

**A Critical Examination of The Recovered
Memory/False Memory Debate:
Reflections Upon Law and Social Transformation**

by
Geri Moss-Norbury, B.A. (Hons. Law)

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of

Master of Arts

Department of Law

Carleton University
Ottawa, Ontario
14 May 1999

© 1999, Geri Moss-Norbury



National Library
of Canada

Acquisitions and
Bibliographic Services

395 Wellington Street
Ottawa ON K1A 0N4
Canada

Bibliothèque nationale
du Canada

Acquisitions et
services bibliographiques

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file *Votre référence*

Our file *Notre référence*

The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

0-612-43317-X

Canada

ABSTRACT

This thesis critically examines the recovered memory/false memory polemic, arguing that feminist and other anti-child sexual abuse advocates have not adequately linked the debate to a political understanding of social power and gender bias. Building upon the theoretical work of Joseph Gusfield, Stephen Pfohl and others, this thesis contends that the false memory hypothesis is readily accepted by society partly because doing so allows attention to be diverted away from the underlying issue that often those exploiting children are the same people children depend upon for their safety and nurturing. Analysing the construction of the public problem of child sexual abuse in relation to the recovered memory/false memory debate, and the liberal legal paradigm, this thesis calls for, and contributes to, a larger feminist anti-child abuse project that recognizes law as a site of ongoing social contestation.

ACKNOWLEDGEMENTS

I thank my thesis supervisor, Maeve McMahon, for her patience and for suggesting I look at the work of Joseph Gusfield and Stephen Pfohl, two authors whose writings I was previously unfamiliar with.

My deep appreciation is extended to the single most influential teacher of my academic career, Brettel Dawson.

I would like to take this opportunity to acknowledge the importance of the love and support I have received from my immediate family (Carol, Roger and Vanessa Moss-Norbury) and other family members and friends, particularly Bonnie & Lionel McLaughlin, Hilda Sullivan and Kelli Tonner.

Finally, I must thank my husband, classmate and partner - Blake McLaughlin. Having survived simultaneous Masters' theses, I look forward to less theoretically fraught conversations!

Gerri Moss-Norbury, B.A. (Hons. Law)

TABLE OF CONTENTS

| | |
|-------------------------------------------------------------------------------------------------------------|-----|
| ACCEPTANCE SHEET | ii |
| ABSTRACT | iii |
| ACKNOWLEDGEMENTS | vi |
| TABLE OF CONTENTS | v |
| | |
| Chapter One Introduction | 1 |
| | |
| Chapter Two The Social Construction of Public Problems and Deviance | 13 |
| I. The Social Construction of Public Problems | 13 |
| II. On Deviance and Social Control | 30 |
| III. Formal Theories of Deviance | 32 |
| | |
| Chapter Three Hegemony and Its Effect on Beliefs About the Veracity of Sexual Abuse Claims | 66 |
| I. Introduction - The Extent of the Sexual Victimization of Children | 66 |
| II. Gramsci and the Concept of Hegemony | 67 |
| 1. The False Memory Syndrome Foundation | 71 |
| 2. The Media | 73 |
| 3. The Use of Science to Bolster the FMS Hypothesis | 83 |
| III. The Effects of Popular Consciousness Around Recovered Memories .. | 91 |
| IV. Conclusion | 97 |
| | |
| Chapter Four The Legal Landscape | 111 |
| I. Introduction | 111 |
| II. The History of the Criminal Law and the Possibilities Within Civil Remedies | 112 |
| III. Present Day Jurisprudence | 114 |
| A. Case Law | 115 |
| 1. Statute of Limitations cases | 115 |
| 2. Criminal Cases | 118 |
| 3. Civil Cases | 122 |
| B. Recovering Memories in Therapy | 125 |
| 1. Access to Therapy Records | 125 |
| 2. The Political Landscape | 131 |
| 3. The Legal Consequences for Therapists | 139 |
| IV. The Utility of Legal Engagement | 142 |
| V. Conclusion | 144 |

| | | |
|---------------------------|-------------------------|------------|
| Chapter Five | Conclusion | 155 |
| Bibliography | | 169 |

Chapter One Introduction

This thesis is a critical examination of the recovered memory/false memory debate. I critique the sexist stereotyping of women and children in the debate that fosters the belief that many recovered memories of childhood sexual abuse are false. I argue that feminists and other anti-child abuse advocates are not doing an adequate job of linking this debate to a political understanding of power and gender bias in society. It is my contention that society is quick to accept the false memory hypothesis because doing so diverts attention from the underlying issue that so many children are exploited by the very people upon whom they depend for their safety and nurture within their families.

In her book Feminism and the Power of Law, Carol Smart comments at the outset of a chapter on the subject of child sexual abuse:

that the legal treatment of rape epitomizes the core of the problem of law for feminism. The law in this field operates to signify the dominance of a specific notion of sexuality, it reaffirms a particular form of heterosexuality, and disqualifies women's experiences of abuse. But if rape law silences and denies women's experiences, what does the criminal law signify in relation to child sexual abuse?¹

It is with this question that the thesis engages. Indeed, child sexual abuse was chosen as the focus of this thesis project because "its connection with the patriarchal order is not as obvious as the connection between rape, for example, and patriarchy."²

My undergraduate thesis explored whose interests are protected by laws against rape. I argued that historical and current anti-rape legislation and case law revealed that the primary aim of such law is the protection of the property rights of certain men in 'their' women.³ I further argued that our society sexualizes violence to the extent that

rape is, essentially, ‘the price of coercive sexuality’.⁴ In previous research I also examined child custody law finding, not surprisingly, that child sexual abuse was an issue in some of the child custody cases. At approximately the same time (the early 1990s), the term ‘false memory syndrome’ started to come into common usage. In the preceding few years, many celebrities⁵ and other high profile persons had ‘come out’ as having been abused as children and society in general were seemingly shocked but not disbelieving that such things occurred. The topic of child sexual abuse was very ‘current’ and there seemed to be great relief that the topic was ‘finally out in the open’.

Nearly a decade later, child sexual abuse is still being talked about but it seems that society is even further from believing women and children when they say they have been abused.⁶ As author Louise Armstrong has stated “it was not our intention merely to start a long conversation”⁷ about child sexual abuse. Obviously, the scope of this paper is not sufficient to examine all the ways in which women’s experiences of sexual abuse are negated. The one I will focus upon is upon the application of the label of ‘false memory syndrome’ to many adult women’s recollections of childhood sexual abuse. It is my view that this is proving to be a very effective and insidious tactic in discrediting survivors’ claims both individually and collectively.

I make no claims to ‘neutrality’ here. While I do not discount the possibility that inaccurate memories may exist, most women (and men) who ‘recover’ memories of sexual abuse in their childhoods are remembering real events⁸ that they had blocked out of their conscious memories due to the traumatic nature of the events. Traumatic events other than sexual abuse are often blocked out of individuals’ memories because they are

too difficult to deal with, only to resurface later.⁹ The Post Traumatic Stress Disorder (PTSD) suffered by many Vietnam war veterans, survivors of automobile accidents etc., often include the symptom of suppressed memories.¹⁰ While certainly these ‘recovered’ memories have been the subject of psychological studies, the popular conclusion does not appear to be that these people are mistaken about what happened to them. However, popular opinion about recovered memories of child sexual abuse is becoming just that: that the memories are false, or certainly not true in a legal sense. Why and how that is so is the subject of this paper.

Chapter Two discusses the work of two influential social theorists in order to set a framework through which to demonstrate how the ‘false memory syndrome hypothesis’ may be becoming the popular opinion about the veracity (or lack thereof) of recovered memories of childhood sexual abuse. The first theorist, Joseph Gusfield, writing about the social construction of public problems, examines the problem of drinking and driving. He argues that certain phenomena are recognized as problematic in certain time periods and not in others. In his view public problems are (to some extent) ‘socially constructed’. For example, driving while under the influence of alcohol, while seen as an egregious social problem in the 1990s, was not so perceived in, say, the 1950s. What Gusfield has to say about the specifics about drinking-driving are less important (to this project) than the insights he provides, or helps to clarify, about the distribution of power in society and the way in which law is employed by elites to legitimate the position of the powerful. While a straight substitution of the problem of child sexual abuse for that of drinking-driving is not intended, Gusfield’s work helps to illuminate the politics surrounding the

issue of recovered memories of child sexual abuse in some thought-provoking ways. For example, I argue that child sexual abuse has generally come to be accepted as a public problem but that presently there is a struggle over whether intra familial sexual abuse is actually a public problem or whether false memory syndrome is the real problem. This is not as contradictory as it appears initially. In several senses there are two levels to this debate. For example, academic Gail Kellough, citing Gusfield, notes:

it has often been noted within social science literature that there is a world of difference between what one says and what one does. Although reality is experienced differently from the way it is interpreted within the totalizing voice of dominant culture, this is not a simple distinction between words and actions. Rather there are actually two levels of consciousness or two levels of culture, a public one where values are articulated for public consumption and a private one where actual activities require a different kind of explanation.¹¹

On one level, child sexual abuse is recognized and socially constructed as a public problem. There is greater resistance, however, to *incestuous* child sexual abuse being recognized as a public problem (for reasons that will be further discussed in Chapter Three). The struggle to keep this particular kind of abuse ‘private’ through the employment of the false memory syndrome hypothesis is the topic with which Chapter Two engages.

The second social theorist whose work I examine in Chapter Two is Stephen J. Pfohl, who is concerned with the ways in which the concept of deviance is constructed in our society. In his book, Images of Deviance and Social Control: A Sociological History,¹² Pfohl examines different theories of deviance, focusing upon who is able to assign the label of ‘deviance’, to whom, and the result of such labelling in terms of social

control.

I do not argue that there is one answer as to why the belief in the falsity of recovered memories has become so strong in our society. The popularity of the false memory hypothesis¹³, however, leads me to think that society's desire to 'blame' the victim (or, more correctly, her memory) lays at the root of the issue. Pfohl himself discusses the 'discovery of child abuse' in this book and another separate paper.¹⁴ He notes that previous to this 'discovery', child abuse was not historically 'seen' by medical professionals and society at large as a problem. As he has applied theories of deviance and social control to the discovery of child abuse, so I will apply them to the more specific, and gendered, issue of child sexual abuse and the lure of the false memory syndrome thesis.

Essentially the argument in Chapter Two is that society 'constructs' social problems and therefore the same 'objective' reality may be seen as problematic in one time period and not another. As Gusfield argues, certain conditions must be met for something to be seen as a 'public', as opposed to a 'private', problem. I will argue that the conditions do presently exist for child sexual abuse to be 'seen' as a public problem on the first level that Kellough describes. However, I think that most people are not yet prepared to deal with this problem of child sexual abuse within the family. Therefore, the problem of incestuous child sexual abuse is minimized by, among other things, the application of the false memory hypothesis. As such, the ability of elites to label certain people or groups as deviant has been found useful, in this context, by a wider segment of society. As Pfohl describes, elites have made 'deviants' of various groups differently in

various historical periods, using a myriad of different theoretical explanations and justifications. His analysis is important to this thesis project as I will argue that, on this subject, there are issues about which groups (e.g., abusers, survivors, and therapists etc.) are being constructed as deviant. There are echoes of numerous theories in the debate.

Another concept that could be used to clarify what Gusfield and Pfohl are talking about, essentially, is the creation and recreation of hegemony.¹⁵ The work of Antonio Gramsci extremely useful in this regard. However, in this paper the more specific focus on public problems and the law (Gusfield) and the different ways to create deviance and, thus, socially control individuals and groups (Pfohl), has proven more illuminating to this particular project. Had I not been exposed to Gramsci, however, I am not sure that I would have seen as much in Gusfield and Pfohl and I use his work secondarily to clarify the link between the two main theorists' work and to my own thesis project.

In the third chapter I move away from theoretical discussions, to a more concrete examination of the extent to which the false memory syndrome hypothesis has pervaded public consciousness and why. To this end, I will discuss how the issue has been represented in the media. Whether or not false memory syndrome exists¹⁶ is hotly debated in both the popular and the scientific press. In the scientific journals the debate is centred on the details of memory loss and retrieval, although it is no less political than the debate in the popular press where 'family values', attitudes about women, and the need to deny certain horrifying realities fight for space and help to cloud the issues. Underneath all this 'noise' there is a certain fatigue, "enough already. We talked about that."¹⁷ As author Louise Armstrong notes:

It is no wonder that, given the fundamentalist spin that's been overlaid on the issue- "I believe!"; "I don't believe!"; "Infidel!"; "Heretic!"- great numbers of people throughout the land are simply praying for surcease. And are tempted, in ever greater numbers, to pull the plug on the whole issue; dismiss the whole lot, if that is the easiest way to tune out the relentless crossfire¹⁸

The easiest way to 'tune out the crossfire' is, I suggest, to accept the false memory syndrome hypothesis. Of course, there are other simpler and less insidious reasons why society finds it difficult to believe people who have recovered previously 'lost' memories. 'Forgetting' or 'repressing' something as significant as sexual abuse does not fit with most peoples' 'common sense'. The significant amount of time between the alleged abuse and the coming forward of the survivor doesn't seem 'right' to most people, who do not suffer from Post Traumatic Stress Disorder. Therefore, it may be difficult for most lay people to understand how someone could bury such a memory. The memories of children have always been suspect to adults and this is no less true of adult memories of childhood events.¹⁹ Similarly, the fact that some women recover their memories while in therapy (although much less than the false memory rhetoric would suggest) leads some scholars,²⁰ and, relatedly, media and lay persons, to attribute the memories to 'suggestive' therapy. Chapter Three concludes by examining the general consensus on the issue of recovered memories of childhood sexual abuse and then attempts to delineate some reasons why society may 'consent' to these beliefs, in part due to the sexism still inherent in our society and the 'common sense' view that prevails.

Chapter Four analyses the legal issues around recovered memories of child sexual abuse. As many incidents of child sexual abuse are not brought to the courts at all,²¹

some readers may wonder why looking at the law is important. I think, as Gusfield does, that law is an important cultural medium and that it affects society even as society affects it. The chapter begins, then with a discussion of the importance of law and moves to the specifics of both the jurisprudence and scholarly commentary on the issue. The Canadian literature is compared with American commentary, where the issue of recovered memories has spawned many more cases and commentary than it has (thus far) in Canada. I examine the state of the law in Canada and briefly touch on some emerging issues in the United States (as an indication of where Canadian jurisprudence may be headed). My intention is not merely to review the cases and commentary however, but to argue that there is a need to make explicit the connection between law and politics.

It is unfashionable perhaps, in this so-called “post-feminist” age, to admit publicly that one is a feminist or that gender inequality still exists. Perhaps that is why it seems that feminists are hampered in their efforts to connect their struggle to defend the concept and validity of recovered memory with a political understanding of power. Their opponents (at least on this issue) have no such trepidation, characterizing the feminist movement as extremely powerful and the leader of some vast conspiracy to disempower men.²²

As will be discussed in Chapter Two, issues are not seen as public problems until they are socially constructed as such, usually by elites. Given the lack of progress that has been made in identifying abusive family members and in preventing abuse,²³ one could argue that the public is either unaware, or chooses to be ignorant, of the number of children being sexually abused. The most effective weapon against allegations that North

America is a sexually violent society, even within the family unit, is the discrediting of adult survivors. Children are not as much of a concern because, for the most part, they do not talk, and are easier to discredit if they do. Calling adults who claim to have been abused liars is not as effective a strategy. Portraying women as misguided, confused and easily led however, still appears to resonate, hence ‘false memory syndrome’.

I do not wish to gloss over the number of male children who are sexually abused. By some estimates one third of sexual abuse victims are male children.²⁴ Whether societal reaction to male and female victims differs would be an intriguing project. Interestingly, however, as of 1996, “all of the reported Canadian cases involving memories which have been found [in a legal sense] to be false and induced by therapy have involved female complainants.”²⁵ As this paper is about the false memory/recovered memory debate and my hypothesis is, in part, that ‘false memory syndrome’ may be an effective tactic in the discrediting of female survivors, my references to survivors throughout this thesis project will generally be gender specific to female victims. Is it possible that sexist notions about women, particularly their ‘influenceability’, have helped to make the false memory syndrome hypothesis such an attractive ‘solution’²⁶ to society’s inability or unwillingness to deal with the problem of child sexual abuse?

Endnotes - Introduction

1. Carol Smart, Feminism and the Power of Law, (London: Routledge, 1989) at 50.
2. Kathleen A Lahey, "Research on Child Abuse in Liberal Patriarchy" in Jill McCalla Vickers, ed., Taking Sex Into Account: The Policy Consequences of Sexist Research (Ottawa: Carleton University Press, 1984).
3. See Lorenne Clark & Debra Lewis, Rape: The Price of Coercive Sexuality, (Toronto: The Women's Press, 1977).
4. This phrase is taken from the title of Clark & Lewis', Rape: The Price of Coercive Sexuality, *supra* note 3.
5. For example, comedian Roseanne Barr and former Miss America Marilyn Van Derbur have both talked publicly of being abused sexually as children. See Elizabeth F. Loftus, "The Reality of Recovered Memories" (May 1993), in 48(5) American Psychologist 518 at 519.
6. The plethora of articles on "false memory syndrome" is a good indicator of the FMS hypothesis' penetration. A search of the Current Contents database of Carleton University's MacOdrum Library finds approximately 50 matches using the boolean key words "false", "memory" syndrome" and "memory" as of March 1999.
7. Louise Armstrong, Rocking the Cradle of Sexual Politics: What Happened When Women Said "Incest" (Reading, Mass.: Wesley-Addison, 1994) at 7.
8. See J.L. Herman & E. Schatzow, "Recovery and Verification of Memories of Childhood Sexual Trauma" (1987), 4 Psychoanalytic Psychology 1.
9. J. Golier & R. Yehuda, "Neuroendocrine Activity and Memory-Related Impairments in Post Traumatic Stress Disorder" (1998) 10(4) Development and Psychopathology 857.
10. Ibid. Golier and Yehuda's study includes war veterans, survivors of childhood abuse, and other trauma survivors.
11. Gail Kellough, Aborting Law: An Exploration of the Politics of Motherhood and Medicine (Toronto: University of Toronto Press, 1996) at 94.
12. Stephen J. Pfohl, Images of Deviance and Social Control: A Sociological History, (New York: McGraw-Hill Publishing Company, 1985).
13. As evidenced by the debate in the media, to be discussed in Chapter Three, and the volume of scholarly articles written on the subject indicate.

14. Stephen J. Pfohl, "The Discovery of Child Abuse", in Delos H. Kelly ed., Deviant Behaviour: A Text-Reader in the Sociology of Deviance (New York: St. Martin's Press, 1984).

15. Antonio Gramsci defines hegemony as:

1. The "spontaneous" consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is "historically" caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production [and]
2. The apparatus of state coercive power which "legally" enforces discipline on those groups who do not "consent" either actively or passively.

Antonio Gramsci, Selections From the Prison Notebooks, ed. and trans. Q. Hoare and G. Nowell-Smith (New York: International Publishers, 1971), at 12.

16. Perhaps it would be more precise to say 'whether recovered memories exist' since, to my mind, the existence of false memory syndrome seems to be more readily accepted by the public.

17. Armstrong, supra note 7 at 78.

18. Ibid., at 7.

19. The legal ramifications of this will be discussed in Chapter Four.

20. Such as Dr. Elizabeth Loftus of the University of Washington whose work will be discussed in detail in Chapter Three.

21. Judith L. Herman, Trauma & Recovery (USA: Basic Books, 1992); Christine A. Courtois, Healing the Incest Wound: Adult Survivors in Therapy (New York: W.W. Norton & Co., 1988).

22. See, for example, George Jonas, "Recovered Memory is Best Forgotten", Montreal Gazette, May 3, 1998 at A8.

23. B. Flicker, "Psychohistorical Roots of the War Against Children" (1993), 21 The Journal of Psychohistory 69.

24. As revealed by the *Badgley Report* . . . and other literature, while the vast majority of perpetrators of child sexual abuse are male (*i.e.* well over 90 per cent) a large portion of victims are male (perhaps as many as one-third).

Nicholas Bala, "False Memory 'Syndrome': Backlash or *Bona Fide* Defence"?(1996), 21 Queen's Law Journal 423 at 439, note 45.

25. Ibid. Clarification added.

26. I use 'solution' here in the sense that if child sexual abuse can be denied or minimized by the acceptance of the false memory hypothesis then the problem is 'solved' in that it no longer requires (as much) action.

Chapter Two

The Social Construction of Public Problems and Deviance

Recently, the widespread nature of child sexual abuse has come to be recognized as a social problem.¹ The question of why it has taken Canadian society so long to realize the depths of this problem has much to do, I believe, with what academic Joseph R. Gusfield calls ‘the social construction of public problems’. In other words, something is not perceived as a problem (or at least as a societal problem as opposed to an individual one) until it is socially constructed as such. But who constructs this perception and by what process? Once something is recognized as a problem, how is responsibility assigned for that problem? How is it ‘solved’ or made to go away? These complex issues will be addressed in this chapter by examining Gusfield’s thesis on the social construction of public problems and that of another academic, Stephen J. Pfohl, who addresses the creation of ‘deviance’ and related social control. While neither speak specifically of child sexual abuse, the concepts that they explore are beneficial to an understanding of the socio-political construction of the discourse around child sexual abuse today in Canada.

I. The Social Construction of Public Problems

even to recognize a situation as painful requires a system for categorizing and defining events. All situations that are experienced by people as painful do not become matters of public activity and targets for public action. Neither are they given the same meaning at all times and by all peoples.²

Joseph R. Gusfield posits that the particular case can inform us about the more

general case. One of his books, The Culture of Public Problems: Drinking-Driving and the Symbolic Order,³ is about both the general case (the culture of public problems) and the microcosm (drinking and driving). Some of the same arguments and logic that Professor Gusfield applies to the drinking driving issue can also be applied to the topic of this thesis project. His arguments about the social construction of public problems (and, particularly, who constructs them) can be utilized to help illuminate the dynamics of the construction of other 'social problems.' Gusfield's particular 'public problem'⁴ is drinking-driving, while the 'microcosm' of this paper is the debate around child sexual abuse and 'false' memories.

Observers may note that the problem of widespread⁵ child sexual abuse has only become publicly recognized as a public problem in recent years.⁶ Similarly, drinking and driving was only 'created' as a social and legal problem a few decades ago. The social construction of public problems is a multifaceted phenomenon, the examination of which assists in understanding how the same objective condition is defined as problematic in one time period but not in another.

Gusfield notes that the problems connected with most public issues arise long after events and processes are set in motion.⁷ For example, driving after having consumed alcohol is less socially acceptable in the 1990s than it was in the 1950s, although the 'objective reality' of a person driving drunk is the same in both time periods. Similarly, common sense (and historical records) tell us that child sexual abuse has, to some degree, occurred for centuries and yet at no time in history has the topic had as much, or at least the same kind of, 'currency' as it does today.

There are a number of other reasons why child sexual abuse and the false memory debate are such a common and controversial topic today. Gusfield contends that a phenomenon is not a 'public problem' unless there is both a cognitive belief in its alterability and a moral judgement of its character.⁸ Until recently, these preconditions for the recognition of the tragedy of childhood sexual abuse were not met.

Secondly, there is the matter of the 'ownership' of public problems. To 'own' a public problem is to have the ability to create and influence public perceptions of the 'problem'. Gusfield uses this metaphor to emphasize the "attributes of control, exclusiveness, transferability and potential loss"⁹ that are also associated with the ownership of (real) property. Different groups are unequally situated with regards to the power, influence and authority to define the reality of the problem. It is the ability to create and influence public perceptions of the problem that Gusfield identifies as 'ownership'.¹⁰ Predictably, like real property, the ownership of public problems is also unequally distributed.

In Gusfield's drinking-driving examples, it was the churches and the temperance movement which 'owned' (i.e., controlled the agenda on) alcohol problems in the nineteenth and early twentieth centuries in the United States. 'Ownership' later passed to the universities, the medical profession, the problem drinkers themselves, and the government.¹¹ The placing of child sexual abuse onto the social and political agenda as an egregious social problem came through the actions of the feminist movement which, in Gusfield's sense, had at least partial 'ownership' of the problem. The capacity of the feminist movement to 'own'/define the problem of child sexual abuse may have been a

logical extension of the central analysis of feminism which focused attention on the existence of a patriarchal society with structured/gendered inequalities built around sexual subordination.¹² If it was the (radical) feminist movement¹³ which essentially 'owned' the problem of child sexual abuse for several years, its ownership was not secure. As Gusfield asserts, 'ownership' of public problems is transferable. It seems indisputable that at present there is a battle for ownership of the issue being waged between feminists and the False Memory Syndrome Foundation (FMSF) and other new right groups. Control over the agenda seems to be sliding toward the FMSF and their supporters.¹⁴ Several years ago the focus of the mental health community and other concerned groups, such as feminist anti-child abuse organizations, was on alleviating the trauma experienced by those 'coming out' as incest survivors. Today, in North America and elsewhere, the recovered memory/false memory debate seems to have superseded such concerns in the popular and scientific press. Writer Louise Armstrong further argues that the recovery/addiction movement is starting to have an influence on the debate around child sexual abuse. She describes the recovery/addiction movement as being primarily reactive, apolitical and concerned with the healing processes of individual survivors. While this movement certainly is not anti-feminist, its focus, Armstrong argues, tends to depoliticize the nature of the debate and shift attention away from accountability/responsibility¹⁵ and, relatedly, to submerge the gendered nature of the abuse.¹⁶ It is also not focussed on strategies to counter abuse.

Ownership constitutes one piece of the structure of public problems.

Responsibility is another. While there are benefits to 'owning' a problem; there can also

be benefits to disowning one, particularly in terms of responsibility. Gusfield maintains that, “some groups . . . may be especially interested in avoiding the obligation to be involved in the problem creating or problem solving process. They deliberately seek to resist claims that the phenomenon is their problem”¹⁷ and “quite often those who own a problem are trying to place obligations on others to behave in a ‘proper’ fashion and thus take political responsibility for its solution.”¹⁸

The above two quotations are concerned with causal responsibility and political responsibility. Much like Gusfield's alcohol distillers and distributors who ‘disown’ (or attempt to dissociate themselves from) the problem of drinking and driving,¹⁹ the figureheads in the battle over false memory are often women. Have men ‘disowned’ the problem in terms of causal and political responsibility? Research has shown that the vast majority of child sexual abuse is committed by men,²⁰ and yet many of the players on this field are women. Pamela Freyd co-heads the False Memory Syndrome Foundation with her husband. She is, by far, the more vocal of the two. She has not been accused of child sexual abuse but her husband has.²¹ Dr. Elizabeth Loftus is the preeminent and oft-quoted psychologist disavowing the existence of recovered memories.²² Many of the pro-family values organizations are also headed by women. This is not to suggest that all men are child abusers or that all men must dedicate themselves to the eradication of child sexual abuse. My point is simply that men as a group *appear* to be absent from overt involvement in the debate, particularly when the gendered nature of child sexual abuse is considered.²³ Researcher Carolyn Allard also notes that “for the most part, sexual abuse is an issue being addressed by women.”²⁴ Is it likely that some women, such as some

feminists, have taken 'ownership' of the problem in recognition of the gendered nature of child sexual abuse?²⁵ And conversely do others, such as those who present themselves as 'defenders of the family', perhaps wish to 'own' the problem (in terms of spearheading discrediting efforts) in lieu of their male counterparts? Of course, this question could be a thesis project in itself. I do not claim to have explored all the possibilities therein.

The focus of the recovered memory/false memory debate has shifted in the latter half of the 1990s. Increasingly, the scenario unfolds as such: a person (most often a man) is accused of child sexual abuse, usually by his now-adult children,²⁶ and the blame gets laid at the feet of therapists²⁷ and/or the memories of the survivors²⁸ (causal responsibility). The gendered nature of child sexual abuse and the power differentials involved are left unexamined. The obligation to 'fix' the problem (political responsibility) is not on society as a whole. Endemic child sexual abuse is not perceived by FMSF supporters (and others, as their influence grows) as a symptom of society's power structures. Rather, (political) responsibility for the 'solution' to the problem is put upon the survivors, the ideal action of whom is to recant their 'false memories'.²⁹ In Gusfield's examples, the fault is "in the man, not the bottle";³⁰ certainly it is not with the alcoholic beverages industry. In the child sexual abuse example, the fault is in the victim, not the bottle (the abuse). In either example however, effective means of shifting responsibility (by 'disownership') are demonstrated. It is not my argument that the two are entirely synonymous. Rather, the fact that powerful groups employ strategies (perhaps in different ways at different times) to shift blame, and thus political responsibility for 'solutions', is highlighted.

The three aspects of the structure of public problems are ownership, causation (causal responsibility), and political obligation (political responsibility). As Gusfield puts it:

the structure of public problems is then an arena of conflict in which a set of groups and institutions, often including governmental agencies, compete and struggle over ownership and disownership, the acceptance of causal theories, and the fixation of responsibility.³¹

The relationships between these three elements form the crux of Gusfield's study.

Gusfield's work is concerned with, as he puts it, "the ways in which science provides compelling arguments."³² Rather than viewing science in the traditional sense, as a neutral process of certain and accurate method; Gusfield asks the reader to think of scientific presentations as a form of rhetoric that is calculated to induce belief.³³

Similarly, some feminist scholars³⁴ have questioned the 'objectivity' of science, and contest "the notion of pure research which is free from value-laden theories."³⁵ Gusfield posits that:

the most subtle forms of social control are those we least recognize as such. Precisely because the categories of understanding and meaning provide so powerful a constraint to what we experience and how we think about that experience, they prevent awareness of alternative ways of conceiving events and processes. Because they lead us to "see" the accustomed forms as the only reality they minimize and obscure the possible conflicts and the volitional decisions that have helped construct that "reality."³⁶

If one views scientific presentations as rhetoric rather than as unquestionable fact, it is possible to question the 'facts' that emerge from them.³⁷ As will be discussed further in Chapter Three, several researchers on the pro-recovered memories side of the debate have stated that the debate is not solely based on scientific factors given that the research is not

conclusive in either direction. Instead, they admit, the position that researchers take must necessarily be, at least partially, socio-politically motivated.³⁸

Gusfield argues that the theory of the incompetent driver has been, thus far, the focus of accident research to the exclusion of alternate theories such as the 'unsafe car' thesis. According to Gusfield:

such foci are not results of objective realities in any direct, compelling fashion but are deeply influenced by the social and cultural organization by which attention is directed down some avenues and away from others.³⁹

Implicit in our generally unfailing faith in the pronouncements of science is the notion of legitimacy. Certain persons, scientists being a paradigmatic example, are publicly accepted as legitimate and authoritative and, thus, so are their viewpoints.⁴⁰ While in the false memory debate there are scientists on both sides of the debate with convincing arguments, the notion of legitimacy is still an intriguing concept. When the locus of 'legitimacy' in the recovered memory debate is examined, it appears that the odds are stacked in favour of proponents of the false memory thesis. Scientists are often perceived as more legitimate than therapists⁴¹ who are often accused in the recovered memory debate of 'implanting' false memories in patients. So while a pro-recovered memory scientist may 'neutralize' a pro-FMS scientist (equal in terms of 'legitimacy'), a pro-FMS scientist 'trumps' a therapist who believes his or her clients' recovered memories. Regarding other agents in the debate, men have more legitimacy than women;⁴² and the word of a parent is generally believed over that of a child, even an adult child.

Within Gusfield's theory there are two components to the structure of knowledge about auto accidents. The first is cultural organization, found in the linguistic and logical

categories used to think about auto accidents.⁴³ The analysis of cultural organization is a study of cognitive order. It is about what is selected as the content of public reality - the symbolic categories through which auto accidents and deaths are perceived.⁴⁴ It tells us what 'auto accidents' or 'sexual abuse' mean, how they are interpreted and how they are made into objects of thought.⁴⁵ Issues of political and causal responsibility are involved, in that how a problem is conceptualized influences the policy making process. The policy making apparatus is the point at which political responsibility is placed, which in turn may influence theories on causation.

The second component of the structure of knowledge that Professor Gusfield describes is social organization. This is described as the pattern of activities through which "phenomena become accessible and systemized into data and theory."⁴⁶ In other words, what facts are gathered, how and by whom and how are they processed and presented? The analysis of social organization, then, is the study of organized actions. The essential question becomes "who are the aggregators and transmitters of the public reality of"⁴⁷ a particular phenomenon?:

Because such facts are not records of individual events but are rather aggregations of data, amassed and presented, the "discovery" of public facts is a process of social organization. Someone must engage in monitoring, recording, aggregating, analysing, and transmitting the separate and individual events into the public reality of "auto accidents and deaths." At every stage in this process human choices of selection and interpretation operate.⁴⁸

As 'responsibility' is connected to cultural organization, 'ownership' is particularly significant to social organization in that the powerful have more opportunity to control the data gathering and dissemination process and therefore put their own 'spin' upon it.⁴⁹

Thus, the uncertain, inconsistent and inaccurate is transformed into a public system of certain and consistent knowledge in ways which heighten its believability and its dramatic impact.⁵⁰ Gusfield suggests that it is helpful to try perceiving from a different viewpoint as "such games of imagination make one conscious of the problem of how fact is created and certified in the public arena."⁵¹

The thesis that it is the 'unsafe driver' that causes accidents considers each accident to be a separate event and seeks a solution for it individually. Similarly, individualizing sexual abuse as being caused by 'deviants' de-politicizes the issue. To Gusfield, such individualisation "of the event keeps alive the sense of a drama of conflict against disordered persons."⁵² Conversely the 'unsafe car' thesis or the 'sexually violent society' thesis provides a view of accidents/abuse in the aggregate and directs the search for solutions through aggregate policies. As Gusfield explains:

The movement to produce safer cars accepts accidents as a given -as inevitable or probable, rather than as random or inexplicable events. It attempts to heighten the public consciousness of the individual event as embedded in a collective and aggregate process.⁵³

To what extent can these observations be applied to the debate around child sexual abuse? First, authority figures tend to blame either the individual perpetrators or the individual victims for their 'performance of deviance,' rather than regarding sexual abuse as a social problem.⁵⁴ One solution, then, is to lock up the offender, place him into psychiatric treatment or at least remove him from proximity to children. Another solution is to blame the victim: either her actions, or her memory. While the 'unsafe car' thesis may not be perfectly analogous, I think it is arguable that 'society' has failed to look at

child sexual abuse as an 'unsafe'/sexually violent society problem. Instead 'monsters' or 'lunatics' are created of those involved. There is little suggestion that society is, at least partially, to blame. To 'see' automobile accidents as as much a function of unsafe cars and unsafe roads as unsafe drivers, is to consider driving-related casualties as a cost of using automobiles.⁵⁵ Is it analogous to see child sexual abuse as a cost of the power hierarchy and the level of sexual violence in our society?

