

## Forensic Hypnosis and the Courts

Dr. Brent A. Paterline<sup>1</sup>

### Abstract

*The theory behind the use of forensic hypnosis is the belief that under hypnosis a subject's concentration is heightened to the point where they can recall details of a crime that seem to elude them in a conscious state. Hypnosis is believed to cause subjects more to be more attentive, focused and less prone to analytical thinking which can block memory. Forensic hypnotists often claim that hypnosis has proven to be a valuable tool in enhancing or recovering past memories. Scientific research, however, suggests, fairly overwhelmingly, that hypnosis does not reliably increase the accuracy of eyewitness recall and recognition; rather, the research shows that when effects do occur, hypnosis can produce an increase in false, distorted, or manufactured memories. The purpose of this paper is to examine the treatment that the U.S. court system has accorded hypnotic testimony. An examination of early court cases reveals that hypnosis was not accepted in the courtroom, but recently courts have been more willing to admit hypnotic testimony, providing certain procedures are followed.*

**Keywords:** Forensic Hypnosis, Memory, Hypnotic Testimony, Eyewitness Recall.

### Introduction

Fredrick Woods, Richard Schoenfeld, and his brother James Schoenfeld all came from privileged backgrounds, living in wealthy neighborhoods in San Francisco. When they research their early 20s, their parents began to limiting their allowances and they believed that they the needed a way to make some quick money to keep up the extravagant lifestyle. Being huge fans of police movies such as *Dirty Harry*, the three devised a plan to hijack a school bus, hide all of the passengers in a safe but secure location, demand \$5 million ransom from the State of California, retrieve the money, and then release the hostages; all within 24 hours.

On July 1976, the three men decided to put the plan in motion. They stopped their white van in the middle of a rural road in Chowchilla, California and waited for a school bus to drive by. Acting as though their van had broken down, they waved down the school bus. When the 55-year-old driver Edward Ray stopped to investigate, the men boarded the bus armed with a shotgun and wearing nylon stockings over their faces. The men kidnapped 26 children the driver who were being dropped off on their way back from a field trip at the Chowchilla fairgrounds' swimming pool. The kidnappers hid the bus in a drainage slough and drove the children and bus driver around in two vans for 11 hours, eventually taking them to a quarry in Livermore, California.

There, the kidnappers imprisoned the victims inside a buried moving van with a small amount of food and water, and a number of mattresses. After several hours, the bus driver and the children were able to stack the mattress, enabling some of the children to reach an opening at the top of the truck. They wedged the metal lid of the opening at the top of the truck with a stick and escaped after 16 hours in the truck. All were in good condition. The police decided to use a new investigative technique, forensic hypnosis, in order to see if they could enhance the memory recall of the bus driver. Under hypnosis, the bus driver was able to remember the license number of the van used in the kidnapping, leading to the capture of the three suspects. The kidnappers had been unable to phone in their ransom demand because telephone lines to the Chowchilla Police Department were tied up by media calls and families searching for their children.

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<sup>1</sup>University of North Georgia, Department of Criminal Justice, Dahlonega, GA 30040, USA.

The use of hypnosis in the Chowchilla case was one of the catalysts that inspired interest in the use of hypnosis in criminal investigations. Law enforcement agencies across the country began to train officers in the use of forensic hypnosis. The theory behind the use of forensic hypnosis is the belief that under hypnosis a subject's concentration is heightened to the point where they can recall details of a crime that seem to elude them in a conscious state. Hypnosis is believed to cause subjects more to be more attentive, focused and less prone to analytical thinking which can block memory. Hypnosis purportedly bypasses a person's psychological defenses and taps into repressed memories. For example, it is widely believed that trauma can block memories of past events. This means that victims of a crime may not be able to recall traumatic memories because they perceive them as being too dangerous or frightening. A hypnosis trance, however, can help the subjects relax and feel safe enough to allow the details of traumatic memories to surface.

