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Collaborating to Deter Potential Public Enemies: Social Science and the Law

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I. INTRODUCTION

Supreme Court Justice Louis Brandeis in 1935, during the throes of an economic depression that constantly has been revisited in discussions of the current financial meltdown, expressed in dramatic terms the need for lawyers to extend their embrace beyond parochial jurisprudential boundaries: "A lawyer who has not studied economics and sociology," Brandeis wrote, "is very apt to become a public enemy."¹ The future Justice, hired as outside counsel by the state of Oregon, would be celebrated for his pioneering submission to the United States Supreme Court of the results of a social scientific inquiry. What became generically known as the "Brandeis Brief" was a 113-page analysis of the consequences of long working hours on the health of women. The brief strongly influenced the Supreme Court to uphold an Oregon law that mandated that "no female [shall] be employed in any mechanical establishment, or factory, or laundry in the State more than ten hours in one day."²

Two writers subsequently would gloss the Brandeis "public enemy" theme with interpretative observations. David Riesman, a Harvard professor trained in law who also had a doctorate in sociology, noted that lawyers "are very apt to be

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1. LOUIS D. BRANDEIS, *The Living Law*, in *THE CURSE OF BIGNESS* 316, 325 (1935).

2. *Muller v. Oregon*, 208 U.S. 412, 416 (1908) (challenged law adopted as Oregon Session Law 1903); see also NANCY WOLOCH, *MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS* 144–45 (1996).

scornful of the findings of social science,” and suggested that the main reason for this was that the social sciences tend to introduce novel insights and uncertainty into the comparatively rigid legal system, thereby presenting something of a threat to legal practitioners.³ On the other hand, A. Delafield Smith, who had spent twenty years as a counsel for federal agencies administering social legislation, charged that the social sciences largely muddied the rather pristine realm of legal business, that they had demonstrated “a grievous absence of understanding of the law’s objectives . . . a resulting failure to apply legal methods, and little awareness of the contributions of legal philosophy to social objectives.”⁴

There is, of course, no simple resolution of the accuracy of any of these three viewpoints and it seems evident that, with numerous caveats and qualifications, each has some degree of truth on its side. But it appears unquestionable that, in the three quarters of a century since Brandeis called for greater legal attention to social science, there have been many serious attempts to respond to his challenge.⁵ The most notable infusion (or, perhaps, “invasion” is the better term) of social science into court decision-making was the Supreme Court’s reliance in the famous footnote 11 of the unanimous landmark school desegregation ruling *Brown v. Board of Education*⁶ on the research findings of psychologists Kenneth Clark and Mamie Clark.⁷ This was not an unreservedly blessed event, since it also ignited a considerable debate about the scientific rigor of the evidence that the Court had accepted.⁸

There has been a slow but steady incorporation of social scientists into law school faculties, a movement that has as yet not been adequately examined and interpreted by social scientists—or by lawyers. For a time, the University of Denver College of Law had a large group of distinguished social scientists on its

3. David Riesman, *Law and Sociology: Recruitment, Training, and Collegueship*, 9 STAN. L. REV. 643, 651 (1957).

4. A. DELAFIELD SMITH, *THE RIGHT TO LIFE* 5 (1955).

5. The most significant attempt by his contemporaries was a collaboration between law professor Roscoe Pound and sociologist Edward A. Ross, both members of the faculty of the University of Nebraska, to fashion what they labeled “sociological jurisprudence.” See Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1 & 2), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140, 489 (1912). See also Ernest K. Braybrooke, *The Sociological Jurisprudence of Roscoe Pound*, 5 U.W. AUST. L. REV. 288, 309 (1961) (“It is some indication of the weight and influence of Pound’s philosophy that there has been relatively little criticism of his approach, and such criticism has generally been directed toward complementing it rather than supplanting it.”); Gilbert Geis, *Sociology and Sociological Jurisprudence: Admixture of Lore and Law*, 52 KY. L.J. 267 (1964).

6. *Brown v. Board of Education*, 347 U.S. 483, 494–95 & n.11 (1954) (citing sociological research by Kenneth Clark and Mamie Clark to support holding that school segregation is unconstitutional).

