

TO TELL THE TRUTH, MEMORY ISN'T THAT GOOD

"The palest ink is better than the best memory."
Chinese Proverb

"When you ask how I've been here without you,
I like to say I've been fine, and I do.
But we both know the truth is hard to come by,
And if I told the truth, that's not quite true."

Bob Feller
Some Days are Diamonds
(*Some Days are Stones*)

A PARABLE

The week of trial is almost over. The parties watch nervously as Judge Judith Justiciable reads instructions to the thirteen jurors, who look interested, but puzzled. The jurors range in age from 20 to 73 and have varying levels of education. One dropped out of high school as a junior, and seven never went past high school. Five went to college, but only two graduated. One (the 20-year old) is still working on a degree. Other than her, all of the jurors have been out of school for at least 15 years. For all of them, school was the last time in their lives that they were asked to sit in uncomfortable chairs for hours at a time and try to remember what people were telling them. Most of them were not very good at it when they were in school, and they are not any better at it now.

As the judge reads instructions, the lawyers are still rehearsing their closing arguments in their heads. One of the lawyers doesn't trust his recall about exactly what the key witnesses said on the stand, and worries that if he misstates the testimony, the jurors will think he is lying to them. He worried about that while he ate breakfast this morning. As a result, he forgot about his lactose intolerance and used milk on his cereal,

so he will feel bloated and probably be flatulent all morning. The other attorney has been so wrapped up in this case that he has forgotten to file the complaint in a multi-million dollar personal injury action and blown the statute of limitations. Both lawyers also happen to have wedding anniversaries today, and both will forget to bring home gifts for their spouses. For one of them, that will be the last straw and the marriage will end in divorce.

Both lawyers expect the verdict to turn on the testimony of Shurras Istandhere, the only witness who testified about the discriminatory remarks allegedly made by the Defendant, Huegot Dewrongman. Istandhere, Dewrongman and seven other witnesses all took the standard courtroom oath to tell the truth, the whole truth, and nothing but the truth.

Dewrongman denied that he discriminated against the Plaintiff, and he also denied that he had lied about what he had said and done. But he had no evidence to corroborate his position, so his lawyer, Rip Herup, had to impeach Shurras Istandhere through cross-examination. He questioned her about her hearing, whether she was wearing her hearing aid and had it turned up high enough. He pointed out that she claimed she had heard the remarks while she was walking quickly past Dewrongman in the hall, that it was noisy and hectic, and that she had heard only a fragment of the conversation. Rip Herup also got Shurras to admit she disliked Dewrongman and felt threatened by him, so passing him in the hall was always scary and a little traumatic for her. Nonetheless, Shurras was unshakeable in her conviction that she had heard Dewrongman make inappropriate and discriminatory remarks about the Plaintiff. She swore, "I'll never forget his words."

The lawyers aren't paying much attention while the judge drones out the stock instructions that neither of them had read, much less objected to. To tell the truth, the

judge is not paying much attention either. She is distracted because an old rock and roll song has been running through her head and she cannot remember the lyrics. For what seems like the thousandth time, she reads MPI 1.02, which says in part:

You are the sole judges of the facts in this case. It is up to you to determine which witnesses you will believe and what weight will be given to their testimony. In doing so, you may consider, for example, such things as their demeanor, apparent bias or prejudice, motive to testify truthfully or falsely, consistency, ability and opportunity to perceive, recall and communicate, or the overall reasonableness of their testimony in the light of all the other evidence.

At the outset, a witness is entitled to a presumption that his or her testimony is truthful. This presumption may be overcome, however, by any evidence tending to disprove that testimony or raising a substantial question as to the witness' credibility. A witness false in one part of his or her testimony is to be distrusted in others. However, this rule does not apply to a witness who unintentionally commits an error.

After the judge finishes the instructions, the lawyers give closing arguments. Then the jury retires to eat lunch and deliberate. An hour later, the jury returns a verdict against Dewrongman. Over the next few days, Rip Herup calls some of the jurors to ask why they ignored his cross-examination. All of them say they believed Shurras Istandhere and Dewrongman offered no evidence to contradict her. One of the jurors mentions something more specific: the judge's instruction that said Shurras Istandhere was presumed to speak the truth. The juror says that instruction iced the case.

Rip hangs up, and curses the jury system. He tells his secretary he would never trust his fate to a jury, and he feels lucky that he is an insurance defense lawyer handling a discrimination claim rather than a public defender in a murder trial. At least his client won't go to jail, or worse.

Then he walks into his office and rereads the instruction. It does say a witness's testimony is presumed to be truthful. It also says the presumption can be overcome, but only by evidence. He wonders what evidence he could have offered. He wonders why he had never noticed the language before, because it really does not make sense. Like the song says, "truth is hard to come by." In every trial, some of the witnesses forget, make mistakes about, reinterpret, shade, and prevaricate the truth. If they didn't, there would be no trials. Presuming that every witness speaks the truth makes as much sense as assuming that every player in a poker game holds four aces. It just does not add up.

What's more, the instruction seems to contradict the instructions courts give on the burden of proof. Especially when the burden of proof is only a preponderance of evidence, the presumption that any testimonial evidence is true makes it pretty easy to tip the scales toward a favorable verdict.

Rip does a little research. He learns the presumption of truth has been disapproved in federal criminal cases for more than 25 years, and it is no longer part of the standard instructions in federal civil cases or in Montana criminal cases. He learns that some courts have adopted instructions in criminal cases "to caution jurors about the inaccuracies in eyewitness identifications,"¹ and that "some of the traditional barriers to eyewitness identification expert testimony are coming down."² He also discovers that the problems with eyewitness testimony have been recognized for decades, and that "psychologists have

¹ Laurie Levenson, *Criminal Law: Eyewitness IDs*, NAT'L L.J., July 10, 2000, at A20.

² Warren Wolfson, "That's the Man!" *Well, Maybe Not: The Case for Eyewitness Identification Expert Testimony*, 26 LITIG., Winter, 2000, at 5.

developed an impressive body of research [about those problems] that cannot be ignored.”³ Yet, in Montana at least, the problems have been ignored, and the presumption of truth remains a part of the standard instructions in all civil cases.

I. INTRODUCTION

Our lawmakers and courts have long held schizoid views about the worth of testimonial evidence. On one hand, skepticism about the accuracy of human memory is reflected in the doctrine of laches, the parol evidence rule, the corroboration requirements for crimes such as accountability and defamation,⁴ statutes of limitations that are shorter for oral contract claims than for written contract claims,⁵ and other firmly-entrenched legal doctrines. On the other hand, over the past half-century courts and legislatures have lengthened statutes of limitations for child sexual assault claims,⁶ recognized a plethora of

³ *Id.*

⁴ MONT. CODE ANN. § 46-16-213 (2001) provides: A person may not be found guilty of an offense on the testimony of one responsible or legally accountable for the same offense, as defined in 45-2-301, unless the testimony is corroborated by other evidence that in itself and without the aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense.

MONT. CODE ANN. § 45-8-212(4) (2001) provides: “A person may not be convicted on the basis of an oral communication of defamatory matter except upon the testimony of at least two other persons that they heard and understood the oral statement as defamatory or upon a plea of guilty or nolo contendere.”

⁵ MONT. CODE ANN. § 27-2-202 (2001) provides an eight-year limitation period for written contracts and a five year period for oral contracts.

⁶ Gary Ernsdorff & Elizabeth Loftus, *Let Sleeping Memories Lie? Word of Caution about Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L & CRIMINOLOGY 129, 145-53 (1993).

causes of action, as well as some defenses, that depend principally on testimony,⁷ and adopted rules of evidence that allow testimony from any competent witness who has personal knowledge that is relevant.⁸ During the 20th century, courts and legislators have tended to be more willing than their predecessors to admit testimonial evidence, to rest judgments on uncorroborated testimony, and to recognize causes of action and defenses based on uncorroborated testimony.⁹

If the pendulum swung toward acceptance of testimonial evidence during most of the last century, it may be swinging the other way now. In the summer of 2000, Texas officials executed Gary Graham for a murder that occurred outside a Houston supermarket. Prosecutors had no physical evidence linking Graham to the crime. He was convicted based on the testimony of a lone eyewitness, whose testimony was contradicted by other witnesses at the scene but was nevertheless sufficient to convince a jury to convict

⁷ See discussion *infra* Parts II and V.

⁸ See MONT. R. EVID. 601, 602; FED. R. EVID. 601, 602. The rules of evidence require less of a foundation for testimonial evidence than for any other kind of evidence. Documents must be authenticated, photographs must be shown to accurately reflect the scene depicted, and fingerprints and DNA samples must be proven to have been properly obtained, processed, and linked to the case, but a witness can testify to relevant facts without being first asked whether to establish that she is capable of and did accurately perceive and recall the relevant events. The rules seem to presume that all witnesses have the necessary capabilities, and leaves it to opposing counsel to question whether the witness actually exercised the capabilities at the critical time.

⁹ These developments in the law of evidence and other fields have occurred as “[s]cholars who study the social psychology of evidence have investigated how rules of evidence affect jury decision-making, how juries react to evidence, whether psychological assumptions underlying rules of evidence are valid, and what factors influence the reliability of evidence given by witnesses.” Roger Park, *Evidence Scholarship: Old and New*, 75 MINN.L.REV. 849, 851 (1991). For whatever reasons, the work of these scholars has “had little or no influence on evidence scholarship.” *Id.* at 849.

