momentous sociopolitical import as occurs in the controversies surrounding delayed traumatic recall? Questions such as these, interpersonal and sociopolitical, are highly relevant to the dilemmas of everyday living and thus to psychiatry and the law.

### Two Homicide Cases

To approach this interpersonal dimension, I first summarize the essence of two contrasting homicide cases in which questionable delayed memories played pivotal roles. The first case, now well known, is California's *People v. Franklin*.<sup>4</sup> The second, *Pennsylvania v. Crawford*,<sup>5</sup> was decided in Pennsylvania's Supreme Court last year. Both cases illustrate the courts' dilemmas in approaching the power of memory in law on the broadest social scale.

***People v. Franklin*** Two decades after the notorious unsolved 1969 murder of Susan Nason, a nine-year-old girl, her childhood friend Eileen Franklin-Lipsker (age eight at the time of the offense) developed increasingly vivid memories of having watched Eileen's father, George Franklin, commit this crime. Eileen ultimately reported this to authorities, who were sufficiently convinced to prosecute Franklin for murder. Experts testified that

the nature and quality of Eileen's memories constituted a proof beyond reasonable doubt that the memories were traumatic and accurate, having emerged spontaneously through an environmental trigger, as opposed to suggestion.<sup>6</sup> The jury agreed, and Franklin served nearly seven years of prison time.

The conviction was overturned on appeal in 1995, citing growing evidence for false traumatic recall, that many aspects of the unsolved case had been publicized at the time that might have provided a context for Eileen's later memory, and that contrary to prior statements, Eileen had in fact contacted a hypnotist.<sup>4</sup> Beyond the specific details at issue, the presumption of innocence within reasonable doubt was a pivotal factor in the successful appeal.

***Commonwealth of Pennsylvania v. Crawford*** As in *Franklin*, a defendant, Franklin D. Crawford, was convicted primarily on the basis of one witness's emergent recall of the 1971 murder of Pearl Altman, which had remained unsolved for more than 20 years. The defense had requested a psychiatric evaluation of this witness, John Reed. Because of the frailty of memory, defects in Reed's character, and probable memory contamination from the witness's concurrent drug abuse, the evaluating psychiatrist concluded that the memory in question could not be considered accurate within a reasonable doubt. The trial court ruled that the prospective expert testimony was inadmissible, because it related not to memory *per se* but to the *credibility* of a witness, and witness credibility is the sole province of the jury. Like Franklin, the accused was

convicted, largely on the basis of one witness's memory plus a few strands of circumstantial evidence that lacked tangible physical referents.

An appeals court reversed the conviction, ruling that the proposed but excluded expert testimony did in fact address unfamiliar aspects of memory and was important to the defense, and the court remanded the case for a new trial.<sup>7</sup> On the state's subsequent appeal, however, the Pennsylvania Supreme Court reinstated the trial court's ruling, affirming its original reasoning; excluded the potentially exonerating evidence; and affirmed the conviction.<sup>5</sup> Why did the all-important presumption of innocence *not* apply in this case, in a similar way, even with the result that an innocent man may well be languishing in prison with no further recourse?

### **The Transactional Dimension of Human Memory: Four Hypotheses**

Before returning to legal issues raised by these contrasting cases, I will define their broader context by elaborating on a major transactional function of memory: memory as power. To do this, I will propose hypotheses concerning the four questions asked earlier: the emotional charge on whose memory is more true, the effect of slant or framing, vulnerability to suggestion, and how all of these factors can extend to large scale social groups and to an entire society.

The objective function of accurate recall is self-evident—simply getting along in the real world. Vulnerability to suggestive influence is so problematic, however,

that one is tempted to dismiss the very idea that it could be functional and to assume instead that it is necessarily pathological. Such a summary dismissal is belied by the issue's ubiquity, however, which any objective observer can confirm by taking an honest look at him/herself and others. I will begin by speculating on the functions of true and false memory within the dominance hierarchies that are ubiquitous among all social primates, including humans.<sup>8,9</sup>

***Social Dominance*** Consider my first question: why people argue so heatedly over whose version of some trivial past event is more true. Whence the affective charge? A closer look shows that if over the course of many such disputes one establishes oneself as the more reliable, this will imply subtly but inevitably that the other party should defer to one's own judgment in related situations, directly enhancing one's dominance status. Herein arises my primary hypothesis that, within an interpersonal context, memory is power. The affect arises not from the issue at hand but from humans' strivings both to dominate and not to be dominated.