7. See Kenneth B. Clark & Mamie P. Clark, *The Development of Consciousness of Self and the Emergence of Racial Identification in Negro Preschool Children*, 10 J. SOC. PSYCHOL. 591 (1939).

8. See, e.g., Edmund Cahn, *Jurisprudence*, 31 N.Y.U. L. REV. 182 (1956); Ernest van den Haag, *Social Science Testimony in the Desegregation Case—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69 (1960).

faculty—sociologist Gresham Sykes and political scientist William M. Beaney, among others. Sociologist Stanton Wheeler spent thirty-four years (from 1968 until his retirement in 2002) on the Yale Law School faculty⁹ while psychologist John Monahan has been a long-time member of the University of Virginia School of Law faculty and the compiler of a multi-edition text on law and social science.¹⁰ Particularly noteworthy was the move of sociologist Richard Schwartz from the Yale Law faculty to become dean of the University at Buffalo Law School. The novelty and the later more routine recruitment of social scientists by law faculties was pointed out in Wheeler's obituary by political scientist Austin Sarat of Amherst College. "He was so far ahead of his time in bringing to law schools the perspectives of disciplines beyond the realm of law," Sarat observed. "What today is taken for granted in law schools, that they have faculty people with degrees in sociology, history, economics, philosophy, was very rare when Stan was appointed at Yale."¹¹ The current influx of social scientists onto law faculties is exemplified by the recent movement of penologist Joan Petersilia from the University of California, Irvine (UC Irvine) to Stanford Law School and psychologist Valerie Hans from the University of Delaware to Cornell Law School.

In the following pages, we detail in question-and-answer format the experiences and reactions of Elizabeth Loftus, a cognitive psychologist and the first author of this essay, who does not teach traditional law school courses, but will be offering a graduate seminar that will enroll law students, and has been very involved in the activities of the fledgling UC Irvine School of Law. She has served as an expert witness in numerous criminal and civil cases, typically testifying on her empirical work concerning the accuracy of eyewitness testimony, the (lack of) evidence for repressed memories, and other memory issues.¹²

In the question-and-answer format, the second author posed the questions. We followed the practice of the U.S. Congress that allows participants in hearings and debates the opportunity to examine and recast their responses if they so desire.

9. The story is told of a Yale law school faculty meeting at which the discussion focused on anti-Semitism. Wheeler joined in, only to be told that he was in no position to contribute on the subject since he was not Jewish. He responded: "But I am a sociologist on a law faculty." See Dennis Hevesi, *Stanton Wheeler, 77, a Yale Law Professor*, N.Y. TIMES, Dec. 11, 2007, at C12 (describing Wheeler's tenure on the law faculty).

10. See JOHN MONAHAN & LAUREN WALKER, *SOCIAL SCIENCE IN LAW* (7th ed. 2010).

11. Hevesi, *supra* note 9 at C12.

12. See ELIZABETH LOFTUS & KATHERINE KETCHAM, *WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUT MEMORY ON TRIAL* (1991); ELIZABETH LOFTUS & KATHERINE KETCHAM, *THE MYTH OF REPRESSED MEMORY* (1994).

II. A COGNITIVE PSYCHOLOGIST'S COGNITIONS ON THE LAW AND SOCIAL SCIENCE AND UC IRVINE'S NEW SCHOOL OF LAW

Q. *Over four decades now you have testified in almost three hundred trials. On the basis of that experience, what are your thoughts on the relationship between the law and social science?*

A. Inherently, there is an element of tension, a disjunction, between the ethos of social science and the practice of law. Ideally (and what actually transpires is often far from the ideal), lawyers start with a conclusion (e.g., the accused is innocent, the defendant is liable) and muster evidence that supports this position and arguments that seek to destroy or at least dilute contrary evidence. New York University Professor Stephen Gillers, an expert in legal ethics, expressed the matter well. He told an interviewer that lawyers can be at particular risk of pushing the boundaries of acceptable spinning because legal training and practice reinforce the notion that “a fact become[s] true if a jury or opponent can be persuaded to think that it is true—even if it is false.” Lawyers, Gillers claimed, “work this alchemy through performance.”¹³

Social and natural scientists start with a hypothesis and attempt to demonstrate its accuracy, falsity, or need for reformulation. They, of course, sometimes become so committed to a conclusion that they unwittingly or otherwise distort what they learn in order to have it fit their presuppositions. The disparate ideals of law practice and the vocation of social science can create collaborative discomfort.