Graham. Graham's execution prompted commentators to renew the call for criminal courts to issue special jury instructions and allow expert testimony by cognitive psychologists about the unreliability of eyewitness testimony.¹⁰ To support their argument, the commentators cited research by the cognitive psychologists, as well as research reports that had identified dozens of convictions based on eyewitness identifications that had to be vacated because DNA testing proved the defendants were innocent.¹¹ Some courts have heeded the call by allowing expert testimony or giving precautionary instructions.¹²

That the courts and commentators would focus on serious criminal cases, where life and liberty are at stake, is understandable. However, concerns about the unreliability of eyewitness testimony also are present in civil cases where a claim or a defense relies on uncorroborated testimony. Testimonial evidence is often the sole basis for claims such as fraud, discrimination and infliction of emotional distress, as well as defenses such as mistake, waiver, promissory estoppel and assumption of risk. While the stakes in these civil claims and defenses are less severe than the stakes in a serious felony prosecution, the risk that unreliable testimony will taint verdicts actually may be higher in civil cases because the burden of proof is lower.

In Montana, concerns about the unreliability of testimonial evidence in civil cases are exacerbated because a standard jury instruction used since the mid-19th century says, "a witness is entitled to a presumption that his or her testimony is truthful."

¹⁰ See, e.g., LEVENSON, *supra* note 1; WOLFSON, *supra* note 2, at 5.

¹¹ WOLFSON, *supra* note 2.

¹² *Id.*

In this article, I argue the pendulum should swing sharply away from reliance on uncorroborated testimony in civil cases. Specifically, the presumption of truth instruction should be abandoned in all cases and be replaced with an instruction cautioning juries about the unreliability of testimonial evidence, including eyewitness testimony. The presumption of truth instruction is an historical anomaly that improperly favors claims and defenses based on testimonial evidence as opposed to those that rest on documentary and scientific evidence, which generally are more reliable and more probative. Rather than telling juries to presume the testimony of witnesses is true, courts should be cautioning juries about the fallibility of human perception and memory, or welcoming expert testimony explaining the growing body of research in cognitive psychology and related fields about the vagaries of the human mind's skill in observing, storing, and recreating events.

I look, first, at the history of the presumption in Montana and elsewhere. Second, I summarize the history of the presumption in federal courts, all of which have disapproved it. Third, I offer an overview of the body of psychological research concerning human perception and memory. Finally, I argue the presumption should be replaced by an instruction cautioning jurors about relying on uncorroborated testimonial evidence, and I propose such an instruction. My hope is that the Montana Supreme Court will finally disapprove a quaint and silly anachronism that could be leading jurors astray.

II. WHENCE THIS PRESUMPTION?

In Montana, (and in some other states,¹³) the presumption that witnesses testify truthfully is statutory. Section 26-1-302 provides:

26-1-302. Witness presumed to speak the truth - how presumption rebutted. A witness is presumed to speak the truth. The jury or the court in the absence of a jury is the exclusive judge of his credibility. This presumption may be controverted and overcome by any matter that has a tendency to disprove the truthfulness of a witness' testimony; such matters include but are not limited to:

- (1) the demeanor or manner of the witness while testifying;
- (2) the character of the witness' testimony;
- (3) bias of the witness for or against any party involved in the case;
- (4) interest of the witness in the outcome of the litigation or other motive to testify falsely;
- (5) the witness' character for truth, honesty, or integrity;
- (6) the extent of the witness' capacity and opportunity to perceive or capacity to recollect or to communicate any matter about which he testifies;
- (7) inconsistent statements of the witness;
- (8) an admission of untruthfulness by the witness;
- (9) other evidence contradicting the witness' testimony.

A shorter version of the statute was first enacted in 1877. It was taken from the California Code of Civil Procedure. It was re-enacted as part of Montana's Civil Code in 1895. The statute has been amended only once, in 1983. Before it was amended, it read:

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, by evidence affecting his motives or his character for truth, honesty, or integrity, or by contradictory evidence; and the jury is the exclusive judge of his credibility.¹⁴

¹³ The Montana statute was based on a California statute that has been repealed. A similar statute is still on the books in Oregon. See, OR. REV. STAT. § 44.370 (2001) ("Witness presumed to speak truth; jury judges of credibility"). The Oregon statute was challenged unsuccessfully on constitutional grounds in *Cupp v. Naughten*, 414 U.S. 141 (1973).

¹⁴ MONT. CODE ANN. § 26-1-302 (1981). The use of the term "repelled" is a curiosity. Oregon's statutory presumption, which was adopted in 1862, uses "overcome." See OR. REV. STAT. § 44.370 (2001).

No similar statutory presumption was ever part of Montana’s criminal code, but Section 2078 of the 1895 Penal Code, which was derived from California’s Penal Code, provided that: “The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code.”¹⁵ Today, the statute reads: “The Montana Rules of Evidence and the statutory rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided.”¹⁶ Under that statute, the presumption that witnesses speak the truth would apply equally in civil and criminal actions.

For many years – probably from the time the presumption was codified in 1877 until the early 1960s, when the Montana Jury Instruction Guide Criminal was promulgated – trial courts instructed juries about the presumption by reading the statute or something very similar to it in both criminal and civil cases.¹⁷ As late as 1959, trial courts were admonished by the Montana Supreme Court not to append “unauthorized exceptions” onto the statutory presumption of truth instruction.¹⁸

¹⁵ MONT. CODE ANN. § 2078 (1895). [NOT RIGHT]

¹⁶ MONT. CODE ANN. § 46-16-201 (2001).

¹⁷ Use of the statutory presumption instruction was endorsed in cases such as *State v. Kessler*, 74 Mont. 166, 169, 239 P. 1000, 1001 (1925) (holding that “ordinarily an instruction based upon [the pre-1983 version of 26-1-302] is sufficient”). Two of the latest cases to invoke the statutory presumption language are *Jeffries Coal Co. v. Indus. Accident Bd.*, 131 Mont. 511, 518, 312 P.2d 128, 133 (1957) (deciding an action to recover unpaid worker’s compensation premiums), and *State v. Wild*, 130 Mont. 476, 490, 305 P.2d 325, 333 (1956) (deciding a criminal case for selling alcohol to minors).

¹⁸ In *State v. Carns*, 136 Mont. 126, 140, 345 P.2d 735, 743 (1959), the Supreme Court admonished the trial court not to “write in an unauthorized exception” to the stock statutory instruction on witness credibility. The unauthorized instruction, with the “unauthorized exception” italicized, read as follows:

Around 1960, the Montana Judges Association promulgated the Montana Jury Instruction Guides (“MJIG”).¹⁹ For civil actions, MJIG 2.02 used the same statutory presumption of truth instruction that had been given for years. The comment to MJIG 2.02 said the language “seems clear and sufficient.” Curiously, the language was not sufficient for criminal cases. The criminal instruction, MJIG 1.02Crim qualified the statutory presumption of truth language at some length:

You are the sole judges of the credibility of all the witnesses who have testified in this case, and of the weight to be given their testimony. A witness is presumed to speak the truth; but this presumption may be repelled by the manner in which he testifies, by the nature of his testimony, or by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence; and in determining the weight to be given to the testimony of any witness, you have a right to consider the appearance of each witness on the stand, his manner of testifying, his apparent candor [sic] or lack of candor, his apparent fairness or lack of fairness, his apparent intelligence or lack of intelligence, his knowledge and means of knowledge on the subject upon which he testifies, together with all the other circumstances appearing in evidence on the trial.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he or she testifies, by the character of his or her testimony, or his or her motives, or by contradictory evidence, and the jury are the exclusive judges of his credibility.

If you believe from all of the evidence in the case, that any witness who has testified in this case, has wilfully and deliberately testified falsely to any fact or matter material to this issue involved herein, then you will be at liberty to disregard the entire testimony of any such witness, *except insofar as it may be corroborated by other and credible evidence in the case.*

¹⁹ MJIG was drafted by a committee, with assistance from Professor Gardner Cromwell of the University of Montana School of Law.

The instruction went on to state and explain the presumption of innocence, but did not offer guidance on how the jury should reconcile any conflicts between those two presumptions. The committee's reasons for writing different presumption of truth instructions for civil and criminal cases apparently were not recorded or preserved, at least in any readily-available source.²⁰

For 25 years or more, MJIG was relied on by Montana jurists and practitioners. During that time, the only cases to address the presumption of truth instruction were criminal cases. In most of the cases it decided, the Supreme Court held that MJIG Instruction 1.02Crim was sufficient. In *State v. White*, for example, the court affirmed a conviction for burglary of a gas station based on the testimony of the owner of the station and a police officer, both of whom saw the defendant and an accomplice run out of the station into an alley and get into the car in which they were arrested a short time later.²¹ In *State v. Just*, the defendant in a sexual assault case had offered a cautionary instruction saying, "charges such as the one made against the defendant in this case are easy to make and hard to defend against even by one who is guiltless."²² The trial court refused the instruction and the Supreme Court affirmed, saying MJIG 1.02Crim adequately addressed witness credibility, particularly where there was no evidence that the victim had

²⁰ Neither the University of Montana Law Library nor the State Law Library has any records related to the work of the various committees and commissions that drafted MJIG and MPI. My attempt to obtain records from the current chair of the Civil Jury Instructions Guidelines Commission was unsuccessful.