***Truth Versus Legitimization*** A corollary points directly to the second question: why "slant" alone may impart social differences as significant as those in truth value. Liabilities often can be redefined as assets, for example, and setbacks as opportunities. Such "reframing" is central to psychotherapeutic success.<sup>10</sup> Political success also often turns on the contenders' relative ability to "slant" the same data in favor of their own interests and at their opponents' expense.<sup>11</sup>

To understand this elusive process, it

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helps to clarify how the dominance-enhancing effect of memory is mediated. Truth value is certainly an influential factor, but it is only one of many.

In actual practice, *what third parties believe to be true*, rather than truth itself, is what dispenses memory's power. At all levels within society, truth value and what is socially legitimized may diverge. The more that this occurs, the greater the risk of injustice. In other words, unless one party simply yields, it is significant others who ultimately do the deciding.

Dominant parties may have less accurate memories, in specific cases, but succeed via other social skills in getting themselves *perceived as if* they are the more reliable. Interpersonal persuasiveness is paramount. Related factors include the intensity of one's affective charge, subjective certitude, and steadfastness in the face of opposition. Interestingly, all of these factors are enhanced by hypnosis or psychological trauma with minimal if any change in truth value.<sup>1</sup> Another influential factor is one's ability to enlist allies and punish opponents, which is influenced in turn by one's interpersonal appeal, choice of receptive potential allies, and ability to frame the context convincingly in one's own interest. Legitimized memory, when it diverges from the "truly true," is what confers power and status. Truth value readily recedes into the background.

***Suggestibility Is Adaptive*** What value might there then be in being vulnerable to suggestive influence, with its potential for inducing false memories? Most likely, it is because striving for interpersonal dominance so often is hazardous to one's

health. For trauma victims in particular, challenging others had once provoked life-threatening retributions. If one perceives oneself as at risk, a traditional correlate of the trauma response, one might instead establish protected status within prevailing hierarchies by winning support and advocacy from significant others as a backup strategy. Ability to assume others' belief systems as one's own would help one to win this social support. One might ally with social dominants, ensuring their protection, or with challengers, to overturn prevailing dominants through strength of numbers.

These predictions are confirmed at many levels. Over two centuries of hypnosis research shows that suggestive interpersonal influence is universal and pervades all interpersonal transactions.<sup>12</sup> Suggestibility is significantly increased by traumatization,<sup>13</sup> and the trauma response is readily transmitted to others as if by contagion.<sup>14</sup>

The fact that suggestive malleability often effects its hypothesized goals is reflected in how readily large groups of significant others do legitimize individuals' traumatic narratives without requiring verification<sup>15</sup> and dismiss opposing views as malicious without adequately considering them.<sup>16</sup> Adaptability to new circumstances is also reflected in the frequency of retracting<sup>17</sup> and in the power of cult programming and deprogramming.<sup>18, 19</sup> In the extreme case, if frontal and hippocampal damage do follow extreme psychological trauma,<sup>20</sup> its irreversibility would "protect" the victim against ever again challenging others' dominance—thereby purchasing survival

at the cost of status. This process would provide an adaptive basis for an extreme degree of vulnerability to traumatic stressors that is otherwise anomalous.

In summary, memory is power—but directly so, only if one has the requisite social dominance skills. Otherwise, one does better adapting to others overtly and dominating covertly through passive control (e.g., “symptoms as power tactics”).<sup>21</sup>

**Greater Social Levels: Mutual Suggestion** The fourth question concerns how memory-as-power issues extend to ever greater social levels. Most broadly, the intensity of the recovered memory controversy reflects the conflicting attempts of the health care and legal professions to mitigate the inexorable basic fact that because memory is fallible, injustice occurs. Injustice arises both by failing to interdict offenders and by falsely convicting the innocent. Selective attention to one pole at the expense of the other appears to be fueled by traumatic experience and polarizes otherwise compatible individuals into desperate opposition.<sup>16</sup> Disparity between “legitimized” and “truly true” memory heightens the risk of injustice at each pole. What is at stake is no less than what are to be the dominating social mores; that is, the cultural identity of the society that we all share and want to help shape into what we believe is for the best.

