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We Said, She Said: A Response to Loftus (2003)

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Abstract
In Loftus' (included in this issue) commentary on our article, she agreed with many of our conclusions concerning allegations in 'he said, she said' legal cases. However, she focused some criticism on our coverage of recovered memory evidence. It appears that the main difference in our perspectives was not related to the science of memory but rather was one of scientific education versus advocacy in the legal system.

Porter, Campbell, Birt, and Woodworth (this issue) provided a review of the psychological science relevant to understanding the validity and characteristics of memories for crimes – or alleged crimes – from the distant past. We feel strongly that psychology has the potential to improve legal decision-making and avoid miscarriages of justice in historical cases. We agree with Loftus (this issue) that to a large extent this potential already has been realized in the related application of scientific findings on eyewitness memory and identification in the courtroom. It is widely recognized in both the scientific and legal communities (as reflected in the Sophonow Inquiry) that eyewitness errors have directly contributed to wrongful convictions. Much more controversial is the use of uncorroborated memory reports by complainants concerning incidents that may have happened decades ago, that serve as the main evidence in many trials. This issue is further complicated when the evidence is based on recovered memories of the alleged incident. In the Porter et al. article, we noted that Canadian courts have responded to historical memory evidence in a highly inconsistent fashion.

Since the writing of Porter et al. (this issue), the situation has been improving. Starting in December, 2002, the National Judicial Institute (based in Ottawa) – an organization dedicated to the development and delivery of educational programs for all federal, provincial, and territorial judges – has organized an annual Wrongful Convictions conference at which judges are provided with a wide range of information on factors contributing to erroneous convictions. Along with eyewitness researcher Rod Lindsay and other psychologists, the first author of the present paper has had the opportunity to speak with numerous judges and lawyers about psychological science and its relevance to credibility assessment in the courtroom. In the long run, this educational approach involving large numbers of the judiciary is likely more effective than expert psychological testimony in any given case.

In her commentary, Loftus (this issue) chose to focus most of her attention on the sections of our paper that dealt with recovered memories, and little on the sections dealing with continuous memories, intentionally false allegations, etc. From this, we assume that Loftus agreed with our conclusions on these other important issues. Although she stated that "while strongly agreeing with some of our conclusions, I disagreed with others," in reading her commentary we only were able to uncover one major disagreement with our conclusions and this disagreement was not "scientific" in nature (we will return to this point later). However, our views differed concerning whether to argue explicitly to keep dubious claims of repression out of the courtroom. That is, instead of making a policy recommendation (i.e., keep such and such evidence out of the court), we stuck to providing a scientific review and scientifically founded guidelines. In our view, it is not our role as psychologists to make policy decisions for the legal system, just as it is not our role to comment on whether recovered memory evidence should be admissible in the courtroom. We argue that this is simply not our question to answer. Rather, our role as psychological researchers is to provide the relevant scientific information to legal decision-makers to assist them in policy and case decisions. On the flipside, imagine if lawyers started telling us how to do good science. As researchers with forensic interests, we would always welcome suggestions from the legal community for important psycho-legal questions that need to be answered but not recommendations or guidelines on how to answer them.
Loftus makes the argument that psychological science has contributed significantly to the procedures and policies adopted by the legal system for evaluating evidence based on eyewitness memory and line-up identification. However, she is much more skeptical about how successful the application of scientific findings on "recovered" memories has been in the legal system. No disagreement here. She described the case of Michael Kliman to illustrate the potential for injustice when during the course of therapy a complainant "recovers" a memory of having been sexually molested many years earlier. As we outlined, our perspective on this and similar cases (some of which we reviewed in our paper) is similar to Loftus'. That is, we expressed major skepticism for the validity of repressed memories (as we stated, "some complainants have based their reports on memories 'recovered' in the context of questionable and suggestive psychotherapy approaches") and, further, discussed mistaken memories and how they can arise. We suggested that a review of documents pertinent to the circumstances and method of memory "recovery" or first-time disclosure is essential in determining the level of suggestion involved in obtaining the account. These documents may include therapy notes, police interviews, videotapes/records, and interviews with the complainant. Although Loftus agrees with the value of this information in assessing memory credibility, she raises concerns about the balance between the violation of the complainant's privacy with the suspect's right to a fair trial. This is obviously one of the negative sides to reporting a complaint of sexual abuse to the police and likely one of the factors that leaves some victims unwilling to disclose their abuse. However, this is a necessary feature of a fair police investigation and is by no means a problem limited to cases of sexual abuse or cases in which recovered memories are an issue. It is the responsibility of the investigator and legal professionals to handle such an invasion of privacy with care and respect for the complainant. The disclosure of information could be limited to the circumstances of the memory disclosure and/or memory "recovery" procedures employed.