²¹ 151 Mont. 151, 153, 440 P.2d 269, 271 (1968).

²² 184 Mont. 262, 274-75, 602 P.2d 957, 964 (1979).

a motive to make false accusations, and her testimony was corroborated by other evidence.

In *State v. Stokes*, a defendant convicted of burglary and robbery based on an eyewitness identification argued the trial court was required to instruct that a witness's believability could be disproved by evidence of the "extent of his opportunity and ability to see any matter about which he testifies."²³ The Supreme Court disagreed, finding MJIG 1.02Crim satisfactory.²⁴ In *State v. Sanderson*, the Montana Supreme Court affirmed a sexual intercourse without consent conviction and rejected the defendant's challenge to MJIG 1.02Crim.²⁵ The defendant argued the trial court erred by refusing his instruction that the presumption could be overcome by prior inconsistent statements.²⁶ The Supreme Court held that 1.02Crim's language "by contradictory evidence" was sufficient to address prior inconsistent statements.²⁷

While the court affirmed many convictions based on MJIG 1.02Crim, it did issue some warnings that the instruction would not be sufficient in all circumstances. For example, in *State v. Dolan*, the Supreme Court agreed "with defendant that cautionary instructions regarding accomplice testimony and oral admissions should have been included in the court's jury instructions,"²⁸ but nevertheless affirmed the conviction for theft,

²³ 195 Mont. 321, 327, 637 P.2d 498, 501 (1981).

²⁴ *Id.*

²⁵ 214 Mont. 437, 450, 692 P.2d 479, 487 (1985).

²⁶ *Id.* at 449-51, 692 P.2d at 486-87.

²⁷ *Id.* at 450, 692 P.2d at 486.

²⁸ 190 Mont. 195, 202, 620 P.2d 355, 359 (1980).

holding the trial court's error was "minimized" by other instructions that were directed toward the prosecution's witnesses, since the defendant had called none.²⁹ The only "other instruction" the court pointed to was MJIG 1.02Crim.

In *State v. Hart*, another case in which the State relied on eyewitness identification testimony, the defendant had proposed a lengthy instruction that addressed factors such as the time, distance, and lighting conditions when the witness observed the crime, and whether the witness's recollection may have been influenced by lapse of time or by the circumstances under which the later identification was made.³⁰ The trial court refused the

²⁹ *Id.* at 203, 620 P.2d at 359.

³⁰ 191 Mont. 375, 392-93, 625 P.2d 21, 31 (1981). The proposed instruction read:

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had a capacity and adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had occasion to see or know the person in the past.

(2) Are you satisfied that the identification made by the witness subsequent to the offense was a product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by circumstances under which the defendant was presented to him for identification you should scrutinize the identification with great care. You may also consider the length of time that elapsed between the occurrence of the crime and the next

instruction, and the Supreme Court found no error, holding that MJIG 1.02C was adequate.³¹ However, referring to the defendant's proposed instruction, the court also stated, "[s]uch an instruction may be proper, if not mandatory, in certain cases. The necessity of this type of instruction is especially clear when there is only a single eyewitness's unsubstantiated testimony which identifies the offender."³²

During the quarter century that MJIG was in force, the Supreme Court rejected the presumption of truth only twice. In *State v. Taylor*, decided in 1973, the Supreme Court reversed a murder conviction on other grounds, but because the case was remanded for a new trial, and because "the State's principal witness had admittedly made a number of prior inconsistent statements,"³³ the Supreme Court ordered the trial court on remand to supplement MJIG 1.02Crim with the following: "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony * * *."³⁴

State v. Perry involved a 1988 appeal from a bench trial where the Supreme Court refused to apply the presumption of truth to recanted testimony.³⁵ A convicted murderer argued that it was an abuse of discretion for the trial court to refuse to set aside a

opportunity of the witness to see the defendant, as a factor bearing on the reliability of the identification. *Id.*

³¹ *Id.* at 393-94, 625 P.2d at 31.

³² *Id.* (citing *United States v. Masterson*, 529 F.2d 30 (9th Cir. 1976)).

³³ 163 Mont. 106, 122, 515 P.2d 695, 704 (1973).

³⁴ *Id.* (quoting MONT. REV. CODE ANN. § 93-1901-12 (1947)).

³⁵ 232 Mont. 455, 465-66, 758 P.2d 268, 275 (1988).

conviction seventeen years after the fact when an accomplice recanted the testimony on which the conviction rested.³⁶ The defendant argued the presumption of truth should apply equally to the original and recanted testimony, but the Supreme Court declined to agree. Instead, the court adopted “the prevailing judicial attitude that recanted testimony is to be viewed with great suspicion.”³⁷ In doing so, the court apparently abandoned the presumption of truth as a matter of law under circumstances that are not recognized by §26-1-302, either in its original form or as amended in 1983.

In 1990, the MJIG criminal instructions were replaced by the Montana Pattern Instructions – Criminal (“MPI-Crim”), and the presumption of truth was suddenly abandoned in criminal cases. The change is difficult to explain if one looks only at Montana law. The Montana Supreme Court had found the presumption of truth instruction incomplete at times, but it had never suggested that MJIG 1.02Crim was an improper instruction, or that the presumption of truth should not be recognized in criminal cases.

Furthermore, the presumption of truth instruction was preserved in civil cases. Montana Pattern Instructions – Civil (“MPI”) 1.02 kept the presumption of truth, albeit in slightly different form. The new civil instruction incorporated the 1983 changes to §26-1-302. As a result, it reads more like the MJIG criminal instruction than the MJIG civil instruction.

In the decade since MPI and MPI-Crim were promulgated, no Montana cases have specifically addressed a presumption of truth instruction. Although an instruction has not

³⁶ *Id.*

³⁷ *Id.* at 466, 758 P.2d at 275.

been addressed, the presumption has been addressed in civil cases. In *Benjamin v. Torgerson*,³⁸ for example, the court recited the presumption as it affirmed a defense verdict in a civil damages action for psychological damages resulting from alleged childhood sexual abuse.³⁹ The court's holdings did not rest on the presumption. Rather, the Supreme Court seemed to take the presumption of truth for granted, just as it and the members of the Montana bar have for more than 125 years.

In 125 years, no Montana lawyer has gone to the Montana Supreme Court to challenge the presumption on the grounds that it is unnecessary, confusing, improper, or unconstitutional. Lawyers for some criminal defendants have tried to supplement the instruction, but no one has tried to strike it as inconsistent with the presumption of innocence or a violation of due process. In 125 years, the presumption of truth instruction has been read to tens, if not hundreds of thousands of Montana civil trial juries, but no appeal has been taken on the grounds that the instruction was an incorrect statement of the law, improperly shifted the burden of proof, or was an improper comment on the evidence.

The lack of attention paid to the instruction in Montana would make sense if it was widely accepted in other American jurisdictions. However, as the Ninth Circuit stated, the presumption of truth instruction “has been disapproved by every court of appeals and, so far as we know, by every commentator who has addressed the subject.”⁴⁰

³⁸ 1999 MT 216, 295 Mont. 528, 985 P.2d 734.

³⁹ *Id.* ¶ 32.

⁴⁰ *United States v. Gutierrez-Espinosa*, 516 F.2d 249, 250 (9th Cir. 1975).

III. WHY DID FEDERAL COURTS QUIT PRESUMING THAT TESTIMONY IS TRUTHFUL?

Though juries in Montana and a few other states have been instructed on the presumption of truth for 125 years or more, most states never joined that bandwagon. In fact, the 1960 replacement edition of Branson's treatise on jury instructions in state courts, which was first published in 1914 and still being updated as late as 1981, said flatly it was error to instruct a jury that "the law presumes an unimpeached witness has spoken the truth."⁴¹ The authors of that treatise were from the Midwest and East.⁴² They cited Montana and Oregon cases for other propositions,⁴³ but gave no sign they were even aware of the statutes and cases in western states that established a presumption of truth.

About the same time the last edition of Branson's treatise was published and the Montana Judges Association was drafting MJIG, a United States District Judge from the Southern District of California named William C. Mathes published a compilation of jury instruction forms he had developed over a ten year period as "a sort of hobby ... to facilitate oft-repeated acts in the day-to-day work of a United States District Judge."⁴⁴ A few years

⁴¹ 1 A. H. REID, BRANSON'S THE LAW OF INSTRUCTIONS TO JURIES IN CIVIL AND CRIMINAL CASES § 37, at 123 (3d ed. 1960) (citing the Illinois case of Chicago Union Trac. Co. v. O'Brien, 76 N.E. 341 (1905)). Reid was a circuit judge in Wisconsin. The 1960 replacement was prepared by William Samore, a professor at Cleveland-Marshall Law School in Ohio. The 1981 supplement was written by James Weeks, a professor at Syracuse University College of Law. The first edition of the treatise was published in 1914 by Edward R. Branson.

⁴² *Id.* at i, supp. i.