The vicissitudes of memory are particularly central to a number of more specific social issues, which are pressing and yet unresolved. Child abuse and other types of traumatizing victimization occur widely. Perpetrating victimization disrupts healthy sociality, selfhood, and jus-

tice at multiple levels, and its containment is a high societal priority. At the same time, the family is a social institution vital both for healthy child development and the transmission of culture. False accusations of abuse perpetration also occur widely, for both sincere and instrumental motives. These accusations, which threaten both justice and the integrity of the family, also warrant a steadfast societal commitment to their containment. These social priorities often come into conflict, for which there are no easy answers.<sup>3</sup>

In summary, the power dynamics of memory extend to society through an interaction of many factors. All share a common thread: the mutual suggestive influence that all human beings have on one another, which readily extends from one social level to others. Individuals sense viscerally their interdependence with peers and social norms, however this fact is experienced. This all-important but often hidden awareness confers the same affective charge onto social issues as we experience in conflicts within close interpersonal dyads. Mutual suggestibility links all citizens with one another, providing the necessary bridge between different social scales. We see this in the effects of social norms,<sup>22</sup> charismatic leaders,<sup>23</sup> cults and fads,<sup>18, 19</sup> collective self-deception,<sup>22, 24</sup> and collective traumatization.<sup>16</sup>

### Functions and Limits of Memory Experts

Enter the expert witness. Here is where mental health disciplines and the law intersect, linking individual psychology

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with great social issues in as tangible a form as one could imagine. Not surprisingly, despite massive amounts of scientific data about memory, hypnosis, and suggestibility, this is perhaps the one area in which the role of the scientific expert has proven most problematic.

**Posthypnotic Testimony** Consider opposing trends in the admissibility of posthypnotic testimony.<sup>25</sup> By the late 1970s, hypnosis was being used widely to “refresh” eyewitness testimony, and it did help to solve several notorious criminal cases. Most clinicians supported this use of hypnosis. Research data, however, inexorably undermined the intuitive concept of memory as being like an objective recorder from which true memories could be “recovered,” replacing it with our now-prevailing constructional model. Memory is being “reconstructed” continuously through current experience,<sup>26</sup> and suggestive interactions increase profoundly its ever-present potential for falsification.<sup>27</sup> Hypnosis “contaminates” subjects’ memory, while simultaneously increasing their subjective certitude—making them less reliable, but more credible as witnesses.<sup>28</sup> In our terms, “legitimized” memory becomes more likely to diverge from what is “truly true.”

To prevent a resulting injustice, most courts rule as in *People v. Shirley*<sup>29</sup> that posthypnotic testimony is inadmissible *per se*, and the American Medical Association<sup>30</sup> took a similarly strong stand for the sake of caution. In *Rock v. Arkansas*, however, the U.S. Supreme Court ruled that hypnosis cannot be excluded when employed by a defendant in his/her own defense.<sup>31</sup> While appearing to conflict,

these rulings all support the presumption of innocence: strict exclusion when the posthypnotic testimony is potentially inculpatory, cautious admissibility when exculpatory. In other words, the power dimension even more than the likely accuracy of the memory is the determinant, with a defining principle of American justice as the criterion.

**Recovered Memory Controversy** The same process was reenacted on a greater social scale in the subsequent controversy about the accuracy of new memories of alleged child abuse “recovered” years after the fact, usually within the context of suggestive psychotherapy.<sup>3</sup> Competing interests fought one another with more desperate intensity, sociopolitical implications were more blatant, and mental health professionals played a highly problematic active role.