### ***Hypnosis***

There is no legal definition of hypnosis. Webster's dictionary describes it incorrectly as an artificially induced sleep, but hypnosis is not sleep because subjects can hear everything that others say and can respond to them if they want. Hypnosis can be best defined as an altered state of consciousness characterized by relaxation, a heightened responsiveness to suggestion, and an increase in concentration (Goldenson, 1984). Hypnotist usually causes subjects to go into hypnosis through the use of an induction procedure. Although there are many different types of induction procedures, most center on suggestion for relaxation and visualization. An induction procedure, for example, may include asking the participant to imagine him or herself slowly walking down a set of stairs and become more relaxed with each step they take. Overall, most people find the experience very pleasant and relaxing.

People differ in their responses to a hypnotic induction and susceptibility to hypnosis. Some enter a deep trance like state of relaxation, while others may only become lightly relaxed. Some people respond to almost all suggestions while under hypnosis, some respond to a few suggestions, and most respond to some suggestions but not others (Braffman & Kirsch, 1999). Among the factors that are important in inducing hypnosis can include (1) a subject's imagination and ability to concentrate the, (2) a participants desire to cooperate, and (3) the preconceived notions the subject has about hypnosis (Orne, Whitehouse, Dinges, & Orne, 1988). A person's ability to experience hypnotic suggestions is most often inhibited by fears and concerns arising from some common misconceptions. Contrary to depictions of hypnosis in books and movies, people cannot be hypnotized against their will. A person who does not want to be hypnotized cannot be hypnotized against their will. Hypnosis requires the complete cooperation of the subject. In order to be hypnotized a subject must completely concentrate on the words and directions of the hypnotist, while at the same time relaxing themselves as much as possible. Another common myth of hypnosis is that under hypnosis a person can lose control and be under the power of the hypnotist. In truth, the subject is always in control. A hypnotist cannot make a person to say or do anything against their will. Under hypnosis, subject will not tell the hypnotist anything they do not want them to know. In fact, subjects can even lie under hypnosis if they want to. Therefore, hypnosis cannot be used to by law enforcement to force confessions out of unknowing or unwilling suspects and defendants. In addition, since the subject holds control of a hypnotic session, there is no difficulty for the subject to terminate the hypnotic state.

### ***Admissibility of Post-Hypnotic Testimony***

The purpose of this section is to examine the treatment that the U.S. court system has accorded hypnotic testimony. An examination of early court cases reveals that hypnosis was not accepted in the courtroom, but recently courts have been more willing to admit hypnotic testimony, providing certain procedures are followed. There are four different recognized legal approaches for the admissibility of post-hypnotic testimony, which have evolved over time: (1) a rule of per se inadmissibility; (2) a rule of per se admissibility. (3) a safeguard approach and; (4) the totality of the circumstances approach. For decades U.S. courts followed a rule of per se inadmissibility, meaning all post-hypnotic testimony is automatically excluded regardless of the facts and circumstances. An example is *State v. Pusch* (1951) in which August Pusch was convicted of first degree murder for giving his former wife poison. The defense hired a Doctor Burgess to hypnotize the defendant and ask him questions concerning the offense charged. Doctor Burgess was formally trained in hypnosis, practiced this profession for a number of years, and claimed he could tell whether or not the defendant was telling the truth in a hypnotic state due to his experience in hypnosis. The state was invited to attend the hypnotic session, but refused to attend.

The session was recorded by wire recorder. The recordings and Dr. Burgess's testimony was offered to the court as evidence. The court ruled that there was not prior case authority for the admissibility of this type of evidence, and therefore the evidence was rejected. The court noted that hypnosis may be used effectively for criminal investigation, but like the polygraph test, it was not usable as evidence in court.

Courts which follow a rule of per se inadmissibility usually exclude post-hypnotic testimony by using the Frye test, or the "general scientific acceptance test," which holds that there must be a consensus of the relevant scientific community before a new scientific technique can be admitted as evidence. The Frye test was established in a case involving the use of the polygraph (*Frye v. United States*, 293 F. 1013, D.C.Cir 1923). The court stated: Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have a gained general acceptance in the particular field in which it belongs. 293 F. at 1014.