⁴³ *See, e.g., id.* at 124, n. 7 & 9.

⁴⁴ Judge Mathes first published the forms in 1957. Judge William Mathes, *Some Suggested Forms for Use in Criminal Cases*, 20 F.R.D. 231 (1957). Three years later, he published a revised version. Mathes, *Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 39 (1960). In the Foreword to the 1960 edition, Judge Mathes

later, Judge Mathes' work was incorporated in a treatise he co-authored with Judge Edward Devitt. The treatise was called *Federal Jury Practice and Instructions*.⁴⁵ In 1970, Devitt co-authored a new edition with Charles Blackmar. The treatise, now written by a new generation of authors, has grown to nine volumes, is in its fifth edition, and is widely cited.⁴⁶ It is hard to imagine now that such a comprehensive treatise started as an article of less than one hundred pages printed in the Federal Rules Decisions.

Judge Mathes' article included a presumption of truth instruction that "apparently became increasingly used in federal criminal prosecutions."⁴⁷ The instruction articulated the presumption of truth in terms very similar to MJIG 1.02C.⁴⁸ The similarity cannot be coincidental.⁴⁹ Mathes was from California, and a number of his instructions incorporated language from California statutes⁵⁰ – the same statutes the Montana Legislature copied

issued "a reminder that legal forms seem to deteriorate in quality with repeated use, unless the user makes a conscious effort to improve them." Wise words.

⁴⁵ WILLIAM MATHES & EDWARD DEVITT, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* (1965 & Supp. 1968). The presumption of truth instruction appears in § 9.01 Credibility of Witnesses – Discrepancies in Testimony.

⁴⁶ KEVIN O'MALLEY, ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS* (2000 & Supp. 2001).

⁴⁷ *Cupp v. Naughten*, 414 U.S. 141, 144 (1973).

⁴⁸ 20 F.R.D. at 241-243, forms 7 & 9; 27 F.R.D. at 67-68, form 3.01.

⁴⁹ Justice Rehnquist thought the Oregon presumption-of-truthfulness instruction "appears to have had quite an independent origin" from Judge Mathes's instruction. *Cupp*, 414 U.S. at 144. Justice Rehnquist's assumption, which seems to have been made without exercising his customary skill as a historian, overlooks the probability that the Oregon statute and Judge Mathes's instruction both flowed from the same source – the California Civil Code.

⁵⁰ For example, sections 1847 and 1963 of the California Code of Civil Procedure apparently were the source for this part of Mathes's general instruction on

when it adopted the Civil Code in 1895 and the presumption of truth in 1877.⁵¹ That a federal judge sitting in California would be familiar with California law and draft instructions incorporating that law is not surprising. It is surprising, though, that Judge Mathes did not cite California law as authority for the instruction. Instead, he quoted the United States Supreme Court's 1943 decision of *Tot v. United States*.⁵² His reliance on *Tot* is curious because the decision does not address any of the presumptions listed in the instruction and actually struck down as unconstitutional a presumption in a federal criminal statute. The statute forbade convicted felons from possessing firearms transported in interstate commerce and presumed that any firearm possessed by a convicted felon had been so transported. The Supreme Court held:

presumptions:

Unless and until outweighed by evidence to the contrary, the law presumes that a person is innocent of crime or wrong; that a witness speaks the truth; that official duty has been regularly performed; that private transactions have been fair and regular; that the ordinary course of business has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed. 20 F.R.D. at 241.

⁵¹ The statutes that became and were sections 1847 and 1963 of the California Code of Civil Procedure were the source of the presumptions codified in sections 26-1-302 and 26-1-602 of the Montana Code Annotated.

⁵² 319 U.S. 463, 466-70 (1943). Mathes also cited two cases decided in 1891, neither of which invoked or endorsed the presumption of truth. *Aetna Life Insurance Co. v. Ward*, 140 U.S. 76, 88 (1891); *Quock Ting v. United States*, 140 U.S. 417, 420-21 (1891). In fact, one of the cases refused to credit uncontradicted testimony. In *Quock Ting*, the court recited a "general rule" that "positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court," but the court ignored the general rule and instead applied one "of many exceptions" to the rule and refused to credit the uncontradicted testimony of the father of a sixteen year old boy who claimed to be an American citizen.

Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience... [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.⁵³

Though Judge Mathes cited this common sense standard for evaluating presumptions, he seems not to have considered how it applied to the presumptions incorporated in his own instructions, or even whether it was appropriate to use the root term “presume” in this context. “A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding.”⁵⁴ Under that definition, the presumption of truth is not a true presumption, just as the presumption of innocence is not a “true presumption at all in the sense of an inference based on probability.”⁵⁵

When courts use the term presumption of innocence, they mean by it “nothing more than another way of emphasizing the State’s burden of proving the defendant’s guilt

⁵³ *Tott*, 319 U.S. at 466, 468; 20 F.R.D. at 242-43 form 7; 27 F.R.D. at 51, form 2.04

⁵⁴ MONT. R. EVID. 301(a). The comments prepared by the Montana Supreme Court Commission on Evidence note that Montana’s Rule 301 is “entirely different” from both the federal rule and the uniform rule. Montana’s Rule 301 was taken from section 600(a) of the California Evidence Code. Before Montana adopted Rule 301, presumptions were defined in section 93-130103 of the Revised Code of Montana (1947), which was identical to the California statute that preceded § 600(a).

⁵⁵ *State v. Kessler*, 458 P.2d 432, 435 (Or. 1969).

beyond a reasonable doubt.”⁵⁶ Similarly, the presumption of truth is merely a way “to get the jury off dead center and to give it some guidance by which to evaluate the frequently confusing and conflicting testimony which it has heard.”⁵⁷

The presumption of truth directs the jury to draw an inference of truth from the mere fact that a witness – any witness – has taken the stand and testified under oath. In the 19th century, when the presumption was adopted in California, Montana and elsewhere, courts and legislators may have thought it was reasonable to infer that witnesses told the truth on the stand, in part because the common law had created rules of competency that prevented some of the most questionable witnesses from even getting on the stand. For example, under one common law rule which was codified in Montana, any person who had a financial stake in a case, including a party, was disqualified from testifying.⁵⁸

Of course, rules such as that one have long since faded from memory, along with the other 19th century justification for the presumption, which was the “widely held belief that a willful violation of the oath would expose the witness ‘at once to temporal and to eternal punishment.’”⁵⁹ The jurists and salons of that time may be forgiven for thinking that no Ananias would prevaricate if the consequence would be an instantaneous blow from

⁵⁶ *Id.*

⁵⁷ *Cupp v. Naughten*, 414 U.S. 141, 149 (1973). The Oregon Supreme Court has suggested that both presumptions “might well be dispensed with entirely.” *Kessler*, 458 P.2d at 435.

⁵⁸ 1 JOHN HENRY WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 488 (1904); WILLIAM HOLDSWORTH & JOHN BURKE, *HISTORY OF ENGLISH LAW* 177-197 (7th ed. 1964).

⁵⁹ *Cupp*, 414 U.S. at 153-54 n.3 (Brennan, J., dissenting) (quoting T. STARKIE, *LAW OF EVIDENCE* 29 (10th Am. ed. 1876)).

a heavenly hand. Unfortunately, faith sometimes has to give way to experience. Decades without a single reported smiting on the witness stand have forced courts to abandon the assumption that perjurers are punished immediately, if at all. Thus, as Justice Brennan remarked, “the rationale underlying the presumption has been substantially undercut.”⁶⁰

Within a decade after Mathes’ presumption of truth instruction was published, most of the federal courts of appeals had disapproved it, and Mathes’ one-time collaborator, Judge Edward Devitt, had omitted the presumption of truth instruction from Federal Jury Practice and Instructions.⁶¹ Federal appellate courts condemned the instruction, particularly in criminal cases where the defendant had called no witnesses, because it “may ‘dilute,’ ‘conflict with,’ ‘seem to collide with,’ or ‘impinge upon’ a criminal defendant’s presumption of innocence; ‘clash with’ or ‘shift’ the prosecution’s burden of proof; or ‘interfere’ with or ‘invade’ the province of the jury to determine credibility.”⁶²

In 1973, the United States Supreme Court was asked to hold the presumption of truth instruction given in an Oregon armed robbery trial had unconstitutionally infringed the due process rights of the defendant, who had called none of his own witnesses.⁶³ The court recognized the instruction had “been almost universally condemned,”⁶⁴ and did not quibble with the courts that had found the instruction “confusing, of little positive value to

⁶⁰ *Cupp*, 414 U.S. at 153-54 n.3 (Brennan, J., dissenting).

⁶¹ EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL AND CRIMINAL § 12.01 & accompanying note (2d ed. 1970).

⁶² *Cupp*, 414 U.S. at 145 (citations omitted).

⁶³ *Id.* at 144.

⁶⁴ *Id.* (citations omitted).

the jury, or simply undesirable,⁶⁵ but nevertheless held the problems with the instruction were “not of constitutional dimension”⁶⁶ and allowed the conviction to stand.

Since then, federal appellate courts have continued to disapprove the instruction and reverse convictions where an objection was preserved and the instruction was prejudicial; however, even in cases where convictions were affirmed, the courts described the instruction as “confusing and useless” or worse.⁶⁷ The instruction may not be unconstitutional according to the United States Supreme Court, but it is improper in almost every court. The instruction does not appear in any book of pattern jury instructions, either for criminal or civil cases, or in Montana’s criminal pattern instructions.