Attorneys in the courtroom tend toward confrontational “I’m right” stances. Contrast this posture to the statement of Richard Feynman, a Nobel laureate, who observed that “[d]etails that could throw doubt upon your interpretation must be given.”¹⁴ Of Robert Dicke, an esteemed physicist, it was said: “That’s why he was such a hero. When the data said the theory was wrong, then for him his theory was wrong. It was as simple as that.”¹⁵

The matter of standing (in the sense of status, not as a jurisprudential issue) offers an interesting insight into consideration of the disparities between law and social science. Expert witnesses typically enter a case bolstered by a record of achievements that are lovingly detailed by “their” attorney. This cloak of authority has at times been employed by courts to refuse to allow expert testimony. In *United States v. Foshier*,¹⁶ for instance, there is an unmistakable verbal sneer in the judge’s decision to reject expert testimony about eyewitness memory regarding the identification of the defendant by two witnesses that apparently was crucial to his conviction for bank robbery and the assault of bank employees. The judge noted

13. John Schwartz, *Résumés Made for Fibbing*, N.Y. TIMES, May 23, 2010, at Wk. in Rev. 5, available at <http://www.nytimes.com/2010/05/23/weekinreview/23schwartz.html>.

14. RICHARD FEYNMAN AS TOLD TO RALPH LEIGHTON, “SURELY YOU’RE JOKING, MR. FEYNMAN?” 341 (Edward Hutchings ed., 1997).

15. MARCIA BARTUSIAK, EINSTEIN’S UNFINISHED SYMPHONY 66 (2000).

16. *United States v. Foshier*, 590 F.2d 381 (1st Cir. 1979).

the proffer of “purportedly” expert testimony and declared that it would carry an “aura of special reliability and trustworthiness.”¹⁷ This preference for Luddite wisdom in place of research evidence is a disconcerting element in law-science relationships.

It is not surprising that status would make an impression on those who are told about it. Lawyers understand that there is more acceptance of precisely the same information when it is offered by a person who is identified as a leading authority than when the same person is presented as an amateur. Lawyers and judges may have equally or more striking accomplishments and backgrounds compared to the expert witnesses, but these will not be entered into the record: they must perform then and there in order to persuade. Perhaps this is what irked the *Fosher* judge who sought to tuck the purported eyewitness authorities into their proper place, which he deemed to be some distance from a courtroom.

Fifteen years later another court echoed the *Fosher* ruling in another bank robbery case. “Given the powerful nature of expert testimony, coupled with its potential to mislead the jury,” the judge ruled, “we cannot say the district court erred in concluding that the proffered evidence would not assist the trier of facts and that it was likely to mislead the jury.”¹⁸ Cynics might find farcical the use of the word “fact” in the quoted opinion since it is combined with the rejection of empirical evidence and is employed in reference to a drama in which regard for the truth often is an irksome and irrelevant consideration for the adversarial parties.

It has intrigued me, in this regard, that beginning in the 1960s law schools (Yale was a laggard) altered the first degree they offered from LL.B., a bachelor of law, to J.D., a juris doctorate. Those who earn the degree have the imprimatur of the American Bar Association to call themselves “Doctor.”¹⁹ Yet no lawyer that I know of has had the temerity to self-identify as a “Doctor.” I wonder why this is so in a society such as ours and with a group that often is not hesitant to engage in acts of self-aggrandizement. In Italy many lawyers call themselves “Doctor,” and are authorized by law to do so.²⁰

Q. *Let's follow up on this point for a moment. How do you see status issues playing out in legal cases?*

A. The most obvious point is that when I am involved in a case as a social scientist I do not have home field advantage and, as every sports fan appreciates, that can be a considerable disadvantage. (Perhaps I should have said I do not have home court advantage!)

A court is attorney territory and the judge is from the same tribal unit. While

17. *Id.* at 383.

18. *United States v. Rincon*, 28 F.3d 921, 926 (9th Cir. 1994).

19. Peter H. Gerahty, *Are There Any Doctors or Associates in the House?*, AMERICAN BAR ASSOCIATION (2007), <http://www.abanet.org/media/youraba/200709/ethics.html>.