The Frye test is still the most commonly used test in the country for determining if hypnotically induced testimony should be allowed. However, while the test may be commonly applied by different jurisdictions, the results have been very uncommon. In *State v Harding* (246 A.2d 302, Md. App. 1968) the court allowed the testimony of a victim of a sexual assault who was only able to identify her attacker under hypnosis. This decision, the first to allow hypnotic evidence per se, opened the door for the wide spread use of hypnosis in subsequent cases. A door that has been closing ever since. Over the next two decades several courts, using the Frye test, excluded hypnotically induced testimony. In *State v. Mack* (292 N.W 2d 764, 1980) the State of Minnesota citing, among other problems, numerous differences between the hypnotically recalled testimony of the victim and known unquestioned facts in the case ruled that based on the Frye test, that hypnotic testimony was per se inadmissible because there was no general acceptance of it in the scientific community.

The Federal courts no longer use the Frye rule. In the case of *Daubert v. Merrel Dow Pharmaceuticals* (509 U.S. 579, 1993) the U.S. Supreme court held that The Federal Rules of Evidence governed the introduction of scientific evidence not the Frye Test. The Daubert case centered on the admissibility of evidence related to the cause of birth defects. The trial court held, based on Frye that the studies and evidence proffered by the plaintiff did not meet the standards of the Frye test and was thus excluded. The U.S. Supreme Court overturned the decision stating that the Frye test was super-ceded by The Federal Rules of Evidence, particularly Rule 702. The Court stated that the Judge in the case should not per se deny the evidence but should serve as a gatekeeper to review the evidence and make sure it meets some minimum standard. The actual validity of the evidence can be tested through cross-examination and rebuttal testimony during the trial, thus the trier of fact should be the ultimate determiner of the validity of the evidence.

Recently, a number of Western states have taken the lead on the issue of hypnotic testimony. In a series of significant cases, Washington, Utah and California State appellate courts wrote extended opinions in which they examined the validity and reliability of hypnotically induced testimony. Each court, though using different reasoning, came to a similar conclusion; that hypnotically induced testimony is not reliable enough for use in the courtroom. *People v. Shirley* (723 P.2d 1354, 1982), Utah: *State v. Tuttle* (780 P.2d 1203, 1989) *State v Martin* (684 P.2d 651, 1984) The U.S. Supreme Court added to the confusion in the 1987 case of *Rock v. Arkansas* (483 U.S. 44), in which they overturned a lower court ruling in which hypnotically refreshed testimony had been initially rejected, as dictated by state law. In this case, Mrs. Vickie Lorene Rock fired a loaded gun at her husband, Frank Rock, during a fight. During cross-examination immediately following the incident, it was discovered that Loren failed to remember any specific detailing relating to the shooting. To help unravel the circumstances surrounding Frank Rock's death, Loren's attorney decided to bring in a trained psychologist to hypnotize her. The hypnosis sessions were recorded. While in a hypnotic trance, Loren revealed evidence crucial to her defense. In a trance, she recalled that her gun had misfired when her husband had grabbed her arm. She had placed her thumb on the hammer of the gun but had not pulled the trigger. A gun expert testified that the Hawes .22 Deputy Marshall was indeed faulty and was prone to misfire if dropped or hit, even if the trigger was not pulled. The prosecuting attorney filed a motion to exclude this testimony and Judge, doubting the validity of the testimony, and ruled that the hypnotically refreshed testimony was inadmissible.

He limited Loren's testimony to "matters remembered and stated to the examiner prior to being placed under hypnosis." Loren Rock was convicted of manslaughter and sentenced to ten years in prison and a \$10,000 fine. An appeal was filed with the state supreme court, but the Arkansas Supreme Court affirmed the conviction and restated that hypnotically refreshed testimony is inadmissible per se because it is unreliable. Yet grounds for further appeal rested on whether or not a state law could so restrict a defendant's right to testify by excluding material parts of the testimony.

The U.S. Supreme court overturned the Arkansas decision on the basis that a total ban of such testimony restricted Mrs. Rock's 14<sup>th</sup> Amendment Right to due process and her 6<sup>th</sup> Amendment right to call witnesses. The court held that Loren had the right to testify in her own defense and that prior statements made by the accused under hypnosis are admissible evidence. In another words, the United States Supreme Court held that a per se rule excluding post-hypnotic testimony infringes on a criminal defendant's right to testify on his own behalf and is therefore unconstitutional. Justice Harry A. Blackmun, who wrote the majority opinion, conceded that there are varied responses to hypnosis and the procedure cannot guarantee accurate memories; in fact, he noted, that it often has no effect on memory whatsoever. If hypnotically induced testimony were suspect, however, its veracity could have been adequately tested by cross-examination. This decision was limited to the testimony of defendants, not victims or witnesses and was not based on the accuracy of hypnosis, but the legal rights of the defendant.