Still, it lives on in Montana’s civil jury instructions. It does not belong there unless it meets the standard for presumptions articulated by the United States Supreme Court in *Tot*, that there is some reasonable basis for believing that all witnesses – or at least the vast majority of witnesses – who testify on the stand speak the truth.

IV. DOES THE PRESUMPTION ACCURATELY REFLECT HUMAN BEHAVIOR?

Poet and Lincoln biographer Carl Sandburg in “The People, Yes,” mocked the oath that courts give to witnesses and challenged the legalistic meaning of truth:

⁶⁵ *Id.* at 146.

⁶⁶ *Id.* at 149.

⁶⁷ *United States v. Arias-Villanueva*, 998 F.2d 1491, 1505 (9th Cir. 1993), (quoting *United States v. Gutierrez-Espinosa*, 516 F.2d 249, 250 (9th Cir. 1975)). See generally, Walter W. Jones, Jr., *Annotation, Propriety and Prejudicial Effect of Instruction, in Federal Criminal Trial, that Witnesses are Presumed to Tell the Truth*, 8 A.L.R. FED. 319 (1971 & Supp. 2001).

“Do you solemnly swear before the everliving God that the testimony you are about to give in this cause shall be the truth, the whole truth, and nothing but the truth?”

“No, I don’t. I can tell you what I saw and what I heard and I’ll swear to that by the everliving God but the more I study about it the more sure I am that nobody but the everliving God knows the whole truth and if you summoned Christ as a witness in this case what He would tell you would burn your insides with the pity and the mystery of it.”⁶⁸

The Bible recounts only one instance in which Christ testified in a forum similar to a court. He appeared before Pontius Pilate. Whether or not he took an oath, he is reported to have made statements against his own interest that proved extremely painful. His reported statements are widely accepted as truth. Of course, no one really knows the whole truth about Christ’s life, in part because the Gospels that were written by four of his disciples offer different and sometimes conflicting versions of the events in Christ’s life. Truth is an elusive thing.

Most witnesses are much less willing than Christ reportedly was to make admissions that could damage them personally. This fact is recognized in MPI 1.02, where jurors are encouraged to evaluate the witnesses for any “apparent bias or prejudice, [and] motive to testify truthfully or falsely,” and also in the hearsay exception for admissions against interest⁶⁹ and in the concept of judicial admissions.⁷⁰

In two cases that address judicial admissions, the Montana Supreme Court quoted Wigmore, an evidence scholar who recognized that truth is hard to come by:

⁶⁸ CARL SANDBURG, *THE PEOPLE*, YES 193 (1936).

⁶⁹ MONT. R. EVID. 804(b)(3).

⁷⁰ See MONT. CODE ANN. § 30-2-201(3)(b) (2001) and *Conagra, Inc. v. Nierenberg*, 2000 MT 213, ¶ 35, 301 Mont. 55, ¶ 35, 7 P.3d 369, ¶ 35.

Testimony in court is an elusive matter of mental operations. It is the culmination of much talk and reflection and memory-stirring between all concerned. It is full of surprises at the trial. The truth of the case depends on a comparison of what all the witnesses say and all the circumstances indicate. A rule which binds a party to a particular statement uttered on the stand becomes an artificial rule. It is out of place in dealing with testimony.⁷¹

Quoting Wigmore is as close as the Montana Supreme Court has ever come to acknowledging that truth is elusive. Usually, the court invokes the presumption that witnesses speak the truth.⁷²

A juror who is instructed the testimony of a witness is presumed to be truthful may interpret that instruction to mean at least two very different things. The instruction could mean that courts do not expect witnesses to intentionally lie under oath, but do expect them to tell the truth as they perceive it, subjectively. So a witness who is asked what was said in a conversation is presumed to accurately recite what she remembers, although her memory may be incorrect.

The presumption of truth instruction could also mean that courts expect what witnesses say is true in some larger, more objective or absolute sense. This meaning would suggest the witness not only accurately recites the conversation as she recalls it, but that her recollection is accurate and complete.

Both meanings are reflected in Montana's statute and pattern instruction. The statute and instruction refer to demeanor, character, bias, consistency, and contradictory

⁷¹ 9 WIGMORE ON EVIDENCE, § 2594(a) at 601 (3d ed. 1940), quoted in Conagra, Inc., *supra* note 63 at ¶ 44, (quoting Klemens & Son v. Reber Plumbing & Heating Co., 139 Mont. 115, 123-24, 360 P.2d 1005, 1009-10 (1961)).

⁷² Benjamin v. Torgerson, 1999 MT 216, ¶ 32, 295 Mont. 528, ¶ 32, 985 P.2d 734, ¶ 32.

evidence, all cues that human beings use to determine whether another person is telling the subjective truth, the truth as she perceives it.

The statute and pattern instruction also refer to the witness's ability and opportunity to perceive, recall and communicate, as well as the reasonableness of the testimony. All of these elements are evaluated by humans when determining whether another person's recollection is grounded in reality – that is, if the truth as the witness perceives it really is an accurate and complete account of the events that occurred.

Both meanings are part of what courts and lawyers refer to when they talk about the credibility or believability of a witness. However, because our jury instructions do not distinguish them – and Montana's civil instruction actually melds the meanings together – we invite jurors to confuse them, to believe that a witness who is not lying must be speaking the truth in an absolute, objective sense.

People should know better, both from their everyday experience, and from seeing films such as *Rashomon* or *My Cousin Vinnie*, or reading literature like Shakespeare's "A Midsummer Night's Dream" or Tom Shepard's "Oleanna." However, it is not easy for jurors to apply either their common experience or their cultural knowledge to their job in a courtroom. In a courtroom, jurors are asked to observe and remember days or weeks of testimony and other evidence while assessing the credibility and objective accuracy of a stream of witnesses. Few people have jobs or hobbies that require them to absorb that much information, much less to constantly evaluate the believability of the people with whom they are dealing.

Parents may doubt their children's excuses for violating curfew, teachers may doubt their students' excuses for tardy papers, and law enforcement personnel may doubt

everyone they stop on the street, but none of them have to listen for hours or days at a time to lawyers conversing with multiple witnesses using terminology that is foreign and observing rules the listeners don't understand and no one explains to them. Only jurors are asked to evaluate credibility at the same time they are denied the opportunity to gather other information that might corroborate or undermine the stories they hear. And only jurors have to rely solely on what they can remember of such testimony (or a few notes they may have taken during the trial) to make decisions that could cost someone their life or livelihood.

Most jurors have no training in assessing credibility. Whether they really are good at it is doubtful. Researching the ability of jurors to assess credibility is difficult because no one but the witnesses ever really knows who told the truth at trial and who did not.⁷³ However, there is research that sheds some light on the subject. For example, there are studies showing that juries wrongfully convicted dozens of criminal defendants of sexual assault based on eyewitness testimony.⁷⁴ Those defendants were finally exonerated through DNA testing. Also, there are studies that have assessed the ability of the experts who conduct research on children's testimonial competence, who provide therapy to children suspected of having been abused, and who carry out law enforcement interviews with children. Those studies find that even highly trained professionals "failed to detect which children were accurate and which were not, despite being confident in their mistaken

⁷³ See *infra* pp. 29-30 and note 76.

⁷⁴ See WOLFSON, *supra* note 2.

opinions.”⁷⁵ If highly trained professionals cannot distinguish fabricators from truth-tellers, what chance do jurors have?

Jurors are not the only ones in the courtroom who must take on unfamiliar roles and duties. Every witness is forced to perform tasks that most people seldom have to do. There is no environment other than litigation (defined broadly, to include arbitration and legislative and administrative hearings) where people are expected either to recall in minute detail events they perceived months or years earlier or to communicate their recollections accurately and completely. Marital spats can develop when spouses’ recollections differ about some shared experience, but neither partner is expected to, or probably even gets the chance to relate his or her own version of events moment-by-moment. Moreover, neither spouse has to convince the other or any unfortunate bystanders that her version is the truth. It seldom matters which version is the truth, so the spouses can end the conversation both thinking each is right, and any spectators can let the incident pass.

In court, however, the jury must decide which of the witnesses’ memories are complete and accurate. Of course, no one has a perfect memory. But most of the time, the imperfections are never revealed. People seldom if ever get a chance to compare their own memories of an event with an accurate and objective record of the event.

⁷⁵ STEPHEN CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN’S TESTIMONY* 281 (1995).

“[W]ithout independent verification, the accuracy of memory cannot be evaluated.”⁷⁶ Even without independent verification, though, we know that memory is often inaccurate.

Distortion is inevitable. Memory is distortion since memory is invariably and inevitably selective. A way of seeing is a way of not seeing, a way of remembering is a way of forgetting, too. If memory were only a kind of registration, a “true” memory might be possible. But memory is a process of encoding information, storing information, and strategically retrieving information, and there are social, psychological, and historical influences at each point.⁷⁷

Memory is an adaptive skill that evolved because it was useful to survival. “[T]he progenitor function evolved to register facts related to the discovery of food and the avoidance of danger.”⁷⁸ Conscious recall resides in the limbic system, a phylogenetically ancient part of the brain.⁷⁹ Even single-celled animals demonstrate rudimentary perception and memory abilities. Of course, in humans, perception and memory are quite advanced.