What is the benefit of portraying drinking drivers as problem drinkers (or even alcoholics)? If, in fact most persons cited for drinking and driving are actually not 'problem drinkers' and are not particularly 'impaired',⁵⁶ what is the gain in portraying them in this manner? Perhaps it is that:

if the problem drinker has been stigmatized as responsible for drinking-driving and the drinking-driver stigmatized as a deviant drinker, in this process the "social drinker," the convivial "solid citizen," has been "taken off the hook" and absolved of deviance. The contrasting archetype -- the social drinker -- is an "erring driver" when he strays. He is a man of rationality and basic good will who "can be dissuaded." Such a man is not very likely to be a drinking-driver: a social drinker might err once in the excessive use of alcohol sufficient to result in his arrest but he would not be likely to repeat his indiscretion. If not exactly heroic, the social drinker is neither villainous nor venal.⁵⁷

And so, the myth of the 'killer drunk' is created. The 'killer-drunk' is a character so completely reprehensible that he risks his own and other peoples' lives with his "irresponsibility and hedonistic lifestyle,"⁵⁸ while "the social drinker is Everyman."⁵⁹ So too, it is only 'sick perverts' that abuse children, and not 'ordinary family members'. The more someone is perceived as an 'ordinary family member', the less likely they are, applying Gusfield's theory, to be labelled as the 'deviant' in a child abuse situation.

As Gusfield elaborates, the myth of the killer drunk is both cognitive and moral.⁶⁰

This myth:

organizes the cognitive and moral order of the world into a form which can be utilized to make sense out of the incidence of auto accidents and fatalities. As model, as iconic metaphor, it presents a narrative which constitutes a guide to understanding other events.⁶¹

By deviantizing the drinking driver, 'we' cannot be held responsible for his or her actions and we are in no danger of becoming embroiled in such a situation ourselves. Further, the costs of operating automobiles can be blamed on some 'bad' people rather than having to acknowledge the human cost of this now indispensable form of transportation. Of course, attitudes have changed considerably since the publication of this work in 1981. At some point, conditions became conducive to the social construction of drinking and driving as a social problem. In the present day, very low levels of alcohol consumption whilst operating a motor vehicle could result in the deviantization of the driver causing an accident. However, the narrative has only shifted. It is still the 'bad' person, who drank alcohol (albeit a much smaller amount than previously), who can be blamed for the human cost of operating automobiles.

As Gusfield suggests, this narrative can be applied to other events. The cry of 'false memory syndrome' seems to occur primarily where the alleged perpetrator is closely linked to the alleged victim.⁶² I will argue that this is, in part, because an adult child accusing her father of child sexual abuse hits too close to home. A 'known sex offender' who has been in and out of psychiatric treatment, who has no close family ties is not enough like 'the average person' to threaten their view of the world. Likewise:

The emergence of the problem drinker as drinking-driver and the location of one major source of problem drinkers in the lowest categories of the social hierarchy in Waller's paper does place the problem outside the scene of the solid citizen. As long as the social drinker was the potential source of the problem of auto accidents due to drink, a prevalent style of stable middle- and working-class drinking habits was under impeachment.⁶³

Of course, the public perception of the drinking-driver has changed significantly since the publication of Gusfield's book. This is partly my point. The 'social construction' of public problems changes over time. For the purposes of this thesis, however, comparisons between how drinking-drivers were perceived during the time of the writing of Gusfield's book and how the problem of child sexual abuse is being 'socially constructed' now are illuminating.

The creation of the killer-drunk, like the 'real rapist'⁶⁴ or the stereotypical 'child molester', allows citizens to distance themselves from these crimes, both as individuals and collectively. According to this sort of 'wilful blindness', the people who commit these crimes are 'deviants'; they are not the least bit like the 'average person'. Thus, they can be considered as an aberration from society, rather than as a creation of it. Again, this rationale is an echo of the liberalism inherent in Canadian society. Even within feminism there is such a split. According to liberal feminism, sexism is an aberration that can be eliminated through formal equality.⁶⁵ According to radical feminism, sexism is systemic and is endemic to a patriarchal, hierarchically constructed society.⁶⁶

In a liberal legal/criminal justice system it is these 'deviants' who are generally made subject to legal enforcement. Gusfield analyses the law with respect to drinking and driving "as a system of communications, not only in its manifest language but also in

the metaphorical symbolism of its latent meanings."⁶⁷ In studying law as a mechanism in the definition and solution of public problems, Gusfield is less interested in the study of law's possible utilitarian effects (deterrence, preventing this particular person from driving etc.) than in "the cultural attributes of law as an embodiment of meaning, a way to think about the phenomenon of drinking-driving or the character of the drinking driver."⁶⁸

As Gusfield notes in a chapter entitled Law as Public Culture, "within legal doctrine a difference is made even between the 'ordinary violator' and the 'criminal'."⁶⁹ This is clear in the case of drinking-driving. Doctrinally, drinking-driving differs from 'ordinary' traffic offenses both in its legal sanctions and in its moral status. While "traffic offenses, in usual circumstances, are small sins, minor delicts, and afford no basis for stigma, deviance, or abnormality, let alone crime:"⁷⁰

the drinking driver is arrested and placed in custody: the traffic violator is cited and permitted to return to traffic. The boundary between the two "crimes" is made when the DUIA offender is apprehended, put in the back seat of a squad car in which the inside door handles have been removed, read his rights, and possibly handcuffed.⁷¹

It is made clear that the drinking-driver has done something seriously wrong.

After the initial apprehension however, drinking-driving may have been treated more like a traffic violation than a 'criminal action', particularly in that the actual punishments meted out were often far below those prescribed and advised.⁷² As Gusfield notes:

The limited enforcement of the judicial and legislative classification of drinking-drivers as morally corrupt underlines the fact that a different perspective on drinking-driving exists situationally, in the particulars of the routine transaction of daily events, rather than in the public pronouncements of official governing agents⁷³

Similarly, 'on paper' any type of sexual violence is legally unacceptable. 'Situationally' however, it often goes un- or under-punished⁷⁴ as Kellough's interpretation would also suggest.⁷⁵

As Gusfield posits, "*the law* has a universalistic character; it represents a judgement of a situation irrespective of the persons involved in the individual case."⁷⁶ He argues that even the language of legal decisions can obscure the personal attributes of the individuals involved. Whether the accused are Black or white, male or female, young or old *appears* to be of no consequence. However, in practice, such considerations are hardly absent; "they are part of the way in which rough justice is meted out and a sense of fairness maintained."⁷⁷ Therefore,:

The idea of law as a statement of a moral reality, . . . is seemingly contradicted in the process by which the drinking-driving event becomes a "fact" in judicial practice. Here it is a negotiated reality . . . It is a result of values, organizational constraints, pragmatic contingencies, and bargaining between the relevant parties, considerations that make it a matter of the choice, discretion, and power of the several parties, interacting in the process of law. It is in this sense that "driving while under the influence of alcohol" is a social construction - a creation of human beings and not a direct representation of an objective fact.⁷⁸

In a 'negotiated reality', it is not difficult to imagine how the above factors (some of which may be particularly pronounced in child sexual abuse cases, such as the power differential between the parties etc.) outlined by Gusfield would apply to other situations.

Gusfield continues to build upon this analysis of "law as a self contained cultural product."⁷⁹ Quoting Thurman Arnold, he posits that there are two distinct problems of criminal administration; the keeping of order, and the "dramatization of the moral notions of the community."⁸⁰ Here, Gusfield is more interested in the latter, law as a form of

communication rather than as a mechanism for keeping order in the community,:

My concern here is with another aspect of legal acts, their symbolic forms as communications -- as narratives, stories, tales, as public legend and myth. Seen as culture, law takes its place alongside other forms of art -- literature, painting, sculpture, science, religious ceremony.⁸¹

Further, he contends that:

the dramatic qualities of legal acts infuse a situation with a visible meaning, an understanding of which can be attributed by the observers to the general public. Whatever the situated acts may be, the public, official, communal meaning is portrayed and fixed by public legal acts.⁸²

What this means in relation to the prosecution (or lack thereof) of child sexual abuse cases will be further examined in Chapter Four of this thesis. My point here, arising from Gusfield's symbolic analysis of law, is that advocates cannot afford to relinquish the law as an arena of social struggle given the "communal meaning that is portrayed and fixed by public legal acts" including the bringing forward of cases at all. Law has a communicative, cultural role in addition to (and perhaps more importantly than) its normative, instrumental one (the outcomes in individual cases).

The concept that the law has a communicative, cultural role can be linked to the construct of hegemony. Gusfield explicitly chooses not to discuss the concept of hegemony in this book. He notes that while some of his work may seem like a restatement of what Gramscian theorists have referred to as 'cultural hegemony', he avoids "examining the relation of drinking-driving knowledge to the interests, values, and sentiments of particular groups, classes or occupations,"⁸³ because his concern is 'public culture', in particular, "the symbolic and mythic character of that culture"⁸⁴ so emphasized. Although he avoids using the word *hegemony*, it seems that the public's

‘consent’ to have their reality constructed by others is certainly a major point of Gusfield’s argument. He states:

Here the emphasis is on the way in which the ruling groups create legitimation and functional response to their power and interests not by direct assertion of power but by construction of a cognitive and moral reality, a set of motives and directions in the ruled which are consistent with the needs and interests of the ruling groups.⁸⁵

While the concept of hegemony is useful to this thesis project (and, in fact, I will be touching on the work of Antonio Gramsci in slightly more detail in Chapter Three), Gusfield’s specific example of the social construction of a public problem has been helpful in that it demonstrates how the ‘construction’ of one public problem can relate to the construction of another. His discussion of the communicative, cultural aspects of law will be further examined in Chapter Four.

In the next section of this chapter the thesis of Stephen Pfohl will be examined. Pfohl discusses the ‘social construction’ of deviance and the social control of the resulting ‘deviants’. The most compelling point of his examination of numerous theories of deviance to the arguments in this thesis project is that certain groups within society have historically been able to assign the label of ‘deviant’ to those who threaten their position. They have done so at different times, employing different theories of deviance. Pfohl’s theories are helpful in examining how it is the survivors and the therapists of survivors who are being made the ‘deviants’ in the false memory hypothesis as part of the struggle over ‘ownership’ of child sexual abuse as a social problem.

II. On Deviance and Social Control

In his book, Images of Deviance and Social Control: A Sociological History,⁸⁶

Stephen Pfohl seeks to “systematically explore the ways that certain political commitments become attached to our images of deviance and social control.” While Pfohl is primarily discussing criminal deviance in this particular work, much of his theory can be extrapolated to other behaviours that society deems deviant. Certainly, Pfohl himself suggests this when he notes that “power relations penetrate all discussions of deviance.”⁸⁷ ‘Deviance’ then can be viewed, as other sociologists have often contended,⁸⁸ as socially constructed by power relations. When the powerful are successful in attaching the label of ‘deviance’ to a nonconforming or otherwise threatening group the chances of regaining control or power over that group are increased. More importantly perhaps, the powerful group's position remains stable.

Pfohl examines a variety of important theoretical perspectives on deviance in order to illustrate both the power dynamics involved and the reasons why the term ‘deviant’ is such a powerful tool in the arsenal of those who benefit from the status quo. Central to Pfohl's thesis is the concept of power -- the power to define what is deviant (or its reverse; ‘acceptable’ behaviour) and what should be done about such deviance (social control). In terms of this focus on power relations, Pfohl's work shares a strong connection to the theories of Gusfield and Gramsci. While Pfohl echoes many of the same themes as Gusfield and Gramsci, his more specialised analysis on the concept and meaning of deviance is valuable to this paper because of the implicit labelling that ‘false memory syndrome’ hypothesis entails.

The concept of deviance, particularly how it is constructed and why, is central to this paper for two reasons. The first quite simply is to illustrate how the ‘false memory’ movement has operated to ‘make deviant’ and thus stigmatize and delegitimize survivors of childhood sexual abuse. Even the term, ‘false memory’, implies deviance - a mental lapse - as does much of the rhetoric of the False Memory movement. The False Memory Syndrome Foundation’s characterization of the typical ‘false memory’ victim is that of a woman who goes into therapy for another problem (hence, there is already something ‘wrong’ with her) and, once there, becomes increasingly open to the therapist’s suggestions that she was sexually abused as a child.⁸⁹

Secondly, and more importantly, I will examine ‘deviantization’ as a political strategy in the struggle to maintain social control as it applies to both the general case (through Pfohl’s work) and the particular case of child sexual abuse. As Pfohl notes:

Deviants are only one part of the story of deviance and social control. Deviants never exist except in opposition to those they threaten and those who have enough power to control against such threats. The outcome of the battle of deviance and social control is this. Winners obtain the privilege of organizing social life as they see fit. Losers are trapped within the vision of others.⁹⁰

It is not difficult to understand that the general public does not want to acknowledge child sexual abuse as endemic to our culture. It is easier to create ‘deviants’ of the perpetrators or the victims. It is my contention that a worldview where the alleged victims of such abuse are mistaken (actually, suffering from a ‘syndrome’) may be more palatable than the idea that a substantial number of adults sexually abuse children.

The different sociological perspectives on deviance discussed by Pfohl,:

provide us with an image of what something is and how we might best act toward it. They name something as this type of thing and not that. They provide us with a sense of being in a world of relatively fixed forms and content . . . Without them we would be lost in space and time. Everything would be undefined, in flux, without order, chaotic.⁹¹

Without theoretical perspectives, any kind of coherent ‘understanding’ of the world is virtually impossible. Both this ‘understanding’ and theoretical perspectives may well be illusory but they are, nevertheless, necessary and powerful illusions.⁹²

Over the years sociologists have developed a number of formal theories on deviance. Many of Pfohl’s insights about these different theoretical perspectives and their origins shed light on the construction and solidification of ‘false memory syndrome’ as a newer but, I believe, extremely dangerous, form of ‘deviance’.

III. Formal Theories of Deviance

Pfohl states that "any one human act can be conceptualized in terms of literally hundreds of formal theoretical perspectives."⁹³ This is also true of perspectives on deviance and social control. Pfohl examines nine theoretical perspectives on deviance and social control. Each of these perspectives offers a distinct theoretical concept of what deviance is, how it is best studied, and how it should be controlled.

I will, as Pfohl has done, discuss these perspectives in order of the general time periods in which they emerged as important. While some of these perspectives are past their peak influentially, vestiges from all of these perspectives continue to resonate in the debate today. Furthermore, there is considerable overlap among the different perspectives and they continue to influence each other.

The first two perspectives that Pfohl deals with are the Demonic Perspective and the Classical Perspective. The first, as the name would suggest, characterizes instances of deviance as caused by demonic possession. This perspective originated in antiquity and was the predominant interpretation of deviance until the Enlightenment during the eighteenth century. The classical perspective, on the other hand, characterizes the deviant as a rational hedonist. Deviance is a rationally calculated choice where maximum pleasure is achieved at the cost of minimum pain.⁹⁴ As discussed by Pfohl, the classical perspective emerged in the eighteenth century, in the writings of scholars such as Cesare Beccaria and Jeremy Bentham who “viewed themselves as enlightened reformers, guiding society away from some dark ages of superstitious and arbitrary social control toward a new era based upon the rational, fair and consistent application of human reason.”⁹⁵

Pfohl differentiates the two aforementioned perspectives by noting:

Whereas demonic thinking emphasized the influence of supernatural forces, classical theorists conceived of humans as uninfluenced by anything but the calculative rationality of human reason. Deviance, like any other human act, was viewed as a freely calculated choice to maximize pleasure and minimize pain.⁹⁶

The third perspective that Pfohl discusses is the pathological perspective, or deviance as sickness. This perspective gained prominence in the late nineteenth century. Simply, the thrust of this perspective is that deviance is a product of sickness rather than of sin. Deviants, according to this perspective, do not choose to be deviant. My primary interest in this perspective is to illustrate how survivors of childhood sexual abuse are being presented by the false memory movement as having ‘defective’ memories. The pathological perspective allows those who do not wish to admit to the epidemic rate of

child sexual abuse to find an explanation for the number of complaints while not branding such complainants as liars. As a political strategy, characterizing alleged victims of child sexual abuse as sick is much more acceptable than labelling them as bad or evil. Furthermore, it still allows for the discounting of their claims as their 'defectiveness' means that such claims can be dismissed. It is not mystifying why this perspective would gain such popularity. In all "pathological theories are successful not because they are correct but because they are attractive to a particular historical audience - an audience thirsty for simple solutions to complex problems."⁹⁷ Child sexual abuse is a decidedly complex social problem. Taking real steps to address this problem is and will continue to be extremely difficult. One can see how a simple 'solution' would be appealing.⁹⁸

Pfohl exposes some of the shortcomings of the pathological perspective. The most important of these, I think, are that it reduces complex social problems to individual sickness and that it ignores the "essential politicality of all nonconformity."⁹⁹ On the one hand child sexual abuse is seen as a massive social problem. Even fairly conservative statistics will tell us that.¹⁰⁰ And yet the current emphasis on 'false memory' allows this painful reality to be ignored by individualizing the problem to singular 'confused' complainants. Individualizing the problem de-politicizes it. Further, the power structure of society is not questioned by elites. The innocence of alleged perpetrators or political motivations for stifling allegations of abuse are not examined.

The Social Disorganization perspective emerged in the 1920's in the writings and research of sociologists at the University of Chicago.¹⁰¹ Where classical and pathological

theorizing emphasized individual actions or maladies (rational choice and illness respectively), these sociologists emphasized social causation. Under this theory, deviance is seen as a by-product of rapid social change.¹⁰² Nonconformity increases when there is too much change in too short a period of time, disrupting the normative order of society.

During the 'disorganization' phase (i.e., prior to reorganization) conflicting normative frameworks would operate, normative competition, conflict or dissensus being a key characteristic of social disorganization.¹⁰³ An increase in deviant behaviour is a by-product of this social disorganization, according to this perspective, in that "the normative web of society has been stripped of its power to control people."¹⁰⁴ Therefore, an increasing number of people drift toward deviance.

Unlike the pathological perspective, the social disorganization perspective does not individualize social problems. In fact, notes Pfohl, "disorganization theorists believed it would be a major mistake to treat the individual in isolation from his or her disorganizational malaise."¹⁰⁵ The social disorganization theory was a major break from earlier theories in that it was part of a group of theories that came to examine the societal roots of 'deviance', rather than focusing solely on the individual's 'problem', be it 'demonic possession', 'rational hedonism' or 'sickness'.

Certainly two types of possible 'deviants' (alleged child molesters and complainants with alleged 'false memories') involved in the debate around child sexual abuse have been characterized as being created by rapid social change. The 'increase' in child sexual abuse has been linked, by churches and 'pro-family' groups at the very least, to the 'declining morality' and/or the increasing 'sexual permissiveness' of our society.

Similarly, the increase in the number of allegations of childhood sexual abuse is characterized by the false memory movement as being a result of feminism, partly in that ‘feminist’ therapists (another group that can be constructed as ‘deviant’ in order to shift the focus from perpetrators) convince a woman she was abused as a child.¹⁰⁶ The feminist movement has been characterized (by those who do not agree with its principles) as having produced ‘rapid social change’. However, unlike the University of Chicago sociologists, those interested in maintaining the status quo would be more likely to perceive of change and ‘social disorganization’ in a negative manner.

Some people do, perhaps, attribute the increase in allegations of child sexual abuse to ‘rapid change’. However, to view deviance as solely a product of social disorganization is to ignore the political character of social problems.

The Functionalist Perspective on deviance differs from the previously discussed theories in that it emphasizes the positive aspects of deviance. In this perspective deviance can be seen as ‘functional’ in that it has positive consequences for the *organization* of society as a whole by strengthening the bonds of an existing social order. The view of deviance as constructive is commonly traced to French social theorist Emile Durkheim. To Durkheim, deviance was an aspect of social life that was both universal and necessary and, therefore, normal; “an omnipresent feature of social life necessary for the existence of a stable social order.”¹⁰⁷ As Pfohl writes:

According to Durkheim and other functionalists, deviance contributes to social order in several ways: by setting moral boundaries, strengthening in-group solidarity, allowing for adaptive innovation, and reducing internal societal tensions¹⁰⁸

The boundary-setting function of deviance is fairly self-explanatory. Functionalists posit that the concept of 'deviance' helps to define the moral boundaries between right and wrong. Punishment of deviance creates a disincentive and informs members of society of what not to be or act like. In essence, the boundaries marked by the label of 'deviance' let people know what is expected of them; "(w)e are provided with a kind of moral map to guide us in the do's and don'ts of everyday social life."¹⁰⁹ In fact, under the functionalist perspective, "(w)ithout deviance there will be no moral boundaries, and without such boundaries there can be no society."¹¹⁰

The in-group solidarity fostered by deviance is achieved by collective opposition to the normative threats of nonconformity. This 'war' on deviant 'outsiders' may help to strengthen the social bonds of non-deviant 'insiders'.¹¹¹

Functionalists posit that deviance also has a tension-reduction function, as a safety valve for societal tensions. Scapegoating certain groups, often minorities, allows society as a whole to project some of its problems onto the shoulders of these 'deviant' groups.¹¹²

Pfohl notes that:

Minorities, for instance, may be blamed for tensions produced by society as a whole. By scapegoating its own problems on witches, hippies, Jews, Communists, welfare recipients, or homosexuals, society may temporarily drain off some of its own self-produced contradictions and tensions.¹¹³

Similarly, designating adult survivors or their therapists as deviant allows society to disengage itself from dealing with (or reduce the tension of dealing with) what, if it were to be believed, is a tragic and seemingly almost insurmountable problem.

While functionalists focus on the positive aspects of deviance, they also note that

too much deviance is counterproductive. Accordingly, when deviance exceeds a certain level social control is employed. Durkheim's statements about the usefulness of deviance were prefaced by the qualification that it not exceed a certain level. Influential modern functionalist Talcott Parsons was greatly concerned with 'excess deviance'. Parsons and other modern functionalists noted that the four main mechanisms of social control were: socialization, profit, persuasion, and (failing all else) coercion.

Socialization is the first line of defence against deviance. If socialization worked perfectly there would be no need for other control mechanisms. However, socialization is generally a very effective mechanism, teaching people to "internalize the patterned roles necessary for achieving social equilibrium."¹¹⁴ Certainly the 'taboo' of speaking about incest is firmly entrenched, both to maintain family equilibrium and social equilibrium. If this fails, profit may serve to reinforce equilibrium-enforcing behaviours. There is a very specific example of the profit motive in the area of civil sexual abuse cases. Louise Armstrong notes in her book, Rocking the Cradle of Sexual Politics: What Happened When Women Said Incest,¹¹⁵ that many out-of-court settlements involving adult survivors suing their molesters civilly involve a subsequent 'gag-order'. Under such an order, the victim may no longer discuss her or his molestation publicly, as a condition of the settlement.¹¹⁶

Parsons identifies persuasion as the third mechanism of social control. He notes that persuasion may attempt to correct an existing pattern of deviance, such as a minister delivering a sermon to sinners or a psychiatrist urging a patient to gain insight into their psychological deviance.¹¹⁷ Parents attempting to persuade their daughter to believe that

her therapist has brainwashed her into thinking she was abused could be a pertinent example. Other forms of persuasion may be aimed at preventing deviance, rather than correcting it. Pfohl gives the example of television advertising, which may induce us to act, feel or look a certain way.¹¹⁸

Socialization, profit, and persuasion together are thought to contribute to social control by providing, reinforcing, and legitimizing conformity. However, these three mechanisms are not always foolproof. To functionalists, coercion is the 'trump card' in maintaining social control.¹¹⁹

While devotees of the functionalist perspective make convincing arguments as to the positive contributions of deviance to social order, it must be recognized that any existing 'social order' is invariably organized to the benefit of the powerful. Indeed, labelling child molesters as 'deviant' implies that child molestation is not a widespread phenomenon. Further, it is likely that only certain people will be labelled as deviant. Society is loath to designate as such those who are otherwise 'normal', i.e., powerful. Therefore, the true 'deviant' must be someone else. In the case of child sexual abuse, is it the 'confused' woman who claims to be a survivor or her 'feminist' therapist that is likely to be labelled 'deviant'. As previously noted, having these persons labelled as deviant delegitimizes their claims, thus allowing society to dismiss them and yet create scapegoats on which to blame (or partially blame) perceived social problems, such as the high rate of family breakdowns. Pfohl notes that the universality of "objects of public scorn and condemnation suggest that the consequences of deviance may sometimes be positive."¹²⁰ Clearly, however, not all groups or individuals benefit from the existence of

‘deviance’. For example, it would be absurd to assert that all Germans benefitted equally from the deviantization of the Jews during Hitler’s reign. In an unequal society the functions of deviance will not be equally distributed. Under the functionalist perspective the benefits are recited without exploring who controls the system.¹²¹ Like the previously discussed theories, the functional perspective of deviance as (generally) normal and positive fails to account for the political character of deviance.

However, a further perspective that Pfohl discusses is primarily concerned with power relationships in ‘creating’ deviance. The Societal Reaction Perspective emerged as a major theoretical perspective in the 1960s and differed greatly from other theoretical perspectives in that it acknowledged power differentials. The essential thesis of the Societal Reaction Perspective is that nothing is deviant until labelled so by someone else. According to societal reaction theorist Howard S. Becker:

Deviance is not the quality of the act the person commits, but rather a consequence of the application of rules and sanctions to an ‘offender’. The deviant is one to whom the label has been successfully applied; deviant behaviour is behaviour that people so label.¹²²

In both The Other Side¹²³ and Outsiders,¹²⁴ Becker suggests that deviant labels arise as the result of the efforts of powerful ‘moral entrepreneurs’; people or groups who lobby for the deviantization of certain types of behaviour.

The societal reaction perspective has as a central concern the concept of power as a driving force behind the labelling process. Power differentials among individuals or groups translate into differences in the ability to label. According to Becker:

(t)he groups whose social position gives them weapons and power are best able to enforce their rules. Distinctions of age, sex, ethnicity, and class are all related to differences in power, which accounts for the differences in the degree to which groups, so distinguished can make rules for others¹²⁵

Certainly, the fact that women and children generally have less power, as groups and as individuals, than men can be seen as a leading factor in who is assigned the 'deviant' label in cases of child sexual abuse allegations. Also, it stands to reason that those men higher up the social ladder are least likely to be caught, reported, prosecuted or punished due to the 'differential surveillance'¹²⁶ different classes, races etc. of men receive. As previously noted, white, upper and middle-income men are generally the 'labellers' to begin with. 'Claims-making' activity, as Pfohl points out, is generally carried out by "groups with sufficient power are able to stake and defend their claims regarding what (and, I would add, who) should be considered deviant."¹²⁷

Pfohl examines the 'discovery' of child abuse, in both his book¹²⁸ and in a separate paper entitled "The "Discovery" of Child Abuse."¹²⁹ He writes that although child abuse undoubtably existed before the 1960s, no laws prohibiting such abuse were enacted until that time. Then, within a very few years, all 50 U.S. states "discovered" child abuse and hurriedly passed legislation calling for its control.¹³⁰ He notes that:

there were several attempts to draw attention to this problem during the nineteenth and early twentieth centuries. None, however had the backing of groups powerful enough to break the legal hold that parents had over children. Rather than deviantize violent parents, early efforts to fight child abuse generally resulted in institutionalizing beaten children¹³¹

This links to Gusfield's thesis that certain 'social problems' are recognized as such in certain time periods and not in others. It appears that certain preconditions must be met

in order for this ‘discovery’ to occur. Up until the 1960s it appears that doctors had not ‘seen’ violence against children. Pfohl attributes this ‘blindness’ to several factors. For example, seeing abuse might subordinate medicine to the interests of another profession (the law). Further, doctors were not trained to recognize child abuse and may have wanted to avoid the psychological horror of child abuse. According to Pfohl, the failure of doctors “to see child abuse for what it was involved not bad motives but a socially organised lack of perception; ... that kept them from coming into conflict with their organized professional interests.”¹³² Interestingly enough, when child abuse was ‘discovered’ by the medical profession, it became categorized as a ‘syndrome’ and its perpetrators would generally be treated rather than punished.¹³³

The societal reaction perspective is undoubtedly one of the most important to the study of deviance and social control. It clearly links the study of deviance with the study of social control and thus accounts for the existence of power differentials between individuals and groups in ways that many other perspectives fail to do. Further, the societal reaction perspective treats official statistics as a “topic for research rather than as reliable data”¹³⁴ on deviance; it makes the official production and recording of deviance as much a topic for investigation as the distribution of deviance within the population.

The last perspective that Pfohl examines is what he calls a ‘more reflective’ understanding of deviance and social control, the critical perspective. He discusses the work of psychologist Rollo May. May suggests that both deviance and social control are about power; “the twin blades of a power struggle, each like a razor slashing into the other’s ability to transform the world in its own image and likeness.”¹³⁵ This is, of

course, a more 'reciprocal' relationship than previously suggested. Pfohl summarizes

May's views as:

Social control is always an exercise of power. Does that mean that social control is an exercise of power by some people over others --- a hierarchical exercise of power such that some have more at the expense of those who have less? If this is the case, then deviance is always a power struggle too, an effort to reassert or regain power in relation to controllers who limit one's access to power in the first place¹³⁶

Pfohl finds this way of looking at social control and deviance troubling in that, if true (that power is a basic feature of all human action), then the core of human social existence must be critically reexamined. Is it inevitable that in this inescapable power struggle, one side must triumph and brand the other as deviant? Or, Pfohl asks,:

is it possible to exert power without exerting restrictive power over the power of others? Is it possible, in other words, to socially structure power such that power relations are more reciprocal than hierarchical, such that power struggles might be resolved by reconciliation rather than conquest, such that power may collectively be shared instead of institutionally stratified? An inquiry into such possibilities marks the beginning of the critical perspective on deviance and social control¹³⁷

According to Pfohl:

The critical perspective proposes that, in a society stratified by a hierarchical structuring of power, the social control of deviance will be shaped by the interests of those in positions of established power. **The categorization of certain acts of deviance is one way to suppress the resistance of those who threaten existing arrangements of power. The categorization of people as deviant is an important tool in the production and reproduction of social inequality.** If the "haves" had to constantly use force to keep an upper hand over the "have-nots," life would be little more than an ongoing war between opposing interests. But what if the haves successfully produce the impression that many of the have-nots are to blame for their own problems? If this were the case, then **a systemic control over the resistive behaviours of the have-nots would appear natural** or necessary. The likelihood of an overt state of war would be reduced. This, of course, is exactly what happens when power-

resistive people or groups of people are categorized as deviant. **The label of deviance depoliticizes the process whereby the powerful maintain control . . .**¹³⁸ (Emphasis added)

The creation of a class of troubled or deviant persons both hides and advances the interests of those in positions of power. The system (which advantages certain groups over others), therefore, is not to blame. This seemingly simple categorization of certain acts and persons (or groups of people) as deviant is actually a complex political act, located within a particular framework of social, economic and political power relations. Using the example of child sexual abuse is appropriate here. Creating a class of troubled or deviant women, or incompetent therapists, could both hide and advance the interests of those in positions of power. If a significant number of women are shown to have 'false memories' then the 'system', or a sexist, hierarchical society, may be absolved of some of the responsibility for child abuse rates, which would no longer appear to be so high. The critical perspective sees deviance as structurally related to the production and reproduction of power relations and has as its aim the deconstruction of inequality and the creation of a more just and reciprocal social order.

Feminist groups certainly employ a 'critical perspective' and have as one of their aims the deconstruction of inequality. However, at the moment, as will be discussed further in Chapters Three and Four, 'feminists'¹³⁹ seem to be caught up in a power struggle with the proponents of the false memory hypothesis over the veracity of recovered memories. While false memory syndrome supporters seem to have a political understanding of the issue (or at least an understanding of how to appeal to the general public), anti-child abuse advocates are caught in a reactive stance of trying to defend the

existence of recovered memories. This is extremely dangerous ground. Feminists and other supporters of survivors are having to expend much of their efforts merely *trying to resist the deviant label* instead of also questioning the ability of the powerful to formulate such a diagnosis. Without a political understanding of these issues and a *dissemination* of this understanding, the side that looks the most 'legitimate'/'authoritative' is likely to win this battle. Feminists were able to keep the politics of gender at the forefront in the battle over the credibility of rape victims. It will be necessary for them to do the same in the recovered memory/false memory debate.

The critical perspective emerged in the late 1960s and early 1970s against the conflictual social landscape of North America and western Europe. While 'intellectually nurtured' by the societal reaction process and its efforts to clarify the process by which certain behaviours and people become labelled as deviant, the central impetus of critical theory is more concrete.¹⁴⁰

The vision of the critical perspective is a reciprocal structuring of power, such that each party has the ability to transform things or make them happen, although not necessarily all the time or in the same fashion. Social control need not be a battle of winners and losers; it can be participatory rather than imposed. Under conditions of reciprocal power, conflicting parties can be reconciled rather than the options of the less powerful restricted. Thus, while deviance may always represent a power struggle, its management need not be a process of one-sided domination.

Pfohl readily admits that conditions favourable to fostering reciprocal power relations are generally absent from the world at present, noting that most elements of

contemporary society promote hierarchy rather than reciprocity. These hierarchical divisions are, in fact, so deeply rooted in public consciousness that they are often taken for granted or viewed as natural. As long as this “ritualistic reproduction of power hierarchies continues, there is little chance that deviance and social control will be more than an endlessly conflictual battle over who will control whom.”¹⁴¹ The essential question of critical theory then is this: “Is it possible to begin to create history in a different way, in a way which permits greater reciprocity in power relations, in a way which allows social control to be participatory rather than imposed?”¹⁴² Until then, actors who resist, disrupt or symbolize the inequities inherent in the smooth operation of the dominant economic mode become the central targets of social control. It could be argued, however, that women who accuse their fathers (or stepfathers or mothers’ boyfriends)¹⁴³ of childhood sexual abuse threaten their community (their immediate and extended family) in addition to the dominant economic and political mode. Are they then doubly dangerous and subject to more extreme social control?

The contradictory nature of social control is not generally recognized by many or most citizens. Coercion alone does not keep people in their relative positions of advantage or disadvantage. The stability of stratified state power requires that differences in the ability to control one’s destiny must be justified, legitimized or authorized by the production of a ‘common sense’ that things are the way they are because they must and should be so. This hierarchical structuring of power “is as much a state of mind and experience as a reflection of the more visible institutions of centralized government coercion.”¹⁴⁴ In essence, domination is both coerced and consented to, an arguably

insidious form of persuasion.