Using this per se admissible approach courts treat post-hypnotic testimony as they would any other testimony. It is subject to cross-examination and the testimony of experts to help the trier of the fact determine its reliability and accuracy. In essence, the question is not one of admissibility of the evidence, but one of credibility of the witness and the trier of fact is believed responsible enough to weigh the reliability of post-hypnotic testimony. A more restrictive approach to the admissibility of post-hypnotic testimony is the safeguard approach, in which the court allows the introduction of testimony refreshed by hypnosis if certain procedural safeguards are followed to help insure reliability during the hypnosis session. The seminal case using this approach was the New Jersey Supreme Court's decision in *State v. Hurd* (432 A.2d 86, 1981). In this case Jane Sell was attacked with a knife while sleeping in her bedroom. She escaped the attack, but afterward, could not recall any details of the crime. Her ex-husband, Paul Hurd, had a heated phone conversation with Jane's current husband, David Sell, on the evening before the assault. That made Hurd the primary suspect.

Jane Sell was put under hypnosis by a psychiatrist and identified her former husband, Paul Hurd, as the attacker. In her post-hypnotic state, however, Jane Sell expressed mistrust about her thinking, but the psychiatrist and the investigating detective encouraged her to remain with her hypnotic identification. Hurd was therefore identified as the attacker, and he was indicted and charged with assault with intent to kill, assault with a deadly weapon, and breaking and entering. The defense argued, on the basis of the Frye test, that hypnotically refreshed testimony is inadmissible per se because hypnosis was not generally accepted as a reliable scientific technique. The defense also argued that Jane Sell's testimony was tainted by suggestion and coercion.

In 1981 the case went to the New Jersey Supreme Court and the Court reviewed the issue of whether Sell's testimony was true recall or confabulation. In reaching their decision to bar the testimony, the Court came up with the following state guidelines:

1. Witness must use a psychiatrist or psychologist trained and experienced in the use of hypnosis.
2. The hypnotist should be independent of, and not regularly employed by, the prosecution, police, or defense.
3. Information given by any party to the action to the hypnotist should be written or recorded and made available to all parties.
4. The hypnosis session(s) should be video- or audio-taped, including pre- and post-interviews.
5. Only the expert and the witness should be present during all phases of the hypnosis.
6. The subject's pre-hypnosis memories for the events in question should be carefully recorded and preserved.

The Court determined that Sell's testimony had failed to follow any of the proposed safeguards.

A few courts have taken yet a fourth approach to the question of admitting hypnotically-influenced testimony – a case-by-case totality of circumstances approach. The precedent for adopting this approach was set by the United States Courts of Appeals for the Second Circuit, in *Borawick v. Shay* (68 F. 3d 597, 2d Cir.1995). In this case, the Plaintiff, Joan Borawick, began to experience panic attacks during the fall of 1984.

The Plaintiff underwent hypnosis on the advice of her medical doctor. The Plaintiff was hypnotized on 12-14 occasions over a one-year span between the summer of 1987 and the fall of 1988.

The hypnotist, Valerian St. Regis, did practice as an hypnotist in California, but he did not have a medical degree, was not a licensed psychologist, or a member of the American Society of Clinical Hypnosis, and he had no education beyond a high school degree. The hypnotist believed that problems in childhood sometimes cause chronic illness and are susceptible to recall under hypnosis. Therefore, in the last three hypnosis sessions, age regression was used to take Joan Borawick, the plaintiff, back to the ages of three to five. Borawick left each session with no conscious recollection of having been sexually abused as a child. Months after the hypnosis ended, while driving alone in her car, Borawick experienced her first recollection of having been sexually abused as a child. Borawick testified in her deposition that her aunt, Christine Shay, vaginally raped her with a pistol and broomstick. Borawick also stated that she regained memory of being naked in the presence of her aunt and "having to dance around."