Fortunately, memory operates with a high degree of accuracy across many conditions and circumstances. Indeed, it is possible to create conditions in which people exhibit impressively accurate levels of recollection, recalling hundreds of previously studied words or recognizing thousands of previously viewed pictures. The fact that memory is often reliable makes a good deal of sense: just like other biologically based capacities, many features of memory are adaptations that help an organism to survive and prosper in its

⁷⁶ Ted Abel, et al., *Steps Toward a Molecular Definition of Memory Consolidation*, in *MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST* 298, 320 (Schacter ed. 1995).

⁷⁷ Michael Schudson, *Dynamics of Distortion in Collective Memory*, in *MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST* 346, 348 (Schacter ed. 1995).

⁷⁸ Marek-Marsel Mesulam, *Notes on the Cerebral Topography of Memory and Memory Distortion: A Neurologist's Perspective*, in *MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST* 379, 381 (Schacter ed. 1995).

⁷⁹ *Id.*

environment. Given the crucial role that memory plays in numerous aspects of everyday life, a memory system that consistently produced seriously distorted outputs would wreak havoc with our very existence. Nevertheless, everyday experience and laboratory research indicate clearly that memory is far from perfect, and that under certain circumstances it can be surprisingly inaccurate.⁸⁰

Memory is inaccurate because it is not a recording process, like a video camera; rather, memory is primarily a reconstructive process. We do not have, or need, perfect memories. Our memories evolved to help us find food and shelter and function in social groups, not to testify accurately in court. “Our species seems best adapted for accumulating knowledge – for inference, approximation, concept formation, and classification – not for the literal retention of the individual exemplars that lead to and support general knowledge.”⁸¹ In fact, “[i]t could be argued that a superior talent for veridical recall could constitute a sign of brain disease.”⁸² For example, the mentally retarded individuals known as “idiot savants” are capable of remarkable feats of accurate recall, but cannot reorganize facts creatively, and their memory skills do not translate into job or life skills.⁸³

⁸⁰ Daniel Schacter, *Introduction*, in *MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST* 1-2 (Schacter ed. 1995) (citations omitted).

⁸¹ Larry Squire, *Biological Foundations of Accuracy and Inaccuracy in Memory*, in *MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST* 197, 220 (Schacter ed. 1995).

⁸² MESULAM, *supra* note 78, at 382.

⁸³ *Id.* at 382-83.

There are three stages of memory – perception, retention, and retrieval.⁸⁴ At each stage, “a host of factors may introduce error into the subject’s memory.”⁸⁵

Memory errors occur at the perception stage for the same reason that photographic errors result when we let our finger fall in front of the camera lens; an event not accurately recorded cannot be accurately retrieved. And, just like the mistakes that occur when shooting photographs, errors in perception (and thus, in memory) occur more frequently when the perceiver “experiences an event for a short time, or is unfamiliar with the subject, or is under a great deal of stress during the event.”⁸⁶ For most people “[s]tress enhances the recall of salient stimuli in the environment, but impairs recall of peripheral details.”⁸⁷ If stress impairs the perception of peripheral details, those details can never be accurately recalled because they were never observed.

Soon after we perceive an event, we enter the second stage of memory, in which part of what we perceived is retained in memory. “[M]emory is not fixed at the time of learning but takes time to develop its permanent form.”⁸⁸ “[R]ecently learned material remains vulnerable for a time to interference by the presentation of similar material.”⁸⁹ Our

⁸⁴ ERNSDORFF & LOFTUS, *supra* note 6, at 155.

⁸⁵ *Id.*

⁸⁶ *Id.* at 156.

⁸⁷ John Krystal, Steven Southwick & Dennis Charney, *Post Traumatic Stress Disorder: Psychobiological Mechanisms of Traumatic Remembrance*, in *MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST* 150, 157 (Schacter ed. 1995).

⁸⁸ SQUIRE, *supra* note 81, at 211.

⁸⁹ *Id.*

memories are overlaid by new information as it is received.⁹⁰ If the subsequent events involve repetition and rehearsal of the memory, it will be strengthened.⁹¹ However, when we are exposed to new information that is incorrect or misleading, it produces a “misinformation effect.”⁹² By supplying misinformation to test subjects, psychologists have easily induced erroneous memories.⁹³

Two decades of research leave little doubt that misleading information can produce errors in what subjects report that they have seen. In some studies, the deficits in memory performance following exposure to misinformation have been dramatic, with performance differences exceeding 30%. With a little help from misinformation, subjects have recalled seeing stop signs when they were actually yield signs, hammers when they were actually screwdrivers, and curly-haired culprits when they actually had straight hair. Subjects have also recalled nonexistent items such as broken glass, tape recorders, and even something as large and conspicuous as a barn in a scene that contained no buildings at all.⁹⁴

Researchers have been able to implant entire false memories into the minds of both children and adults.⁹⁵ Some subjects have generated detailed stories about being lost in shopping malls and insisted that the stories were true, even after being told by the

⁹⁰ Morris Moscovitch, *Confabulation*, in MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST 226, 244-46 (Schacter ed. 1995).

⁹¹ James McGaugh, *Emotional Activation, Neuromodulatory Systems, and Memory*, in MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST 255, 265 (Schacter ed. 1995).

⁹² ERNSDORFF & LOFTUS, *supra* note 6, at 156.

⁹³ *Id.*

⁹⁴ Elizabeth Loftus, et al., *The Reality of Illusory Memories*, in MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST 48, 49 (Schacter ed. 1995).

⁹⁵ *Id.* at 62-65.

researchers and the other family members who were involved that no such event ever occurred.⁹⁶

Recent memory tends to be more vulnerable to disruption by misinformation than remote memory, but permanent memory changes and fades over time in a process that appears to be physiological. Both remembering and forgetting “are best understood in terms of synaptic change.”⁹⁷ Synapses in the brain change when a memory is created, and those changes apparently are literally reversed as the memory is forgotten.⁹⁸ “[A]s time passes, memory becomes increasingly malleable and susceptible to new information.”⁹⁹ What we remember permanently can depend on how we feel about an experience. For example, individuals who do not make it through boot camp are more likely to remember the experience negatively than the soldiers who did.¹⁰⁰ Permanent memory also is more susceptible than recent memory to “inferential errors” or “memory illusions.”¹⁰¹

Memory "illusions" may result from the basic human need to make sense out of events. A series of experiments has provided the first scientific evidence that when people see effects (a student toppling

⁹⁶ *Id.* at 65.

⁹⁷ SQUIRE, *supra* note 81, at 219.

⁹⁸ *Id.*

⁹⁹ *Id.* at 157.

¹⁰⁰ A study of French bakers found that those who rose from apprentice to master tended to forget the humiliations of apprenticeship, while those who remained workers tended to recall them vividly. See SCHUDSON, *supra* note 77, at 352.

¹⁰¹ Press Release: *People Make Sense out of Stand Alone Effects by Thinking They ‘Remember’ Seeing Their Probable Causes*, Am. Psychological Ass’n (July 1, 2001) <<http://www.apa.org/releases/illusions.html>> (summarizing Sharon Hannigan & Mark Reinitz, *A Demonstration and Comparison of Two Types of Inference-Based Memory Errors*, 27 J. EXPER. PSYC. - LEARNING, MEMORY, AND COGNITION 4).

onto the floor) without also seeing its cause (a student leaning back in a chair), they automatically "fill in the blank" with that probable cause -- even if they haven't actually seen it with their own two eyes. The result: a memory that seems real, but isn't. The inference may be correct, but it's not based on actual perception, suggesting that memory helps us to make sense of the world, perhaps at the expense of a complete reliability.¹⁰²

Such inferences are useful in everyday life, because they are often correct.¹⁰³ But the inferences may be incorrect, and if the witness does not realize it is an inference rather than a memory, then errors will occur.

The third stage of memory is retrieval. "The factors which influence the retrieval of a memory include the environment in which the memory is retrieved, expectations created in the subject's mind, the techniques used to retrieve the memory, and the persons present."¹⁰⁴ When called on to remember an event or series of events, our minds retrieve available memories and organize them into a sequence and context.¹⁰⁵

The recall of an experience results from specific temporal and spatial activity patterns across groups of neurons. Each neuron is likely to belong to a very large number of such groups and to be engaged by large numbers of new experiences. Each new experience is written on top of existing experiences. Consequently, each new memory is likely to be altered by previous memories and to alter existing memories. The distributed storage of memory also enables the same experience to be recalled in many different combinatorial forms and as a result of many different associative approaches.¹⁰⁶

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ KRYSTAL, *supra* note 87, at 158.

¹⁰⁵ MOSCOVITCH, *supra* note 90, at 244.

¹⁰⁶ MESULAM, *supra* note 78, at 382.