As with forensic hypnosis, the initial impetus arose from concerned citizens’ efforts to confront a known social evil: specifically, child abuse, as opposed to crime *per se*. Adult children began suing their alleged perpetrators, often aging parents who appeared to be taken utterly by surprise and who were appalled, confused, and with nowhere to turn. Plaintiffs’ experts legitimized the memories, variably stating that patients’ symptoms proved their prior traumas, that therapy required accepting patients’ productions, accepting patients’ reports of “objective validation” without objective evidence, and claiming that psychological trauma indelibly etches in memories so that their content is now immune to suggestive influence.<sup>6, 14, 32</sup> Despite a dearth of tangible scientific evidence for these

claims,<sup>15, 33</sup> plus considerable grounds for skepticism,<sup>1, 3, 27, 34</sup> they were professionally legitimized on a huge scale. Nearly half of the states passed laws tolling statutes of limitations to begin not at the alleged offense, but when first recalled. This necessarily subjective criterion put the accused at an overwhelming objective vulnerability. An accusation could now arise at any time, social aversion to child abuse imposed *de facto* presumptions of guilt, and the inevitable decay of tangible evidence over such extended time intervals left little means for the defense.

Seemingly strong families were torn apart by the accusations, and people became alarmed at the blatant threats both to the already stressed American family<sup>35</sup> and to the presumption of innocence.<sup>36</sup> Accused families and concerned professionals allied to form the False Memory Syndrome Foundation in 1992. Memory research proliferated, and new findings confirmed the fallibility of memory. Traumatic recall proved to be just as vulnerable to suggestion as other memories, but like posthypnotic recall, it was associated with increased subjective certainty,<sup>1</sup> which was enforced further by the coercive power of traumatic feelings.<sup>37</sup> The same dilemma had recurred, increasing the divergence of "legitimized" from "truly true" memories—this time with greater force and far more devastating social consequences.

The law's reaction was similar and equally decisive. Delayed recall suits peaked in 1993 and have fallen to near zero at the present.<sup>38</sup> Beginning with the 1994 *Ramona* case,<sup>39</sup> memory recovery therapists are increasingly being sued for

damages both by former patients (retractors) and injured third parties (usually family). In several notorious cases, evidence revealed levels of coercive persuasion and forced family disruptions indistinguishable from cult indoctrination. Monetary judgments against therapists now have reached eight figures.

### Who Is To Decide the Ultimate Issue?

To conclude, I return to the conflicting *Franklin* and *Crawford* cases summarized earlier. In each case, a defendant had been convicted of a decades-old crime largely on the basis of an allegedly recovered memory. Franklin's conviction was overturned through both the presumption of innocence and the shifting content of expert scientific testimony: as accepted now, but not a few years earlier, a recovered memory simply cannot be presumed accurate within a reasonable doubt. Even within this shifting context, Crawford's conviction was nonetheless reinstated by a state's highest court despite the primary witness's memory being equally if not even more subject to question. How? Why?

As so often occurs in the law, one fundamental principle ran afoul of another. Regarding the power of memory, a first issue remained the same: the potential divergence of legitimized memory from truly true memory. However, another question arises: who is to decide what memories are to be legitimized, and who is not? In other words, who holds the power? The trial court and the Pennsylvania Supreme Court concurred that it is the common citizen, not a specialized expert with privileged knowledge and a fa-

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vored belief system. Properly considered, *Crawford* is not a “recovered memory” case to begin with but a ruling on who determines witness credibility.

At one level, *Pennsylvania v. Crawford* could be viewed as a repudiation of mental health expertise: a vote of no-confidence, an expression of courts’ frustration with the often embarrassing and sometimes harmful fads that our profession has legitimized—most recently the collective traumatization of the memory wars.

I view it instead as an affirmation of democracy, which reflects the law’s intuitive differentiation of the objective/factual aspects of memory from the subjective/transactional. The former is a matter for scientific study, and experts are needed to inform jurors of the current state of science.<sup>40, 41</sup> The latter is the foundation of everyday living, and every human being is presumed to be an expert in his or her own way.

Just as untrained third parties adjudicate the power of memory within everyday interpersonal conflicts, a democratic society requires that this also be so within the law. For an expert to usurp this role would be a step away from democracy toward a *de facto* government by a privileged elite—in which a persuasive expert could unduly influence a jury, in effect becoming a “super juror” at the expense of the citizenry.<sup>42</sup> Mr. Crawford may now be suffering from a major injustice, and we have no way of truly knowing how many innocents’ lives are ruined through false accusations or how many guilty offenders elude their just desserts. Any such case is tragic, and memory’s frailty plus the fallibility of human judgment means

that such injustices inevitably do occur. At the same time, it is perhaps for the best, overall, that the judgment of common citizens continues to remain the final arbiter of memory’s fragile power.

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