Italian critical theorist Antonio Gramsci utilized the term *hegemony* to “describe the dynamic process whereby the hierarchical structuring of power penetrates the consciousness of those subject to its rule.”¹⁴⁵ This penetration is as subtle as it is deep. It is less the threat of coercion than the winning and shaping of consent that makes domination by the powerful appear legitimate and natural. Hegemony, being based upon consent, is therefore somewhat fragile and must be constantly ‘shored up’ against cracks in its armour. As Pfohl notes:

The structured social inequality is the historical product of the way that life is organized in the image and likeness of centralized authority. This reality, however, must be constantly disguised by the appearance that all this is a natural state of affairs. If such inequities are to be reproduced without major outbreaks of trouble or resistive deviance, a variety of everyday control rituals must be enacted so as to connect people to a common sense that things could be no different. In the daily routines of family life and in schooling, television watching, job hunting, dressing stylishly, and making ourselves up to look and feel attractive, we citizens of the state society ritualistically contribute to the reproduction of the very structures which imprison us; structures which authoritatively position us according to a naturalized hierarchy of power¹⁴⁶

Because of the fragility of hegemonic control rituals and the structural strains inherently imbedded in the hierarchical positioning of people, state societies must employ reactive (as opposed to reconciliatory) strategies of control. Reactive measures include delegitimizing nonconformers in order to isolate and exclude such deviants. When this delegitimation is accomplished in a law-like manner, it creates the impression that deviants are the primary source of the trouble in which they find themselves:

This is the importance of formal law in a state society. As it legally excludes the deviant it produces the appearance (or collective

representation) that troublesome persons rather than troublesome social structures are at fault. This mystifies the social roots of trouble in a society that is structurally unequal. A critique of this mystification constitutes the core of anarchist theory¹⁴⁷

Deviantization as a tool of hierarchical domination can only be eliminated, according to adherents of the critical perspective, by the destruction of existing power hierarchies in order to permit the growth of more power-reciprocal social relations. This would, of course, entail a thorough restructuring of society. Obviously, the structural changes proposed by critical theorists far outweigh the more liberal reforms suggested by other sociological perspectives such as the societal -reaction perspective which advocates changing existing control mechanisms so as to treat all people more fairly. The critical perspective, on the other hand, sees existing control mechanisms as being structurally connected to the hierarchical organization of social power.

Since its inception in the late 1960s/early 1970's, the critical perspective has had a profound impact on the way in which many sociologists view crime, deviance and social control. During this period there was a growing realization among sociologists that criminology deals with "an inherently political phenomenon which should be viewed in the context of power, conflict, and interest groups in our society."¹⁴⁸ However, the critical perspective also locates the origins of serious mental disturbance within this context of unequal power relations, repeatedly uncovering significant correlations between one's position within the socioeconomic hierarchy and the likelihood of acquiring a diagnosis of a serious mental problem.¹⁴⁹ Critical theorists postulate that psychiatric intervention may exaggerate powerlessness, but also that the experience of

powerlessness may also cause ‘mental disorders’. Certainly rape counsellors and victims of sexual abuse would support this last concept. Both dissociative identity disorder (formerly known as multiple personality disorder) and suppression of childhood memories are said to be coping mechanisms employed by the powerless child.¹⁵⁰ To someone who is not familiar with such phenomena, these disorders may look like ‘madness’.

Pfohl paid little attention to gender issues (perhaps because the perspectives examined thus far are lacking, due to their eras of origin, gender analysis). However, he does note that “recent studies of sex and gender hierarchies have also contributed significantly to the development of the critical perspective. Nowhere is this more evident than in the study of sexual violence against women.”¹⁵¹ Feminist writers such as Susan Brownmiller¹⁵² postulate that rape, or the threat thereof, has historically been used to ‘keep women in their place’ and to reinforce the belief that women are legitimately the property of men.¹⁵³ Certainly, if one examines the development of rape law and the punishments for conviction (usually reparations to the father or husband) one can conclude that rape law was intended to keep men’s female property from being accessed by other men, protecting women in their own right was not a primary concern. An examination of related laws pertaining to such issues as bride-stealing (or heiress-stealing)¹⁵⁴ or the torts of seduction¹⁵⁵ and lack of consortium¹⁵⁶ reveals that it was men’s property interests that were being protected. The fact that it was not illegal in Canada to rape one’s wife until 1982 is particularly telling.¹⁵⁷ It would seem, as several of the authors Pfohl cites suggest, that “the social control of rape has historically functioned to

safeguard the rights of men to lawful access to the bodies of 'their women', rather than to ensure the right of women to control their own bodies."¹⁵⁸ While the mythology of 'victim instigation' (whereby a woman 'asks for it' by being in the wrong place, wearing the wrong thing, or being unchaste) in terms of the rape of adult women is not as blatant as it may have been in the 1970s it has by no means disappeared completely today. Critical theorists have also connected sexual violence against women to the sexist socialization of both men and women in our society.

In other words, certain types of sexual domination (such as marital rape and the rape of a 'loose' woman without a male protector) are, like economic and political domination, seen as 'natural' by perpetrators, 'authorities' such as actors in the criminal justice system, and, sadly, often by the victims themselves. Child-rape is somewhat of a different matter. The victims very often do blame themselves, even after they reach adulthood. Perpetrators and authorities are, however, much less apt to see child-rape as 'normal' sexual behaviour gone wrong. Certainly, though, the fetishism or sexualization of power differentials is particularly apparent in the area of child-rape, especially by parents or guardians. The manner in which victims of child sexual abuse are made 'deviant' is somewhat different too. Adult women tend to be deviantized by the denigration of their character, making the rape somehow their fault, through their actions, their dress or their sexual history. Child victims can be deviantized in this manner also but this occurs with much less frequency. Rather, the quality of their memories are questioned or assumptions are made that she (as an adult) is attempting to seek revenge on her parents for some unrelated reason.

It seems amazing that a society that is 50 percent (at least) female and with all adult members having been powerless children at some point, deviantizes many of these victim/survivors rather than the perpetrators.¹⁵⁹ Such is the power of the hegemonic force of sexism. As previously noted, critical theorist Antonio Gramsci employs the term *hegemony* to describe:

the social production of an apparent consensus, or the “moving equilibrium” which legitimizes a stratified positioning of power. Unlike orthodox Marxist thinkers who theorize about how repressive ideologies are forced from above upon the “falsely conscious” lower classes, Gramsci contends that the production of hegemonic power paradoxically involves the active input of the dominated¹⁶⁰

If the ‘active input of the dominated’ is involved in the production of hegemonic power what accounts for counter hegemonic struggle?

Critical theory has been criticised for being overly deterministic. If deviance and social control are viewed as being confined within socially structured power differentials, is human agency to be dismissed? Pfohl admits that certain early expressions of the critical perspective did indeed neglect the role of agency. Sweeping generalizations about the determining influence of invisible political-economic forces, rather than the possibility of human decisions to pursue particular avenues of action, were emphasized. However, Pfohl notes, later writings by theorists such as Drew Humphries and David Greenberg, point out that the crucial question for critical theory is not to explain social change by reference to invariantly deterministic laws. Rather, it is to “locate agents of change ‘structurally’ within the confines of specific historical situations, such that particular courses of action come to be viewed as ‘desirable’ and ‘able or unable’ to be

achieved.”¹⁶¹

In short, Pfohl states that “while the social control of deviance is never strictly determined by the social structuring of power, neither is it free of the systemic influence of power as structured at particular moments in history.”¹⁶² People at once shape and are shaped by their relations to power. A history of hierarchical power arrangements has given rise to what today is as a matter of common sense considered ‘normal’ and ‘deviant’. By deconstructing and demystifying this common sense, one is better able to “partially recover our freedom of thought and action.”¹⁶³ In Pfohl’s view, then, a critical perspective aids one in becoming an agent in one’s own life:

This is the power-reflexive potential of the critical perspective-- to cast light upon the dimly lit hallways of our own lost history. This light may enable us to better see the shackles of past social, political, and economic injustices and their impact on our present conceptions of deviance and social control.¹⁶⁴

This thesis is an examination of how present social, political and economic injustices shape conceptions of deviance and social control, in the context of sexual abuse committed upon children by family members. Like Pfohl, I believe that a critical perspective (in my case a radical feminist perspective) is necessary to do this. It is such a perspective that allows for critical reflection upon the social construction of public problems.

Without a political understanding of power differentials that allow some groups to be able to shape the ‘dominant’ reality, with the ‘active input of the dominated’ in many cases, it is not possible to ‘see’ that public problems are socially constructed. Obviously, this ‘dominant reality’ is not monolithic or no critical work would exist. Nevertheless,

this chapter has demonstrated that for a situation to be even recognized, publicly, as painful or 'wrong' requires a system for categorizing and defining events. Not all situations experienced as painful become matters of public activity and targets for public action, nor are they given the same meaning at all times and by all societies.¹⁶⁵ As has been demonstrated in this chapter, what is considered painful and when it is considered so has much to do with who has power within society. I argued that feminist challenges to patriarchal social structuring helped to get child sexual abuse initially recognized as a public rather than as a private problem. At the next 'level' however, there is still a battle over whether child sexual abuse within the family will be recognized as a public problem or whether false memory syndrome proponents will be successful in having false memory recognized as a public problem, thus regulating 'false' incestuous child sexual abuse memories to the status of 'private,' or individual, problems.

The following chapter examines the content and creation of 'public consciousness' around the recovered memory/false memory debate. In order to do this, Gramsci's concept of hegemony is briefly examined in that it, I believe, better accounts for the 'consent' of the dominated to their own domination than do Gusfield or Pfohl's theses. Consent is an important point in that, as will be discussed, many women (perhaps analogously to the victim-blaming of rape survivors several decades ago) appear to be on the pro-false memory syndrome side of the debate.

The content of public consciousness is approximated by examining the substance of the debate in the popular press where a slight to moderate pro- false memory syndrome bias has been detected by several researchers and by my own reading. The implications

of whether the media reflects or directs public consciousness are discussed but either way, the media coverage is taken as a barometer of which way the debate is going. Further, the 'expert discourse' taking place in the scientific press is discussed due to the influence that 'science' has on the public around these issues. Scientists are deeply divided on either side of the debate with such ferocity that one wonders how much some of their work has to do with 'science' and how much it has to do with the socio-political leanings of the researchers. Certainly, however, many fascinating studies on recovered memory have been undertaken and will be discussed.

In all, by the conclusion of Chapter Three additional light should be shed upon reasons why the false memory hypothesis may be attractive to a large segment of the population.

Endnotes - Chapter Two

1. Nicholas Bala, "False Memory 'Syndrome': Backlash or *Bona Fide* Defence"?(1996), 21 Queen's Law Journal 423 at 427.
2. Joseph R. Gusfield, The Culture of Public Problems: Drinking-Driving and the Symbolic Order (Chicago, Ill.: University of Chicago Press, 1981) at 3.
3. Ibid., at 187-188. Also see Joseph R. Gusfield, "Risk and Misfortune: A Social Construction of Accidents" (1998), 104(2) American Journal 589; and Joseph R. Gusfield, Contested Meanings: The Construction of Alcohol Problems (Madison, Wisconsin: University of Wisconsin Press, 1996).
4. See ibid., at 5 for insight into Gusfield's distinction between public and private problems.
5. Studies have found that approximately one in three to one in four women have been sexually abused by the age of 18. See Diana Russell, The Secret Trauma: Incest in the Lives of Girls and Women (New York: Basic Books, 1986) and C. Badgley & R. Ramsey, "Disrupted Childhood and Vulnerability to Sexual Assault: Long-term Sequels with Implications for Counselling" (1985), 5 Social Work and Human Sexuality 142. See also Canadian Centre For Justice Statistics, 19 (5) Juristat (Ottawa: Statistics Canada, 1999) Catalogue No. 85-002-X1E.
6. Actually some researchers suggest that 'cycles' of awareness with regards to child sexual abuse exist. See Judith L. Herman, Adult Memories of Childhood Trauma: Current Controversies, Paper presented at the Annual Convention of the American Psychiatric Association, May 26, 1993; E. Olafson, D.L. Corwin & R.C. Summit, "Modern History of Child Sexual Abuse Awareness: Cycles of Discovery and Suppression" (1993), 17 Child Abuse and Neglect 7.
7. Gusfield, supra note 2 at 3.
8. Ibid., at 10.
9. Ibid.
10. Ibid., at 12.
11. Ibid.
12. See Catharine MacKinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge, Mass.: Harvard University Press, 1987), particularly Chapter Seven.

13. Kathleen Lahey, differentiating radical feminism from liberal feminism, states:
 Radical feminism seeks to deny not only male prerogative but also the values which male prerogative depends upon and implies. Patriarchal thinking - which focuses upon concepts of hierarchy, right and wrong, restitution, rectification - is seen as depending on values such as autonomy, power, revenge, domination, compliance. In rejecting these values radical feminism seeks to give expression to gynocentric values...

Kathleen A. Lahey, "Research on Child Abuse in Liberal Patriarchy" in Jill McCalla Vickers, ed., Taking Sex Into Account: The Policy Consequences of Sexist Research (Ottawa: Carleton University Press, 1984) at 157.

14. At least in the media as will be further explored in Chapter Three. The importance of the debate in the media must not be overlooked. According to media sociologists Stanley Cohen and Jock Young, the media either reflects and mirrors society or it sets the public agenda. Thus, according to either the market model (mirrors society) or the manipulative model (leads society), the media's coverage of public issues provides useful information about social knowledge and attitudes. See S. Cohen & J. Young, The Manufacture of News: Deviance, Social Problems and the Mass Media (London: Constable, 1981).

15. Louise Armstrong, Rocking the Cradle of Sexual Politics: What Happened When Women Said "Incest" (Reading, Mass.: Addison-Wesley, 1994) at 78. Armstrong's argument is that the recovery movement is damaging to women in that it's concentration on surviving sexual abuse and its after effects depoliticizes the issue. While helping many individual women recover from childhood sexual abuse it detracts attention from the politics and power differentials involved. She writes:

Incest, medicalized, was neutralized; stripped of its character as a deliberate act of aggression, a violence based on the belief in male right. As a female-censuring "illness", it much better suited the politics of the Right. Billed as help and treatment, it equally suited the sentiments of the Left. And it far better suited a media which was expressing ennui with feminist politics...

16. 'Gendered' in the sense that the overwhelming majority of abusers are male. I have no wish to underplay the fact that up to one third of victims are boys. See Alison Harvison Young, "Child Sexual Abuse and the Law Of Evidence: Some Current Canadian Issues" (1992-93), 11 Canadian Journal of Family Law 20. Sexual abuse can also be seen as 'gendered' in the sense that some argue that such 'coercive sexuality' is endemic to a hierarchically structured, patriarchal society. See, for example, Liz Kelly, Surviving Sexual Violence (Minneapolis: University of Minnesota Press, 1988); MacKinnon, supra note 12.

17. Gusfield, supra note 2 at 12.

18. Ibid., at 14.

19. Ibid., at 11.
20. Young, supra note 16.
21. See Jane Doe, "How Could This Happen? Coping with a False Accusation of Incest and Rape" (1991), 3(3) Issues in Child Abuse Accusations 154. Pamela Freyd later admitted to writing this article. Her daughter, Jennifer Freyd, never sought to have criminal charges laid. See Jennifer Freyd, Theoretical and Personal Perspectives on the Delayed Memory Debate, Paper presented at "Controversies Around Recovered Memories of Incest and Ritualistic Abuse" at the Centre for Mental Health, Foote Hospital, Ann Arbor, Michigan, August 7, 1993.
22. See Elizabeth F. Loftus, "The Reality of Recovered Memories" (May)(1993), 48(5) American Psychologist 518.
23. This is not to say that men are not involved in the debate overtly (psychologists John Briere and Richard Ofshe, for example). Further, the new right/pro-family values groups that tend to support the FMSF's efforts generally subscribe to a 'nostalgic', traditional power differential upholding 'male-oriented' agenda. Another area where men are highly represented in the debate is child custody law and the fathers' rights movement. Male writers are also disproportionately represented in the media; see Carolyn B. Allard, The Recovered Memory Debate: The Press's Coverage and the Impact on Survivors, M.A. Thesis (Ottawa: Carleton University, 1995). See John Briere, "Studying Delayed Memories of Childhood Sexual Abuse" (1992), Summer The APSAC Advisor; John Briere & Jon R. Conte, "Self-Reported Amnesia for Abuse in Adults Molested as Children" (1993), 6(1) Journal of Traumatic Stress 21; R. Ofshe & E. Watters, "Making Monsters" (1993), March/April Society 4.
24. Allard, ibid., at 16.
25. For example, according to Lahey's analysis supra note 13, some radical feminists may take "ownership" of the problem due to the links they see between the domination of women and children (whether male or female) under patriarchy.
26. The classic example is the facts around the founding of the False Memory Syndrome Foundation which resulted from just such a scenario. See Doe, supra note 21 and J. Freyd, supra note 21 for both perspectives.
27. See Karen Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997), 9(1) Canadian Journal of Women and the Law 148 at 164-165.
28. See Katharine D. Kelly, "'You Must Be Crazy If You Think You Were Raped': Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials" (1997), 9(1) Canadian Journal of Women and the Law 178 at 179.

29. FMSF literature suggests many of its members are ‘recanters’. See, for example, L. Pasley, “Misplaced Trust: A First-Person Account of How My Therapist Created False Memories” (1994), 2 Skeptic 62.
30. Gusfield, supra note 2 at 12.
31. Ibid., at 15.
32. Ibid., at 28.
33. Ibid.
34. See, for example, Winnie Tomm, ed., The Effects of Feminist Approaches on Research Methodologies (Waterloo, Ont.: Wilfred University Press, 1988).
35. Ibid., at 1.
36. Gusfield, supra note 2 at 28.
37. Of course, both the pro-FMSF forces and those opposed to their position have powerful scientific ‘proof’ at their disposal. See for example, Briere & Conte, supra note 23; and Loftus, supra note 22.
38. See Allard, supra note 23 at 5, citing C.M. Kristiansen et al, False Memory Syndrome: An Authoritarian Backlash Against Women, Paper presented at the National Multidisciplinary Conference, “Women’s Health: Key Research and Health Care Issues” (April 1994), McMaster University, Hamilton, Ontario. This paper was subsequently published in (1994) 35 (2A) Canadian Psychology 203.
39. Gusfield, supra note 2 at 31.
40. See Alan F. Chalmers, What is This Thing Called Science? (St. Lucia, Australia: University of Queensland Press, 1982).
41. See, for example, Bala, supra note 1 at 447, note 77. Bala comments that in *R. v. Norman* (1993) 16 O.R. (3d) 295:

It may be the Court of Appeal preferred the testimony of the psychiatrists, with their professional qualifications over the two therapists, one with a Bachelor of Arts degree and the other with a Masters of Social Work degree.
42. Carolyn Allard notes that “society associates more authority, reliability and credibility with men than women.” Allard, supra note 23 at 1. This is gross generalization of course and further, is likely only true for certain races and classes.
43. Gusfield, supra note 2 at 31.

44. Ibid., at 37.
45. Ibid., at 32.
46. Ibid.
47. Ibid., at 37.
48. Ibid.
49. Ibid., at 32. The 'spin' may not even be deliberate; quite simply, the perspective of the powerful is more likely to be perceived as 'common sense'.
50. Ibid., at 53.
51. Ibid., at 52.
52. Ibid., at 82.
53. Ibid., at 48.
54. Indeed, the legal system is set up as an adversarial system where there are only two principal combatants, the plaintiff and the defendant. A judge has to decide if, indeed, the defendant caused the harm that the plaintiff says he or she did. A plaintiff can usually only sue her attacker, she cannot sue 'society' for creating the preconditions for her abuse.
55. Gusfield, supra note 2 at 52.
56. See Gusfield, ibid., Chapter Three, The Fiction and Drama of Public Reality, at 51-82.
57. Ibid., at 99.
58. Ibid., at 98.
59. Ibid., at 99.
60. Ibid., at 112.
61. Ibid.
62. At least in popular literature. See, for example, John Taylor "Donna [Smith] and the Therapy Police: Was it Psychology or a Modern Kind of Sorcery That Led Her to Accuse Her Father of a Terrible Crime?"(September)(1994), 145 (869) Reader's Digest (Canada) 37; Sharon Begley, "You Must Remember This: How the brain forms false memories"(September 26)(1994), 124 (13) Newsweek 68; Marie-Claude Ducas, "Inceste:

que valent les souvenirs retrouvés?" (April)(1994), 35 (1) Chatelaine (Fr) 19. Further, the 'archetype' of the stranger, upon which liberal legalism is premised, is endemic to legal discourse. As such, it is difficult for 'the law' to conceptualize and respond to problems arising out of relationships. This can be traced back to the days when only (certain) men were considered 'legal actors' or even 'persons.' Not as intimately connected to one another, legal liberalism was able to respond to the conflicts of these 'discrete actors' adequately. See Hugh Collins, The Law of Contract, Second Edition (London: Butterworths, 1993).

63. Gusfield, supra note 2 at 103.

64. Susan Estrich, Real Rape (Cambridge, Mass.: Harvard University Press, 1987).

65. Lahey, supra note 13 at 157.

66. Ibid.

67. Gusfield, supra note 2 at 113.

68. Ibid., at 114.

69. Ibid., at 120.

70. Ibid., at 125.

71. Ibid., at 128.

72. Ibid.

73. Ibid., at 140.

74. For numerous reasons which could constitute a thesis project in themselves. For example, sexual abuse that takes place in the 'privacy' of the home is difficult to detect and difficult to prove (lack of 'objective' witnesses). Also, my argument in this thesis that people do not want to believe that sexual abuse has occurred applies. Further, most people who recover memories do not bring their alleged abusers to court. See, Judith L. Herman, Trauma & Recovery (USA: Basic Books, 1992).

75. Gail Kellough, Aborting Law: An Exploration of the Politics of Motherhood and Medicine (Toronto: University of Toronto Press, 1996) at 94.

76. Gusfield, supra note 2 at 133 (emphasis original).

77. Ibid.

78. Ibid.

79. Ibid., at 146.
80. Ibid., at 148. Gusfield quoting Thurman Arnold, The Symbols of Government (New York: Harcourt, 1962) at 152-54.
81. Gusfield, supra note 2 at 146.
82. Ibid., at 148.
83. Ibid., at 187.
84. Ibid., at 188.
85. Ibid., at 187.
86. Stephen J. Pfohl, Images of Deviance and Social Control: A Sociological History (New York: McGraw-Hill Publishing Company, 1985).
87. Ibid., at 7.
88. See, for example, Emile Durkheim, The Rules of the Sociological Method, trans., Sarah A. Solovay and John H. Muller; ed. Sir George E. G. Carlin (Chicago, Ill.: University of Chicago Press, 1938); Howard S. Becker, Outsiders: Studies in the Sociology of Deviance (New York: Free Press, 1963) and The Other Side: Perspectives on Deviance, (New York: Free Press, 1964).
89. See Armstrong, supra note 15 at 225.
90. Pfohl, supra note 86 at 3.
91. Ibid., at 9.
92. Ibid., at 10.
93. Ibid., at 11.
94. Ibid., at 49.
95. Ibid.
96. Ibid.
97. Ibid.
98. See John Ralston Saul, The Unconscious Civilization (Concord, Ont.: Anansi, 1995). Saul addresses the fact that we tend to gravitate towards simple solutions, or singular

truths. He also talks about the influence of the media.

99. Pfohl, supra note 86 at 125.

100. According to the Institute for the Prevention of Child Abuse, recent studies indicate that one in four girls and one in 10 boys will be victims of unwanted sexual acts before they are eighteen. Cited in R. Bessner, "Important Strides Made by the Supreme Court Respecting Children's Evidence"(1991) 79 C.R. 15 at 16. See also Canadian Centre For Justice Statistics, supra note 5.

101. Pfohl, supra note 86 at 135.

102. Ibid.

103. Ibid., at 136.

104. Ibid.

105. Ibid., at 155.

106. Armstrong, supra note 15 at 225.

107. Pfohl, supra note 86 at 179.

108. Ibid.

109. Ibid., at 180.

110. Ibid.

111. Ibid.

112. Ibid., at 181.

113. Ibid.

114. Ibid., at 189.

115. Armstrong, supra note 15 at 231.

116. Ibid., at 232.

117. Pfohl, supra note 86 at 189.

118. Ibid.

119. Ibid.

120. Ibid., at 178.
121. Ibid., at 197.
122. Becker, Outsiders, supra note 83 at 9.
123. Becker, The Other Side, supra note 83.
124. Ibid.
125. Becker, Outsiders, supra note 88 at 18.
126. Pfohl, supra note 86 at 299.
127. Ibid., at 306.
128. Ibid.
129. Stephen J. Pfohl, "The Discovery of Child Abuse", in Delos H. Kelly ed., Deviant Behaviour: A Text-Reader in the Sociology of Deviance (New York: St. Martin's Press, 1984) at 45-65.
130. Pfohl, supra note 86 at 309.
131. Ibid.
132. Ibid.
133. Ibid., at 310.
134. Ibid., at 317.
135. Ibid., at 333.
136. Ibid.
137. Ibid.
138. Ibid., at 334.
139. I have this 'label' in brackets because, of course, feminism is not monolithic and not all those who identify themselves as feminists are working towards the same goals or would try to accomplish goals in the same manner.
140. Pfohl, supra note 86 at 335.
141. Ibid., at 344.

142. Ibid.

143. Patricia Begin, "Child Sexual Abuse: The Recovered Memory/False Memory Debate," Background Paper BP-391-E, Research Branch, Library of Parliament, Political and Social Affairs Division, November 1994 at 2.

144. Pfohl, supra note 86 at 352.

145. Ibid.

146. Ibid.

147. Ibid., at 353.

148. Charles Reasons, Criminology: Crime and the Criminologist (Santa Monica, Calif.: Goodyear, 1974) at 5.

149. Pfohl, supra note 86 at 371.

150. Ellen Bass and Laura Davis, The Courage to Heal: A Guide for Women Survivors of Child Sexual Abuse (New York: Harper & Row, 1988) at 22.

151. Pfohl, supra note 86 at 372.

152. Susan Brownmiller, Against Our Will: Men, Women and Rape (New York: Bantam, 1975).

153. Pfohl, supra note 86 at 372.

154. Laws against bride capture were a predecessor of modern sexual assault laws. Bride capture was the abduction and rape of a woman, thus establishing a 'right' to possession and marriage. Although this was considered a legitimate method of acquiring a wife, men of property grew concerned that their socio-economic inferiors would use this method to increase their wealth (as marrying automatically gave the man ownership of his wife's property). See Lorenne Clark & Debra Lewis, Rape: The Price of Coercive Sexuality (Toronto: The Women's Press, 1977) at 118. Also Barbara Toner, The Facts of Rape (London: Hutchinson & Co., 1977) at 91. For a statute against bride capture see Statute of Westminster 1, 13 Edward I (1285), c. 35.

155. Although the original essence of this tort action was to compensate householders from the loss of services of domestic servants, daughters and wives resulting from impregnation by the 'seducer', eventually the courts began to award additional damages for the wounded feelings of the father. Eventually this parasitic head of damages took precedence over the original basis (loss of services) and by 1837 the Legislature of Upper Canada eliminated the need for proof as to loss of services (service was statutorily

presumed). This statute asserted a father's property interests in his daughter's chastity. See Constance Backhouse, "The Tort of Seduction: Fathers and Daughters in Nineteenth Century Canada" (1986) 10 Dalhousie Law Journal 45. Also an Act to make the remedy in cases of seduction more effectual, and to render the Fathers of illegitimate children liable for their support, 7 William IV (1837), c.8, (U.C.).

156. See Ken Cooper-Stephenson, "Past Inequities and Future Promise: Judicial Neutrality in Charter Constitutional Tort Claims," in Sheilah Martin and Kathleen Mahoney eds., Equality and Judicial Neutrality (Toronto: Carswell, 1987) at 227. Husbands could sue for losses when their wives were injured. This could include damages for loss of menial services and loss of society and comfort, including sexual relations.

157. Criminal Law Reform Act (1980-81-82), c.129, s.19.

158. Pfohl, supra note 86 at 372. Pfohl utilized the research of Dorie Klein and June Kress, "Any Woman's Blues"(1976), 5 (Spring-Summer) Crime and Social Justice Journal.

159. I say many because, of course, some perpetrators are severely deviantized. For example see Susan Estrich's description of 'real rape', a Black male stranger jumping out of the bushes and sexually assaulting a white woman. See Introduction to Estrich, supra note 64.

160. Pfohl, supra note 86 at 380.

161. Greenberg & Humphries, "The Dialectics of Crime Control" in David F. Greenberg, ed., Crime and Capitalism (Palo Alto, Calif.: Mayfield, 1981) 209 at 213 quoted in Pfohl, supra note 86 at 383.

162. Pfohl, supra note 86 at 383.

163. Ibid.

164. Ibid.

165. Gusfield, supra note 2 at 3.

Chapter Three

Hegemony and Its Effect on Beliefs About the Veracity of Sexual Abuse Claims

There is nothing new in denying or minimizing the extent of child sexual abuse, challenging victims' truthfulness, and labelling adult memories of childhood sexual abuse as inventions and fantasies. These reactions can be traced back over a century, to Freud.¹

I. Introduction - The Extent of the Sexual Victimization of Children

There is a startling amount of child sexual abuse happening in Canada. According to government statistics² and other studies, approximately one in two females and one in three males in Canada reported having been the victim of unwanted sexual acts during their lifetimes. Four out of five of these incidents had occurred when the victims were children and youths.³ A background paper prepared by the Research Branch of the Library of Parliament summarizes what is known about the sexual victimization of children.⁴ Of course, as sexual abuse is generally conducted in a clandestine fashion rarely witnessed by others, it is difficult to establish the true extent of the problem. It is estimated that between 12 and 38 percent of all women and three and 15 percent of all men are victimized sexually in their childhoods.⁵ This abuse is often long term in nature and is experienced as coercive by the child, even when (seemingly) nonviolent strategies are employed to secure the child's acquiescence. Child sexual abuse generally begins before the age of 10 and sometimes as early as age one.⁶ Perpetrators are male in approximately 90 percent of cases. Female children make up 70 percent of the victims and the largest group of perpetrators are fathers. Most children do not disclose the abuse and those that do are often disbelieved. Few sex crimes involving children result in

convictions and researchers in the field conclude that the abuse of power, trust and the sanctity of the family that occurs in such acts often has a “devastating and long-term psychological impact on the victims.”⁷

Whatever statistics one uses it is clear that child abuse is a widespread and devastating problem in North American society. This chapter postulates that the utilization and, indeed embracing, of the concept of false memory syndrome is one powerful way in which society can deny the awful reality of what is happening to children. This sounds simplistic, and of course it is. In actuality, the denial and minimization of the sexual abuse of children is complex and multi-layered.

In Chapter Two I discussed the work of two theorists who, in part, helped to explain some of the complex issues around the subject of the recovered memory/ false memory debate. The concept of hegemony also needs to be introduced and discussed briefly in that it is explicitly relevant to this debate as it includes a realization that the ‘active input of the dominated’ is necessary to project of the ruling bloc. Given that women are often involved in the minimization of child sexual abuse (through the vehicle of the FMS hypothesis), this is an important point that is more specifically detailed in Gramsci’s theory than Gusfield’s or Pfohl’s.

II. Gramsci and the Concept of Hegemony

The organising focus of Italian theorist Antonio Gramsci’s thought on politics and ideology is the concept of hegemony. His distinctive usage of the term has rendered it the hallmark of the Gramscian approach in general. Best understood as the organization of

consent, hegemony is the processes through which subordinated forms of consciousness are constructed without recourse to violence or coercion. According to Gramsci, the ruling bloc operates not only in the political sphere but throughout the whole of society. Emphasizing the 'lower' (or less systematic) levels of consciousness and apprehension of the world, Gramsci was particularly interested in the ways in which 'popular' knowledge and culture develop in such a way as to secure the participation of the masses in the project of the ruling bloc.⁸ As applied to the topic of child sexual abuse and society's propensity to downplay the frequency of its occurrence, I think the concept of hegemony can facilitate an understanding of the ways in which this negation occurs.

There is, understandably, some discussion as to the interpretation of 'hegemony'. Michelle Barrett notes that it is not clear whether Gramsci uses hegemony to refer only to the non-coercive aspects of the organization of consent or whether he also uses it to explore the relationship between coercive and non-coercive means of securing consent.⁹ Other scholars cited by Barrett, such as Perry Anderson, suggest that Gramsci's use of hegemony is inconsistent. At times he uses it to mean consent and at others to mean a synthesis of consent and coercion.¹⁰ Gramsci himself speaks of the "subaltern functions of social hegemony and political government" as being comprised of:

1. The "spontaneous" consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is "historically" caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production [and] 2. The apparatus of state coercive power which "legally" enforces discipline on those groups who do not "consent" either actively or passively.¹¹

The 'spontaneous consent' given by the masses can be linked both to Gusfield's 'social

construction of public problems' and Pfohl's 'creation of deviance' and social control because in order for the pro-FMS proponents to 'win' the recovered memory/false memory debate they must secure the 'active input of the dominated'.

Questions of specific interpretation aside, Gramsci concentrates more upon the 'consent' given by the people to their own domination, rather than the coercive mechanisms of the state. I will also do so in this chapter. Certainly, I do not wish to disregard the coercive actions perpetrated upon some survivors of childhood sexual abuse (for example, commitment to psychiatric hospitals, 'gag orders' instituted and enforced by civil courts, and ostracism from one's family). However, the thrust of this thesis is why suggestions that childhood sexual abuse claims have been greatly exaggerated or, particularly, are false are so readily accepted by a large number of citizens. Much of this has to do with who has the power in society and how the powerful are able to 'shape reality' or make their subjective reality the only or 'objective' reality (to use Gramsci's terminology, 'common sense'). Certainly, some of these issues were touched on in the previous chapter. Gramsci, however, provides a framework for understanding not only *how* the powerful exert their influence but *why* the public allow and, in fact, sanction this control.

Hegemony is not a static phenomenon, it creates and recreates itself constantly. While it is true that some of the positive changes may be due to 'passive revolution' (the process whereby the dominant hegemonic group adopts some of the demands of the subordinated classes in order to placate them and thus maintain the 'consent' to their domination¹²), such changes have occurred nonetheless and to argue that domination is

monolithic is, therefore, unnecessarily (and debilitatingly) pessimistic.