Unfortunately, “the more heavily recollection depends on reconstruction, the greater the possibility for distortion [or confabulation].”¹⁰⁷

Scientific or psuedo-scientific attempts to improve our ability to recall events by using hypnosis or drugs have not been successful. Hypnosis may help people “unearth additional correct information” about a memory, but may also make people more willing “to report fantasies as memories.”¹⁰⁸ Hypnotically-enhanced memories are not admissible in a majority of American courts because of “scores of studies demonstrating the unreliability of hypnotically refreshed memories.”¹⁰⁹ The drugs sometimes described inaccurately as “truth serums” produce similar effects.¹¹⁰ “Modification of memory” results even when we simply think back occasionally on a favorite memory of childhood. Thinking back makes the memory stronger and more vivid, but also may change it.¹¹¹

The memory process is complex and, like most human traits, varies from person to person. Some people suppress traumatic memories, while others do not.¹¹² People who suffer anxiety disorders tend to “continuous[ly] monitor ... the environment for signals of potential threat,” while people suffering from depression are “adept at remembering vital

¹⁰⁷ MOSCOVITCH, *supra* note 90, at 245.

¹⁰⁸ David Spiegel, *Hypnosis and Suggestion*, in *MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST* 129, 140 (Schacter ed. 1995).

¹⁰⁹ ERNSDORFF & LOFTUS, *supra* note 6, at 162.

¹¹⁰ See KRYSTAL, *supra* note 87, at 162.

¹¹¹ ERNSDORFF & LOFTUS, *supra* note 6, at 157-58.

¹¹² See ABEL, *supra* note 76, at 318-19.

information concerning loss and failure to facilitate reflection.”¹¹³ Some people remember names, while others are better at remembering numbers. Many of us cannot recall what we ate for dinner last night or the names of acquaintances we see on the street. We forget the plots of books or movies, the order in which everyday events occurred, and what we did on a given day. Many of us forget information that is pleasant and important, such as the birthdays of our children and the dates of our anniversaries, despite the fact that remembering those details may be critical to surviving in the environment of our own homes.

The question to be asked, given that the memory system is organized this way, is why memory is as good as it is. Why don't we all confabulate? There are two answers to this question. One is that we do confabulate – all the time, but the distortions are sufficiently small so as not to matter. For most occasions our memory is good enough, though we may wish it were better. When precision of content and sequence is demanded, as it is in eyewitness testimony, our memory is notoriously poor and distorted.¹¹⁴

Good trial attorneys have always known that memories are weak and malleable. They know it is important to spend time with witnesses, not just so the lawyer can learn what the witness has to say, but because what the witness has to say can be influenced by the questions the lawyer asks and what the lawyer says about the case. Witnesses can be encouraged to recall details on which their attention had not focused, and to recall them in ways that may alter the outcome at trial.

¹¹³ Susan Mineka & Kathleen Nugent, *Mood-congruent Memory Biases in Anxiety and Depression*, in *MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST* 173, 187 (Schacter ed. 1995).

¹¹⁴ KRYSTAL, *supra* note 87, at 246 (citation omitted).

Despite our intuitive understanding of the limitations of human memory, lawyers and judges continue to instruct jurors to rely on memory-based evidence, and even to presume that uncorroborated evidence produced from human memories is true. We assume that juries (and other finders of fact) can distinguish truth and falsehood, even when our own experience, which is confirmed by the results of research studies, shows that finders of fact “have a great deal of difficulty discriminating between memories that are a result of suggestion and memories that are a result of a true perception or experience.”¹¹⁵ We know that “[j]udges and juries are impressed with witness testimony delivered with confidence and containing concrete details.”¹¹⁶ But we also know that “a subject’s confidence in a specific memory is not necessarily related to the accuracy of that memory.”¹¹⁷

All of us at some time in our lives, and probably within the past few weeks, have been convinced to believe a falsehood of some magnitude, however trivial, by a salesperson, con artist, sociopath, actor, or practical joker, or even by a lawyer.¹¹⁸ We

¹¹⁵ ERNSDORFF & LOFTUS, *supra* note 6, at 163.

¹¹⁶ *Id.* at 162.

¹¹⁷ *Id.* at 163.

¹¹⁸ Lawyer jokes imply that lawyers are con artists or worse, which is not true, at least of most lawyers. However, it is at least partially true that all “[g]ood courtroom lawyers are super salesmen and consummate actors...” JOHN T. MALLOY, *NEW DRESS FOR SUCCESS* 295 (1988), *quoted in* RICHARD A. POSNER, *OVERCOMING LAW* 517 (1995). Mr. Malloy meant that statement as a compliment to lawyers, but Judge Posner seems to construe it as an insult, as if sales people and actors were consummate liars. Posner worries that if lawyers are trained as actors they will engage “in courtroom theatrics that are as likely to deceive as to inform the jury.” *Id.* at 516. Judge Posner, who displays an incredible breadth of knowledge about many subjects and particularly about social science research that ought to influence court decisions, seems to have overlooked the research showing that jurors are persuaded not by “courtroom theatrics,” whatever that means, but by testimony that is delivered with confidence and contains concrete details. *See supra*

know that people lie or confabulate, and we know it is not possible for human beings to reliably or consistently differentiate between liars or confabulators and tellers of truth. Yet our law assumes that every witness speaks the truth and that jurors or judges can identify those witnesses who do not. It is an absurd assumption, and we should discard it. Instead, we should be telling jurors, either through instructions or expert testimony, that their everyday experiences may not adequately prepare them to evaluate the truth of memory-based testimony, that human memory is vulnerable to error at each of the three stages of memory, and that testimony based on uncorroborated memories should not be believed too readily.

V. WHAT DIFFERENCE WILL DISCARDING THE PRESUMPTION OF TRUTH MAKE?

If jurors follow the courts' instructions, as we assume they do,¹¹⁹ then dropping the presumption of truth and replacing it with an instruction that cautions jurors about the fallibility of human memory, or allowing expert witnesses to testify about the vagaries of human memory, should change the outcomes in trials where the claims or defenses rest on uncorroborated testimony. What claims or defenses are likely to be affected? In this section, I will speculate about the kinds of cases in which different outcomes could result. My speculations are meant to be illustrative, rather than prescriptive or predictive.

text accompanying note 116.

¹¹⁹ Jurors may not follow instructions because they do not understand them, even though they are presumed to. See *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Studies show that jurors consider the evidence carefully during deliberations, and are "remarkably competent" at finding the facts, but "consistently fare poorly on tests of their comprehension of the judge's instructions." NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* 34-35 (2000); see also Bethany Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 50 *DEFENSE L.J.* 345, 346 (2001).

Childhood Sexual Abuse

Claims for childhood sexual abuse should be more difficult to win, particularly claims brought by adults alleging they recovered repressed memories of abuse. Often, there is no evidence of abuse other than the testimony of the alleged victim and possibly her or his therapist, and scientific studies show that recovered memories can be induced by many common therapy techniques.¹²⁰ A jury forced to assess such uncorroborated accusations by an alleged victim who has something to gain, and to weigh them against uncorroborated denials by an alleged perpetrator who has something to lose, may well be swayed by the testimony of a social worker or therapist vouching for the alleged victim's story, or by an instruction presuming that witnesses speak the truth. Simple fairness demands that the alleged perpetrator not be faced with a presumption against him or her, and be permitted to present experts to challenge the veracity of the allegations.

Child abuse is a serious problem, and the consequences of abuse can be horrendous, but allowing juries to award verdicts against defendants who are innocent will not solve the problem or ameliorate the consequences. Allowing plaintiffs to prevail on claims for unredressed injuries from long-ago abuse will not do anything to protect children today.¹²¹ Protecting alleged victims of horrible crimes does not justify depriving the alleged perpetrators their right to defend themselves.

Discrimination

¹²⁰ ERNSDORFF & LOFTUS, *supra* note 6, at 158-62.

¹²¹ *Id.* at 174.

Discrimination claims frequently rest on disputed allegations about racist, sexist, or other inappropriate remarks made by supervisors, lenders, landlords, and others.¹²² When the alleged remarks are oral, and uncorroborated, the jury must decide whether or not the remarks were made – whether to believe the plaintiff’s allegations or the defendant’s denials. The exact wording of the alleged remarks can be critical to the determination of liability. An instruction or expert testimony cautioning jurors that human beings are prone to misperceive details of stressful events, and to overwrite their recollections of events with misinformation, certainly could prompt a jury to be more skeptical about a plaintiff’s recollection, and to reject discrimination claims that might otherwise be treated favorably.

Interference with Prospective Economic Advantage

Like discrimination, interference with business relations rests on a claim that some act by the defendant was intended to harm the plaintiff or motivated by animus toward the plaintiff. Often, the plaintiff testifies the defendant made an oral statement of intent or animus.¹²³ Here again, the precise words used and the context in which they were used, are significant. Liability can turn on the use or meaning of a single word, or on the speaker’s inflection. Opportunities for misinterpretation abound. A sarcastic remark might be seen as an honest expression of opinion. A word spoken softly can be missed, or misunderstood.

¹²² See, e.g., *Crockett v. City of Billings*, 234 Mont. 87,761 P.2d 813 (1988).

¹²³ See, e.g., *Morrow v. FBS Ins.*, 230 Mont. 262, 749 P.2d 1073 (1988).

Reminding jurors that human beings do not perceive everything that goes on around them, and may draw incorrect inferences about the things they missed, should help jurors evaluate these claims and avoid placing undue reliance on questionable testimony.