20. Ottavio Campanella, *The Italian Legal Profession*, 19 J. LEGAL PROF. 59, 66 (1994).

the courts allow some extra leeway to expert witnesses, the setting, the laws, and the evidentiary and other rules are the product of legal sources and inevitably have some self-serving elements. The judge sits majestically above the plebes, and opposing counsel, unlike witnesses, need not take an oath to tell the truth and only the truth.

Q. *How about the matter of the law going astray in trying to regulate social science testimony?*

A. For me personally, the most glaring example is the standard that must be met for expert testimony to be admitted into court under *Daubert*²¹ and *Frye*.²² Essentially, a core consideration, implicitly in *Daubert* and explicitly in *Frye*, is that if the cadre of specialists in a field grant the legitimacy of the material then the court will allow it to be entered into the proceedings.²³

It is understandable that judges prefer to abdicate judgment in matters in which they typically have little or no training despite the *Daubert* court's dicta that it was "confident that federal judges possess the capacity to undertake this [kind of] review."²⁴ The judges can fall into the trap of allowing what might disparagingly be called "junk science" to prevail. If the relevant scientific group is deemed to be, say, professionals who subscribe to the *Journal of Traumatic Stress* the court undoubtedly would endorse the validity of the concept of "repressed memory" while most cognitive scientists such as myself and many health professionals would dispute this belief. We believe that there is virtually no credible scientific support for this concept. Psychologist Richard McNally of Harvard put it aptly: "The notion that the mind protects itself by repressing or dissociating memories of trauma, rendering them inaccessible to awareness, is a piece of psychiatric folklore devoid of convincing empirical support."²⁵ Yet under *Daubert*, courts would entertain such suspect testimony. Other writers have noted this same kind of perceived judicial naïveté or bias, particularly in cases involving workplace sexual harassment²⁶ and what are known as the Battered Woman Syndrome and the Rape Trauma Syndrome.²⁷

Q. *Let's move back in time for a moment. How did you initially form an interest in the law?*

A. In my first position as an assistant professor in New York City, I was conducting research on semantic memory. Semantic memory involves memory for words, concepts, and general knowledge rather than memory for the personal

21. *Daubert v. Merrell Pharm.*, 509 U.S. 579 (1993).

22. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

23. See *Daubert*, 509 U.S. at 594; *Frye*, 293 F. at 1014.

24. *Daubert*, 509 U.S. at 593.

25. RICHARD MCNALLY, REMEMBERING TRAUMA 275 (2003).

26. Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 197–99 (2004).

27. Janet C. Hoefel, *The Gender Gap: Revealing Inequities in Admission of Social Science Evidence in Criminal Cases*, 24 U. ARK. LITTLE ROCK L. REV. 41 (2001–02).

experience in life. My focus was on how general knowledge is stored in the human mind and how it can be retrieved when needed.

I was having lunch one day with a cousin who was a lawyer. She said: “So you’re an experimental psychologist. Have you made any discoveries?” “Yes,” I replied proudly, “I’ve discovered that people are faster to give you the name of a bird that you say is yellow than they are if you asked for the name of a yellow bird. They’re 250 milliseconds faster or about a quarter of a second.”²⁸

My cousin looked at me with an expression that might best be described as incredulity with a slight touch of disdain. She had but one question: “How much did we pay for that bit of information?”—referring, I suppose, to the fact that my work may have been supported by a grant of federal funds.

My finding was important in my field because it demonstrated that humans tend to organize information according to categories, in this instance the category of birds, rather than by attributes, such as yellow. The conclusion was that an individual’s self-search for information can get underway sooner if the category cue is presented first.

But my cousin’s reaction was unnerving and made me want to study something that had more practical relevance, something that would be interesting not only to me and a rather limited number of fellow scholars who studied long-term memory. My concern set me thinking that a natural intersection for someone who had training in the area of memory and a considerable fascination with legal issues would be to study the memories of witnesses to crimes and accidents and similar matters. I thought it would be interesting, for instance, to try to figure out whether the structure of questions posed to witnesses by the police, investigators, or lawyers affected what people remembered and what they said. So I undertook a series of experiments using films of accidents or simulated crimes and studied how people recalled what they were shown.²⁹ I have ever since, for the past four decades, sought to discover the correct way for the law to be applied to a very large array of matters concerning memory. It has led me to testify in some 270 trials as an expert witness and to provide depositions in hundreds of other cases.