The hypnotist, St. Regis, also testified that Borawick revealed under hypnosis that her aunt, defendant Christine Shay, persuaded Borawick, at the age of four to strip and engage in "ritual dancing." St. Regis further stated that during hypnosis Borawick described anal object penetration by Christine Shay, as well as another incident in which her uncle, defendant Morrie Shay, anally raped her. St. Regis did not tell what she said under hypnosis after each session because in his opinion, such revelations would have been "devastating" and would probably surface in time. The hypnosis sessions were not video or audio taped. St. Regis had kept notes of the session, but had moved his office and the notes could not be found. On January 24, 1992, Borawick sought compensatory and punitive damages from Morris and Christine Shay for their alleged willful, wanton, and malicious sexual exploitation of her in 1961 and 1964. The initial district court decision decides to exclude the hypnotically recovered testimony based on the procedural safeguard rule outlined in *State v. Hurd* (1981). The Court added that although there was no evidence that hypnotist St. Regis influenced Borawick's testimony; he did not possess the proper qualifications as a hypnotist.

The decision was appealed and the Second Circuit reviewed the case based on the totality-of-circumstances ruling. The Court felt that the safeguard approach was too rigid. They also, however, decided to exclude Borawick's hypnotic testimony and said that there was no corroborative evidence in any form of the events described by Borawick. They also felt that St. Regis was under qualified and with no record of the hypnosis session, there was no way to evaluate the session or any suggestion St. Regis may have given Borawick. It was also noted that St. Regis read Borawick's deposition previous to testifying and his testimony may have reflected the deposition rather than the actual events. The court also ruled that the party seeking to admit hypnotically refreshed testimony bears the burden of convincing the court of its admissibility. The totality of circumstances approach incorporates the following "non-exclusive" factors in determining whether or not hypnotically-influenced testimony is admissible:

1. An evaluation of the purpose of hypnosis, whether investigative or therapeutic.
2. Whether the subject received suggestions from the hypnotist or others prior to or during the hypnosis.
3. The presence or absence of a permanent record, which can help the court ascertain whether suggestive procedures were used, ideally the sessions should be videotaped or audio taped
4. Whether the hypnotist was appropriately qualified by training in psychology or psychiatry.
5. Whether corroborating evidence exists to support the reliability or the hypnotically-refreshed memories.
6. Evidence of the subject's susceptibility to hypnosis.
7. Consideration of expert evidence offered by the parties as to the reliability of the procedures used.
8. A pre-trial evidentiary hearing should be conducted by the district court.

While more liberal than the pre se inadmissible rule or safeguard test, the non-exclusive multi-factored test adopted by the Second Circuit is flawed in several respects.

### ***Discussion and Conclusion***

Forensic hypnotists often claim that hypnosis has proven to be a valuable tool in enhancing or recovering past memories and survey data indicate that many people believe that hypnosis increases the accuracy of eyewitness's testimony (Wagstaff & Vella, 1992; McConkey & Jupp, 1986; Wilson, Greene, & Lotus, 1986).

Scientific research, however, suggests, fairly overwhelmingly, that hypnosis does not reliably increase the accuracy of eyewitness recall and recognition; rather, the research shows that when effects do occur, hypnosis can produce an increase in false, distorted, or manufactured memories (Smith, 1983; Wagstaff, 1984; Dywan & Bowers, 1983; Dasgupta et al. 1995; Dinges et al. 1992; Geiselman & Machlovitz, 1987; Steblay & Bothwell, 1994; Wagstaff & Mercer, 1993; Nash, 1994). The American Medical Association (1985) also concluded that “recollections obtained during hypnosis can involve confabulations and pseudo-memories and not only to fail to be more accurate, but actually appear to be less reliable than non-hypnotic recall.” The evidence indicating the unreliability of hypnotic memories is not limited to laboratory research. For example, M. Orne, Whitehouse, Dinges, and E. Orne (1988) reported a number of forensic cases in which hypnotized witnesses testified to remembering seeing events that they could not have possibly seen.

Even with all the scientific studies that show that human memory is fragile and malleable; many courts in the United States still regard hypnotic memories as a permanent record of past events. In many jurisdictions, hypnotic memories are treated as if they were a videotape of past events, faithfully storing everything we say and do. But our minds do not work like a video camera and every time an old memory is pulled into consciousness, the brain takes it apart, updates it, and then transforms it permanently reflect each person’s life experiences. Hypnotic memories may therefore be a combination of actual events, irrelevant memories of actual events, fabricated memories to fill in gaps in ones memory, and pure fantasy.