Defamation

The law has long wrestled with the challenge of distinguishing between mere insults and actionable slander.¹²⁴ Some people are easily offended and will construe any criticism or slight as defamatory. Such people may be prone to exaggerate the offensiveness of the remarks they hear, or even hear offensive remarks when none were spoken. That a person takes offense does not prove that anything offensive was done. The law of defamation does not and should not impose liability for every statement that causes some subjective pain, but only for those that are objectively false and cause actual harm. Reminding jurors the plaintiff's subjective perceptions may or may not match objective reality could encourage them to protect freedom of speech in a close case.

Contract Defenses

Replacing the presumption of truth with cautionary instructions or testimony about testimonial evidence will not benefit defendants in all cases. Defendants asserting affirmative defenses that rely on testimonial evidence also will face a heavier, and more appropriate burden. For example, a defendant in a contract case who asserts defenses such as waiver, fraud, misrepresentation, promissory estoppel, or mistake based on oral

¹²⁴ For example, courts rely on the "basic tenet of the law of defamation ... that an expression of opinion is generally not actionable" when dismissing claims that seem frivolous. *Board of Dentistry v. Kandarian*, 268 Mont. 408, 417, 886 P.2d 954, 959 (1994) (quoting *Frigon v. Morrison-Maierle, Inc.*, 233 Mont. 113, 121, 760 P.2d 57, 62 (1988)). However, the distinction between facts and opinions is anything but obvious.

testimony would have to confront instructions or evidence cautioning the jury about accepting such oral testimony, particularly testimony that is self-serving.

Assumption of Risk and Misuse

In tort cases, defenses such as assumption of risk in products liability (or comparative fault in negligence cases) may be harder to sustain. Assumption of risk requires proof the plaintiff voluntarily exposed himself to a known risk.¹²⁵ It usually depends on evidence of what the plaintiff said at some point prior to the accident, and that evidence often is uncorroborated.

Another Example

The claims and defenses mentioned here obviously are not the only ones that would be affected by instructions and evidence reminding jurors that human perception and memory are imperfect and warning them not to expect precision or accuracy from uncorroborated testimony. It is much easier for witnesses to forget or confabulate, or to lie, when there is no documentary or scientific evidence that challenges the testimony.

Before blood and DNA testing made it relatively easy to determine paternity (or at least to reliably disqualify some of the putative fathers), an unwed mother could find it

¹²⁵ See *Lutz v. National Crane Corp.*, 267 Mont. 368, 378, 884 P.2d 455, 461 (1994). *Lutz* virtually eviscerated the defense of assumption of risk, just as *Hart-Albin Co. v. McLees Inc.*, 264 Mont. 1, 5, 870 P.2d 51, 53 (1994), had disemboweled the defense of misuse (it apparently would not apply even to what both the plaintiff's counsel and the court described as "a classic example of misuse: a rotary lawnmower misused as a hedge trimmer." *Id.* Unless and until those cases are overturned, the proposal made in this article will have little effect in products cases. It is important to note, though, that the proposal is not directed against plaintiffs or defendants, but against whichever party has the burden of proof on a particular point and intends to meet that burden with uncorroborated testimony. Perhaps if this proposal had been in place when *Lutz* and *Hart-Albin* were being decided, the Montana Supreme Court would have had less motivation to stretch the law to favor the plaintiffs.

convenient to name a wealthy man as the father of her child, as Joan Berry named Charlie Chaplin:

Joan Berry's mistake, her lawyers said, had been to fall for Charlie Chaplin. She was a naive young woman of modest means. He was a wealthy and famous movie star, reputed to have had many affairs. Sometime in December 1942, she became pregnant. Not long after, she demanded that Chaplin pay child support for her new daughter, Carol Ann.

It was a scandalous trial. Berry claimed she had slept with Chaplin on December 10, 23, 24, and 30. Chaplin was required to parade in front of the jury beside Joan and her infant child. Chaplin's butler agreed there had been a meeting on December 23. Chaplin himself admitted a liaison with Berry before March 1942, but denied all the December trysts.

It emerged, however, that in November, and again the following January and April, Joan has traveled to Tulsa, Oklahoma, where another male companion had wined and dined her, taken her to the theater, and then joined her at her hotel. She had also spent time with another man in Los Angeles, twice visiting his apartment. And in the spring of 1943 she told Chaplin's butler that she had married an army captain and was going to bear a child. The jurors nevertheless sided with Joan and Carol. Chaplin would have to pay.¹²⁶

Chaplin had to pay because the jury decided to believe Joan's testimony and to disbelieve Chaplin's testimony about the dates of their liaisons. The jury's verdict ignored the weight of the testimonial evidence, but that is the jury's prerogative. Unfortunately, the jury ignored more than testimony. It also ignored evidence of blood tests that proved Chaplin was not the father.

[A]mid all the confusion about just who had slept with whom in which cities on which days, amid the Madonna-and-child staging of the unwed mother and the randy movie star, the scientific evidence presented by Chaplin's lawyers was not in any serious doubt. Joan Berry had Group A blood. Her daughter, Carol Ann, had Group B blood. This meant that the father's blood must have been either

¹²⁶ PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 148-49 (paperback ed. 1993).

Group AB or Group B. Charlie Chaplin's was Group O. As three physicians testified at Chaplin's trial, to no avail, Chaplin was not in fact Carol Ann's father.¹²⁷

Whether Joan Berry lied or confabulated does not matter. What matters is that she sued the wrong man, and the jury (as well as a trial judge and an appellate court) christened her faulty memory as truth.

The appellate court's opinion does not say whether the jury was instructed on the presumption of truth, but the presumption was codified in California at the time, apparently was part of the standard instructions used then,¹²⁸ and was invoked by the appellate court to justify the jury's acceptance of Joan Berry's testimony.¹²⁹ Whether or not the jury received a presumption of truth instruction, it certainly was not specifically instructed that it could disregard Berry's testimony. However, the jury was specifically instructed that the uncontradicted medical testimony refuting Chaplin's paternity was not "conclusive or unanswerable" and that the jury was "therefore, ... not bound by such medical opinions."¹³⁰ In other words, the jury was encouraged to accept the truth of disputed testimonial evidence at the same time it was discouraged from accepting the truth of undisputed scientific evidence.

¹²⁷ *Id.* at 168.

¹²⁸ See *supra* text at notes 38-52. I infer from the fact that Judge Mathes included the presumption of truth instruction in his jury instruction forms in 1960, only fifteen years after the *Berry v. Chaplin* decision, the instruction was commonly used in California courts before Mathes became a federal judge.

¹²⁹ *Berry v. Chaplin*, 169 P.2d 442, 449 (1946).

¹³⁰ *Id.* at 452.

If truth is important in a system of justice – and it is hard to argue that it should not be – then the verdict against Charlie Chaplin was not only a personal loss for him but also a blow to our profession and our system of government. Whether the verdict resulted from instructions that elevated questionable testimonial evidence over more reliable information we will never know, but there is no reason to allow similar silliness to taint any verdicts today.

VI. CONCLUSION

Our memories are flawed. Courts and lawyers ought to recognize that, and be modest in what we expect of our own and of others' recollection. Instead, we have told juries for more than a century the words uttered by witnesses are presumed to be the truth.

Abandoning the presumption of truth instruction and replacing it with expert testimony or instructions about the vagaries of human memory will not help jurors distinguish truth from falsehood in every case, or prevent juries from being misled by particularly compelling testimony. But it may make a difference in a few close cases. It will give a stronger argument to the lawyers who must rebut uncorroborated witnesses. It will remind jurors of what they already know but can forget when sitting in the alien role of finder of fact in the alien realm of the courtroom – that none of us is very good at recalling the critical details of everyday events, much less the most stressful moments in our lives. And it may remind judges to be modest about the ability of jurors and trial judges to differentiate between truth and fabrication.

To promote those goals and start a debate in the Montana bench and bar about the guidance that should be given to juries on this subject, I offer the following alternative

language to be inserted in MPI 1.02 instead of the paragraph that now contains the presumption.¹³¹

Although every witness took an oath to tell the truth, some witnesses may have tried to deceive you, and you may disregard their testimony. Most witnesses probably told the truth, at least as they perceive it, but their perception may or may not be accurate. What a witness saw or heard at any particular time depends on what he or she was looking at or listening to, what else was going on at the time, and how well the witness was thinking and paying attention. Even if the witness saw and heard an event accurately, what the witness remembered and testified to here in the courtroom could be affected by other things the witness saw or heard after the event and before the trial, or simply by the passage of time. Witnesses have been known to provide detailed and compelling testimony about events that were entirely imagined. If a witness's memory of events is contradicted by other evidence, you should be suspicious about the memory. Human memory does not work like a video camera. It would be unfair to expect any witness to have a complete and accurate memory of the events that are important in this case, many of which occurred months or even years ago.

Let the debate begin!

¹³¹ The language I propose to replace reads: At the outset, a witness is entitled to a presumption that his or her testimony is truthful. This presumption may be overcome, however, by any evidence tending to disprove that testimony or raising a substantial question as to the witness' credibility. A witness false in one part of his or her testimony is to be distrusted in others. However, this rule does not apply to a witness who unintentionally commits an error.