Gramsci's theory of hegemony and his insistence of the importance of tactics and persuasion and his detailed attention to questions of culture, and the politics of everyday culture, have all been taken up enthusiastically by a generation who are, as Michelle Barrett puts it "sick of the moralising rules and precepts of both the Marxist-Leninist and Labourist lefts."¹³ I would also add that this emphasis on struggle and agency is valuable to the feminist project(s) in that it avoids the trap of mere deconstructive technique. Feminists have been criticised for treating women as mere victims of male domination, when in truth, the reality is much more textured and complex than that. Male domination is not monolithic and women are not mere passive victims. The Gramscian framework, although rarely thought out in feminist terms (perhaps because of Gramsci's lack of attention to sexism), is a promising one. Mary O'Brien argues that:

neo-marxism, which marginalizes women but does not obliterate them, may hold heuristic and analytical possibilities which its current androcentrism conceals. For example, it may permit a deeper understanding of the relation of patriarchy and that complex abstraction we call the State.¹⁴

Further, the understanding that domination is not monolithic, combined with the emphasis on agency and struggle in Gramscian theory, not only provides a more complex way in which to examine complicated issues but, it also escapes being debilitatingly pessimistic.

A. Hegemony and the Problem of Child Sexual Abuse

The social construction of public problems, the creation of a class of 'deviants'

and the shifting nature of hegemony can all be seen as different ways of describing the formation and content of popular consciousness. This next section of the paper will deal first with the question of what constitutes current popular consciousness around the recovered memory/false memory debate. In plain language, it asks (as close as can be ascertained) “what does ‘the public’ think about these issues?”

In order to facilitate an understanding of the content of popular consciousness around the veracity of recovered memories, it is conducive to look first at how the phrase ‘false memory syndrome’ originated.

1. The False Memory Syndrome Foundation

The False Memory Syndrome Foundation is an organization formed to provide legal and emotional support to those accused of sexual abuse. ‘False memory syndrome’ or FMS is a term that has become widely known in North American society during the last few years. It is, however, not recognized in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). Published by the American Psychiatric Association (APA), this manual is the foremost diagnostic manual of the mental health profession. The phenomenon of delayed recall of traumatic events (and, specifically of childhood sexual abuse) *is*, however, recognized by this association.¹⁵ In fact, as for the False Memory Syndrome Foundation’s assertions that memories degrade over time and thus cannot possibly be reliable, the APA states:

Remembering is facilitated by retrieval clues, reading something in the newspaper, for example, or by re-experiencing an effect similar to the original memory. Research has also shown that memory seems to be

stronger and less subject to alteration for events . . . that have strong emotional impact.¹⁶

The False Memory Syndrome Foundation (hereinafter FMSF or the Foundation) was founded primarily by parents claiming to be falsely accused of child sexual abuse by their now-adult children. The Foundation has also attracted some well respected members of the mental health community, such as memory expert Dr. Elizabeth Loftus of the University of Washington, for example. The Foundation has advocacy, support and research objectives as are clearly laid out in their website.¹⁷ The Foundation also has a Professional Advisory Board made up of academics and mental health professionals from all over the continent and Europe. Nicholas Bala notes, however, that the FMSF has also attracted some unsavoury characters. He writes:

While there are doubtless some genuine victims of false accusations among its members, it is also an easy organization for abusers to join. The Executive Director, Pamela Freyd, a psychologist, is still accused by her daughter of being an abuser. Who really knows whether she is an abuser? One of the Founding Board Members of the Foundation (who has since resigned) is Dr. Ralph Underwager, also a psychologist. He reportedly told a Dutch periodical that sex with children is a “responsible choice for the individual.”¹⁸

The FMSF is an advocacy group and thus admittedly biased. While it is important to look at the origins of the debate being waged presently, this group’s perspective (while certainly having an effect on popular consciousness) may not be representative of what the general population thinks about this issue.

What the general public ‘thinks’ about a particular issue can be difficult to ascertain. While certainly one can employ large scale polling or surveying, there are a number of difficulties inherent in this method. Polls can be costly, time intensive and

difficult to conduct with little bias.¹⁹ Another method is a media content analysis. While ‘public consciousness’ and the media coverage of a particular issue are not necessarily equivalent, I think it is important to look at the issue as presented by the media both because of its mass distribution and also its implicit claims to ‘objectivity.’ Further, according to media sociologists Stanley Cohen and Jock Young²⁰ the media either reflects and mirrors society (the market model) or it sets the public agenda (the manipulative model). According to either model, then, a study of the media’s coverage of the recovered memory debate should provide “an index of social knowledge and attitudes regarding recovered memories of child abuse.”²¹ Moreover, as the “press purports to be unbiased, objective and accurate,”²² the audience is led to have confidence in what they read therein.²³

2. The Media

In 1995, graduate student Carolyn Allard, a student of Dr. Connie Kristiansen, published as part of her Master’s thesis a media content analysis of the recovered memory debate.²⁴ Allard did a content analysis of all pertinent articles in six major Canadian newspapers between January 1992 and January 1994 (N=66). All published submissions to the papers were examined regardless of whether they were articles written by journalists, editorial-type pieces, or letters to editors and columnists. Of the 66 items, half of the pieces where the author’s gender was known were written by women. Each piece was rated by two raters on a number of factors as to whether the piece was pro-FMS, slightly pro-FMS, balanced, slightly anti-FMS or anti-FMS. As a result of the

study Allard concluded that:

To the extent that society regards journalists' articles as being more reliable than readers' opinions, and associates more authority, reliability and credibility with men than women, evidence of a pro-FMS bias was found²⁵

Seventy percent of the items were actual 'articles' written by journalists. Allard found that more 'authority' was attached to these items over the letter to the editor or 'Dear Abby' type letters.²⁶ More of these (more authoritative) 'articles' were written by men and were more pro- than anti-FMS.²⁷ Females authored an equal number of pro- and anti-FMS items²⁸ while male authors were more likely to author pro- than anti-FMS articles and were cited more frequently as pro- than anti-FMS sources.²⁹ As to overall bias, Allard found, on a scale of 1.0 (totally pro-FMS) to 5.0 (totally anti-FMS) that the items in the study rated 1.71,³⁰ indicating a slight to moderate pro-FMS bias.

Other researchers have also found pro-FMS bias in the mainstream press.³¹ As

Allard notes:

pro-FMS arguments reportedly commonly found in news articles include the complaint that therapists and researchers exaggerate the prevalence and incidence of childhood sexual abuse, that memory is faulty, that repression does not exist, and that therapists are capable of implanting new memories. Challenges to the validity of FMS as an actual syndrome, by comparison, are rarely discussed.³²

Judith Herman, who has written extensively on recovered memory,³³ argues that articles in the mainstream press are constructed from a set of questionable propositions,

including:

- 1) that false claims of childhood sexual abuse are common and increasing;
- 2) that claims based on delayed recall are especially likely to be spurious;
- and;
- 3) that an epidemic of fictitious memories of abuse are being implanted in

a large population of gullible people by ‘bogus’ therapists³⁴

The propositions that Herman suggests do seem to be present in many newspaper articles written in the last eighteen months.

Articles examined since Allard’s study support her and Herman’s assertions that there is a pro-FMS bias operating in the mass media. An editorial in the Globe & Mail newspaper, in the spring of 1998, highlights many of the misconceptions and circular logic surrounding the issue of recovered memories.³⁵ First however, it is necessary to supply some background as the editorial is somewhat lacking in detail. Justice Minister Anne McLellan was asked, in a letter, by Alan Gold, president of the Criminal Lawyers’ Association to review the cases of men convicted of sexual abuse where recovered memories were involved in the testimony.³⁶ Gold noted that the cases of women who had been convicted of murdering their husbands’ could be reopened on the basis of ‘battered wife syndrome’ due to the findings of a special Justice inquiry. Without, he claims, considering the merits of *that* inquiry, Gold asks for the same type of governmental action into recovered memory cases, stating:

In recent years, a certain concept has been allowed uncritically into jurisprudence in Canada and elsewhere: that of “repressed” and later “recovered” memory. There was never any legitimate reason for regarding such alleged memories as trustworthy; but by this point in time it is perfectly clear that they are not.³⁷

There are a number of problems with Gold’s statements. First, as will be further detailed in Chapter Three, recovered memories have *not* been accepted ‘uncritically’ into jurisprudence. Secondly, Gold appears to be basing his theory about recovered memories on the concept of repression,³⁸ not dissociation.³⁹ Dissociation is the construct more

commonly held by traumatic memory experts, as will be discussed below. Thirdly, it is in no way 'perfectly clear' that recovered memories are not trustworthy as the scientific evidence discussed below will establish. Gold makes further highly irresponsible and misleading statements about the 'total unreliability' of recovered memory, inferences that the mental health community in general has come to the conclusion that recovered memories do not exist etc. Gold refers to recovered memory as 'this now-discredited concept' and calls for the Minister to conduct an inquiry into this entire category of convictions.

The author of this editorial both uses Gold's misleading and sometimes outrageous reasoning and corrupts it yet further. He or she takes Gold's insinuations that 'as these battered women are able to have their cases reopened, so should men convicted of child sexual abuse' and makes them explicit, writing:

If women can do it, why can't men? That is the question underlying the call for Justice Minister Anne McLellan to review the cases of men convicted by recovered memories of sexual abuse. Here's the argument: Women, in prison for killing abusive partners, can retroactively use a recently recognized concept - the battered woman syndrome - to have their sentences reduced or quashed. Should men, convicted of crimes prosecuted on a recently discredited concept - recovered memories of sexual abuse - also be entitled to have their cases reviewed? Natural justice says yes; the Minister of Justice says maybe.⁴⁰

Other erroneous statements made by this writer include comments that such memories are 'usually recovered with the help of a therapist' and that recovered memories have been 'roundly condemned by psychiatric associations in Canada, the United States, Britain and elsewhere.' These statements are misleading.

Studies show that most memories are *not* recovered in therapy.⁴¹ It is true that

psychological associations do indeed suggest caution be employed when dealing with recovered memory cases. For example, the Canadian Psychological Association issued a position paper noting that while recovered memories do exist, caution should be taken in recovered memory cases where there is no corroborating evidence. This is proper given that no one has suggested that false memories *cannot* be created. However, while difficulties in obtaining corroborating evidence should not be downplayed, there are two studies reporting that between 60 and 83 percent of adult survivors who attempted to get corroborating evidence for their memories were able to do so.⁴² The characterization, by many FMS supporters, that recovered memory cases are brought forward with ‘no evidence other than memories’ is fairly easy to disprove. Unfortunately however, it seems difficult to disseminate this ‘truth’ in such a climate.

It should be emphasized that neither the CPA nor the APA has recognized FMS as a legitimate disorder and both organizations maintain a dissociative amnesia diagnosis. In Britain, the Royal College of Psychiatrists concluded that memories recovered through hypnosis, dream interpretation or regression therapy were suspect.⁴³ None of the three psychological associations cited have ‘roundly condemned’, as Gold asserts, recovered memories *in general*.

Reporter Kirk Makin of the Globe & Mail, commenting on the interchange of letters between Gold and Justice Minister McLellan in the spring of 1998, has also written that memories are recovered “often with the help of a therapist”⁴⁴ and, “known as ‘false-memory cases’ to their critics, many of the accounts volunteered by alleged victims have featured excessive violence and bizarre, cult-like rituals.”⁴⁵ He quotes Alan Gold

uncritically, “I think the important philosophical breakthrough is the recognition that this is and was a form of psychological quackery”⁴⁶ and notes, “repressed-memory accounts first began to surface in the late 1980s - accounts of sexual depravity and ritual abuse so terrible that the victims had apparently buried them in their subconscious for years or decades.”⁴⁷

In the exchange of letters between Minister Anne McLellan and Mr. Gold that sparked this flurry of news coverage, McLellan explicitly noted that while she was not prepared to call for an enquiry, any section 690 applications⁴⁸ “will be promptly and thoroughly reviewed.”⁴⁹ She noted, however, that even though this avenue has long been available to people claiming to have been falsely convicted, no applications which raise the issue of recovered memory have been received.⁵⁰

Perhaps one of the most virulent media attacks on recovered memory comes from Toronto author and freelance journalist George Jonas in articles published in the Montreal Gazette⁵¹ and Ottawa Citizen⁵² He writes:

I’ve always found it astounding that in a supposedly sane society anyone could be charged with a crime, let alone convicted, without any evidence except “recovered memory” inside an **emotionally disturbed person’s** mind. I first called for throwing out all such convictions in the 1980s, soon after the ruinous epidemic got under way.⁵³ (Emphasis added)

Likening recovered memory prosecutions to the witch trials, Jonas writes:

at the core of the hysteria was the demonization of males as part of a feminist myth. If a woman had a problem, it had to be caused by a man. Maybe she had been sexually abused as a child, whether she remembered it or not. The therapist’s task was to elicit the recollection of abuse from the victim’s repressed memory⁵⁴

The above, of course, assumes that all therapists are feminists and are enlisted in this

man-bashing project. Jonas refers to the men convicted of sexual abuse in recovered memory cases as ‘prisoners of gender politics’ and compares research on recovered memory to ‘the pseudo-scientific ravings of Nazi zealots.’ Jonas borrowed his Salem witch trial analogy from another writer, Moira Johnston, who suggested that the accused were victims of a mass hysteria epidemic. She identified the causes of this epidemic as:

1) society’s increased awareness that many children suffer genuine sexual abuse; 2) our culture’s widespread acceptance of Freudian notions of subconscious and suppressed memories; and 3) a vigorous feminist drive to put the patriarchy in its place⁵⁵

Jonas can be considered somewhat of a ‘straw man’ admittedly. His views are fairly extreme and thus, arguably, less insidious. Other reports would likely be characterized as ‘more balanced’ by many.

Ottawa Citizen reporter Stephen Bindman puts parentheses around such statements as the “now discredited concept.”⁵⁶ Bindman calls this issue a “raging international legal and scientific controversy.”⁵⁷ Bindman quotes Alan Gold liberally but also does include other perspectives. For example, he quotes Toronto lawyer Susan Vella who notes that Gold’s organization, the Criminal Lawyers’ Association, is attempting to confuse the public. She argues that Mr. Gold must know, as any legal scholar should, that judges already carefully consider the reliability of any recovered memory testimony. Ms. Vella, whose caseload includes a number of civil sexual assault cases, has written several articles in legal journals stating her view that FMS seems to be the latest defence strategy to be employed against sexual abuse charges.⁵⁸ Bindman also interviewed with Carleton University psychology professor Connie Kristiansen who, like Vella, noted that

while “everybody is clear that caution is necessary”⁵⁹ it is also “clear that accurate recovered memories are possible.”⁶⁰ On the whole, Mr. Bindman’s piece is one of the more balanced articles printed in the mass media on the subject within the last 18 months.

Similarly, calling it “one of the most heated and confusing debates in modern psychology,”⁶¹ Ottawa Citizen columnist Shelly Page examined at the recovered memory debate from the perspective of two Carleton University psychology professors on opposing sides of the issue. The first, Dr. Nicholas Spanos died in 1994 having nearly completed a book on the issue. Friends ultimately finished the book, which was released in 1996. Page notes that the book, entitled Multiple Identities and False Memories: A Socio-Cognitive Approach⁶² “is increasingly offered as evidence in academic journals and media reports that recovered memories are mere fantasy.”⁶³ Page, however, doesn’t seem convinced. For example, she writes:

In a thorough reading of Dr. Spanos, therapists emerge as the villains, women their wacky, vulnerable victims. Most of these women, he concludes, have indeed suffered but he condemns those who have encouraged them to adopt a “sick role”, forever marginalizing them and avoiding the political and societal roots of the problems. Closing the red cover of this book one can’t help wondering if Dr. Spanos is really the true hero of women, the one who sees through a therapist driven plot to make fools out of thousands of women by taking advantage of their obvious distress.⁶⁴

Spanos does seem to suggest that he is the ‘hero’ of women, the one who will ‘save’ them from the false child sexual abuse diagnosis. He notes that the “resurgence of evangelical Christianity in the early 1980s was infused into the MPD-child abuse movement in the form of ritual abuse ‘memories’ recovered by adult survivors”⁶⁵ and that the resulting:

stories, told by both the child day-care survivors and the adult ritual abuse

survivors, contained the same message: We are all endangered by a powerful but secret cult that threatens our very way of life. Women and children are in particular danger. If allowed outside the protective bosom of the God-loving, male-dominated nuclear family, they are in danger of mutilation, torture, and ritual death, and if they survive, they will suffer from MPD, severe depression, or other mental disorders⁶⁶

Admittedly, this is an interesting way of looking at the issue. Given that most survivors were abused by family members, I am not convinced by Dr. Spanos' arguments.

However, he does make some compelling points about the 'medicalization' of child sexual abuse noting that "medical mythologies sometimes serve political functions by supporting the dominant ideology of those who hold social power"⁶⁷ and that "the modern notion of abuse-created MPD may also function to support patriarchal institutional arrangements. By and large MPD is a 'disorder' of women."⁶⁸ I certainly agree with the idea that there is a danger of feminists and other supporters of survivors becoming too focused on the 'victim' status of survivors. As Louise Armstrong also notes, focusing on the recovery process from such 'disorders' tends to depoliticize the issues.⁶⁹ Where I disagree with Dr. Spanos is in his continuation of this train of thought, writing:

Supposedly through some combination of inherited psychological predisposition (i.e., a tendency toward dissociation) and early wounding (satanic or other child abuse), these unhappy women are unable to "integrate" and function as full members of society. Looked at from a socio-psychological rather than a medical perspective, this "disorder" can be conceptualized as a pattern of self-construal and interpersonal responding used by some chronically unhappy, troubled women to express dissatisfactions, "make sense" of their troubled lives, and attain some succour by adopting a variant of the sick role⁷⁰

The fact that Dr. Spanos would characterize women who may suffer from a dissociative disorder due to childhood sexual abuse as 'whiners', basically, is troubling. In general ,

he is not convinced of the existence of dissociative disorders.⁷¹ Further, Chapter Seven of his book is sceptical of recovered memory in general, and particularly suspicious of memories recovered in therapy.⁷²

Page refers to the other Carleton professor, Dr. Connie Kristiansen, in this article as a “notorious feminist crusader,”⁷³ but also writes that Dr. Spanos’ work is often linked to that of “anti-recovered memory crusader Elizabeth Loftus,”⁷⁴ whose work will be discussed below. Dr. Kristiansen and others in the Psychology Department at Carleton have run a number of studies on the issue of recovered memories. One such study⁷⁵ focussed on the differences and/or similarities between recovered memories of abuse and continuous memories of abuse in order to test some of the false memory supporters attacks of recovered memories. For example, FMS supporters warn that recovered memories are particularly suspect when the alleged events occurred over a long period of time, involve ritualized or satanic abuse, and/or are firmly denied by the perpetrator.⁷⁶ Yet, these ‘signals’ that someone may be suffering from FMS do not make sense. Why would sexual abuse not occur over a prolonged period of time? Once the child’s acquiescence and silence are secured why would the perpetrator refrain from continuing to abuse the child? Moreover, the American Psychological Association posits that:

denials by alleged perpetrators should . . . not be taken as evidence that the client is experiencing other than an accurate recollection. Indeed, known perpetrators of child sexual abuse can also deny and lie about their behavior, even in the presence of physical evidence that incontrovertibly links them to the abuse.⁷⁷

Other ‘warning signs’ touted as signals of FMS are the type of therapy received and that people with FMS are likely to cut off communications with their families and others who

do not believe their memories.⁷⁸ But when Wendy Hovdestad (one of Kristiansen's students) and her team (which included Kristiansen) surveyed 113 Ottawa area survivors, 49 percent of whom had continuous memories, they found remarkably few differences between the recovered memories and continuous memories groups. FMS supporters hypothesize that sufferers report no distress until they 'recover' memories in therapy (usually around age 30), but the Hovdestad study found that both groups reported distress throughout their childhood and adolescence, with the recovered memory group reporting slightly more distress.⁷⁹ The study also found that the two groups were equally likely to report ritualized abuse and that perpetrators had confessed in as many of the recovered memory cases as the continuous memory ones.

Media coverage of the recovered memory/false memory debate has relied heavily upon journalists' interpretations of the scientific discourse. An examination of the actual literature is required, both to see how accurate the above interpretations have been and to see what the 'experts' are studying.

3. The Use of Science to Bolster the FMS Hypothesis

What Foucault would term the 'expert discourses' need to be explored as these too have an effect on popular consciousness. In the psychological literature, both sides of the recovered memory/false memory debate have suggested that the debate is a socio-political, rather than a scientific, issue.⁸⁰ The pro-FMS lobby has characterized the debate as being led by man-hating feminists, preying upon 'confused' young women who may have had their memories 'implanted' by 'feminist' therapists.⁸¹ Others, not surprisingly,

minimize the influence of politics on beliefs; insisting, for example, insisting that “this is a debate about memory, not ideology.”⁸²

Researcher Kathryn Belicki maintains that she has heard the debate described as being one of scientists versus therapists or rationality versus gullibility. This is important in that, as discussed in Chapter Two, certain people’s opinions tend to be given more weight by the public than others. In actual fact there are scientists on both sides of the issue.⁸³ Moreover, as far as all therapists being characterized as pro-recovered memories, Belicki writes that she has an ongoing research program “inspired by the very real problem that a good number of therapists underestimate abuse and can be quite distrustful of abuse reports.”⁸⁴

Perhaps the most widely quoted ‘expert’ on the issue is psychologist and FMSF board member Dr. Elizabeth Loftus. A member of both the Psychology department and an adjunct professor of Law at the University of Washington, Dr. Loftus’ expertise is in the area of eyewitness testimony and particularly how the memories of crime witnesses can be distorted by post-event questioning. Dr. Loftus’ views have been, on the whole, well received by the media in the U.S., and have, no doubt, contributed in large part to popular consciousness on recovered memory. She has written articles published in mainstream magazines⁸⁵ and scientific journals⁸⁶ and has coauthored a book entitled The Myth of Repressed Memories.⁸⁷ While she has undoubtedly prevented some wrongly accused persons from being convicted (both directly, as she has been an expert witness at a number of trials and indirectly) and has called attention to some irresponsible practices by some incompetent therapists, Dr. Loftus has also done much damage. In claiming that

recovered memory is a ‘myth’, she implies that the majority of such memories are false and are implanted by therapists. This is patently untrue and Dr. Loftus is likely aware of this. In fact, she herself conducted and published a study in which 19 percent of her subjects who reported sexual abuse also reported complete amnesia of the abuse for some period of time and a recovery of it at a later date.⁸⁸ The explanation of the research team was that these women had repressed the memories, even though Dr. Loftus attacks the construct of repression in her work.⁸⁹ Further, in the piece in Scientific American, she concedes:

Of course, because we can implant false childhood memories in some individuals in no way implies that all memories that arise after suggestion are necessarily false. Put another way, although experimental work on the creation of false memories may raise doubt about the validity of long-buried memories, such as repeated trauma, it in no way disproves them. Without corroboration, there is little that can be done to help even the most experienced evaluator to differentiate true memories from ones that were suggestively planted.⁹⁰

Several points of discussion arise from this excerpt from Dr. Loftus’ article. First, if ‘even the most experienced evaluator’ (such as Dr. Loftus herself) would find it difficult to differentiate true memories from ones that were suggestively planted, why is Dr. Loftus so firmly on the ‘false memories’ bandwagon and how, more particularly, can she testify for the defence at child sexual abuse trials? Secondly, how can she, in good conscience, entitle her book The Myth of Repressed Memories? Further, the memories that Dr. Loftus and her team were able to create were of fairly innocuous situations and they were only able to implant them in 25 percent of the study participants⁹¹. The memories that Dr. Loftus created, according to her Scientific American article, were based on being lost in a

shopping mall at the age of five. Other studies that she cites to substantiate her findings include memories created around an overnight hospitalization with an ear infection, a birthday party with pizza and a clown, spilling a bowl of punch on the bride's parents at a wedding, and having to evacuate a grocery store when the overhead sprinkler system went off in error.⁹² In all three studies the erroneous events were grouped with experiences that had actually happened to the subjects as children. In other words, the subjects were given, accounts of, say, three events that according to their parents, had happened to these people in childhood and an account of an event (as above) that had not happened. Further, lawyer Wendy Murphy notes that there is no scientific evidence to suggest that people are capable of being implanted with wholly false memories of sexual abuse. She cites a recent study where the researchers tried to make adult test subjects believe that they had been lost in a shopping mall as children (a common choice it would appear) and that they had experienced rectal enemas as children. While 15 percent of the subjects did erroneously claim to have been lost in the mall (a relatively common and familiar experience), no subjects would mistakenly agree that they had experienced a rectal enema.⁹³

This research proves, I suppose, that, if you really attempt to, you can trick some people into believing that a fairly non-traumatic incident happened to them in their childhood. For ethical reasons it is, of course, impossible to try to create false memories of childhood sexual abuse or any other trauma in subjects. Because scientists cannot directly study the issue by implanting false traumatic memories, Dr. Loftus' studies are inadequate to prove that such memories can be created. It cannot be known, from the

research she cites, whether the memory of a traumatic event is encoded and stored differently from that of a non-traumatic event. Furthermore, the threat and intimidation factor that is present in many cases of childhood sexual abuse may further impair memory retrieval.

Of course, what researchers like Dr. Loftus tend to ignore is that every single memory that anyone has is a 'recovered memory'. Every memory of every event in our lives is reconstructed and, of course, distortion occurs. But if that reasoning were followed then no one would ever be allowed to testify in court because all memory is then suspect. Interestingly, however, it seems that in terms of memory degradation, people are more likely to remember their pasts as being rosier than they actually were. As Kathryn Belicki explains,:

in terms of biases in memory, the most frequent are 1) to exaggerate the positive in our lives 2) for parents to particularly exaggerate the positive qualities of their children's childhoods and 3) for children to be tugged towards their parent's way of remembering events -- biases all in the opposite direction from that described in the FMS literature.⁹⁴

Perhaps the most important point to make, however, is concerning Dr. Loftus' focus on repression. To lay people, the terms 'repression' and 'dissociation' in the context of the false memory debate seem interchangeable. However, in her attack on recovered memories Dr. Loftus focuses on repression. Someone as knowledgeable in the field as she is must know that for several years *traumatic* memory experts have used the construct of dissociation to account for the majority of recovered memories.

Psychologist Jim Hopper notes that "despite this knowledge, she continues to focus on and attack 'repression' and 'repressed memories' and in this way confuses and misleads

many people.”⁹⁵ Dissociative amnesia, not repressive amnesia, is the diagnosis contained in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM).

This distinction is important because of the effect Dr. Loftus’ views may be having upon popular consciousness with regards to ‘false memories’. A recent radio interview with a Canadian scientist helps to highlight this. Dr. Steven Porter, a forensic psychologist at Dalhousie University in Halifax says that, “Loftus has had an incredible impact on the way in which we think about memory and its distortion.”⁹⁶ In his own study, entitled “Real, Implanted and Fabricated Memories,”⁹⁷ Dr. Porter and his team were able to implant or create false childhood memories of being attacked by a small animal while walking down the street in some participants. All the participants again were given some true incidents to recall, and all were told their parents had provided the information about the animal attacks. However, Dr. Porter admits that all were subjected to very suggestible techniques. They were told that their parents had supplied this information. They were told that most people have difficulty remembering childhood incidents at first but if that they really tried they could do so. Moreover, the participants were questioned a number of times about the incident, along the ‘are you *sure* you don’t remember’ and ‘why do you think you can’t remember this incident’ vein. In this interview Dr. Porter, like Loftus, also used the concept of repression to explain recovered memories. He did concede, however, that not all recovered memories are erroneous and, when asked so by the interviewer, admitted that his research could be misused by those who wished to make it appear that recovered memories are a myth.

My problem with these types of studies is fourfold: 1) what motivates so many people to try so hard to prove that memories can be created?; 2) non-traumatic event memory storage should not be conflated with traumatic event memory storage; 3) dissociation is the construct more frequently used by traumatic memory experts; 4) a situation where researchers try extremely hard to ‘create’ such memories is not analogous to the vast majority of therapeutic environments.⁹⁸ Further, Dr. Porter expresses hope that his research will help psychotherapists and police use less suggestive techniques when questioning people they believe to be survivors of sexual abuse. I hope this is the case too but I am afraid that it is much more likely to be used again and again against the testimony of survivors. Scientists on both sides of this issue need to be cognizant of the power of scientific ‘truths’. As Kathryn Belicki has noted, “we must be very mindful of the current pressures to determine reality on the basis of political and legal agendas and very mindful of our own tendencies to edit data and experience on the basis of our biases.”⁹⁹

Of course, scientists are not the only ‘experts’ to enter the discourse. As will be discussed further in Chapter Four, Liberal backbench Member of Parliament John Bryden, in opposing his own government’s introduction of Bill C-46, an act to amend the Criminal Code regarding the production of personal records of complainants and witnesses in sexual offence proceedings, had the following to say during the Bill’s second reading in the House:

In the past ten years or so approximately 800 people have been convicted in North America on the basis of repressed memories that have been brought back to the surface by therapists. They have been convicted of

very serious crimes usually involving sexual abuse. They have gone to jail **solely** on the evidence of these people who had no recollection of these crimes against them as children but **suddenly** found vivid memories when they were treated by therapists.

In the past few years the medical authorities in Canada and the United States have come to recognize that there seems to be a very strong probability that **many** of these repressed memories are not memories at all but are induced by the therapist.¹⁰⁰ (Emphasis added).

Bryden further makes remarks such as “if one is accused as a result of false memory syndrome,”¹⁰¹ and:

The problem is this. The situation with false memory syndrome is that the testimony of recovered memory through therapy has become widely discredited in the United States. All kinds of people who have been convicted on these charges are now being released from prison. It is recognized that it is not a very reliable source of testimony. Moreover, some states in the U.S. will not allow a prosecution based on recovered memories.¹⁰²

The fact that Bryden is far from an expert on the subject of recovered memories of childhood sexual abuse does not mean that he is not perceived so by the public.

Certainly, many people, hearing a Member of Parliament reel off his (largely unsubstantiated) claims about the gross injustice being done to men accused of child sexual abuse will believe him. All Bryden needs is one incidence where someone has been falsely or mistakenly accused or *even the appearance of such* and his case is made for him. Conversely, Donald Marshall and Guy Paul Morin were falsely convicted of murder. However, this does not mean that all murder convictions are now suspect. Why does the likelihood of there being a few cases of false memory make all recovered memory cases suspect?

III. The Effects of Popular Consciousness Around Recovered Memories

I do not profess to have done an in depth study of ‘public consciousness’ around the issue of recovered memories. I do think, however, that signs point toward there being a slight pro-FMS bias in society. Allard’s media content analysis showed such a bias. None of the other articles discussed in the general news media could be described as being ‘pro-recovered memories’ and several could be described as the opposite. The parliamentary debate initiated by Bryden and criminal lawyers associations (to be discussed further in Chapter Four) attest to the supposition that the pro-FMS lobby is arguably ‘winning’ this debate.

To my mind, popular consciousness is weighted in favour of the believers in the widespread nature of false memory even though “no studies or research exist to suggest that any one suffers from it.”¹⁰³ As I noted earlier, it is not my intention to prove that ‘false memories’ do not exist. Nobody would argue that memory is perfect, nor do I believe this to be necessary. It is arguable, however, that false memory syndrome is a convenient and easy way for society to avoid dealing with the difficult issues around child sexual abuse,¹⁰⁴ particularly given that the scientific debate is not conclusive either way.¹⁰⁵ There are many reasons for people to want to downplay the extent to which children are sexually abused.

As described in Chapter Two, Gusfield suggests that “people want simple answers to complex problems.” Disbelieving those people who claim to have recovered memories of childhood sexual abuse in a way *that does not cast aspirations on the victim’s character* is very attractive. As Armstrong notes:

...survivors themselves were never blamed. Always it was the therapists, who had programmed them, hypnotized them, and preyed on their suggestibility, who were held to be at fault and who were, collectively, held to be 'cult-like'. The women themselves were portrayed as vulnerable, gullible, infantile . . . and at the mercy of craftier forces.¹⁰⁶ (Emphasis original).

If most recovered memories are believed to be false then neither the perpetrator nor the victim (because she is mistaken, or has been 'tricked' into having these false memories) are to blame. Neither of them are lying. In fact she is defective (and childish). Instead, the blame is often laid on a third party who is a less sympathetic figure than either the 'confused' young woman or the 'ordinary dad'. Therapists, often characterized as 'feminists' by false memory proponents, are sometimes accused of 'implanting' these memories. As previously noted, studies showing that people are suggestible and may be misled to believe that they, for example, witnessed a particular event or heard a certain word are often cited. As Murphy pointed out however, these studies "do not involve protracted, secret child sexual abuse"¹⁰⁷ and thus have no bearing on most recovered memory cases.

If recovered memories cannot be dismissed as false then the issue must be confronted, both as to the individuals involved and as to the underlying societal problem. Believing that recovered memories are false gets society 'off the hook'. Child sexual abuse is one of the most complicated and tragic issues facing society today. It is not surprising that effectively ignoring the problem, by disbelieving recovered memories, would be attractive to many.

The previous is not to suggest that moral cowardice or sheer laziness are the major

reasons to accept the thesis that most recovered memories are false. Social psychologist Connie Kristiansen comments that the sheer inability of people to acknowledge the horror of child abuse is a recurring feature in discussions of recovered memories. She attributes this, in part, to the psychological need that people have, to believe that the world is fair and just (good things happen to good people and bad things happen to bad people). In such a world, people get what they deserve. Seeing events as totally random and out of our control isn't healthy or functional. The wholesale denial of the validity of recovered memories of childhood sexual abuse may be connected to this 'just world' hypothesis.¹⁰⁸ Because no child deserves to be sexually abused, it is difficult for people who subscribe to the 'just world' hypothesis to believe that childhood sexual abuse is occurring with such alarming frequency.