The memories recovered in hypnosis sessions do differ dramatically in quality from memories of events recollected in a normal state of consciousness. Hypnotically recovered memories can be very powerful and subjects often claim that under hypnosis they can watch past events as if they were watching a movie. The scenes become highly detailed, in vivid color, and very emotional. Details may include what people were wearing, what someone smelled like, and specific dialogue. Subjects also feel what was happening at the time of the event and tell their story with an emotional sincerity. Forensic hypnotists take such vividness, detail, and emotional sincerity as proof of the accuracy of the memory when it actually implies the opposite. Under hypnosis subjects’ imaginations become much more active than in normal states of consciousness and fantasized events often have more detail, vividness, and emotion than actual events. A host of studies verify this effect. Hypnotized subjects, for instance, can produce detailed and dramatic accounts of their first few months of life even though those events did not in fact occur and even though adults simply do not have the capacity to remember early infancy.

It is also worth noting that it is not only the distortion of memory which is at issue, but also the sincerity with which people believe their distorted memories to be accurate. Because hypnotically recovered memories are remembered in such detail and with such emotion, subjects often develop a false confidence in it. This is often called “memory hardening” because the memory become “hardened” or “cemented” in one’s mind as a result of the hypnotic experience. This memory hardening may render a witness impervious to cross-examination, and the witness may testify to the false memory with such confidence and certainty that the judge and/or jury could be swayed by the testimony. Therapist and some psychologist use hypnosis in “recovered memory therapy” which popularity peaked in the USA in the early 1990s. The theory behind recovered memory therapy is that uncovering supposed repressed memories from the client’s past will help them solve their psychological problems.

Hypnosis is used to bypass a subject’s analytical conscious mind, and reach the subconscious mind where one’s memories are stored. There is a difference, however, between therapeutic truth and legal truth. For example, recovered memory therapy, also often called regression, is used to treat phobias. The theory being that many phobias are tied to an unpleasant experience or in a person’s past that he or she cannot remember. Once the memory of the event is recovered, the client can become more aware of the origin of the phobia, and is supposedly better able to cope with or even free themselves of the phobia. Whether or not this “recovered memory” really happened or is just a figment of the client’s imagination is not an issue. If the “recovered memory” helped the cure or reduces the client’s phobia, then the therapist has done his or her job. Such a case is unlikely to reach a court of law. The problem with recovered memory therapy, however, is that there are many practitioners who believe that repression is a powerful psychological defense that can causes one to lose all memory of any physical or sexual abuse that occurred during childhood. According to these practitioners, there are hundreds of thousands of adults, primarily women, who suffer psychological and emotional problems that are caused by childhood sexual abuse. Many of these persons have supposedly repressed these memories and therefore cannot recall any childhood abuse.

Therapist feel obligated to uncover their client's hidden traumatic history and often use hypnosis to do so. Clients who respond to this therapy become convinced that they were ignorant of their childhood abuse, which may have gone on for years. Therapists report that the memories their clients recover must be true because they tell them with such emotion and pain. Such cases do reach courts of law and are surrounded in controversy. Critics charge the recovered memory therapy or regression does not unearth real memories at all, but rather the memories created in the hypnosis session. Under hypnosis one's imagination is extremely active and persons therefore often create or even inaccurately reconstruct past events. For example, a vague childhood memory of a silhouette in one's doorway can become, under hypnosis, a memory of a parent or relative who did something terrible. In a sense, hypnosis can essentially trick into believing that they are remembering events that never happened. The only evidence used that supports the recovered memories comes out of the therapy sessions.

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## Notes

There have been many different rulings on the admissibility of hypnotic testimony. The courts of this country have ruled at different times that this testimony is per se admissible to being per se inadmissible and practically every compromise in between. Controversy surrounded every one of these decisions. Recovered memory is also derived from Freud. One of the elements of psychoanalytic theory is repression. A person can repress an unpleasant experience into their unconscious as a sort of self-preservation. The concept of recovered memory got a tremendous amount of media exposure during the mid 80's to the early 90's. There were a number of highly publicized court cases and even some celebrities who recovered memories of sexual abuse.