Loftus agreed with our guideline stressing the importance of obtaining corroborating evidence in historical "he said, she said" cases. However, she also raised a reasonable question concerning the definition of corroborating evidence and used the Kliman case to illustrate her point. Credibility appeared to have been attributed to the initial complainant's memory when a second person "recovered" her own memory of sexual abuse by the accused following the initial complainant's disclosure. Although this second report may provide superficial corroboration of the alleged abuse, it would also require an independent, rigorous evaluation of its own credibility. In addition, the fact that the two victims were friends who may have discussed the allegations would raise concerns about the use of the second statement as "corroborating" evidence.

Loftus took issue with our recommendation for the use of empirically based cues in the credibility assessment, making the reasonable argument that false memories often share similarities with true memories. At times, differences between true and false memories may not appear obvious when evaluating individual cases and their use in judging credibility may lead to errors. However, we do not suggest that an evaluation of a memory report be based entirely on such cues. This science is still developing. Rather, these cues can provide a useful piece of the puzzle when questions about memory credibility are raised. These guidelines are not intended to be absolute, but to provide an informed structure by which professionals can conduct their evaluations and formulate their decision of credibility. Rather than have legal professionals/investigators rely solely on common sense (which is often greatly misinformed when it comes to understanding memory), the application of such a structure might help avoid miscarriages of justice similar to the Kliman case.

It was clear from Loftus' arguments that she is not in support of the idea of a separate memory system responsible for processing traumatic memories (such as child sexual abuse) or a cognitive system that would allow for a mechanism of repression. Neither are we (see Porter & Birt, 2001, for example). Loftus felt that we did not provide a sufficiently thorough critical review of the data refuting repression and did not challenge studies that purport to evidence repression. Although it was not our agenda to thoroughly examine the evidence against repression (which we have done before, e.g., Porter, Birt, Vaillé, & Hervé, 2001; Porter & Marxsen, 1998), we clearly indicated that the notion has extremely questionable validity. We believe that readers from both the scientific and legal communities would perceive our strong skepticism regarding the concept. Ultimately, we agree with Loftus' view that the questionable validity of the concept of repression raises serious concerns about its acceptance as evidence in the legal system. But, we reiterate, this is not a decision for scientists. Canadian courts have not yet eliminated recovered memory evidence from trials, which underscores the need for the type of guidelines we provided to assist professionals in evaluating recovered memory evidence.

In conclusion, it appears that Loftus and Porter et
al. do not disagree about the science of memory. The
dissension appears to lay only in our opinions regard-
ing appropriate advocacy as scientists. We think that
the information presented in our article should be an
important consideration for legal decision-makers and
can inspire positive change within the legal system.
However, we challenge the view that researchers ought
to be telling the legal system to exclude certain types
evidence. Otherwise we usurp the legal system
itself. Rather it is our role to provide information to
the legal decision-makers to inform their decisions
and judgments. We fully agree with Loftus’ conclud-
ing paragraph that the type of applied research con-
cerning memory reviewed in Porter et al. (this issue)
has intrinsic value over and above its relevance to
legal evidence. We feel fortunate to be part of an
international “team” of researchers engaged in studies
on memory and are inspired by both the basic and
forensic implications of the work.

Résumé
Dans son commentaire (paru dans le présent numéro) qui
faisait réponse à notre article, Loftus est d’accord avec

plusieurs de nos conclusions concernant les allégations
dans des causes judiciaires basées sur les seuls témoignages
de la victime et de l’agresseur. Toutefois, elle formule
certaines critiques quant à la façon dont nous traitons de
l’existence de la mémoire retrouvée. Or, il appert que ce
qui distingue principalement les points de vue que nous
proposons, c’est que ceux-ci ne sont pas liés à la science
de la mémoire mais se penchent plutôt sur l’éducation
scientifique par rapport aux plaidoiries dans le système
judiciaire.

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