Q. Obviously, the ideal and idealized in science becomes cluttered with other considerations in a courtroom drama. Can you give me some examples of some of the issues that arise?

A. At the heart of the matter are marketplace constraints. How much does or can an expert witness insist on saying things that he or she believes need expressing from a scientific perspective but that might reduce the likelihood that the side who hired you will prevail? Sometimes science and law dictate the same outcome, albeit for different reasons. I once testified that impeccable research

28. See, e.g., Elizabeth F. Loftus and Jonathan L. Freedman, *Effect of Category-Name Frequency on the Speed of Naming and Instance of the Category*, 11 J. VERBAL LEARNING & VERBAL BEHAV. 343 (1972).

29. For an early illustration, see Elizabeth F. Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 8 PSYCHOL. TODAY 116 (1974).

demonstrated that people have greater difficulty identifying the faces of people of a different race than people of their own race. In that case the eyewitness who testified was a white Anglo, the defendant a Latino. I was asked by the defendant's attorney whether reported studies included subjects of the races involved in the case being tried. I said that they did not (at least not at that time). The attorney was asking a question that he presumed the prosecution would ask and he believed it a good strategy to put my answer on record in the direct examination. But suppose it seemed likely that the prosecutor might not be skilled or informed enough to probe that issue. Should, under those circumstances, the expert witness insist on pointing out this particular gap in the research?³⁰

Or, to take another real-life scenario, should an expert witness allow the hiring side to ask the expert witness whether the defendant who has a tear-jerking history of serious personal and family problems would have his memory impaired by these circumstances? The question is put not to elicit a scientific answer but to get before the court information that it is hoped will gain sympathy and a favorable verdict for the accused.³¹

Q. *In terms of the considerations you've discussed, in what way has the arrival of a law school at UC Irvine added to or otherwise altered the ideas you formed from your courtroom or scholarly experiences?*

A. Being an expert witness in adversarial proceedings often is not the most pleasant stroll in the park. One has to be extremely wary during the cross-examination. Shrewd cross-examiners have tactics that can make the most obvious point appear dubious. They can be bullying (although this may not go down well with jurors or judges) and condescending, and their tone of voice and gestures, conditions that will not be included in the trial transcript, can be disconcerting. I enjoy the challenge; otherwise I would long since have abandoned participating in trials.

The new law school has proven to be an invigorating and refreshing experience for me. At symposia, workshops, and other presentations, which I always look forward to, I am exposed to some of the best minds, dealing with some of the most difficult jurisprudential problems, and doing so not as advocates but as analysts.

Q. *You may have set something of a world record for dutifully attending faculty meetings in three academic units—in the School of Social Ecology, Departments of Psychology and Social Behavior, and Criminology, Law and Society as well as the law school faculty. Have you noticed any particular difference between the first two and the law school?*

A. In some regards the difference has been striking. In part, of course, the law school has been challenged by the need to get a new and very ambitious

30. Elizabeth F. Loftus, *Experimental Psychologist as an Advocate or Impartial Educator?*, 10 LAW & HUM. BEHAV. 63 (1986).

31. *Id.* at 70.

endeavor off the ground. But what struck me was the strong focus on creating guidelines. There was, for instance, considerable debate in law faculty meetings about the desirable distribution of grades. This is a matter that likely never would be raised in a social science department. The law faculty tends toward uniform, mandatory rules and seems more comfortable with guidelines than with *laissez-faire* flexibility. Things were more regimented, which, I would imagine, would make life more predictable and in many regards less worrisome for participants. I do not know the extent of differing behavioral and personality characteristics of lawyers and social scientists, if any, but it would be a fascinating area of inquiry, especially with a longitudinal design that would determine whether distinctions prevailed when law schooling is chosen, or whether, again if they exist at all, the differences arise subsequently.