Just as I am not advocating that every recovered memory is completely accurate, I am not arguing that beliefs about the validity (or lack thereof) of recovered memories are shaped solely by the dominant hegemony. Such an argument cannot explain those with counter-hegemonic views and, importantly, pays too little attention to less complex reasons why people might not want to believe in recovered memories. Kristiansen has suggested that people don't believe in recovered memories out of self-interest (belief in a just world). However, wishful thinking is, I believe, only one of a myriad of reasons why claims of childhood sexual abuse are, seemingly, so difficult to believe. As noted in Chapter Two, Gusfield speculates that it is often difficult to 'make a monster' of someone who looks so 'normal'. It is the mythical 'killer-drunk', devoid of any redeeming features, not the 'Average Joe' who comes to mind (at least during the era when his book

was published)when drinking-driving is discussed. Again as noted in Chapter Two, when the alleged offender is seen to be much like the ‘norm’, it is easier to disbelieve his or her complicity. As Kathryn Belicki notes, “when an attractive, intelligent, likable individual says “I didn’t abuse that child” -- too many people are ready to unquestionably believe him or her.”¹⁰⁹ It may be even more difficult to imagine an ‘ordinary dad’ or other “cherished family member”¹¹⁰ as the perpetrator. Notes Smart, “the more child sexual abuse was depicted as a horrible pathology, the less could ‘ordinary’ fathers be seen as enacting such deeds.”¹¹¹ In other words, the stereotype of the abuser is of an “abnormal, evil stranger.”¹¹² Women and children, particularly, are taught to fear the stranger lurking in the bushes. This is highly ironic given that women and children are much more likely to be harmed by intimates (e.g., their partners and father-figures respectively) than by strangers or acquaintances. As Carol Smart notes:

With incest the threat is the paterfamilias. He does not just threaten the child or his own family, he threatens the patriarchal ideal of family life. He becomes too threatening to be cast as a folk devil, he is ‘unthinkable’. There has therefore been an uneven response to child sexual abuse.¹¹³

There are three things operating here. One is an inability to see ‘ordinary’ dads as child molesters and another is the threat to the patriarchal family form. It is doubtful that it is a coincidence that the false memory/recovered memory debate has flared up at a time when a call to the return of ‘traditional family values’ has such political currency. The third is simply that, as Canadians become a society of strangers, strangers are who people fear. Families are supposed to be where one is safe. In the specific case of child sexual abuse, Smart notes:

This is a history of both consternation and complacency, with the consternation over child/stranger abuse oddly nourishing the complacency over father abuse. It would appear that the more concern is expressed over the threat of strangers, the less close relatives could be brought into the frame.¹¹⁴

Thus far, two distinct ‘clusters’ of reasons why false memory syndrome is such a popular ‘solution’ to the problem of child sexual abuse have been discussed. The first was the psychological need for simple answers to complex problems and the ability to retain a belief in a just world. The second cluster involved the inability to believe that ordinary seeming fathers/relatives could commit such acts, that children may have more to fear from family members than strangers and that the family may be the ideal place for such acts to go unpunished. The third cluster of reasons to believe in the falsity of recovered memories is attitudes towards women, or, more bluntly put, the sexism that is still inherent in society. The clusters are all linked. As other researchers have noted, when survivors of childhood sexual abuse speak out they challenge both the patriarchal notion that the family is a safe and harmonious unit and political, economic, and social power structures.¹¹⁵

Connie Kristiansen et al note that “people’s beliefs about recovered memories might also, in a more insidious way, be tied to their attitudes toward women.”¹¹⁶ The authors cite Susan Faludi’s expose of the New Right’s opposition to women’s equality¹¹⁷ and their attempt to appeal to ‘family values’ to justify this position, noting that the New Right gains more sympathy from the press and the public if they march “under the banner of traditional family values.”¹¹⁸ Similarly, a read of the False Memory Syndrome Foundation’s Mission Statement reveals a stated concern with “the consequences of false

allegations where whole families are split apart.”¹¹⁹ In Faludi’s hypothesis such posturing is merely a cover up of the real agenda. Kristiansen et al note that if Faludi’s backlash hypothesis applies to the recovered memory debate, attitudes toward women’s equality, not the priority ascribed to values like family security, will underlie beliefs about recovered memories. Thus, Kristiansen et al conducted two studies to examine whether the just world hypothesis and Faludi’s backlash hypothesis might account for people’s beliefs about recovered memories. They concluded that their data suggests that “people’s beliefs about recovered memories and other aspects of child abuse are more closely tied to autocratic misogyny and self-interest than they are to social values or science.”¹²⁰

Allard also posits that the ‘backlash’ against survivors is part of a more general backlash against women’s equality.¹²¹ And, relatedly, Herman and Harvey have suggested that notions propagated by the pro-FMS movement are easily accepted because they appeal to common prejudices.¹²² Allard, summarizing the work of several other researchers¹²³ writes that:

Several investigators have argued that the backlash against survivors exists not because child sexual abuse is peripheral to major social interests, but because it is so central to social interests that we as a society have chosen to ignore rather than change it. The FMS movement, as a form of backlash against survivors, is designed to shift the focus of energy and attention away from the central problem, that of child sexual abuse, towards safer issues such as overzealous, incompetent therapists. Indeed, little progress has been made in identifying and treating abusive parents and preventing abuse.¹²⁴

Author and survivor Armstrong has a more specific explanation for the strength of the backlash. She postulates that civil cases (i.e., for money damages) are a major contributor to the ‘backlash’ against sexual abuse survivors and their supporters. She

notes:

Adult survivors, who had not earlier presented any threat to the status quo, had decided not only to challenge their aging parents with sometimes no more than snatches of dim recall, but to actively confront them and take them to court. This certainly contributed to bringing down upon our heads an organized backlash which, invoking a mantle of medical authority, decided to charge forth under the banner of a newly invented disease: False Memory Syndrome. At bottom, one main trigger for the backlash that brought us into this morass was that well-known emotional catalyst, money.¹²⁵

Herman and Harvey also note that as more survivors try to hold their abusers accountable, it is natural to expect a backlash from abusers.¹²⁶ However, the backlash membership is clearly not limited to those directly involved.¹²⁷

IV. Conclusion

I am not suggesting that society has a difficult time in believing in recovered memories of childhood sexual abuse for any **one** of the above reasons. I think the reasons that childhood abuse claims are sometimes easily dismissed are complex and that any individual's reasons most likely consist of a number of different factors, the most significant being that most people, especially in this overwhelming 'information age', tend to believe what other people believe. For instance, given that no one has time to research and form an educated opinion on every subject, most people tend to believe what they are told by 'people who know'. The dominant hegemony affects society's perceptions of the validity of child sexual abuse claims. In a patriarchal, hierarchically structured society, such as Canada, power resides disproportionately with certain groups of people. As Alison Harvison Young notes,:

a number of feminist writers in recent years have argued persuasively that as most perpetrators of abuse are male, the problem of child sexual abuse and society's failure to wholeheartedly address it - is really one of male domination . . . The number of obstacles to victims of sexual abuse . . . in pursuing their attackers in the legal process is thus seen as symptomatic of a patriarchal society which has systemised the oppression and devaluation of women.¹²⁸

The parallels between the historical discrediting of children (and by extension, adult children) and that of women reporting sexual assaults as adults are striking. It was not so long ago that many complaints of sexual assault by adult women were classified by police forces as 'unfounded' or 'false reports'.¹²⁹ The frequency with which the term 'false memory syndrome' is known and used by lay people is quite startling when one considers that neither the American Psychological Association nor the Canadian Psychological Association recognize 'false memory' as a psychological syndrome.¹³⁰ In fact, even the people who coined and popularized the term, the False Memory Syndrome Foundation, only argue that about 25 percent of recovered memories of child abuse are false.¹³¹ Remarkably little attention, however, is given in this debate to the 75 percent of recovered memories that even these skeptics admit are valid. In all, it is quite astounding that:

given the apparent lack of evidence for false memory syndrome the eagerness with which the idea has been embraced by the public, the popular press, and by some members of the legal, medical and psychological communities is surprising. Some argue that the recovered memories debate is a purely scientific issue, concerning only the reality of memory. But, if science is the focus, one wonders why so many people are willing to talk about a new syndrome for which there is so little empirical evidence. The present research supports suggestions that the politics of violence toward women and children, rather than science, are central to the current debate.¹³²

Sadly, it is precisely this ‘politics of violence towards women and children’ in our society that make it so simple not to ‘see’ child sexual abuse for the pervasive phenomenon that it is. Ironically, instead of society paying anything more than lip service to the real issue, it seems almost that there is a ‘moral panic’ occurring around the issue of recovered memories. Indeed, if we examine the process of events which, according to sociologist Stanley Cohen, constitutes a moral panic, it seems that the present day furor over recovered memories certainly qualifies as such. As Cohen outlines, the stages that comprise a moral panic are:

a stage where a condition of groups of persons becomes defined as a threat to the social order; the involvement of the mass media which presents the problem in stylized and stereotypical terms; the ‘manning’ of moral barricades by right-thinking people; the pronouncement of solutions by experts; a means of coping evolves; the problem is seen as being solved or simply becomes submerged.¹³³

It is imperative that feminists and anti-child abuse advocates attempt to calm this panic. If they cannot, then the real issues about the widespread nature of child sexual abuse are not dealt with and, as Armstrong so hauntingly puts it, “many adults await us in the future to tell us of life in court-licensed sexual slavery.”¹³⁴

Connie Kristiansen has calculated ‘the odds’ of the existence of a false memory in any one particular survivor. She notes that if one takes a widely respected 1995 survey of British and American clinicians which found that 15.8 percent of the therapist’s clients had recovered a memory of abuse that they had previously had no awareness of, and accept the Loftus figure that 25 percent of adults are susceptible to the implantation of a false memory, then only four percent of women in therapy can be expected to develop a

false memory of child sexual abuse. This coincides with the estimate in her study and is also in keeping with false reports of other violent crimes.¹³⁵ Of course, I would add my previous objection to the Loftus figures in that the 25 percent result was achieved when the researchers were *trying* to create a false memory, which is *not* analogous to most therapy environments.

If we accept, for the sake of argument, that only four percent of therapy clients develop a false memory of childhood sexual abuse and then factor in that most survivors never enter the court system with their belief, valid or otherwise, that they were abused as children¹³⁶ some people might question the emphasis on law in this thesis. There are several important reasons for this emphasis. First, there is Gusfield's argument that law is a transmitter of cultural norms in North American society, as discussed in Chapter One and forthcoming in Chapter Three. Law is an 'expert discourse' and thus the opinions and reasoning of the 'experts', such as lawyers and judges, play a role in the shaping and reshaping of hegemony as well as, possibly, being influenced by the dominant hegemony themselves. The following chapter is an analysis of the recent Canadian and American case law on the subject of recovered memory, with particular emphasis on the effects of hegemony upon legal reasoning and vice versa.

Endnotes - Chapter Three

1. Patricia Begin, "Child Sexual Abuse: The Recovered Memory/False Memory Debate", Background Paper BP-391-E, Research Branch, Library of Parliament, Political and Social Affairs Division, November 1994 at 10.
2. For statistics that are updated on a regular basis see Canadian Centre for Justice Statistics, 19 (5) Juristat (Ottawa: Statistics Canada, 1999) Catalogue No. 85-002-X1E.
3. Committee on Sexual Offences Against Children and Youth, Sexual Offences Against Children, Volume 1, Ottawa, 1984, at 175. This report is often referred to as the Badgley Report. See also Diana Russell, The Secret Trauma: Incest in the Lives of Girls and Women (New York: Basic Books, 1986) and C. Badgley & R. Ramsey, "Disrupted Childhood and Vulnerability to Sexual Assault: Long-term Sequels with Implications for Counselling" (1985), 5 Social Work and Human Sexuality 142.
4. Begin, supra note 1 at 2.
5. Ibid. See also Rita Gunn & Rick Linden, "The Processing of Child Sexual Abuse Cases," Confronting Sexual Assault: A Decade of Legal and Social Change, Julien Roberts and Renate Mohr, eds. (Toronto: University of Toronto Press, 1994) at 84-86.
6. Begin, supra note 1 at 2. Begin notes that an incest study at a hospital pediatric clinic in Boston found that almost 28 percent of child sexual abuse victims were between the ages of one and five; 25 percent ages six to nine; 32 percent ages 10 to 13; and 16 percent ages 14 to 16. See S. Barret and W.L. Marshall, "Shattering Myths," Saturday Night, June 1990, at 22.
7. Begin, supra note 1 at 2.
8. Michele Barrett, The Politics of Truth: From Marx to Foucault (Stanford, Calif.: Stanford University Press, 1991) at 54.
9. Ibid.
10. See Perry Anderson, "The Antinomies of Antonio Gramsci" (1976-77), 100 New Left Review, cited in Barrett, supra note 8 at 55.
11. Antonio Gramsci, Selections From the Prison Notebooks, ed. and trans. Q. Hoare and G. Nowell-Smith (New York: International Publishers, 1971), at 12.
12. For a more complete discussion of 'passive revolution' see Gramsci, ibid., at 58-59.
13. Barrett, supra note 8 at 51.

14. Mary O'Brien, "Hegemony and Superstructure: a feminist critique of neo-marxism," in Jill McCalla Vickers, ed. Taking Sex Into Account: The Policy Consequences of Sexist Research (Ottawa: Carleton University Press, 1984), at 85.
15. American Psychological Association, Statement on Memories of Sexual Abuse (1993). Also American Medical Association, Council Of Scientific Affairs, Memories of Childhood Abuse (1994). In the actual manual "Dissociative Amnesia" (formerly psychogenic amnesia) is listed as 300.12.
16. American Psychological Association, Questions and Answers About Memories of Childhood Abuse (1995).
17. www.adviccom.net/~fitz/fmsf.
18. Nicholas Bala, "False Memory 'Syndrome': Backlash or *Bona Fide* Defence"?(1996), 21 Queen's Law Journal 423 at 456. Dr. Underwager may have resigned from the FMSF Board but he and his wife Dr. Hollida Wakefield continue to publish articles contesting the validity of recovered memories. See, for example, R. Underwager & H. Wakefield, "Therapeutic Influences in DID and Recovered Memories of Sexual Abuse" (1996), 8 Issues in Child Abuse Accusations (3/4) 169. In all other accounts I have read regarding the founding couple of the FMSF, it is not Pamela Freyd but her husband, Peter Freyd, whom their daughter Dr. Jennifer Freyd has pinpointed as the actual abuser. I am unsure as to where Bala got his information.
19. For example, the wording of the question(s) or even choice of question(s) can have an effect on subjects' answers, as can who asks the questions.
20. Stanley Cohen & Jock Young, The Manufacture of News: Deviance, Social Problems and the Mass Media (London: Constable, 1981).
21. Carolyn B. Allard, The Recovered Memory Debate: The Press's Coverage and the Impact on Survivors, M.A. Thesis, Dept. of Psychology (Ottawa: Carleton University, 1995) at 21.
22. Ibid., at 48.
23. Ibid.
24. Ibid.
25. Ibid., at 1.
26. Both as attributed by her raters and other studies. See, for example, R. Cirino, Don't Blame the People: How the News Media Use Bias, Distortion and Censorship to Manipulate Public Opinion (Los Angeles: Diversity Press, 1971) where letters to the

editor are found to be less influential than actual news pieces.

27. Allard, supra note 21 at 45.

28. Ibid., at 43.

29. Ibid., at 46.

30. Ibid., at 40.

31. See, for example, Judith Herman, "Presuming to Know the Truth" (1994), Nieman Reports 43.

32. Allard, supra note 21 at 22.

33. See, for example, Judith L. Herman, "Adult Memories of Childhood Trauma: A Naturalistic Clinical Study" (1997), 10 (4) Journal of Traumatic Stress 557; Trauma & Recovery (USA: Basic Books, 1992); "Presuming to Know the Truth" (1994); Nieman Reports 43; Adult Memories of Childhood Trauma: Current Controversies Paper presented at the Annual Convention of the American Psychiatric Association, May 26, 1993; with M. R. Harvey, "The False Memory Debate: Social Science or Social Backlash?" (1993), 9 Harvard Mental Health Letter 4; with E. Schatzow, "Recovery and Verification of Memories of Childhood Sexual Trauma" (1987), 4 Psychoanalytic Psychology 1.

34. Herman, supra note 31 at 44.

35. "Recalling Abusive Memories", Globe & Mail May 21, 1998, at A2.

36. The full text of this letter can be found in the Ottawa Citizen, May 24th, 1998 at D4.

37. Letter from Alan D. Gold, president of the Criminal Lawyers' Association to Justice Minister Anne McLellan, reprinted in the Ottawa Citizen, May 24th, 1998 at D4.

38. Repression is characterized as an active defensive process by Briere and Conte. See John Briere & Jon R. Conte, "Self-Reported Amnesia for Abuse in Adults Molested as Children" (1993), 6(1) Journal of Traumatic Stress 21. See also Elizabeth F. Loftus, "The Reality of Recovered Memories" (May 1993), in 48(5) American Psychologist 518 at 518, who says of repression, "according to the theory, something happens that is so shocking that the mind grabs hold of the memory and pushes it underground, into some inaccessible corner of the unconscious".

39. Dissociation is viewed more as an altered state of consciousness. See Linda Meyer Williams, "Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse" (1994), 62(6) Journal of Consulting and Clinical Psychology 1167.

40. "Recalling Abusive Memories", supra note 35 at A2.
41. See for example, Wendy Hovdestad, "A Field Study of 'False Memory Syndrome'", M.A. Thesis, Dept. of Psychology (Ottawa: Carleton University, 1995).
42. Herman & Schatzow, supra note 33; K. Belicki et al, "Adults Reports of Sexual Abuse: Memory or Confabulation?" (1995), Unpublished manuscript, Brock University, St. Catherine's, Ontario.
43. See Christine Hahn, "Bryden up in arms over new Bill C-46 legislation", Ancaster News, Wednesday April 8th, 1998 at 10. For a recent critique of dream interpretation see G.A.L. Mazzoni, P. Lombardo, S. Malvagia & E. F. Loftus, "Dream Interpretation and False Beliefs" (1999), 30(1) Professional Psychology: Research and Practice 45.
44. Kirk Makin, "McLellan to Look into Recovered Memory Debate", Globe & Mail, Wednesday May 20th, 1998 at A3n.
45. Ibid.
46. Ibid.
47. Ibid.
48. Any convicted person who has exhausted his or her appeal remedies may apply for the 'mercy of the Crown' pursuant to section 690 of the *Criminal Code*. Should the applicant raise new and significant information that casts doubt upon the appropriateness of the conviction or demonstrates that a miscarriage of justice has occurred, may be granted either a new trial, an appeal or the Minister of Justice may refer a specific question to the Court of Appeal for an opinion.
49. Letter to Alan Gold from Minister Anne McLellan. The full text is reprinted in the Ottawa Citizen, May 24, 1998 at D5.
50. Stephen Bindman, "McLellan to discuss 'recovered' memory", Ottawa Citizen May 16, 1998 at A4.
51. George Jonas, "Recovered memory is best forgotten", the Montreal Gazette, Sunday May 3, 1998.
52. George Jonas, "Recovered memories of abuse don't prove guilt", Ottawa Citizen, November 7th, 1997 at A15.
53. Jonas, supra note 51.
54. Ibid.

55. As quoted in Jonas, ibid.
56. Bindman, supra note 50 at A4.
57. Stephen Bindman, "Can recovered memories be trusted?", Ottawa Citizen, May 4th, 1998 at A1 and A8.
58. See, for example Susan Vella, "False Memory Syndrome: The latest defence to childhood sexual abuse claims"(1992) 12 (4) Jurifemme 1; and "False Memory Syndrome: Therapists are the target in new sexual assault defence theory"(1994), Jan/Feb. National 36.
59. Bindman, supra note 57 at A8.
60. Quoted in Bindman, ibid.
61. Shelly Page, "Of Two Minds: The Profs at the Heart of the 'Recovered' Memories Debate", Ottawa Citizen, May 24, 1998 at D3.
62. Nicholas P. Spanos, Multiple Identities and False Memories: A SocioCognitive Approach, (Washington, DC: American Psychological Association, 1996).
63. Page, supra note 61 at D3.
64. Ibid., at D4.
65. Spanos, supra note 62 at 292.
66. Ibid.
67. Ibid., at 293.
68. Ibid.
69. Louise Armstrong, Rocking the Cradle of Sexual Politics: What Happened When Women Said "Incest" (Reading, Mass.: Addison-Wesley, 1994) at 78.
70. Spanos, supra note 62 at 293.
71. See Nicholas P. Spanos, "Dissociative Disorders: Not Empirically Proven" (1995), 40(3) Contemporary Psychology 261. This article is a book review of David Spiegel, ed., Dissociative Disorders: A Clinical Review (Lutherville, M.D.: Sidran Press, 1993).
72. See Spanos, supra note 62 at 77-90.
73. Ibid., at D3.

74. Page, supra note 61.
75. Wendy E. Hovdestad, Connie M. Kristiansen, Kathy A. Felton, & Carolyn B. Allard, "An Empirical Study of the Incidence of False Memory Syndrome", Paper presented at the Annual Convention of the American Psychological Association, New York, August 1995.
76. Ibid., at 3. See also, D. Calof, "A Conversation with Pamela Freyd, PhD: Co-founder and Executive Director, False Memory Syndrome Foundation, Inc., Part One" (1993), 3(3) Treating Abuse Today 25.
77. American Psychological Association, Working Group on Investigation of Memories of Childhood Abuse: Final Report, February 14, 1996 at 6.
78. Hovdestad et al, supra note 75 at 3.
79. Ibid., at 9.
80. Connie Kristiansen, Carolyn Gareau, Jennifer Mittleholt, Nancy DeCourville & Wendy Hovdestad, "Social-Psychological Factors Sustaining the Recovered Memory Debate", Paper Presented at the Annual Convention of the American Psychological Association, New York, August 1995, at 2.
81. Karen Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997), 9(1) Canadian Journal of Women and the Law 148 at 164.
82. E.F. Loftus and K. Ketchum, The Myth of Repressed Memory, (St. Martin's Press: New York, 1994), cited in Kristiansen et al., supra note 80 at 7.
83. For example, Dr. Elizabeth Loftus would be one of the pre-eminent scientists on the 'recovered memories are false' side of the debate. Dr. John Briere, on the other hand has done work supporting the existence of 'recovered' childhood memories. See John Briere, "Studying Delayed Memories of Childhood Sexual Abuse" (1992), Summer The APSAC Advisor; Briere & Conte, supra note 38. For a well rounded collection of scientific articles written from both sides of the debate see Kathy Pezdek & William Banks, eds., The Recovered Memory/False Memory Debate (San Diego, Calif.: Academic Press, 1996).
84. Kathryn Belicki, "False Memory Syndrome -- Science or Backlash?: A Discussion of the Hovdestad and Kristiansen Papers", A Paper Presented to the 103rd Annual Meeting of the American Psychological Association, New York City, August 1995, at 2.
85. Dr. Elizabeth Loftus, "Creating False Memories"(September 1997), 277 Scientific American 3 at 70. The blurb on the cover of this issue (incidentally, the only blurb on the cover) reads "The Truth About False Memories: Why We Can Remember Events that

Never Happened.”

86. See Loftus, supra note 38.

87. Loftus & Ketchum, supra note 82.

88. E.F. Loftus, S. Polansky, & M.T. Fullilove, “Memories of Childhood Sexual Abuse: Remembering and Repressing” (1994), 18 Psychology of Women Quarterly 67.

89. For example, she notes that “it is misleading to assume that simple failure to remember means that repression has occurred. If an event happened so early in life, before the offset of childhood amnesia, then a woman would not be expected to remember it as an adult” and “studies have shown that people routinely fail to remember significant life events even a year after they have occurred”. See Loftus, supra note 38 at p. 522. Williams notes that Loftus et al. appear to ignore relevant research and clinical evidence, “They say that my findings demonstrate only “simple forgetting” but it is difficult to make this argument about the experiences of the women in the sample.” See Linda Meyer Williams, “What Does It Mean to Forget Child Sexual Abuse? A Reply to Loftus, Garry and Feldman” (1994), 62(6) Journal of Consulting and Clinical Psychology 1182 at 1182.

90. Loftus, supra note 85 at 75.

91. Ibid., at 72.

92. Ibid., at 74.

93. Wendy J. Murphy, “Debunking ‘false memory’ myths in sexual abuse cases”, <http://www.smith-lawfirm.com/Murphy_Memory_Article.html> 11/27/98 at 7. The study Murphy is referring to is described by K. Pezdek, Planting False Childhood Memories: When Does It Occur and When Does It Not?, Paper presented at the 36th Annual Meeting of the Psychonomics Society (November 10-12, 1995). This paper was later published as “Planting False Childhood Memories: The Role of Event Plausibility” (1997), 8 (6) Psychological Science 437.

94. Belicki, supra note 84 at 4.

95. Jim Hopper, Ph.D, “Recovered Memories of Sexual Abuse: Scientific Research & Scholarly Resources”, <<http://www.jimhopper.com.memory>>27 December 1998 at 29.

96. Dr. Steven Porter, radio interview with Avril Benoit, CBC Radio One morning show “This Morning”, January 26, 1999.

97. According to the CBC host, Avril Benoit, this study is currently being considered for publication, radio interview with Dr. Steven Porter, CBC Radio One morning show “This

Morning”, January 26, 1999.

98. As Carolyn Allard notes, “it is a questionable assumption that a substantial number of therapists both use suggestion-inducing methods such as hypnosis with their clients and suggest to clients that they were sexually abused.” Supra note 21 at 8.

99. Belicki, supra note 84 at 5.

100. Volume 134 House of Commons Debates Number 142, 2nd Session, 35th Parliament, February 4th, 1997 at 7672.

101. Ibid., at 7673.

102. Ibid.

103. Murphy, supra note 93 at 6.

104. Allard, supra note 21 at 25.

105. See Allard, ibid., at 5.

106. Armstrong, supra note 69 at 225.

107. Murphy, supra note 93 at 6.

108. Kristiansen et al., supra note 80 at 2-3.

109. Belicki, supra note 84 at 1.

110. Allard, supra note 21 at 16.

111. Carol Smart, Feminism and the Power of Law, (London: Routledge, 1989) at 52.

112. Allard, supra note 21 at 16.

113. Smart, supra note 111 at 52.

114. Ibid.

115. See, for example, C. Wasserman, “FMS: The Backlash Against Survivors” (1992), Sojourner: The Women’s Forum 18.

116. Kristiansen et al., supra note 80 at 3-4.

117. Susan Faludi, Backlash: The Undeclared War Against American Women, (New York: Anchor Books, 1991).

118. Kristiansen et al., supra note 80 at 3.
119. False Memory Syndrome Foundation, FMS Foundation Mission Statement, (FMS Foundation: Philadelphia, P.A., 1993).
120. Kristiansen et al., supra note 80 at 7.
121. Allard, supra note 21 at 16.
122. Herman & Harvey, supra note 33 at 5.
123. E. Olafson, D.L. Corwin & R.C. Summit, "Modern History of Child Sexual Abuse Awareness: Cycles of Discovery and Suppression" (1993), 17 Child Abuse and Neglect 7; J. Cronin, "False Memory: The Controversy Surrounding "False Memory" and Child Abuse" (1994), April Z Magazine 31; Christine A. Courtois, Healing the Incest Wound: Adult Survivors in Therapy (New York: W.W. Norton & Co., 1988); and B. Flicker, "Psychohistorical Roots of the War Against Children" (1993), 21 The Journal of Psychohistory 69.
124. Allard, supra note 21 at 25.
125. Armstrong, supra note 69 at 229.
126. Herman & Harvey, supra note 33 at 5.
127. See C.Z. Enns, C.L. McNeilly, J.M. Corkery & M.S. Gilbert, "The Debate About Delayed Memories of Child Sexual Abuse: A Feminist Perspective" (1995), 23 The Counselling Psychologist 181 for a review of the backlash against survivors.
128. Alison Harvison Young, "Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues"(1992-93), 11 Canadian Journal of Family Law 20.
129. See Susan Brownmiller, Against Our Will: Men, Women and Rape (New York: Bantam, 1975).
130. See Murphy, supra note 93 at 6.
131. Connie Kristiansen, "Recovered Memories of Child Abuse: Fact, Fantasy or Fancy?" (1996), 19(1) Women and Therapy 47 at 48.
132. Hovdestad et al., supra note 75 at 11.
133. Smart, supra note 111 at 51-52, citing Stanley Cohen, Folk Devils and Moral Panics, (London: MacGibbon & Kee, 1972).
134. Armstrong, supra note 69 at 125.

135. See Page, supra note 61 at D5.

136. See Courtois, supra note 123 and Herman (1992), supra note 33.

Chapter Four The Legal Landscape

I. Introduction

If one is convinced, as I am, by Gusfield's argument that law operates as a cultural medium then it is an important arena for feminists to contest in an attempt to create a 'counter-hegemonic force' to combat the status quo. If law is seen in non-instrumentalist terms "as a system of communications, not only in its manifest language but also in the metaphorical symbolism of its latent meanings"¹ then feminists and other anti-child abuse advocates need to learn to engage with that system to make the point that sexual abuse is endemic to a sexually violent, hierarchical structured society. As noted in Chapter Two, in studying law as a mechanism in the definition and solution of public problems, Gusfield paid less attention to the analysis of law's possible utilitarian effects (such as deterrence, preventing this particular person from driving etc.) than in "the cultural attributes of law as an embodiment of meaning."² On 'the books' it looks as if Canadian society is clearly against the sexual abuse of children and is ready and willing to punish such offenders. And yet very few sexual abuse cases are prosecuted,³ and even fewer result in convictions.

Gusfield builds upon his analysis of law as a "self contained cultural product,"⁴ positing that there are two discrete aims of criminal law; the keeping of order, and the "dramatization of the moral notions of the community."⁵ Gusfield is more intrigued with the latter, law as a form of communication rather than as a mechanism for keeping order in the community. He contends that "the dramatic qualities of legal acts infuse a situation with a visible meaning, an understanding of which can be attributed by the observers to the general public."⁶ An

understanding of the current legal environment as an arena for contestation is crucial to formulating strategies against the minimization and denial of the child sexual abuse left unexamined by society.

It is not surprising that the phenomenon of adult survivors of childhood sexual abuse recovering memories of their abuse is as difficult an issue for 'the law' to deal with as it is for society in general to grapple with. Notwithstanding the politics of the issue, there is the fallibility of memory and the problems inherent in any case where there is a significant lapse of time between the incident(s) and the engagement with the legal system. Further, generally speaking there are few, if any, witnesses to corroborate testimony of long-ago sexual abuse. Added to these realities are the problems commonly associated with the testimony of child witnesses. These are legitimate concerns and, of course, must be addressed during legal deliberations. However, I contend that the 'furor' over the recovered memories/false memories debate acts to cloud these issues.

II. The History of the Criminal Law and the Possibilities Within Civil Remedies

Under English common law, the sexual abuse of children within the family was not criminalized until the Punishment of Incest Act of 1908.⁷ At the time there was strong resistance to the introduction of legislation to deal with sexual abuse within the family. One of the main reasons, writes Carol Smart, was the "simple denial that such acts could occur."⁸ Two other reasons put forward at the time against criminalizing incest were, one, that it would out ideas into people's heads that otherwise they would never have thought of and, two, that it would create new opportunities for the blackmailing of innocent men. These concerns, voiced at the

beginning of the century, sound similar to those being articulated in the present day, despite the so-called advent of the 'post-feminist' age.

This criminal legislation focussed on the 'unnaturalness' of the act of incest, rather than on the abuse of power and authority and the sexual exploitation of a minor child involved. This is further evidenced by the fact that the Act also made it a criminal offence for a woman over the age of 16 years to 'permit' a close male relative to have 'carnal knowledge' of her. The penalties for such 'immodest' female behaviour were the same as for a father abusing a young child. 'Unnatural' sexual contact, not coercive sexual contact, was what was criminalized by this Act. Thus, this legislation can be viewed as being enacted not so as to protect children but to safeguard other interests such as, perhaps, the 'morals' of the community or the ideal of the patriarchal nuclear family.

Of course, a survivor of sexual abuse may also bring a private action, suing the person who assaulted her or him, for monetary damages. The most common civil action for sexual abuse of children is the tort of battery. Tort law is generally common law and is within provincial jurisdiction in Canada.

There are certain advantages to seeking a civil remedy in lieu of involving the police and the criminal process. First, the standard of proof in a civil trial is less stringent than in a criminal trial, being on 'a balance of probabilities' rather than 'beyond a reasonable doubt'. Rules of evidence are somewhat relaxed *vis a vis* those in a criminal case. These facts may make a successful result more easily obtained by the civil plaintiff. Further, any damages awarded in a civil judgement go to the complainant (although oftentimes awards are difficult to enforce). One possible disadvantage in pursuing a case civilly however is that in a civil trial the initial costs of

investigation and court presentations are borne by the complainant rather than by the Crown. Costs may, however, be recovered in a successful civil case.⁹

III. Present Day Jurisprudence

The following section examines recent Canadian criminal and civil cases having to do with recovered memories of childhood sexual abuse and related cases. Not all the cases discussed are specifically about ‘false’ or ‘recovered’ memories, for several reasons. First, the jurisprudence in Canada is very recent and fairly sparse on this matter. Secondly, issues that arise in other sexual abuse and sexual assault cases may be relevant to ‘FMS’ cases. Some U.S. cases will also be discussed as these issues have been brought before U.S. courts numerous times in the last decade. My argument, partially, is that North American society is unable to deal with these difficult issues and so looks to both the media and the ‘experts’ for guidance. Thus, it would be a mistake to disregard what is happening in the U.S. because of the influence American culture likely has on Canadian society.

It is not my intention to do an exhaustive case study of every mention of ‘false memory’ in the law reports. To do so would result in an overly lengthy and not particularly interesting work. What I have done instead is to highlight the more ‘relevant’ material. My decision as to what may be considered ‘relevant’ is based on a number of factors. First, I have kept abreast of legal developments in the area on an ongoing basis, through QuickLaw database searches, newspaper reading and conversations with others interested in the topic. This experiential knowledge about which cases were most ‘relevant’ was then compared with academic articles on the subject.¹⁰ I considered any Supreme Court cases on related issues to be extremely relevant

and so these too will be discussed. 'False memory' cases are not heard or considered in isolation from other cases. Statutes of limitations and access to the private therapy records of complainants in all types of sexual abuse/assault cases impact upon 'the law' with regard to recovered memory/false memory and so must be examined along with the more specific cases.

A. Case Law

1. Statute of Limitations cases

One of the initial barriers to bringing a case against the perpetrator of a long ago incident of child sexual abuse was statutes of limitations, or the courts' willingness to proceed when a significant passage of time had occurred between the alleged incident and the matter being brought before the court. Two Supreme Court of Canada cases in the early part of the 1990's dealt with this issue. In *R. v. W. K. L.*,¹¹ decided in 1991, the Court ruled on two issues relevant to this thesis. This case was related to the concept of 'delayed disclosure' rather than that of recovered memory specifically. However, recovered memory cases also have as a major issue the passage of time between the offence and engagement with the legal system. Statutes of limitations were also barriers in bringing recovered memory cases forward. In *W.K.L.*, the Court took into account the role the perpetrator may have played in delaying the reporting of incest, through intimidation, threats¹², etc. In essence, if the perpetrator had a role in delaying the disclosure of the incident(s), then it would be unfair to let him or her benefit from these tactics by not allowing the case to proceed based on the passage of time. Whether the 'delay' in disclosure is caused by threats or intimidation by the perpetrator or by the suppression of the memories by the victim, due to the trauma inflicted by the perpetrator, either can be attributed to the

perpetrator's actions and thus, the statute of limitations cannot stand. As Mr. Justice Stevenson noted in this case:

In the United States, many states have enacted legislation modifying or extending the limitation period for the prosecution of sexual abuse cases, in recognition of the fact that sexual abuse often goes unreported, and even undiscovered by the complainant, for years.¹³ (Emphasis original).