Q. *Can you describe the course that you will be teaching to graduate students and law students?*

The course is called Memory and the Law. My syllabus tells students that they will read book chapters and articles on a special topic dealing with memory of real-world events and their legal implications. But I can convey a better sense of the course by saying something about my philosophy of teaching. If a friend were to have suggested that I read a book about the history, geography, and politics of Chile, I would have probably responded, “Gee, not sure I really have time for that right now.” But then I discovered the book *Missing: The Execution of Charles Horman* by Thomas Hauser,³² that tells the true story of an American journalist who disappeared after the Chilean coup of 1973. The book chronicles the efforts by the father of the missing journalist to find his son. It is gripping. And while immersed in the story, I learned an enormous amount about the history, geography, and politics of Chile. I got educated without even trying.

I can’t write like Thomas Hauser, but I have constructed a course that tries to immerse students in a significant contemporary controversy, one involving claims of repressed memory. Nadean Cool, a 44-year-old nurse’s aid from Wisconsin, is a prime exhibit.³³ Nadean sought therapy in the late 1980s to help her cope with her reaction to a traumatic event that her daughter had experienced. During therapy, her psychiatrist used hypnosis and other methods to dig out allegedly buried memories of abuse. In the process his patient became convinced that she had repressed memories of being in a satanic cult, of eating babies, of being raped, and of having sex with animals. She came to believe she had over 120 separate personalities—children, adults, angels, and even a duck—all because, she was told, she had experienced severe childhood abuse. When Nadean came to realize that false memories had been planted, she sued for malpractice. Her case

32. THOMAS HAUSER, *MISSING: THE EXECUTION OF CHARLES HORMAN, AN AMERICAN SACRIFICE* (1978).

33. See Elizabeth Loftus, *Creating False Memories*, *SCI. AM.*, Sept. 1997, 70–71.

settled in early 1997 for \$2.4 million. Nadean was one of thousands of people who developed memories in therapy of extensive brutalization that they claimed had been repressed.³⁴ Many sued their alleged abusers or initiated criminal charges.³⁵ Laws were changed to extend the statute of limitations to permit these cases to go forward.³⁶ Nadean was also a member of the subset of those accusers who later retracted these memories.

The repressed memory controversy leads us to ask many questions. How did it begin? What is the evidence for repression? Is the evidence credible? If the memories are not real, where could they come from? How is it possible for people to develop such elaborate and confident false memories? How are jurors and judges reacting to claims of repressed memory? How has the legal system handled claims of repressed memory? Students who become immersed in this sensational contemporary controversy seem eager to want to know as much as they can about the underlying issues—both psychological and legal. They learn, as I did about Chile, effortlessly. And they leave my course with a deep appreciation for the importance of reading the footnotes.

Q. *I understand from some of our earlier talks together that you have been especially impressed with many of the speakers who have given presentations at the law school. Could you provide me with further details?*

A. Well, for one thing, law-trained people tend to be particularly articulate and organized in their thoughts. They are trained to make a living by being persuasive. Law faculty, compared to practitioners at work, usually are not doctrinaire. I have benefited both academically and intellectually listening to good minds grapple with difficult issues, often presenting ideas that I never otherwise would have been exposed to because, like most academics, I move in a relatively parochial intellectual world.

Let me give you one example of how a fascinating law school presentation that I attended fed into my general and professional interests. Burt Neuborne of the New York University School of Law discussed his decade-long litigation on behalf of Holocaust victims whose assets were being secreted by Swiss banks.³⁷ Neuborne posed issues of standing: How could he bring these actions in American courts when the behavior occurred in Europe half a century earlier and none of the surviving victims lived in the United States. “Why,” he asked, “should

34. See T.W. CAMPBELL, *SMOKE AND MIRRORS: THE DEVASTATING EFFECT OF FALSE SEXUAL ABUSE CLAIMS* 145–54 (1998).

35. See *id.* at 154–58.

36. See Joel J. Finer, *Therapists' Liability to the Falsely Accused for Inducing Illusory Memories of Childhood Sexual Abuse—Current Remedies and a Proposed Statute*, 11 J.L. & HEALTH 45, 50 (1996); see also Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie?: Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 145–47 (1993).