It was held that the Crown could proceed with its case against the alleged perpetrator of a 30-plus year old crime. In his written reasons, Mr. Justice Stevenson further noted that, "if proceedings were to be stayed based solely on the passage of time between the abuse and the charge, victims would be required to report incidents before they were psychologically prepared for the consequences of that reporting."¹⁴

The following year the Supreme Court handed down a decision in a civil case, *K. M. v. H. M.*¹⁵, involving similar issues. In this case, which again is not specific to incidences of recovered memories but is relevant as it also applies to the passage of time, the Court accepted that civil limitation periods should be extended for adult survivors of childhood sexual abuse. In fact, the Court went further than previous 'extensions' (where the statute of limitations did not start running until the survivor had reached the age of majority rather than accruing at the time of the incident)¹⁶, to hold that the limitations period "does not accrue until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and the plaintiff's injuries."¹⁷ In this case the plaintiff had continuous memories of abuse by her father but did not realize the extent to which it had damaged her in seemingly unrelated facets of her life until she was in her late twenties. The jury in a lower court had found that the respondent committed sexual assault on the appellant and assessed damages at \$50,000, but her

action was dismissed on the basis of a statute of limitation. The Supreme Court allowed her appeal. Perhaps the most pertinent statement on the issue of recovered memories contained in the majority's decision in this case is "a statute of limitations provides little incentive for an incest victim to prosecute his or her action in a timely fashion if the victim has been rendered psychologically incapable of recognizing that a cause of action exists."¹⁸

Although this case was not specifically on the subject of recovered memories, Mr. Justice LaForest did mention trauma-induced amnesia specifically several times in the judgement. He noted that "the classic psychological responses to trauma are numbing, denial and amnesia,"¹⁹ and accepted that civil limitation periods may be extended because "(m)any, if not most, survivors of child sexual abuse develop amnesia that is so complete that they simply do not remember that they were abused at all."²⁰

In essence, in these two cases the Court paved the way for cases based on recovered memories of childhood sexual abuse in two important ways by recognizing the validity of the concept of memory dissociation and acknowledging that the nature of the act often contributes to impermanent memory loss. Further, the removing of the statute of limitations problem was an equally important step in the ability of survivors to have their cases heard by the courts. Previously it is likely that the statutes of limitations barrier may have denied the survivor the opportunity to bring her case to court through no fault of her own and rewarded the perpetrator for his role in the delayed recall of these memories. While not entirely 'on point', it can be argued that these two cases removed the barriers to the bringing forward of recovered memory cases.

2. Criminal Cases

A 1994 case in Ontario demonstrates the caution with which judges generally proceed when faced with circumstances involving recovered memories. In *R. v. E.F.H.*²¹, a 27 year-old woman undergoing therapy for anxiety and depression after the birth of her child, recovered memories of sexual abuse by her father, for which he was ultimately convicted. While this clear acceptance by the court of the existence of true recovered memories might appear promising to survivors and their supporters, it should be noted that there was ample corroborating testimony in this case. Mr. Justice Stortini explicitly accepted the concept of memory dissociation of childhood sexual abuse. He noted as well, however, that:

there is also the phenomenon known as false memory disorder. In some cases individuals come forward with allegations of **remembered** childhood abuse without basis. The main cause of this event is faulty therapy. If the therapist concludes that the client's problems are a result of childhood abuse, and pursues that with the client with intensity over a long enough period of time, the client or patient can come to adopt the idea as a recollection or memory²² (Emphasis original).

While recognizing the possibility of both dissociation and 'false disclosure disorder', the judge was ultimately persuaded that the allegations in this case were not the result of false memory disorder. A number of factors aided in his conclusion, such as:

1. expert evidence as to the non-suggestive nature of the complainant's therapy;
2. the accused's lack of credibility as demonstrated by his denial of other allegations that were supported by independent evidence;
3. corroborating testimony by the mother concerning blood stains on her then pre-pubescent daughter's underwear;
4. independent evidence of the father's abusive and violent behaviour; and
5. expert evidence from both the complainant's therapists and an independent recovered memory expert.

There was, then, a great deal of corroborative testimony.

Many recovered memory cases, while valid, will not have this kind or quantity of support. The conviction in *R. v. E.F.H.* was upheld by the Ontario Court of Appeal in a brief 1996 judgement. The Court of Appeal expressed in its judgement that “this type of case, perhaps more so than any other, carries with it the potential for a serious miscarriage of justice”²³ and praised Mr. Justice Stortini for recognizing the inherent frailties associated with recovered memories and seeking out “confirmatory evidence designed to restore his trust in the complainant’s testimony.”²⁴ While a ‘victory’ for this particular complainant and others with similarly supported cases, this case could be followed as meaning that a conviction demands this quantity and quality of corroborating evidence.

Another case heard the same year did not require this amount of corroborating evidence in order to secure a conviction. In *R. v. Francois*²⁵ a jury convicted a man accused of repeatedly raping a teenaged girl ten years earlier. The now 23 year old had lost and then subsequently recovered memories of the attacks. The complainant testified that she had blocked out the memories and then recovered them in flashbacks. No expert testimony was heard and no independent corroboration was introduced. The Ontario Court of Appeal upheld the jury conviction and the Supreme Court subsequently dismissed the appeal, thereby upholding the conviction.²⁶ Professor Nicholas Bala, in examining this case, noted that the woman’s memories were recovered spontaneously rather than in the course of therapy. Further, the accused did not testify in his own defence. Both of these factors may have had some bearing on the jury’s decision.²⁷ I would add that the accused and the complainant were not related and so, some of the reasons why there would be an inclination to discredit the survivor’s memories were not present in this case. In dismissing the appeal, the Supreme Court was circumspect on the issue of

recovered memories. Madame Justice McLachlin wrote:

Without pronouncing on the controversy that may surround the subject of revived memory amongst experts, it is sufficient to say for purposes of this appeal that the jury's acceptance of the complainant's evidence . . . was not unreasonable. It was open to the jury, with the knowledge of human nature that it is presumed to possess, to determine on the basis of common sense and experience whether they believed the complainant's story of represses and recovered memory²⁸

A Manitoba case also decided in 1994 had almost the opposite result. Whereas the jury in *Francois* did not require much in the way of corroborative evidence in order to convict the accused, the judge in *R. v. R.L.B.*²⁹ accepted the assertions of the defence counsel that the complainant was 'delusional' and that her allegations were a 'product of her mind' even though the defence offered no expert testimony as to these contentions.³⁰ This 19-year-old complainant claimed to have recovered memories (in flashbacks, not in therapy) of sexual abuse by her father occurring on numerous occasions when she was a child of 15, four years previously. The lack of corroborating testimony does appear to have been a significant factor in this case. Professor Bala notes:

The judge's conclusion about "delusional" allegations in *R. v. R.L.B.* may be a little surprising in light of the absence of expert evidence, but the acquittal may reflect the nature of the onus on the Crown, as well as the difficulties of proving the validity of recovered memories of abuse.³¹

Although both *Francois* and *R.L.B.* were decided without expert testimony, this is not, however, the usual circumstance. Generally, both sides present expert testimony³² as illustrated in *R. v. Norman*³³, a 1993 case, where four experts were called. In this case a 31-year-old woman alleged that she had been raped at a church picnic at the age of thirteen. She had had no memory of the event until she entered therapy in her late twenties. The therapy was, at least partially, for emotional trauma she suffered from childhood sexual abuse committed by someone other than

the accused. Three witnesses were called by the prosecution, the first two being the woman's therapists. They testified as to her particular memory recovery process. The third witness was a psychiatrist who testified about dissociated memories, child abuse accommodation syndrome and post traumatic stress disorder. This expert had not examined the complainant. The defence's psychiatrist acknowledged that a dissociative reaction could produce memory suppression but also stated that memories recovered with the help of therapy "may or may not elicit real memories."³⁴ The trial judge convicted the man. However, the conviction was quashed by the Ontario Court of Appeal. Finlayson J. of the Appeal court took the path of caution with regard to recovered memories, as most of the judiciary has, and noted:

while the memory recovery process in young victims of sexual abuse is well recognized this does not mean that the trier of fact should not exercise caution. The fact that a psychiatric condition exists that could be responsible for the lack of memory for a long period of time does not relieve the trier of fact of his responsibility to satisfy himself to whether the accused committed the alleged criminal offence. The issue was not whether the complainant's memory was real or false but whether the Crown had made out its case against the accused³⁵

The Court of Appeal ruled that the trial judge had erred in considering the expert evidence as 'corroborative,' in the sense of being a 'confirmation of the truth of the recollections'. Also, there were some discrepancies between the evidence of the two psychiatric witnesses and the complainant's evidence as to the memory recall.

Nowhere, in any of these cases can an 'uncritical' acceptance into jurisprudence of recovered memories as per Alan Gold's letter to Justice Minister Anne McLellan³⁶, be found.

3. Civil Cases

The first successful civil suit in Canada based on recovered memories was decided in British Columbia in 1992. In *T.K.S. v. E.B.S.*³⁷, the judge accepted the complainant's recovered memories of childhood sexual abuse by her older cousin as valid. In this action for damages for personal injuries MacDonnell J. awarded to the plaintiff amounts for psychological and aggravated damages, compensation for her loss of income during the time she was dealing with the emotional trauma of the memory recovery process and for counselling expenses. The plaintiff, a 33-year-old woman initially recovered the memories spontaneously in flashbacks. However, the memories became more clear during therapy sought by the complainant as a result of the recovery process. There was corroborating testimony from the victim's family, including her sister and her cousin who had witnessed some of the incidents. Further an expert witness testified that the complainant had had psychogenic amnesia (now called dissociative amnesia) as a result of being in a dissociative state when the abuse occurred. The credibility of the parties was also an issue, at least for the judge, in this case. Mr. Justice MacDonnell found the complainant to be "honest and reliable"³⁸ whereas the defendant's denial of the allegations was found not to be credible. It was proven, among other things, that the defendant had lied about his professional qualifications and had cheated on his Bar Examination. The judge noted that his finding that the defendant was less than credible was "partially based on his failure to tell the truth about very fundamental things."³⁹

The judgement in a 1994 Ontario civil case, *Colquhoun v. Colquhoun*⁴⁰ demonstrates the importance that some judge place upon whether memories were recovered 'spontaneously' or in the course of therapy. Representing the plaintiff in this case was Toronto lawyer Susan Vella

who has written several articles on ‘false memory syndrome’.⁴¹ In this case, the father had previously pleaded guilty and been criminally convicted of fondling his teenaged daughter. The daughter then later commenced an action against her father for damages for the tort of incest, and in the alternative, damages for assault, battery, negligence and breach of fiduciary duty as well as special damages and exemplary punitive and aggravated damages. The case was based on the fondling incidents (which she had never forgotten) and a rape she alleged occurred on her 18th birthday. Memories of the rape were recovered in therapy at the age of 28. Corbett J. accepted that incidents of fondling had occurred and awarded the daughter \$65,000 in damages for that abuse. In assessing the validity of the rape allegations the judge noted that “there is a popular trend whereby some seek to characterize memories revived by a therapist as inherently unreliable or as part of a false memory syndrome.”⁴² While dismissing this trend as inappropriate and unhelpful, Corbett J. nonetheless cited the importance of ascertaining whether the remembrances in question during any case were “revived with the help of a therapist, during therapy, or were spontaneously remembered . . . in an attempt to discover any degree of suggestibility in the process.”⁴³ He found that there had been some elements of suggestibility in the ‘client-centred’ therapy received by the plaintiff and further noted that “such elements may not affect the beneficial nature of the therapy but must be considered in determining the reliability of memory at trial.”⁴⁴ Unfortunately for my research question, however, the judge chose not to rule solely on whether the plaintiff’s therapy was suggestive but noted that the plaintiff had consumed a quantity of alcohol on that occasion (which she stated were supplied to her by the defendant) and therefore her memory of the events could not be relied upon. Corbett J. ruled only on the battery and assault heads of damages, noting that they were sufficient to adequately compensate the

plaintiff and that the underlying objectives were met. Thus, the breach of the fiduciary nature of the relationship and the incestuous sexual assault were not examined. General damages of \$45,000 and special damages of \$19,218 (\$7218 for past and future therapy and \$12,000 for the plaintiff to upgrade her formal education) were awarded. No punitive or exemplary damages, which the plaintiff had specifically asked for, were awarded.

While judicial suspicion of memories recovered in therapy are common and understandable given the ongoing debate, Kathryn Belicki notes that if anything, sexual abuse is under suspected by therapists.⁴⁵ For example, in *T.K.S. v. E.B.S.* above, the plaintiff had tried to disclose her early sexual abuse to a psychiatrist, but her attempts were “unproductive.”⁴⁶ While caution on the part of judges is to be expected, the emphasis on the possibility of suggestibility again highlights the assumption that women and children are suggestible. I would refer the reader back to the study noted in Chapter Three where it was shown to be relatively easy to convince subjects that, as children, they had been lost in a shopping centre (a relatively common event) and very difficult to get them to believe they had been subjected to an anal enema.⁴⁷

Sexual abuse counsellors generally report extreme reluctance on the part of clients to accept that they had been abused as children. Counsellors are trained to not push clients, and to understand that such denial is common to many abuse victims who are just starting to recover memories. In fact, many survivors often think they are ‘going crazy’ when they start to recover such memories.⁴⁸ Professor Bala notes that *Colquhoun* illustrates the importance of having corroborative and expert testimony to support recovered memories although he concedes that this type of evidence is not always available.

B. Recovering Memories in Therapy

1. Access to Therapy Records

As noted above, a distinction seems to have been made in Canada between those memories that are recovered ‘spontaneously’ and those that are recovered with the aid of therapy. It appears that memories recovered in therapy are considered more suspect by judges because of the possibility of the complainant is ‘suggestible,’ and thus suffering from false memories.

R. v. O’Connor,⁴⁹ is perhaps the most widely known case having an impact upon (although not exclusive to) the recovered memory/false memory debate. This British Columbia case involved Patrick Hubert O’Connor who was charged with a number of sexual offences alleged to have occurred when he was a priest at a native residential school. The original trial was adjourned at the request of the accused as the prosecution would not authorize the release of the therapy records of some of the complainants. Crown counsel apparently considered the order to disclose such documentation as not adequately protecting the privacy interests of the complainants. Defence counsel argued that these records were essential for the accused to be guaranteed ‘full answer and defence’.

Asked to consider the issue of defence counsel’s access to the therapy records of sexual assault survivors, the Supreme Court of Canada held that a survivor’s therapy records could be disclosed to the defence when such records:

1. may contain information concerning the unfolding of events underlying the criminal complaint;
2. may reveal the use of a therapy which influenced the complainant’s memory of the alleged events;
3. may contain information that bears on the complainant’s “credibility, including testimonial factors such as the quality of their perception of events at the time of the offence, and their memory since.”⁵⁰

While *O'Connor* is not specific to recovered memory cases, it is arguable that the decision could have a great impact upon many recovered cases where memories are recovered in therapy. For example, reason 2 above could well be interpreted to include therapies such as hypnosis to aid memory recall. The courts seem to be particularly suspicious of memories recalled in this manner. Reason 3 is also troubling to survivors and their supporters. The nature of recovering memories is that they are at some time of 'low-quality,' that is to say they are not remembered at some point, then (often) hazily remembered, before full memory recall is available to the survivor. Further, many survivors doubt their own memories during the initial stages of memory retrieval, 'I must be making this up.' Any doubt expressed by the complainant in therapy would surely be seized by defence counsel. Katharine Kelly notes that there is an increased reliance on personal and therapy records in sexual assault cases. The following excerpt refers specifically to the sexual assault of adult women but the parallels are evident:

These records are used to discredit the primary witness. Their use reflects a range of gender-biased social myths under the guise of scientific fact or medical evidence. The strategy works because it ties our socially constructed mechanisms for assessing conflicting or contested accounts of events to gendered myths about women, mental health, and rape. The defence strategy is to argue that the primary witness' "assault" complaint is the product of defective mental abilities or suggestions by therapists. Alternatively, the records are probed for personal details that will embarrass or humiliate the primary witness to such an extent that she will not proceed.⁵¹

The majority in *O'Connor*, however, seem to minimize this possibility.

The majority in *O'Connor* noted that in *R. v. Osolin*⁵², the Court recognized the importance of ensuring access to the kind of information at issue in this case. In *Osolin* an adult sexual assault victim expressed, in therapy, some concerns that she may have provoked her attacker to some extent by her attitude and behaviour. A new trial was ordered as the accused

had been denied an opportunity to cross-examine regarding the psychiatric records of the complainant.⁵³ Cory J.'s written reasons in *Osolin* are quoted with approval in *O'Connor*:

...what the complainant said to her counsellor . . . could well reflect a victim's unfortunate and unwarranted feelings of guilt and shame for actions and events that were in no way her fault. Feelings of guilt, shame and lowered self esteem are often the result of the trauma of a sexual assault. If this is indeed the basis for her statement to the counsellor, then they could not in any way lend an air of reality to the accused's proposed defence of mistaken belief in the complainant's consent. However, in the absence of cross-examination it is impossible to know what the result might have been.⁵⁴

Allowing the defence access to such private details of the victim's 'shame' and traumatization is, in essence, allowing the accused to relive his crime again. Apart from this further violation of the victim, there are a number of problems I can see occurring with this analysis. First, I am certain that statements by the victim about her own doubts about her memory can indeed 'lend an air of reality' to the accused's contention that he had an honest if mistaken belief in the complainant's consent. Secondly, the sexual assault of a grown woman, with continuous memory may indeed produce feelings of shame and guilt (given societal and legal reaction to such incidents). However, rarely is the victim wondering if the incident actually occurred or whether it is a figment of her imagination. Such second-guessing of oneself, however, is extremely common in recovered memory cases. Although *O'Connor* does not necessarily involve 'false memory' claims directly, the ruling would almost certainly be applied to cases where the accused demands therapy records in such cases. How can a witness expressing to her therapist that she 'must be making it up' not 'lend an air of reality' to the accused's false memory defence?

Other commentators, such as law professor Karen Busby, have noted the likelihood of

O'Connor being applied to 'false memory' cases, writing that the tactic of seeking access to complainants' personal records has "burgeoned following the 1992 passage of Bill C-49 (which restricts questioning of complainants about their sexual history) and, more recently, with the growing public and judicial interest in "false memory syndrome."⁵⁵

The end result in *O'Connor* was the establishment by the court of a two-part process whereby the accused would have to first establish that the records in question were likely relevant, and if so, the records would be turned over to the trial judge for review. The trial judge would then weigh the deleterious and salutary effects of disclosure to the accused.

The Court was deeply divided in *O'Connor*. Although all nine judges agreed that an accused has a qualified right of access to a complainant's counselling records held by a third party, the court split 5-4 "on the nature and sequences of the tests to be applied . . . in determining which records should be produced . . . , as well as the nature of the burden placed on an accused who must establish the relevance of the records"⁵⁶ Madame Justice L'Heureux-Dube submitted a lengthy written dissent from the majority, asserting that therapeutic records will only be relevant to the defence in rare cases. She contended that the persuasive burden on the accused was 'significant' and that simply invoking the credibility of the complainant 'at large' would not be sufficient. The majority, on the other hand, found that the onus on the defence should be low, at least for production, as the accused would not at that stage know what was contained in the record.⁵⁷ Further, as Library of Parliament researchers Kirsten Douglas and Marilyn Pilon note:

The majority went a step further in finding that, given the Crown's duty of disclosure, there are no privacy issues to balance once third-party records have been provided to the Crown. Moreover, because the relevance of therapeutic records must be presumed where they are in the hands of the Crown, the majority agreed that those records can be withheld from the defence only if they are clearly

irrelevant or subject to some form of public interest privilege, for which the burden of proof rests with the Crown.⁵⁸

Madame Justice L'Heureux-Dube was not the only Supreme Court Justice who disagreed strongly with the majority opinion. While the majority held that "since the right of the accused to a fair trial has not been balanced with the competing rights of the complainant to privacy and to equality without discrimination in this case, a new trial should be ordered,"⁵⁹ McLachlin J., writes eloquently:

The test proposed [by L'Heureux-Dube] strikes the appropriate balance between the desire of the accused for complete disclosure from everyone of everything that could conceivably be helpful to his defence, on the one hand, and the constraints imposed by the trial process and privacy interests of third parties who find themselves caught up in the justice system, on the other, all without compromising the constitutional guarantee of a trial which is fundamentally fair. The Charter guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like the complainants and the agencies which assist them in dealing with the trauma they may have suffered. What the law demands is not perfect justice, but fundamentally fair justice.⁶⁰

Busby also highlights some issues in *O'Connor* which specifically point to its relevance to recovered memory cases include the majority's statement that records may be relevant if "they reveal the use of therapy which influenced the complainant's memory of the alleged events."⁶¹ She writes that such statements reflect the majority's skepticism of recovered memories, while failing to note that criminal prosecutions of such cases are rare, and further that "more insidiously, the majority reasons also partake in the growing popular belief in the "Bad Therapist": that counsellors, particularly feminist counsellors are ideologically committed to forcing their clients into believing they have been abused."⁶² The myth of the 'Bad Therapist' has "some popular credibility but very little empirical support"⁶³ and was "plucked out of the

air”⁶⁴ in *O'Connor* as no allegations to this effect were made in the case. Busby notes that she is troubled by the mere fact that the Court was considering this belief “given the Court’s oft-stated reluctance, even refusal, to consider issues absent a factual basis.”⁶⁵ She picks up Dr. Kristiansen’s point⁶⁶ from Chapter Three that discriminatory beliefs about women are involved in the acceptance of ‘false memory syndrome’. She states:

the use of personal records in sexual violence cases invokes particular social constructs about women and children who allege sexual violence. Most importantly, such use engages the belief that women and children frequently and uniquely lie about sexual violence out of vindictiveness, fantasy or delusion.⁶⁷

The positions taken by both sides of the Court in *O'Connor* were echoed again in February 1997 in *R. v. Carosella*⁶⁸, with the same nine judges splitting along the same majority and minority lines. However, the make up of the Court has since changed. It is not known what the leanings of the two new justices, Michel Bastarache and Ian Binnie, are on this matter so it remains to be seen what the Court will hold in future cases on these points.

It is unfortunate that on the actual subject of recovered memories, the Supreme Court has thus far been extremely vague. In order to reach the decision that it did in *O'Connor*, the Court must have considered the idea that some recovered memories may be false and, indeed ‘created’ in therapy. However, in no cases concerning these issues has the Court referred to any literature or cases to support this allusion. Professor Nicholas Bala states, “(f)or lawyers, judges, and scholars, it is a little disappointing that the references to both recovered and false memories in the Supreme Court have been so brief, but it is clear that the Court has accepted the existence of both.”⁶⁹

The legislature, however, has not been so about circumspect about its reasoning. In 1997,

the Parliament of Canada passed Bill C-46, an act to amend the Criminal Code regarding the production of personal records of complainants and witnesses in sexual offence proceedings. These amendments would put tighter controls on the requirement of the prosecution to produce the survivor's personal records than did the Supreme Court in *O'Connor*.⁷⁰ As might be expected, turmoil followed.

The next section examines the battle over the passage of Bill C-46 and the resulting legal quagmire, including another case, *R. v. Mills*,⁷¹ that has gone to the Supreme Court subsequently on similar issues.

2. The Political Landscape

During second reading of Bill C-46 in early 1997, Mr. Gordon Kirby, Parliamentary Secretary to the Minister of Justice and the Attorney-General of Canada was at pains to point out that Bill C-46 was not, as some critics had contended, "simply a knee jerk reaction to the Supreme Court's decision . . . in *O'Connor*."⁷² He noted that the trend toward the seeking of private records had started several years earlier and was brought to (then) Minister of Justice Allan Rock's attention by women's groups in 1994.⁷³

Bill C-46 came into force on May 12, 1997. It does not completely prohibit the production of records but applies a more stringent test to determine whether and to what extent the production of such records should be ordered, in effect curbing the ruling in *O'Connor* which gave judges wide discretion in what courts should see.

The preamble of the Bill states that Parliament recognizes that compelling the production of personal records may have several detrimental effects. It may deter the reporting of sexual

offences and also may stop complainants from seeking necessary treatment, counselling or advice. It may hinder the provision of services and assistance to victims by professionals. For example, orders to produce records increase rape crisis centres' legal and administrative costs, thereby reducing their ability to provide counselling services.

The Bill's preamble further states that sometimes the production of such records may be necessary for a full defence and also that production may breach the complainant's rights to privacy *and equality*. Therefore, the determination as to whether to order production should be subject to careful scrutiny. As such, an accused who seeks production must make an application,⁷⁴ in writing, to the judge before whom he or she is being tried. The accused must establish the grounds upon which they seek production and must name the person in possession or control of the record.⁷⁵ A list of insufficient grounds is established so as to limit judicial discretion as to what is 'relevant.'⁷⁶ The judge must hold an in-camera hearing to determine whether to order the production of such records or information. The complainant or complainant's witness, the person having possession or control of the record, and any other person to whom the record relates may appear at this hearing. The judge may then order the production of the record for review *if the application was made in accordance with subsections 278.3(2) to (6) of the Criminal Code and if the accused has established at the in-camera hearing that the record is likely relevant to an issue at trial or to the competence of a witness to testify.*

Factors that a judge must take into account in determining whether to order production of the record are:

- a) the extent to which the record is necessary for the accused to make a full answer and defence;
- b) the probative value of the record;

- c) the nature and extent of the reasonable expectation of privacy with respect to the record;
- d) whether production of the record is based on a discriminatory belief or bias;
- e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
- f) society's interest in encouraging the reporting of sexual offences;
- g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
- h) the effect of the determination on the trial process.⁷⁷

If the judge does then order the production of the record, or part of the record, for review, he or she must review it in the absence the parties involved in the case. Where a judge finds that the record is likely relevant to an issue at trial or to the competence of a witness to testify, he or she must consider, when determining whether to turn the record over to the defence, the 'salutary and deleterious' effects of the determination on the accused's right to make full answer and defence and on the right to privacy and equality of the complainant or witness and any other person to whom the record relates. The judge shall particularly take into account the factors specified in subsections 278.5(2)(a) to (h) above. Where production to the defence is ordered the judge may impose conditions of the production so as to 'protect the interests of justice and, to the greatest extent possible, the privacy and equality interests' of the complainant, witness or other person to whom the record relates⁷⁸ by editing or other such means. Further, the judge must provide reasons for his or her decision to order or refuse to order production.

Since its passage, Bill C-46 has had a number of challenges, both legal and political. The most significant of the legal challenges is Alberta judge Paul Belzil's ruling in *R. v. Mills*⁷⁹ that the amendment is unconstitutional in that it protects the rights of victims over the rights of accused persons. Again this case is not specifically 'on point' in that it does not deal with facts where recovered memories are involved. Nevertheless, because it deals with the production of

therapy records to the defence, it will likely have an impact upon many cases where memories were recovered in therapy.

In this case defence counsel argued that Bill C-46 is unconstitutional in that it is in violation of subsections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* (hereinafter the *Charter*). Impairing the accused's ability to make full answer and defence deprives the accused of his constitutional right to a fair trial argued defence attorney Denis Edney. Alberta Court of Queen's Bench Justice Paul Belzil was sympathetic to this argument.

He notes:

Furthermore, the practical problem arises that because the accused is never allowed unfettered access to the records, how could the accused ever know whether or not his access to records using the procedures under Bill C-46 would differ in result if he made an application pursuant to the majority judgement in *R. v. O'Connor*. . . . This is distinctly unfair to an accused and puts the accused in an impossible situation.⁸⁰

In essence, Belzil J. upheld the majority decision in *O'Connor*, which he notes is "a very recent decision of the Court and involves a decision which is directly on point."⁸¹ He then proceeded to go through the reasoning of the majority in *O'Connor* approvingly and particularly noted that the Court stated, "it must be recognized that any form of privilege may be forced to yield where such a privilege would preclude the accused's right to make full answer and defence."⁸² He also endorsed the majority reasoning in *O'Connor* whereby it is presumed that if records are in possession of the Crown, they are relevant to the accused's defence as "generally speaking, the Crown would not obtain possession or control of therapeutic records unless the information the records contained was somehow relevant to the case against the accused."⁸³ *O'Connor*, he contended, required a balancing of the rights of the two parties whereas Bill C-46 tilts that

balance, creating a presumption against disclosure because the new law forced a trial judge to engage in this balancing without actually having seen the records.⁸⁴

The fallout from this case has been enormous. A month after this decision was rendered Madam Justice Sandra Chapnik of the Ontario Court's General Division explicitly stated in *R. v. Lee*⁸⁵ that she had followed Justice Belzil's reasoning in *Mills*.⁸⁶ She also held that the new Criminal Code provision violated the entrenched rights of an accused person under Sections 7 and 11(d) of the *Charter*. Her decision, of course, binds lower courts in Ontario and may also be persuasive in other General Division cases unless, or until, conflicting rulings are made.

Karen Busby was interviewed by the Globe & Mail newspaper as to her reaction to the recent decisions overruling the new law. She noted that Justice Belzil had explicitly relied on *O'Connor* in his decision in *Mills* and yet that decision was far from unanimous. She argues that the Supreme Court was 'badly split' in *O'Connor*, with four of the nine judges (including L'Heureux-Dube and McLachlin, I would add) dissenting. Those four judges did not rule out the possibility of records being ordered to be produced but noted that such records should be used only rarely because, in general, the defence lawyers' applications (to have the records produced) were based on discriminatory beliefs about women and children. Busby further argued that in the majority decision in *O'Connor* there was no mention of equality while the minority decision was based on the equality rights of women and children. As I noted above, Bill C-46 is explicit in its preamble that a major aim of the new legislation is the protection of the equality rights of women and children. Busby suggests that Parliament was trying to say, by enacting these amendments, that judges *do* have to consider equality. The actual Bill states:

Whereas the Parliament of Canada continues to be gravely concerned about the

incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual violence against women and children;

Whereas the Parliament of Canada recognizes that violence as a particularly disadvantageous impact on the equal participation of women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the Canadian Charter of Rights and Freedoms.⁸⁷

Busby argues that medical and psychiatric records are rarely requested in other types of cases and indeed, “courts have made it clear that lawyers cannot have access (to such records) in other cases.”⁸⁸ She notes in this newspaper article and the scholarly article discussed earlier⁸⁹ that such records seem to be of little concern in the courts except in those instances where the credibility of the complainant in a sexual assault case is tested and asks “why is it only the credibility of women in sexual violence cases that’s called into question?”⁹⁰ That such records are most often sought in sexual violence cases was also noted by the minority in *O’Connor*.⁹¹

In the first nine months of the new legislation’s life it was subject to more than 50 constitutional challenges in the courts.⁹² As of February 1998, two Alberta judges had struck down the law, judges in British Columbia and Saskatchewan had upheld it and numerous Ontario courts had reached conflicting verdicts. Due to the considerable uncertainty these conflicting rulings have inflicted upon the state of the law, both the federal and Alberta governments have asked the Supreme Court to resolve the issue. The Court agreed in February 1998 to conduct an early constitutional review by hearing an appeal of Justice Belzil’s ruling in *Mills*.⁹³ As of the writing of this paper in early 1999 a decision has yet to be rendered in the *Mills* case.

Of course, not all of the challenges to Bill C-46 have happened in the court room. As briefly touched on in Chapter Three, in 1998 Liberal backbencher John Bryden took on the passage of Bill C-46 as one of his projects. Bryden, member of Parliament from Hamilton-

Wentworth, is no stranger to controversial causes having taken on the 'charity industry' in 1996.⁹⁴ Although a Liberal member of Parliament, Mr. Bryden has populist political leanings more consistent with that of the Reform Party.⁹⁵ His particular opponent is what he calls 'special interest groups.' This animosity arose when Bryden first arrived on Parliament Hill and perceived that political lobby groups had more power than a single backbench MP. He was, in his own words, "in severe competition to be heard."⁹⁶

In a letter to Minister of Justice Anne McLellan dated September 24, 1997, Bryden asked the Minister not to contest Justice Paul Belzil's ruling in the *Mills* case that Bill C-46 is unconstitutional. Bryden had fought the legislation vigorously in the spring of 1996 on the grounds that:

the phenomenon of implanting false memories by therapists and psychiatrists was well recognized in the scientific literature, and that there had been a number of grievous miscarriages of justice in the United States as the result of courts accepting the testimony of alleged victims of sexual abuse who, in fact, were victims of the suggestions of their therapists.

Moreover, Bryden contended, most people 'who are versed in the traditions of justice' would see that restricting the right of an accused to defend himself or herself is a denial of natural justice. He noted, as support for his own position, that the Criminal Lawyers Association and the Canadian Council of Criminal Defence Lawyers had both condemned the proposed legislation at committee hearings. Marvin Bloos, Chair of the Canadian Council of Criminal Defence Lawyers, in opposing this legislation claimed:

We're not talking about a rare case where there might be a miscarriage of justice. We're talking very high numbers of potentially untrue allegations. That's why the balance, which I think was effectively reached by the Supreme Court in *O'Connor*, must be maintained, and that's why this legislation, in my opinion, goes too far.⁹⁷

Of course, a criminal defence lawyer opposing this legislation is to be expected. It should be emphasized again, however, that far from ‘very high numbers of potentially untrue allegations’, in actuality (as discussed earlier) it is likely that only a very small number of ‘false’ allegations are brought to the justice system. My sense is that Bloos must know this and that the access to records issue is simply new way for defence attorneys to challenge the credibility of complainants.⁹⁸

Bryden is, of course, not the only Member of Parliament to question the veracity of recovered memories. During second reading of the Bill, MP Diane Ablonczy noted that while she and her Reform colleagues:

do approve [contingent upon further examination of the provisions] of the balance that has been reached in Bill C-46 . . . there have certainly been instances where complaints that sexual offences have taken place have been brought fallaciously, frivolously, with malice, for reasons of revenge, personal advantage or, in some instances, due to something called **false memory syndrome**.⁹⁹ (Emphasis added).

Ms. Ablonczy refers again to ‘what is now called false memory syndrome’ several minutes later during Bill C-46’s second reading. Mr. Bryden refers to false memory syndrome on numerous occasions as do other Members.¹⁰⁰ I think there is no better example of how this concept has permeated our popular consciousness than the fact that the existence of this ‘syndrome’ is now bandied about, uncritically, in House of Commons debates.

In response to Bryden’s letter, Minister of Justice Anne McLellan wrote that she did indeed intend to join in the leave application to the Supreme Court in the *Mills* case as an intervenor. While announcing her intention to defend the legislation however, Minister McLellan is not entirely dismissive of Bryden’s concerns about false memory. She writes:

The Criminal Code does not prohibit the production of records. Several recent decisions are, in my view, based on an improper interpretation of the legislation. I am confident that, should the Supreme Court of Canada grant the leave application and hear the complainant's appeal and the submissions of the intervenors, the Supreme Court will agree that Parliament has comprehensively and appropriately dealt with the issue of the production of complainants' records in accordance with the Canadian Charter of Rights and Freedoms.

I appreciate your concerns regarding the legislation, particularly due to one of your constituents regarding alleged "false memories." A parliamentary committee explored these concerns and reviewed material provided by Dr. Harold Mirsky, who appeared before the Committee.

For your information, I enclose a letter I recently sent to the president of the Criminal Lawyers Association . . . indicating that I intend to raise the issue of "repressed or recovered memory syndrome" with my provincial and territorial colleagues when I meet with them this fall.¹⁰¹

3. The Legal Consequences for Therapists

Recently, in the United States, there has been an important development in the area of civil liability. More of an American phenomenon than a Canadian one (thus far), some former patients have sued their therapists for the therapist's "role in inducing memories that patients later concluded were false."¹⁰² Occasionally, therapists have also been held liable directly to parents found to be falsely accused.¹⁰³ While this is a new, albeit related, issue to be introducing at this point, I believe it is relevant in that the threat of legal action against therapists who work with survivors may have the effect of further limiting survivors' legal claims. While most survivors recover memories prior to entering therapy, it is conceivable that the help and support received during therapy may assist some survivors in pursuing their cases at a later date. Further, those survivors that do recover their memories in therapy would be, at the least, delayed in bringing their claims forward. Regardless, limiting the supply of therapists willing to work with survivors because of the threat of legal action can be seen as damaging and silencing for

survivors.

In an Illinois case, *Sullivan v. Cheshier*¹⁰⁴, the phrase ‘false memory syndrome’ was uncritically accepted by the judge. He further stated that because the alleged survivor, Kathleen Sullivan, told her parents she would cut off communications with them if they did not accept her memories of abuse by an older sibling, “the jury could infer that the memories were false and intentionally or recklessly implanted by Cheshier.”¹⁰⁵ This, despite the fact that both Dr. Cheshier and his patient, Kathleen Sullivan, denied that he had implanted the memories and that an independent psychologist testified that the two had a ‘good therapeutic relationship.’

To date there are no reported decisions in Canada although in 1993 several people from Parry Sound, Ontario did launch a civil suit against a psychologist.¹⁰⁶ But there is at least a theoretical liability for the therapist who fails to take reasonable steps to be educated about these issues and does not incorporate reasonable measures to address these issues in therapy. The therapist must be negligent or fail to follow accepted professional standards before liability would be imposed.¹⁰⁷ Even in the absence of reported decisions, however, the spectre of being sued by either the parents of a patient or by a former patient (a ‘recanter’) must enter the minds of therapists.

Whilst the legal community and other concerned parties wait for the *Mills* decision to be handed down, the courts have been busy hearing other cases on child sexual abuse and ‘false memory syndrome.’ The fact that this phrase is used so indiscriminately in judgements is telling in itself.¹⁰⁸ In one recent case that survivors and their supporters would likely find particularly distressing, the plaintiff was found not to be credible or reliable apparently because she had been diagnosed with dissociative identity disorder (DID) (formerly known as multiple personality

disorder or MPD). This woman alleged that she had been abused by her sister's ex-husband. The defence claimed that she was suffering from false memory syndrome and brought in an expert who testified that persons with DID are very vulnerable to suggestion. The plaintiff alleges that her memories were recovered before she went into therapy and that during her therapy no memory enhancement techniques were used. Her action was dismissed and further, Stromberg-Stein J. asserted that "the court accepted the expert evidence of psychiatrists that recovered memories are inherently unreliable since it is difficult to distinguish true memory from false memory."¹⁰⁹ It is difficult to distinguish lies from truth in any type of case but presumably judges must feel they are able to do this in order to do their jobs. This case is distressing for a number of other reasons. First, the judge's statement that 'recovered memories are inherently unreliable' is questionable in that, as discussed earlier *all* memories are subject to degradation and distortion. Secondly, it seems as though this woman is being held to be unreliable/not credible because of a disorder that is not unusual to survivors of childhood sexual abuse. The Supreme Court in *R. v. W.K.L.*¹¹⁰, discussed earlier, took into account the role the perpetrator may have had in the delayed recall of the abuse in extending the statute of limitations for recovered memory/delayed discovery cases. To do otherwise would be rewarding the perpetrator for his role in the amnesia, the Court held. This case is based on similar issues, in my opinion. If, as is likely,¹¹¹ this woman has DID due to the fact that she was abused as a child then it hardly seems just to use this against her in finding her, and thus her testimony, unreliable.

Thus far this paper has examined 'the law' as it has taken shape to this point in time. It seems that North American courts, at least, have accepted the existence of both recovered memories and some sort of false memory disorder. The result is a quintessential 'liberal' stance

by the judiciary that each case must be examined upon its own merits. This leads this writer to believe that whatever the Supreme Court decision concerning the constitutionality of Bill C-46, the matter will be battled out in the courts, and even more so in the media, for some time to come. While it is true that very few cases of child sexual abuse ever make it to the courts in the first place, the law is still an important arena of contestation in that it transmits, as Gusfield would argue, cultural beliefs about certain behaviours to the population.

IV. The Utility of Legal Engagement

Many feminist and anti-racist authors have written about the dangers of using the law, with its claims to ‘objectivity’ to fight for equality and justice for oppressed groups.¹¹² Firstly, the law is an adversarial system. There are winners and losers. With any two unequally situated parties, this is a problem. But for the adult survivor of childhood sexual abuse whose *own* belief in her memories may be fragile, the adversarial nature of a trial can take on a nightmarish quality. Also, what if she loses? Will not being believed damage her? Armstrong asks, even if she ‘wins’, is justice served anyway? In a criminal proceeding, if the offender is still a danger to children, *if* the offender had to serve jail time, the survivor may have the satisfaction of knowing that at least she got him ‘off the streets’ and away from children for a time. But in a civil trial, there is not that satisfaction. Which begs the question: what is the goal? Is it perhaps that another person will say “it’s official. He did it?”¹¹³

Another disturbing issue is that under successful civil law actions the tendency is that the more damaged the victim can prove she or he has been by the tortfeasor, the more money she or he is awarded in damages. But, as Louise Armstrong asks, “how much damage do you have to

prove to say that parental-child rape is serious?”¹¹⁴ While the negation of a childhood sexual abuse survivors’ victimization is something that feminists wish to eradicate, is it wise to place so much emphasis on the damage inflicted? Without negating the damage done, is it necessary to frame survivors as mere victims? Moreover, is it conceivable that an emphasis on ‘damage’ will inadvertently set survivors up in competition with each other (e.g., ‘I am more damaged than her, so I should get more damages’?)

Some researchers suggest that litigation has helped to fuel the backlash. As Library of Parliament researcher Patricia Begin notes:

It has been suggested that the false memory controversy and the False Memory Syndrome Foundation emerged in the context of increased litigation launched against abusers. In fact, the public campaign to discredit recovery therapy and therapists was coincident with successful challenges to laws by adult survivors of child sexual abuse regarding the accountability of perpetrators. In November 1993, a year after the Supreme Court of Canada had ruled in *K.M. v. H.M.*, the Criminal Lawyers’ Association held a three-day conference on the false memory syndrome in Toronto. Many of the presentations and lectures dealt with defending an accused against allegations of sexual abuse by focusing on the fallibility of human memory.¹¹⁵

As noted in Chapter Three, Armstrong also postulates that litigation, particularly civil cases (i.e., for money damages), are what fuelled, at least in part, this ‘backlash’ against sexual abuse survivors and their supporters. She notes that, “(a)t bottom, one main trigger for the backlash that brought us into this morass was that well-known emotional catalyst, money.”¹¹⁶ Armstrong says that this was exactly the intent of survivors, to get their abusers ‘where it hurt,’ in the wallet. While this is understandable, especially say, to a woman whose abuser has laughed at her in private confrontations, Armstrong notes that survivors and their supporters were not organized for the kind of reaction that they should have expected.¹¹⁷ Further, she worries that

should there be a settlement, the survivor will likely be barred from disclosing the sum of the settlement and talking publicly about the abuse at all. Ironically then, instead of ‘breaking the silence’ around the abuse, the survivor is remaking it for herself.¹¹⁸ Armstrong is not against civil suits as part of the remedy but notes that:

the combination of a practical threat of retaliation (*civil law suits for damages*) and the absence of a larger political understanding and force simply served to step up the backlash vigour - without leading to moral engagement.¹¹⁹ (Clarification added)

Like Armstrong, I am not against the filing of civil suits *per se*, but cannot see the utility of such a strategy without a larger political understanding of the issues, such as the one employed by Busby or Vella, particularly given the strength of the backlash.

V. Conclusion

While some survivors, particularly those with heavily supported cases and an unlikeable/unrelated defendant, may find what they are looking for in the justice system; it is likely that the majority (due to case attrition and unfavourable results) of plaintiffs will be disappointed with outcomes. For feminists, sexual assault centre workers, therapists and other anti-child abuse advocates, this is a situation rife with ethical considerations. While such activists cannot afford to give up the law as a site of social struggle and contestation, given the cultural meanings and embodiment of ‘truth’ that law has in society, it is necessary that appellants and their supporters have a political understanding of the issues in order that a court room loss does not inflict damage on them. Advocates must refrain from letting frustration overwhelm them. A high profile case, even if it does not go the ‘right’ way, is still an

opportunity for a widening of the discourse.

Widening the discourse is all that the law can do for the vast majority of survivors. The law cannot prevent child sexual abuse. Most offenders are well aware that what they are doing is legally (and morally) wrong. At the present time it seems that ‘false memory syndrome’ has entered the public consciousness characterized as though it were a fairly common occurrence. Counter-hegemonic efforts must be aimed at educating the public and members of the justice system as to how rare false memories of childhood sexual abuse really are and why society has been so willing to accept this ‘solution’ to the problem of child sexual abuse.

While feminists and other anti-child abuse advocates are trying to socially construct (or, more accurately perhaps, trying to protect the social construction of) sexual abuse as a public problem, it seems that FMS proponents are equally trying to socially construct ‘false memory syndrome’ as a public problem.

Throughout this chapter evidence of the social construction of child sexual abuse and, conversely, of ‘false memory syndrome’ as public problems has been seen in the legal arena. For example, the ‘law’ has been followed from attempts in the 1980s and early 1990s to lift barriers to the bringing forward of recovered memory cases to it’s now (in the mid to late 1990s) more cautious handling of recovered memory cases. The use by criminal lawyers’ associations of socially constructed beliefs about women, such that “women and children frequently and uniquely lie about sexual violence out of vindictiveness, fantasy or delusion”¹²⁰ emphasize Kristiansen’s points in Chapter Three that attitudes toward women are likely to influence beliefs about the veracity, or lack thereof of recovered memories. Similarly, Pfohl’s discussion about who is considered deviant may be recalled in cases such as *R. v. R.L.B*¹²¹ where the plaintiff was

characterized as delusional by defence counsel and the judge with no explicit evidence as to such claims.

Law has a legitimating function, as well as an instrumentalist one, as also discussed by Gusfield in Chapter Two. The fact that sexual abuse cases are coming to the courts more often in the last decade (due, in part, to the removal of the statute of limitations barrier perhaps) demonstrates that, in many respects, child sexual abuse is now constructed as a genuine public problem to be so recognized by the courts. However, what does the Supreme Court's ruling in *O'Connor* 'say' about women who have received therapy? Does it legitimate the view, put forward by criminal defence lawyers and their associations, that such women should not be believed because they are 'suffering from a mental lapse' or that they are 'suggestible'? Busby's remarks concerning the implicit acceptance of the false memory hypothesis (and specifically of the 'Bad Therapist' thesis) in *O'Connor*¹²² where the majority judgement stated (even though there were no false memory allegations introduced in this case) that records may be ordered to be produced "if they may reveal the use of therapy which influenced the complainant's memory of the alleged events"¹²³ are relevant.

Although most cases of recovered memories of childhood sexual abuse do not result in court action, clearly the legitimating function of 'law' such as that made by the Supreme Court in *O'Connor*, that made by the legislature in Bill C-46, and that about to be made by the Supreme Court in *Mills* are an important contributor to public consciousness around the recovered memory/false memory debate.

The conclusion to this thesis project follows and will continue to link the themes from each of the previous chapters. Although this is a 'Legal Studies' thesis, students of such a degree

are taught that 'law' does not 'happen' in isolation from society and, therefore, that 'hegemony', 'popular consciousness' or the social construction of the 'dominant reality' must be examined in order to understand changes in the law. However, it must also be realized that law, due to its communicative or symbolic function as discussed by Gusfield, can have a role in the creation and maintenance of such 'reality'.

Endnotes - Chapter Four

-
1. Joseph R. Gusfield, The Culture of Public Problems: Drinking-Driving and the Symbolic Order (Chicago, Ill.: University of Chicago Press, 1981) at 113.
 2. Ibid., at 114.
 3. Patricia Begin, "Child Sexual Abuse: The Recovered Memory/False Memory Debate", Background Paper BP-391-E, Research Branch, Library of Parliament, Political and Social Affairs Division, November 1994 at 2.
 4. Gusfield, supra note 1 at 146.
 5. Ibid., at 148. Gusfield is quoting Thurman Arnold, The Symbols of Government (New York: Harcourt, 1962) at 152-54.
 6. Ibid., at 148.
 7. See Carol Smart, Feminism and the Power of Law, (London: Routledge, 1989) at 53. Previous to this Act, it was possible to prosecute fathers for having intercourse with girl children under the age of 16 under the 1885 Criminal Law Amendment Act, but the limited scope of this legislation meant it was not particularly useful. For example, charges had to be brought against the offender within three months of the occurrence and, further, parental permission was required for a medical examination of the child.
 8. Ibid.
 9. Nicholas Bala, "False Memory Syndrome: Backlash or *Bone Fide* Defence?" (1996), 21 Queen's Law Journal 423 at 448.
 10. For example, Bala ibid., and Nathalie Des Rosiers, "Limitation Periods and Civil Remedies for Childhood Sexual Abuse" (1992), 9 Canadian Family Law Quarterly 43.
 11. [1991] 1 S.C.R. 1091.
 12. For example, telling the child that disclosure may cause the suicide of the child's mother, family break up and death threats. See *K. M. v. H. M.* [1992] 3 S.C.R. 6
<<http://www.droit.umontreal.ca/doc/csc-scc...c-scc%2Fen%2Findex.html&range=5&numdoc=48>> 22 December 1998 at 8.
 13. *R. v. W.K.L.*, supra note 11 at 1101.
 14. Ibid.
 15. *K.M. v. H.M.* supra note 12.

16. In the U.S., most states have general ‘minority tolling’ doctrines whereby the statutes do not begin to accrue until the injured party has reached the age of majority when the complainant then has three years to bring a claim. However, some states have extended minority tolling provisions for child sexual abuse survivors. For example, in Connecticut, sexual abuse claims must be brought within 17 years of the victim’s age of majority. Further “delayed discovery” doctrine provisions have been instituted by legislatures and by courts whereby the statute of limitations does not accrue until the delayed discovery of the injury (i.e. the recovery of the repressed memory). See Susan K. Smith, “Remedies for Victims of Sexual Abuse” <<http://www.smith-lawfirm.com/remedies.html>> 27 Nov 98 at 2.

17. *K. M. v. H. M.* supra note 12 at 2.

18. Ibid.

19. Ibid., at 17.

20. Ibid., at 36, per LaForest J. quoting J. Lamm, “Easing Access to the Courts for Incest Victims: Towards an Equitable Application of the Delayed Discovery Rule” (1991), 100 Yale Law Journal 2189 at 2194.

21. [1994] O.J. 452 (QL) DRS 94-09118, affirmed [1996] O.J. No.553

22. Ibid., at para 35.

23. Ibid., at para 26.

24. Ibid., at para 10.

25. [1994] 91 C.C.C. (3d) 289.

26. *R. v. Francois* [1994] 2 S.C.R. 827.

27. *Bala*, supra note 9 at 444-445.

28. [1994] 2 S.C.R. 827 at 840, as quoted in *Bala*, supra note 9 at 445.

29. [1994] M.J. No. 416 (Q.B.).

30. *Bala*, supra note 9 at 443.

31. Ibid., at 444.

32. Ibid., at 445.

33. 87 C.C.C. (3d) 153.

34. *R. v. Norman* 87 C.C.C. (3d) 153 No. C13342 (QL) at 7.
35. *Ibid.*, at 8-9.
36. Letter from Alan D. Gold, president of the Criminal Lawyers' Association to Justice Minister Anne McLellan, reprinted in the Ottawa Citizen, May 24th, 1998 at D4.
37. [1992] B.C.J. No 2452 (S.C.) (QL), rev'd [1995] B.C.J. No. 1542 (C.A.) (QL).
38. [1992] B.C.J. No 2452 (S.C.) (QL) at 8.
39. *Ibid.*
40. [1994] O.J. No.681 (Gen. Div.) (QL). [Hereinafter *Colquhoun*].
41. See Susan Vella, "False Memory Syndrome: The latest defence to childhood sexual abuse claims"(1992) 12 (4) Jurifemme 1; and "False Memory Syndrome: Therapists are the target in new sexual assault defence theory"(1994), Jan/Feb. National 36.
42. *Colquhoun*, supra note 40 at para 74.
43. Bala, supra note 9 at 450.
44. *Colquhoun*, supra note 40 at 42.
45. Kathryn Belicki, "False Memory Syndrome -- Science or Backlash?: A Discussion of the Hovdestad and Kristiansen Papers", A Paper Presented to the 103rd Annual Meeting of the American Psychological Association, New York City, August 1995, at 2.
46. *T.K.S. v. E.B.S.*, supra note 38 at 8.
47. Wendy J. Murphy, "Debunking 'false memory' myths in sexual abuse cases", <http://www.smith-lawfirm.com/Murphy_Memory_Article.html> 11/27/98 at 7. The study Murphy is referring to is described by K. Pezdek, Planting False Childhood Memories: When Does It Occur and When Does It Not?, Paper presented at the 36th Annual Meeting of the Psychonomics Society (November 10-12, 1995).
48. See Ellen Bass & Laura Davis, The Courage to Heal: A Guide for Women Survivors of Child Sexual Abuse (New York: Harper & Row, 1988) at 86.
49. [1995] 4 S.C.R. 411
50. *R. v. O'Connor* <<http://www.droit.umontreal.ca/doc/csc-scc...c-scc%2Fen%2Findex.html&range=1&numdoc=21>> 04 Jan 99 at 17.

51. Katharine D. Kelly, ““You Must Be Crazy If You Think You Were Raped”: Reflections on the Use of Complainants’ Personal and Therapy Records in Sexual Assault Trials” (1997), 9(1) Canadian Journal of Women and the Law 178 at 179.
52. [1993] 4 S.C.R. 595.
53. *O’Connor*, supra note 50 at 16.
54. Ibid., at 17 quoting Cory J. in *Osolin*, supra note 52 at 674 .
55. Karen Busby, “Discriminatory Uses of Personal Records in Sexual Violence Cases” (1997), 9(1) Canadian Journal of Women and the Law 148 at 148.
56. Kristen Douglas & Marilyn Pilon, “Bill C-46: An Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings), Legislative Summary LS-261E, Library of Parliament, Research Branch, 24 July 1996, revised 17 February 1997 at 2.
57. Ibid.
58. Ibid., at 3.
59. *O’Connor*, supra note 50 at 7.
60. Ibid.
61. *O’Connor*, supra note 49 as quoted in Busby, supra note 55 at 164.
62. Busby, supra note 55 at 164.
63. Ibid., at 170.
64. Ibid.
65. Ibid.
66. Connie Kristiansen et al., “Social-Psychological Factors Sustaining the Recovered Memory Debate”, Paper Presented at the Annual Convention of the American Psychological Association, New York, August 1995, at 3-4.
67. Busby, supra note 55 at 169.
68. [1997] 1 S.C.R. 80.
69. Bala, supra note 9 at 436.

70. For a more detailed look at the differences between *O'Connor* and Bill C-46, see Jodie van Dieen, "O'Connor and Bill C-46: Differences in Approach" (1997), 23 Queen's Law Journal 1.
71. [1997] A.J. No. 891 Action No. 9393-3491-C5 (QL).
72. Volume 134 House of Commons Debates Number 142, 2nd Session, 35th Parliament, February 4th, 1997 at 7665.
73. Ibid.
74. Criminal Code of Canada, R.S., c. C-34, ss. 278.3(3).
75. Criminal Code of Canada, R.S., c. C-34, ss. 278.3(3)(b).
76. Criminal Code of Canada, R.S., c. C-34, ss. 278.3(4)(a) to (f).
77. Criminal Code of Canada, R.S., c. C-34, ss. 278.5(2)(a) to (h).
78. Criminal Code of Canada, R.S., c. C-34, ss. 278.7(3).
79. *Mills*, supra note 68.
80. Ibid., at paras 15 to 17.
81. Ibid., at para 21.
82. Ibid., at para 26.
83. *O'Connor*, supra note 49 at 426 as quoted in *Mills*, supra note 68 at para. 27.
84. Thomas Claridge and Donn Downey, "Medical records reopened in rapes", Globe & Mail, October 3rd, 1997 at A8.
85. [1997] 35 O.R. (3d) 598.
86. Claridge & Downey, supra note 84 at A1.
87. *Bill C-46, An act to amend the Criminal Code (production of records in sexual offence proceedings)*.
88. Claridge & Downey, supra note 84 at A8 quoting Professor Karen Busby. My clarification.
89. Busby, supra note 55.
90. Claridge & Downey, supra note 84 again quoting Busby.
91. Busby, supra note 55 at 151.

92. Stephen Bindman, "Supreme Court to rule on 'privacy shield' sex law", Ottawa Citizen, February 13th, 1998 at A4.
93. Ibid.
94. John Bryden, MP for Hamilton-Wentworth, MP's Report- Canada's Charities: A Need for Reform October 1996. See also John Bryden, MP for Hamilton-Wentworth, Special Interest Group Funding: MP's Report, November 1994.
95. Andrew Cardozo says of Mr. Bryden:
While the Reform Party has led the attack on funding, a lone Liberal backbencher went on a similar crusade. John Bryden challenged the funding that went to fourteen groups, and the fact that some of them had charitable tax status. While his "report" had no consistent methodology, his status as a government MP seemed to give him licence to criticize with abandon. His research methods were questionable.
- Andrew Cardozo, "Lion Taming: Downsizing the Opponents of Downsizing," in Gene Swimmer, ed., How Ottawa Spends 1996-97: Life Under the Knife, (Ottawa: Carleton University Press, 1996), at 314.
96. Susan Delacourt, "Losing Interest," Globe and Mail, April 4, 1995, D5. See Bryden, Canada's Charities, supra note 76 at 7.
97. Standing Committee on Justice and Legal Affairs, Meeting 112, Evidence, House of Commons, 35th Parliament, 2nd Session, March 13, 1997 at 112:15.
98. See Busby, supra note 55, Kelly, supra note 51, and Vella supra note 41.
99. House of Commons Debates, supra note 72 at 7669.
100. See, for example, the remarks of Sharon Hayes, MP for Port Moody-Coquitlam, ibid., April 7th, 1997 at 9363.
101. Letter from Minister of Justice A. Anne McLellan to Mr. John Bryden, Member of Parliament dated 23 July, 1998.
102. Bala, supra note 9 at 453.
103. Smith, supra note 16 at 7.
104. 846 F. Supp. 654 (N.D. Ill. `1994).
105. Ibid., (WestLaw) at 39.
106. See D. Carlson, "Lawyers Told How Fiction Can be Turned into Fact" Law Times (15 November 1993). Professor Bala makes mention of this in his article. He does not supply the

outcome and I am unable to locate a decision either.

107. Bala, supra note 9 at 454.

108. See for example, *L.H. v. W.U.* [1998] B.C.J. No. 1132 (QL); *R. v. Kliman* [1998] B.C.J. No. 49 (QL); *R. v. J.J.W.* [1998] J. No. 3207 (QL); *R. v. Herbert* [1997] O.J. No. 4769 (QL).

109. See *L.H. v. W.U.* [1998] B.C.J. No. 1132 DRS 98-12332 (QL) at 2.

110. *R. v. W.K.L.*, supra note 11.

111. There is much literature linking childhood sexual abuse to dissociative identity disorder or multiple personality disorder. See for example, Bass & Davis, supra note 52.

112. For example, Carol Smart, supra note 7; Nancy Fraser (*Unruly Practices* (Minneapolis, Minn.: University of Minnesota Press, 1989) particularly Chapters 1 & 2)); Gwen Brodsky and Shelagh Day, Canadian Charter Equality Rights For Women: One Step Forward or Two Steps Back? (Ottawa: Canadian Advisory Council on the Status of Women, 1989).

113. Louise Armstrong, Rocking the Cradle of Sexual Politics: What Happened When Women Said "Incest" (Reading, Mass.: Addison-Wesley, 1994) at 233.

114. Ibid., at 234.

115. Begin, supra note 3 at 11-12.

116. Armstrong, supra note 113 at 229.

117. Ibid., at 233.

118. Ibid., at 232.

119. Ibid., at 234. Clarification added.

120. Busby, supra note 55 at 169-170.

121. [1994] M.J. No. 416 (Q.B.).

122. See Busby, supra note 55 at 170.

123. *O'Connor*, supra note 49 quoted in Busby, ibid., at 164.

HOLDING AREA TABLE CONTENTS

Chapter Four

| | |
|-------------------------------------------------------------------------------------------------|------------|
| The Legal Landscape | 111 |
| I. Introduction | 111 |
| II. The History of the Criminal Law and the Possibilities Within Civil Remedies | 112 |
| III. Present Day Jurisprudence | 114 |
| A. Case Law | 115 |
| 1. Statute of Limitations cases | 115 |
| 2. Criminal Cases | 118 |
| 3. Civil Cases | 122 |
| B. Recovering Memories in Therapy | 125 |
| 1. Access to Therapy Records | 125 |
| 2. The Political Landscape | 131 |
| 3. The Legal Consequences for Therapists | 139 |
| IV. The Utility of Legal Engagement | 142 |
| V. Conclusion | 144 |

Chapter Five Conclusion

There are two essential questions that this thesis engaged with. How, and why, does the false memory syndrome hypothesis seem to strike a chord within society such that its existence is accepted as a reality without scientific ‘proof’? And further, how has this acceptance affected Canadian jurisprudence? I was concerned as to the answers to these questions, as a feminist and someone who has previously worked with adults who had been sexually abused as children, given the controversy surrounding the issue in the popular and scientific press.

I was concerned that rhetoric had taken over the debate and to an extent I found this to be true. Certain socio-political leanings seemed to be highly indicative of which ‘side’ of the debate one was on, including for myself. I was concerned that the popularity (as I already perceived it at the beginning of this project) of the false memory hypothesis had given society an easy ‘way out’ of having to deal with high rates of child sexual abuse in a way that ‘fit’ with both liberal patriarchal tradition and sexist social structuring. For the most part, I found that presupposition to be true also. Like other feminist writers on the topic, I do not rule out the possibility that a minority of those who believe they have been abused as children have developed misleading memories. In fact, at the conclusion of this project, I am more sure that this does occasionally happen than I was at the beginning. However, I am also more highly convinced that the false memory syndrome ‘movement’ is propelled more by politics and by the public’s desire to believe that it is true than by ‘facts’.

The writing and researching of this thesis project, for the most part, confirmed many of my suspicions about the false memory syndrome movement. However, it undoubtably enriched

my appreciation of the complexity of the issues around the recovered memory/false memory debate. For example, through Gusfield's discussion of social construction and Kellough's interpretation of this construction as double-layered, I was able to see how there are 'two levels of culture'. The first level of culture that Kellough describes is "a public one where values are articulated for public consumption."¹ Can it be said that 'for public consumption' or 'on the books' it appears that child sexual abuse has generally been accepted as a public problem? The 'second level of culture' that Kellough refers to is "a private one where actual activities require a different kind of explanation."² Can feminist and other anti-child abuse advocates be seen as trying to resist the efforts of the pro-FMS lobby to have certain instances of child sexual abuse, usually those that occur within the family, kept as 'private problems'? And further, can the false memory hypothesis be seen as 'a different kind of explanation' for the high numbers of children that are sexually abused by family members?

Chapter Two was primarily concerned with the question of *how* the 'public problem' of child sexual abuse has been socially constructed. Gusfield's thesis illustrated that issues only become 'public' problems once they are socially constructed as such. Therefore, issues can be considered public problems in some time periods and not in others. Shifts may occur in what is and is not considered a public problem. Several writers have commented upon the cyclical nature of interest in child sexual abuse.³ Gusfield contends that a phenomenon is not a 'public problem' unless there is both a cognitive belief in its alterability and a moral judgement as to its character.⁴ Until recently, these preconditions for the recognition of the tragedy of childhood sexual abuse were not met. These conditions may include the ability of some groups, such as feminists and other anti-child abuse advocates on the one hand and FMS proponents on the other,

to sway public opinion. Gusfield employed the example of drinking-driving to illustrate his theory, noting that public reaction to the same action has changed over time. I concede that the problem of child sexual abuse is more complex than drinking-driving, at least in some respects. Nevertheless, Gusfield's theory is applicable, particularly when Kellough's interpretation is utilized.

In the social construct of drinking-driving as a public problem that Gusfield details there is only one 'villain', the drinking-driver. Whether there are other possible contributors, such as unsafe cars or the availability of alcohol, is not seriously considered because people want to believe that individual 'bad' people are responsible for many of the 'human costs' of automobile use. Societal responsibility, both causal and political, is therefore diminished.

In the social construct of child sexual abuse as a public problem that I have detailed, different actors can be viewed as the 'villain'. As is appropriate to the liberal patriarchal paradigm, when the perpetrator is a 'stranger', he is often labelled as the 'villain'. In intra familial situations particularly, however, there are a multitude of reasons (as explored in Chapter Three) why other actors such as the victim, or her therapist, may be more likely to be 'blamed' through the construct of the false memory hypothesis, a more 'politically correct', as it were, way of shifting attention from the perpetrator and a culture that fosters such behaviour than less subtle forms of victim-blaming. What remains the same as in Gusfield's example, is the desire to individualize the problem. In this way, societal responsibility, both causal and political, is diminished.

Stephen Pfohl's focus on the 'creation' of deviance may be thought, by some, to be more directly and/or less abstractly related to this thesis project. His review of theories of deviance,

many of them specific to different historical periods emphasized two themes in this thesis project. The first was that who and what is considered deviant is not static as 'deviance' is also 'socially constructed' and is, thus, impacted by power differentials in society. The ability of elites to utilize different theories of deviance, at different times, in different ways to socially control those groups who threaten their dominance is evident in the recovered memory/false memory debate. By applying the deviant label to someone, even indirectly, that person or group's power to challenge the status quo is quelled. In the recovered memory/false memory debate it is often the victims of child sexual abuse and/or their therapists, rather than the perpetrators, that tend to be deviantized. This second point was revisited in Chapter Four in Busby's discussion of the 'Bad Therapist' myth. True to Armstrong's hypothesis, much of the pro-FMS literature in the scientific press ascribes false memory syndrome to 'bad therapy',⁵ rather than 'bad' women. Discriminatory beliefs about women are still employed, however, in that these women are characterized as delusional,⁶ highly suggestible,⁷ and emotionally disturbed.⁸ Generally, the victims are not represented as 'bad,' but as confused and indoctrinated⁹ by "feminist counsellors [who] are ideologically committed to forcing their clients into believing they have been abused."¹⁰

Pfohl's work engenders a realization that more subtle methods of deviantizing the victim than straight forward victim-blaming is being utilized by the pro-false memory side of the debate. There is not a simple answer as to why belief in the falsity of recovered memories has become so popular in North American society. However, it was argued that the pervasiveness of this belief (as evidenced, for example, by the term's common usage and the ferocity of the debate) lends credence to the supposition that society's desire to deviantize the victim is strong.

Another key point introduced in Chapter Two was the notion of law as a transmitter of cultural beliefs. Essentially, it was argued that law is a 'system of communications' that transmits the 'truth' to the public. If law is thought of as a mechanism in the definition and solution of public problems, its possible utilitarian effects (deterrence, preventing a particular person from sexually abusing a child etc.) are less important than "the cultural attributes of law as an embodiment of meaning."¹¹ Building upon the analysis of "law as a self contained cultural product,"¹² it is law's role in communicating the "dramatization of the moral notions of the community"¹³ that Gusfield is, and I am, more interested in.

If Gusfield's argument is accepted, what do rulings such as *O'Connor* 'tell' people about recovered memory? Is it possible that if the Supreme Court is willing to invoke the 'Bad Therapist' myth to justify access to counselling records, that others - from family members to funding agencies - might also adopt this belief?¹⁴ Just as importantly, however, what would a lack of cases being brought forward (due to fears over access to personal records, as one example) 'tell' the public?

Neither Gusfield nor Pfohl wrote specifically of child sexual abuse, but employing the concepts they explored throughout this thesis project has facilitated an articulation of the 'politics' of the discourse around recovered memory/false memory today in North America.

The third chapter of this thesis project examined the content of the recovered memory/false memory debate, particularly in the media and the scientific community and introduced the concept of hegemony. 'Hegemony' was a small but important part of this thesis project. It linked the work of Gusfield and Pfohl but, more particularly, it provides a discussion of how the 'active input of the dominated' is required for the project of the ruling bloc. The issue

of 'consent' is not as explicitly dealt with without Gramsci's input. In the recovered memory debate there are many examples of the participation of the 'dominated' in the minimization (through the vehicle of the false memory hypothesis) of, usually, intra familial sexual abuse.