37. See generally LEONARD ORLAND, *A FINAL ACCOUNTING: HOLOCAUST SURVIVORS AND SWISS BANKS* (2010); ITAMAR LEVIN, *THE LAST DEPOSIT: SWISS BANKS AND HOLOCAUST VICTIMS* (1999); GREGG J. RICKMAN, *SWISS BANKS AND JEWISH SOULS* (1989).

a U.S. judge be empowered to resolve [these claims]?"³⁸

I found these intriguing puzzles that, like the core of many of the presentations, set me thinking, always a bountiful reward for an academic. But they also made me wonder about the role of memory in a situation such as this. The plaintiffs usually had no idea or documentation regarding which bank held their funds. The banks wanted proof that the deposit existed and that it had not been paid out: they invoked privacy rules to resist a search of their own records. When they finally yielded it was learned that millions of records for the relevant time period had been destroyed. For me the case posed fascinating research challenges: Would it be possible to establish which claims were credible and which were not? Could a fair process be formulated for the allocation of funds when the documents no longer existed? How much reliance could be placed on memories that are now more than half a century old? Perhaps we could design a study in which we asked people about the banking and financial habits of their parents or other relatives from decades ago. We might be able to compare the people's memories to official documents and gain information about how reliable memories for this sort of insight might be expected to be.

This was but one of the series of talks that I attended that sent me home with my brain spinning with ideas about scientific research that could shed light on questions that lie in the intersection between law and cognitive psychology.

Q. In what other ways has the law school had an influence on you, or how do you believe the law school is likely to prove to be of importance to you?

A. One thing, relating to my court experiences, immediately comes to mind. I am sometimes confronted by ethical questions. Defense attorneys may press me toward making categorical statements that go beyond the limits of what I am comfortable in concluding. In the realm of repressed memories I sometimes have to hedge with "I think" or "it is possible" or with words like "perhaps" and "probably." The opposition might rely on a psychiatrist or a clinical psychologist who often is much less tentative about such matters, and who might well insist that his or her experience and insight is sufficient to support a conclusion that the matter in controversy is exactly what the prosecutor has maintained that it is.

Let me expand on this with an example. In a number of cases that I've been involved in the accuser is accusing someone of a sexual assault based on her (it is most often a her) recovery of a repressed memory of earlier incidents. The accuser has a therapist who will testify: "I believe her memories are real and she was abused." If pressed, the therapist-expert might say that the accuser's emotions while describing the memory clearly demonstrated the memory's accuracy.

But I know from my research that false memories can be expressed with a great outpouring of emotion and that such expressions are no guarantee of

38. See Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L. Q. 795 (2002).

authenticity, and yet I am unwilling to say that such recollections are false since I can't be certain without independent corroboration. So I am blindsided by a plaintiff who relies on what I believe is an unwarranted and unethical conclusion.

Sometimes the ethical boundaries that I deal with are not altogether set in concrete and the fact that I can (and will) take advantage of first-rate legal minds at the new law school to discuss matters such as these is a strong plus for me.

Q. Are there other potential law school ventures that coincide with your experiences and that you find exhilarating prospects?

A. Very much so. We are living in an “age of innocents”—ever-growing awareness among the public that there exists a sizeable population of incarcerated persons who in fact did not commit the crime for which they were convicted and imprisoned. For several decades now, I have regularly received letters from prison inmates proclaiming their innocence. “I am truly innocent,” Steven Slutzer wrote to me from his cell in Pennsylvania. “I was falsely convicted of rape,” J.B. Pease wrote from the McAlester penitentiary in Oklahoma. I am well aware that all those who contact me are not necessarily innocent but a few, at least, might well be.

I respond to each plea, but as a lone social scientist there is very little that I can accomplish for my correspondents. At UC Irvine we wanted to start an Innocence Project based on the work in New York City of attorneys Barry Scheck and Peter Neufeld,³⁹ and the Center on Wrongful Convictions launched by the Northwestern University Law School.⁴⁰ We were stymied by a lack of legal expertise and personnel. Now we can move forward. I've already discussed the idea with some enthusiastic law students.

Q. Finally, how would you summarize your reaction to the inauguration of a law school on the Irvine campus?

A. It's a blessing.

39. JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (2003).

40. Marvin Zalman, *Criminal Justice Reform and Wrongful Conviction*, 17 CRIM. JUST. POL'Y REV. 472 (2002).