In the most direct sense, 'recanters' are often used by the false memory movement to support their claims.¹⁵ Of course, I do not suggest that all recanters are recanting falsely but certainly some may have been coerced. As Busby notes, "recantations by complainants, in the unusual cases where they are made, usually involve minors in situations where there are good reasons to believe that the recantation is false."¹⁶ Also, if 'false memory syndrome' is viewed as a new way to discredit women survivors particularly,¹⁷ what does the number of women on the pro-false memory side of the debate mean?

In Chapter Three it was posited that several 'clusters' of issues contribute to widespread belief in the existence of false memories. One of these 'clusters' is the sexist stereotyping of women and children which serves to foster doubt about the veracity of recovered memories of childhood sexual abuse. As Professor Bala stated, in all Canadian cases reported to 1996, where an 'objective trier of fact', i.e., a judge, has 'found' memories to be false, the plaintiffs were female.¹⁸

Other 'clusters' included the psychological need for simple answers to complex problems, which can be directly linked back to Gusfield, and the ability to retain a belief in a just world. The ability to retain a belief in a just world has also been linked to victim-blaming, particularly by women, in rape cases.¹⁹ The inability of most people, who do not molest children, to believe that 'ordinary' seeming fathers/relatives could commit such acts and that children may have more to fear from family members than strangers are also factors.

All of these 'clusters' help to explain why society may be quick to accept the false memory hypothesis in that it is a convenient and less difficult 'explanation' for the number of people who claim to have been sexually abused as children. To accept the false memory hypothesis is less challenging than having to deal with what it is about North American society that fosters such victimization of children.

The psychological literature directly relating to the existence, or otherwise, of 'false memory syndrome' showed that claims about the existence of false memory were found not to be as well supported by scientific study as FMS proponents would have the public believe. There is no conclusive evidence that false memories of childhood sexual abuse exist. I have argued that Dr. Loftus' studies, and others like hers, are inadequate to prove that such memories can be created. It cannot be known, from the research she cites, whether the memory of a traumatic event is encoded and stored differently from that of a non-traumatic event. Furthermore, the threat and intimidation factor present in many cases of childhood sexual abuse may further impair memory retrieval. Accordingly, neither the Canadian Psychiatric Association nor the American Psychological Association has recognized FMS as a legitimate disorder. Both organizations do, however, maintain a dissociative amnesia diagnosis and further, there are studies reporting that a majority of recovered memories can be corroborated when survivors attempt to do so.²⁰ Similarly Hovdestad's survey of 113 Ottawa area survivors, half of whom had continuous memories and half of whom had recovered memories, found remarkably few differences between the recovered memories and continuous memories groups, contrary to FMS supporters' predictions. This research is not used to suggest that false memories of childhood sexual abuse do not exist, only that they have not been proven to exist. And yet, recovered

memories *have* been proven to exist. It seems strange that in a society that puts so much faith in ‘science’ the unproved hypothesis is seemingly more popular, at least in the press,²¹ than the proven one.

The analysis of media articles also provided insight into ‘popular consciousness’ around the issue. While it is acknowledged that ‘public consciousness’ and the media coverage of a particular issue are not necessarily equivalent, an examination of the issue as presented by the media is interesting both because of the media’s mass distribution and also its implicit claims to ‘objectivity’. Moreover, according to media sociologists the media either reflects or directs the public agenda.²² According to either model, a study of the media’s coverage of the recovered memory debate can provide “an index of social knowledge and attitudes”²³ towards the false memory hypothesis.

In Chapter Four legal issues pertaining to the recovered memory/false memory debate were explored. The development of laws against incest helped to demonstrate what interests were historically protected. I theoretically linked the development of laws against child sexual abuse to those against rape. The history of the criminal law shows a lack of concern for the safety of children in their own right. Rather, fathers were protected. Parental permission was required for the medical examination of suspected victims. Lawmakers expressed the idea that laws against child sexual abuse might give people ‘ideas’ that they would not have otherwise had, implying that they thought they were protecting ‘public morals’ by refraining from passing such legislation. And further, patriarchal notions about the nuclear family were upheld. For example, women who ‘allowed’ closely related men sexual access were punished equally as ‘offenders’. Perhaps this ‘concern’ for the offenders is understandable as lawmakers and

enforcers (given that women, at least historically, and children are seldom such) would more likely see themselves in the position of accused than victim. It is an interesting question to ponder whether 'victim-blaming' of rape victims has become less prevalent as women have become more conspicuous in the power hierarchy. If so, does this mean that the victim-blaming occurring under the false memory syndrome banner, albeit a less outright form, will be less likely to abate given that children are not likely to gain access to power in the foreseeable future?

The present day case law was also examined in Chapter Four. Not all the cases discussed specifically involved child rape, but the law 'made' in all of the cases will certainly impact (and, in fact, has already impacted) recovered memory cases. For example, statute of limitations barriers to bringing sexual abuse cases to the justice system have been eased in recent years, allowing women who recover memories decades after their abuse to bring cases forward.

Criminal and civil case law, accepting both the existence of recovered memories and false memories, was explored. Although it seems likely from the evidence discovered whilst researching this project that only a very small percentage of cases before the courts would ever involve a truly false memory, it has been an issue in many cases. It is unfortunate that the Supreme Court has been so circumspect in its opinions on recovered memory/false memory. It does seem clear, nonetheless, that it has accepted the existence of both. However, a change in the composition of the Court has recently occurred and, therefore, it remains to be seen what will happen with the appeal in the *Mills* case.

While applauding the emphasis on substantive equality that Bill C-46 called for and the restrictions on defence 'fishing expeditions' that it entailed, I am not at all surprised that the amendment has been repeatedly challenged given the strength of the backlash against women in

general and recovered memories in particular. I also agree with many of Louise Armstrong's observations about the dangers of using law *without a political understanding of the potential consequences*.

This thesis has critiqued both the content and the construction of the recovered memory/false memory debate. Perhaps because there are 'experts' on both sides of the issue who claim to be able to 'prove' that they are right, the debate has degenerated into somewhat of a 'he said/she said' polemic. However, because the lure of the false memory hypothesis is so strong and because its proponents have a better articulated political take on the issue, it would appear that their representation of the 'truth' has had more success in infiltrating the public consciousness than that of feminists and other anti-child abuse activists. It is not surprising, then, that it also appears to be making headway within Canadian jurisprudence, with some judges accepting, seemingly uncritically, the 'false memory' hypothesis. Because of law's claims to 'objectivity' and the legitimating function that law has in society, it is imperative that a political understanding incorporating the gendered nature of this issue be articulated and disseminated.

Throughout the thesis, I argued that feminists have been hampered in their efforts at linking the recovered memory/false memory debate to a political understanding of power and gender bias in society. They and other anti-child abuse advocates are so busy merely defending the existence of recovered memory that there seems to be no room or energy for an attempt at 'widening the discourse.'

As noted above, I am sure that occasionally some people do develop misleading memories, for whatever reason. This leaves me in a dilemma in that, clearly, each case must then be decided, individually, 'on its merits'. As a proponent of the radical feminist school of

thought, with the resulting concerns I have with a liberal legal paradigm, I am necessarily conflicted about what course radical feminist efforts should take on this issue. Obviously, however, I believe that a radical feminist political understanding must be articulated.

The knowledge that I have gained in this thesis project about the reasons and the ways in which public problems are socially constructed, as is deviance, has led me to a ‘double-layered’ conclusion about the growing popularity of the false memory syndrome hypothesis. The first is that (socially constructed, of course) discriminatory beliefs about women²⁴ play a major role in legitimating the FMS hypothesis. For example, myths that women make false allegations “out of vindictiveness, fantasy or delusion,”²⁵ or that they take suggestions from therapists because they somehow enjoy the ‘sick role’²⁶ are prevalent on the pro-FMS side of the debate. Katharine Kelly notes that “the strategy works because it ties our socially constructed mechanisms for assessing conflicting or contested accounts of events to gendered myths about women, mental health, and rape.”²⁷

As a political strategy, characterizing alleged victims of child sexual abuse as sick is more acceptable than labelling them as bad or evil. Moreover, it still allows for the discounting of their claims as their ‘defectiveness’ means that such claims can be dismissed. In all, “pathological theories are successful not because they are correct but because they are attractive to a particular historical audience -- an audience thirsty for simple solutions to complex problems,”²⁸ notes Pfohl. Child sexual abuse is a decidedly complex problem, the eradication of which will take political responsibility on the part of a society that seems unable to cope with such a charge.

I do not contend to have an answer except to say that feminists and other anti-child abuse

advocates cannot afford to abandon law as a site of social contestation of this issue, particularly due to law's 'communicative function.' Secondly, along with other advocates such as Vella, Busby and Kelly, I maintain that feminists must continue to expose discriminatory beliefs about women that surface in legal arguments and in legal judgements. I have attempted to articulate the importance of these sites of struggle and while doing so, contribute toward the larger anti-child sexual abuse project.

Endnotes - Conclusion

1. Gail Kellough, Aborting Law: An Exploration of the Politics of Motherhood and Medicine (Toronto: University of Toronto Press, 1996) at 94 citing Joseph R. Gusfield, The Culture of Public Problems: Drinking-Driving and the Symbolic Order (Chicago, Ill.: University of Chicago Press, 1981).
2. Kellough, ibid., at 94.
3. See Nicholas P. Spanos, Multiple Identities and False Memories: A SocioCognitive Approach, (Washington, D.C.: American Psychological Association, 1996) at 290, Judith L. Herman, Adult Memories of Childhood Trauma: Current Controversies, Paper presented at the Annual Convention of the American Psychiatric Association, May 26, 1993; and E. Olafson, D.L. Corwin & R.C. Summit, "Modern History of Child Sexual Abuse Awareness: Cycles of Discovery and Suppression" (1993), 17 Child Abuse and Neglect 7.
4. Gusfield, supra note 1 at 10.
5. Particularly Elizabeth Loftus' and Nicholas Spanos' work, for example, detailed in Chapter Three.
6. See Karen Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997), 9(1) Canadian Journal of Women and the Law 148 at 169.
7. Spanos, supra note 3 at 80.
8. George Jonas, "Recovered memory is best forgotten", the Montreal Gazette, Sunday May 3, 1998.
9. See Alan Gold's remarks as reported in Kirk Makin, "Court Rules Against Rape Victims", Globe & Mail December 15, 1995 at A1, A7.
10. Busby, supra note 6 at 170.
11. Gusfield, supra note 1 at 114.
12. Ibid., at 146.
13. Ibid., at 148. Gusfield quoting Thurman Arnold, The Symbols of Government (New York: Harcourt, 1962) at 152-54.
14. Busby, supra note 6 at 172.
15. For example see Laura Pasley, "Misplaced Trust: A First-Person Account of How My Therapist Created False Memories" (1994), 2 Skeptic 62

16. Busby, supra note 6 at 170. See Julie Taylor, "Rape and Women's Credibility: Problems of Recantation and False Accusations in the Case of Cathleen Webb Crowell and Gary Dotson" (1987) 10 Harvard Women's Law Review 59.

17. Ibid., at 169-170.

18. Nicholas Bala, "False Memory 'Syndrome': Backlash or *Bona Fide* Defence"?(1996), 21 Queen's Law Journal 423 at 439, note 45.

19. See Janet Shibley Hyde, Half the Human Experience: The Psychology of Women (Lexington, Mass.:(D.C. Heath and Company, 1991). Hyde hypothesises that this form of denial (i.e., it can't happen to me because I don't wear short skirts/walk alone at night etc.) is a self-protective mechanism.

20. J.L. Herman & E. Schatzow, "Recovery and Verification of Memories of Childhood Sexual Trauma" (1987), 4 Psychoanalytic Psychology 1; K. Belicki et al, "Adults Reports of Sexual Abuse: Memory or Confabulation?" (1995), Unpublished manuscript, Brock University, St. Catherine's, Ontario.

21. See Carolyn B. Allard, The Recovered Memory Debate: The Press's Coverage and the Impact on Survivors, M.A. Thesis, Dept. of Psychology (Ottawa: Carleton University, 1995).

22. Stanley Cohen & Jock Young, The Manufacture of News: Deviance, Social Problems and the Mass Media (London: Constable, 1981).

23. Allard, supra note 21 at 21.

24. Connie Kristiansen et al., "Social-Psychological Factors Sustaining the Recovered Memory Debate", Paper Presented at the Annual Convention of the American Psychological Association, New York, August 1995 at 3-4.

25. See, Busby supra note 6 at 169.

26. Spanos, supra note 3 at 293.

27. Katharine D. Kelly, "'You Must Be Crazy If You Think You Were Raped': Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials" (1997), 9(1) Canadian Journal of Women and the Law 178 at 179.

28. Stephen J. Pfohl, Images of Deviance and Social Control: A Sociological History (New York: McGraw-Hill Publishing Company, 1985) at 49.

Bibliography

- Allard, Carolyn B., The Recovered Memory Debate: The Press's Coverage and the Impact on Survivors, M.A. Thesis, Dept. of Psychology (Ottawa: Carleton University, 1995).
- American Medical Association, Council Of Scientific Affairs, Memories of Childhood Abuse (1994).
- American Psychological Association, Statement on Memories of Sexual Abuse (1993).
- American Psychological Association, Questions and Answers About Memories of Childhood Abuse (1995).
- American Psychological Association, Working Group on Investigation of Memories of Childhood Abuse: Final Report, February 14th, 1996.
- Anderson, Perry, "The Antinomies of Antonio Gramsci", New Left Review, 100 (1976-7).
- Armstrong, Louise, Rocking the Cradle of Sexual Politics: What Happened When Women Said "Incest" (Reading, Mass.: Wesley-Addison, 1994).
- Arnold, Thurman, The Symbols of Government (New York: Harcourt, 1962).
- Backhouse, Constance, "The Tort of Seduction: Fathers and Daughters in Nineteenth Century Canada" (1986) 10 Dalhousie Law Journal 45.
- Badgley C., & R. Ramsey, "Disrupted Childhood and Vulnerability to Sexual Assault: Long-term Sequels with Implications for Counselling" (1985), 5 Social Work and Human Sexuality 142.
- Bala, Nicholas, "False Memory 'Syndrome': Backlash or *Bona Fide* Defence"?(1996), 21 Queen's Law Journal 423.
- Barret, S., & W.L. Marshall, "Shattering Myths," Saturday Night, June 1990.
- Barrett, Michele, The Politics of Truth: From Marx to Foucault (Stanford, Calif.: Stanford University Press, 1991).
- Bass, Ellen & Laura Davis, The Courage to Heal: A Guide for Women Survivors of Child Sexual Abuse (New York: Harper & Row, 1988).
- Bateson, Gregory et al, "Toward a Theory of Schizophrenia" (1956), 1 Behavioral Science, 251.

- Becker, Howard S., Outsiders: Studies in the Sociology of Deviance (New York: Free Press, 1963).
- Becker, Howard S., The Other Side: Perspectives on Deviance, (New York: Free Press, 1964).
- Begin, Patricia, "Child Sexual Abuse: The Recovered Memory/False Memory Debate", Background Paper BP-391-E, Research Branch, Library of Parliament, Political and Social Affairs Division, November 1994.
- Begley, Sharon, "You Must Remember This: How the brain forms false memories" 124 No. 13 Newsweek (S 26 '94), 68.
- Belicki, Kathryn, "False Memory Syndrome -- Science or Backlash?: A Discussion of the Hovdestad and Kristiansen Papers", A Paper Presented to the 103rd Annual Meeting of the American Psychological Association, New York City, August 1995.
- Bessner, R., "Important Strides Made by the Supreme Court Respecting Children's Evidence"(1991) 79 C.R. 15.
- Briere, John & Jon R. Conte, "Self-Reported Amnesia for Abuse in Adults Molested as Children" (1993), 6(1) Journal of Traumatic Stress 21.
- Briere, John, "Studying Delayed Memories of Childhood Sexual Abuse" (1992), Summer The APSAC Advisor.
- Brodsky, Gwen & Shelagh Day, Canadian Charter Equality Rights For Women: One Step Forward or Two Steps Back? (Ottawa: Canadian Advisory Council on the Status of Women, 1989).
- Brownmiller, Susan, Against Our Will: Men, Women and Rape (New York: Bantam, 1975).
- Bryden, John, MP's Report- Canada's Charities: A Need for Reform October 1996.
- Bryden, John, Special Interest Group Funding: MP's Report, November 1994.
- Busby, Karen, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997), 9(1) Canadian Journal of Women and the Law 148.
- Calhoun, Craig, "Social Theory and the Law: Systems Theory, Normative Justification, and Postmodernism"(1989), 83 Northwestern University Law Review 398.
- Calof, D., "A Conversation with Pamela Freyd, PhD: Co-founder and Executive Director, False Memory Syndrome Foundation, Inc., Part One" (1993), 3(3) Treating Abuse Today 25.

- Cardozo, Andrew, "Lion Taming: Downsizing the Opponents of Downsizing," in Gene Swimmer, ed., How Ottawa Spends 1996-97: Life Under the Knife, (Ottawa: Carleton University Press, 1996).
- Carlson, D., "Lawyers Told How Fiction Can be Turned into Fact" Law Times (15 November 1993).
- Chalmers, Alan F., What is this Thing Called Science? (St. Lucia, Australia: University of Queensland Press, 1982).
- Cirino, R., Don't Blame the People: How the News Media Use Bias, Distortion and Censorship to Manipulate Public Opinion (Los Angeles: Diversity Press, 1971).
- Clark, Lorene & Debra Lewis, Rape: The Price of Coercive Sexuality (Toronto: The Women's Press, 1977).
- Cohen, Stanley & Jock Young, The Manufacture of News: Deviance, Social Problems and the Mass Media (London: Constable, 1981).
- Cohen, Stanley, Folk Devils and Moral Panics, (London: MacGibbon & Kee, 1972).
- Committee on Sexual Offences Against Children and Youth, Sexual Offences Against Children, Volume 1, Ottawa, 1984.
- Cooper-Stephenson, Ken, "Past Inequities and Future Promise: Judicial Neutrality in Charter Constitutional Tort Claims", in Sheila Martin and Kathleen Mahoney eds., Equality and Judicial Neutrality (Toronto: Carswell, 1987).
- Courtois, Christine A., Healing the Incest Wound: Adult Survivors in Therapy (New York: W.W. Norton & Co., 1988).
- Crenshaw, Kimberle Williams, "Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" (1988), 101 (7) Harvard Law Review 1331.
- Cronin, J., "False Memory: The Controversy Surrounding "False Memory" and Child Abuse" (1994), April Z Magazine 31.
- Des Rosiers, Nathalie, "Limitation Periods and Civil Remedies for Childhood Sexual Abuse" (1992), 9 Canadian Family Law Quarterly 43.
- Doe, Jane, "How Could This Happen? Coping with a False Accusation of Incest and Rape" (1991), 3(3) Issues in Child Abuse Accusations 154.

Douglas, Kristen, & Marilyn Pilon, "Bill C-46: An Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings)", Legislative Summary LS-261E, Library of Parliament, Research Branch, 24 July 1996, revised 17 February 1997.

Ducas, Marie-Claude, "Inceste: que valent les souvenirs retrouvés?" 35 No. 1 Chatelaine (Fr) (avr '94) 19.

Durkheim, Emile, The Rules of the Sociological Method, trans., Sarah A. Solovay and John H. Muller; ed. Sir George E. G. Carlin (Chicago, Ill.: University of Chicago Press, 1938).

Enns, C.Z., McNeilly, C.L., Corkery, J.M., and Gilbert, M.S., "The Debate About Delayed Memories of Child Sexual Abuse: A Feminist Perspective" (1995), 23 The Counselling Psychologist 181.

Estrich, Susan, Real Rape (Cambridge, Mass.: Harvard University Press, 1987).

Faludi, Susan, Backlash: The Undeclared War Against American Women, (New York: Anchor Books, 1991).

False Memory Syndrome Foundation, FMS Foundation Mission Statement, (Philadelphia, PA: FMS Foundation, 1993).

Flicker, B., "Psychohistorical Roots of the War Against Children" (1993), 21 The Journal of Psychohistory 69.

Fraser, Nancy, Unruly Practices (Minneapolis, Minn.: University of Minnesota Press, 1989).

Freyd, Jennifer, Theoretical and Personal Perspectives on the Delayed Memory Debate, Paper presented at "Controversies Around Recovered Memories of Incest and Ritualistic Abuse" at the Centre for Mental Health, Foote Hospital, Ann Arbor Michigan, August 7, 1993.

Golier, J. & R. Yehuda, "Neuroendocrine Activity and Memory-Related Impairments in Post Traumatic Stress Disorder" (1998) 10(4) Development and Psychopathology 857.

Gramsci, Antonio, Selections From the Prison Notebooks, ed. and trans. Q. Hoare and G. Nowell-Smith (New York: International Publishers, 1971).

Greenberg, David F., & E. Humphries, "The Dialectics of Crime Control" in David F. Greenberg, ed., Crime and Capitalism (Palo Alto, Calif.: Mayfield, 1981).

Gunn, Rita & Rick Linden, "The Processing of Child Sexual Abuse Cases", Confronting Sexual

- Assault: A Decade of Legal and Social Change, Julien Roberts and Renate Mohr, eds. (Toronto: University of Toronto Press, 1994).
- Gusfield, Joseph R., "Risk and Misfortune: A Social Construction of Accidents" (1998), 104(2) American Journal 589.
- Gusfield, Joseph R., Contested Meanings: The Construction of Alcohol Problems (Madison, Wisconsin: University of Wisconsin Press, 1996).
- Gusfield, Joseph R., The Culture of Public Problems: Drinking-Driving and the Symbolic Order (Chicago, Ill.: University of Chicago Press, 1981).
- Herman, Judith L., "Adult Memories of Childhood Trauma: A Naturalistic Clinical Study" (1997), 10 (4) Journal of Traumatic Stress 557.
- Herman, Judith L., "Presuming to Know the Truth" (1994), Nieman Reports 43.
- Herman, Judith L., Adult Memories of Childhood Trauma: Current Controversies Paper presented at the Annual Convention of the American Psychiatric Association, May 26, 1993.
- Herman, Judith L., Trauma & Recovery (USA: Basic Books, 1992).
- Herman Judith L., & M. R. Harvey, "The False Memory Debate: Social Science or Social Backlash?" (1993), 9 Harvard Mental Health Letter 4.
- Herman, J.L. & E. Schatzow, "Recovery and Verification of Memories of Childhood Sexual Trauma" (1987), 4 Psychoanalytic Psychology 1.
- Hills, Stuart, "Rape and the Male Mystique" in Demystifying Social Violence (New York: McGraw-Hill, 1980).
- Hovdestad, Wendy, "A Field Study of 'False Memory Syndrome'", M.A. Thesis, Dept. of Psychology (Ottawa: Carleton University, 1995).
- Hovdestad, Wendy, et al., "An Empirical Study of the Incidence of False Memory Syndrome", Paper presented at the Annual Convention of the American Psychological Association, New York, August 1995.
- Hopper, Jim, "'Recovered Memories of Sexual Abuse: Scientific Research & Scholarly Resources", <<http://www.jimhopper.com/memory>>27 December 1998.
- Hunt, Alan, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990), 17 (3)

- Journal of Law and Society 309.
- Hyde, Janet Shibley, Half the Human Experience: The Psychology of Women (Lexington, Mass.: (D.C. Heath and Company, 1991).
- Kellough, Gail, Aborting Law: An Exploration of the Politics of Motherhood and Medicine (Toronto: University of Toronto Press, 1996).
- Kelly, Katharine D., "'You Must Be Crazy If You Think You Were Raped': Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials" (1997), 9(1) Canadian Journal of Women and the Law 178.
- Kelly, Liz, Surviving Sexual Violence (Minneapolis: University of Minnesota Press, 1988).
- Klein, Dorie & June Kress, "Any Woman's Blues"(1976), 5 (Spring-Summer) Crime and Social Justice Journal.
- Kristiansen, Connie, Carolyn Gareau, Jennifer Mittleholt, Nancy DeCourville & Wendy Hovdestad, "Social-Psychological Factors Sustaining the Recovered Memory Debate", Paper Presented at the Annual Convention of the American Psychological Association, New York, August 1995.
- Kristiansen, Connie, "Recovered Memories of Child Abuse: Fact, Fantasy or Fancy?" (1996), 19(1) Women and Therapy 47.
- Kristiansen, Connie, False Memory Syndrome: An Authoritarian Backlash Against Women (1994), 35 (2A) Canadian Psychology 203.
- Lahey, Kathleen A, "Research on Child Abuse in Liberal Patriarchy" in Jill McCalla Vickers, ed., Taking Sex Into Account: The Policy Consequences of Sexist Research (Ottawa: Carleton University Press, 1984).
- Laing, R.D., & A. Esterson, Sanity, Madness and the Family (New York: Basic Books, 1964).
- Lamm, J., "Easing Access to the Courts for Incest Victims: Towards an Equitable Application of the Delayed Discovery Rule" (1991), 100 Yale Law Journal 2189.
- Loftus, Elizabeth F., "The Reality of Recovered Memories" (May 1993), in 48(5) American Psychologist 518.
- Loftus, Elizabeth F., "Creating False Memories"(September 1997), 277 Scientific American 3.
- Loftus, Elizabeth F., & Katherine Ketchum, The Myth of Repressed Memory, (New York: St.

- Martin's Press, 1994).
- Loftus, E.F., Polansky, S., & Fullilove, M.T., "Memories of Childhood Sexual Abuse: Remembering and Repressing" (1994), 18 Psychology of Women Quarterly 67.
- MacKinnon, Catharine, Feminism Unmodified: Discourses on Life and Law (Cambridge, Mass.: Harvard University Press, 1987).
- Mazzoni, G.A.L., P. Lombardo, S. Malvagia & E. F. Loftus, "Dream Interpretation and False Beliefs" (1999), 30(1) Professional Psychology: Research and Practice 45.
- Murphy, Wendy J., "Debunking 'false memory' myths in sexual abuse cases", <http://www.smith-lawfirm.com/Murphy_Memory_Article.html> 11/27/98.
- O'Brien, Mary, "Hegemony and Superstructure: a feminist critique of neo-marxism", in Jill M. Vickers, ed. Taking Sex Into Account: The Policy Consequences of Sexist Research (Ottawa: Carleton University Press, 1984).
- Ofshe, Richard & Ethan Watters, "Making Monsters" (1993), March/April Society 4, reprinted in Robert A. Baker, ed., Child Sexual Abuse and False Memory Syndrome (Amherst, N.Y.: Prometheus Books, 1998).
- Olafson, E., D.L. Corwin & R.C. Summit, "Modern History of Child Sexual Abuse Awareness: Cycles of Discovery and Suppression" (1993), 17 Child Abuse and Neglect 7.
- Pasley, Laura, "Misplaced Trust: A First-Person Account of How My Therapist Created False Memories" (1994), 2 Skeptic 62.
- Pezdek, Kathy, "Planting False Childhood Memories: The Role of Event Plausibility" (1997), 8(6) Psychological Science 437.
- Pezdek, Kathy, Planting False Childhood Memories: When Does It Occur and When Does It Not?, Paper presented at the 36th Annual Meeting of the Psychonomics Society (November 10-12, 1995).
- Pedek, Kathy & William Banks, eds., The Recovered Memory/False Memory Debate (San Diego, Calif.: Academic Press, 1996).
- Pfohl, Stephen J., Images of Deviance and Social Control: A Sociological History (New York: McGraw-Hill Publishing Company, 1985).
- Pfohl, Stephen J., "The Discovery of Child Abuse", in Delos H. Kelly ed., Deviant Behaviour: A Text-Reader in the Sociology of Deviance (New York: St. Martin's Press, 1984).

Porter, Steven, radio interview with Avril Benoit, CBC Radio One morning show "This Morning", January 26, 1999.

Reasons, Charles, Criminology: Crime and the Criminologist (Santa Monica, Calif.: Goodyear, 1974).

Russell, Diana, The Secret Trauma: Incest in the Lives of Girls and Women (New York: Basic Books, 1986).

Saul, John Ralston, The Unconscious Civilization (Concord, Ont.: Anansi, 1995).

Scheff, Thomas, Being Mentally Ill: A Sociological Theory (Chicago, Ill.: Aldine, 1966).

Schwendinger, Julia & Herman Schwendinger, "Rape, Sexual Inequality and Levels of Violence" (1991), 16 Crime and Social Justice, 3.

Smart, Feminism and the Power of Law, (London: Routledge, 1989).

Smart, Carol & Selma Sevenhuijsen, Child Custody and the Politics of Gender (London: Routledge, 1989).

Smith, Susan K., "Remedies For Victims of Sexual Abuse" <<http://www.smith-lawfirm.com/remedies.html>> 27 Nov 98.

Spanos, Nicholas P., Multiple Identities and False Memories: A SocioCognitive Approach, (Washington, D.C.: American Psychological Association, 1996).

Spanos, Nicholas P., "Dissociative Disorders: Not Empirically Proven" (1995), 40(3) Contemporary Psychology 261.

Taylor, John, "Donna [Smith] and the Therapy Police: Was it Psychology or a Modern Kind of Sorcery That Led Her to Accuse Her Father of a Terrible Crime?", 145 No. 869 Reader's Digest (Canada) (S'94) 37.

Taylor, Julie, "Rape and Women's Credibility: Problems of Recantation and False Accusations in the Case of Cathleen Webb Crowell and Gary Dotson" (1987) 10 Harvard Women's Law Review 59.

Tomm, Winnie, ed., The Effects of Feminist Approaches on Research Methodologies (Waterloo, Ont.: Wilfred University Press, 1988).

Toner, Barbara, The Facts of Rape (London: Hutchinson & Co., 1977).

Underwager, R., & H. Wakefield, "Therapeutic Influences in DID and Recovered Memories of Sexual Abuse" (1996), 8 Issues in Child Abuse Accusations (3/4) 169.

van Dieen, Jodie, "O'Connor and Bill C-46: Differences in Approach" (1997), 23 Queen's Law Journal 1.

Vella, Susan, "False Memory Syndrome: The latest defence to childhood sexual abuse claims"(1992) 12 (4) Jurifemme 1.

Vella, Susan, "False Memory Syndrome: Therapists are the target in new sexual assault defence theory"(1994), Jan/Feb. National 36.

Williams, Linda Meyer, "Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse" (1994), 62(6) Journal of Consulting and Clinical Psychology 1167.

Williams, Linda Meyer, "What Does It Mean to Forget Child Sexual Abuse? A Reply to Loftus, Garry and Feldman" (1994), 62(6) Journal of Consulting and Clinical Psychology 1182.

Young, Alison Harvison, "Child Sexual Abuse and the Law Of Evidence: Some Current Canadian Issues" (1992-93), 11 Canadian Journal of Family Law 20.

"Custody Litigation and the Child Sexual Abuse Backfire Syndrome", Jurifemme 8, no.3 (Winter 1988) 21.

Parliamentary Committees and Debates

Volume 134 House of Commons Debates Number 142, 2nd Session, 35th Parliament, February 4th, 1997.

Volume 134 House of Commons Debates Number 142, 2nd Session, 35th Parliament, April 17th, 1997.

Standing Committee on Justice and Legal Affairs, Meeting 112, Evidence, House of Commons, 35th Parliament, 2nd Session, March 13, 1997.

Statutes

Statute of Westminster 1, 13 Edward I (1285), c. 35.

An act to make the remedy in cases of seduction more effectual, and to render the Fathers of illegitimate children liable for their support, 7 William IV (1837), c.8, (U.C.).

Criminal Law Reform Act (1980-81-82), R.S., c.129, s.19.

Criminal Code of Canada, R.S., c. C-34, s. 278.3; 278.5; and 278.7.

Bill C-46, An act to amend the Criminal Code (production of records in sexual offence proceedings).

Case Law

Colquhoun v. Colquhoun [1994] O.J. No.681 (Gen. Div.) (QL).

L.H. v. W.U. [1998] B.C.J. No. 1132.

K.M. v. H.M. [1992] 3 S.C.R. 6.

T.K.S. v. E.B.S.[1992] B.C.J. No 2452 (S.C.), rev'd [1995] B.C.J. No. 1542 (C.A.).

R. v. Carosella [1997] 1 S.C.R. 80.

R. v. E.F.H. [1994] O.J. 452, affirmed [1996] O.J. No.553.

R. v. Francois [1994] 2 S.C.R. 827.

R. v. Herbert [1997] O.J. No. 4769.

R. v. J.J.W. [1998] J. No. 3207.

R. v. Kliman [1998] B.C.J. No. 49.

R. v. Lee [1997] 35 O.R. (3d) 598.

R. v. Mills [1997] A.J. No. 891

R. v. Norman 87 C.C.C. (3d) 153.

R. v. O'Connor [1995] 4 S.C.R. 411.

R. v. Osolin [1993] 4 S.C.R. 595.

R. v. R.L.B. [1994] M.J. No. 416 (Q.B.).

R. v. W.K.L.[1991] 1 S.C.R. 1091.

Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988).

Mary D. v. John D., 264 Cal. Rptr. 633 (Cal. App. 6 Dist. 1989).

Sullivan v. Cheshier 846 F. Supp. 654 (N.D. Ill. 1994).

Tyson. v. Tyson 727 P.2d 226 (1986).

Newspaper Articles

Bindman, Stephen, "McLellan to discuss 'recovered' memory", Ottawa Citizen May 16, 1998 at A4.

Bindman, Stephen, "Can recovered memories be trusted?", Ottawa Citizen, May 4, 1998 at A1.

Bindman, Stephen, "Supreme Court to rule on 'privacy shield' sex law", Ottawa Citizen, February 13, 1998 at A4.

Claridge, Thomas & Donn Downey, "Medical records reopened in rapes", Globe & Mail, October 3, 1997 at A8.

Delacourt, Susan, "Losing Interest," The Globe and Mail, April 4, 1995, at D5.

Hahn, Christine, "Bryden up in arms over new Bill C-46 legislation", Ancaster News, Wednesday April 8, 1998 at 10.

Jonas, George, "Recovered memory is best forgotten", the Montreal Gazette, Sunday May 3, 1998 at A3.

Jonas, George, "'Recovered memories of abuse don't prove guilt'", Ottawa Citizen, November 7, 1997 at A15.

Makin, Kirk, "McLellan to Look into Recovered Memory Debate", Globe & Mail, Wednesday May 20, 1998 at A3n.

Makin, Kirk, "Court Rules Against Rape Victims", Globe & Mail December 15, 1995 at A1, A7.

Page, Shelly, "Of Two Minds: The Profs at the Heart of the 'Recovered' Memories Debate", Ottawa Citizen, May 24, 1998 at D3.

"Recalling Abusive Memories", Globe & Mail May 21, 1998, at A2.