

## Common Law S4 Ep 8: Elizabeth Loftus Transcript

[THEME MUSIC IN, THEN UNDER]

**Risa Goluboff:** Today on Common Law, issues with eyewitness testimony with University of California Irvine professor Elizabeth Loftus.

**Elizabeth Loftus:** People start to believe that what they imagined is something that happened to them, even when it didn't.

[THEME MUSIC UP, THEN UNDER]

**Emily Richardson-Lorente:** Hello, Common Law listeners, we wanted to give you a quick heads-up that this episode does mention childhood sexual abuse, which may be upsetting to some audience members.

[THEME MUSIC UP, THEN UNDER AND OUT]

**Risa Goluboff:** Welcome back to Common Law, a podcast of the University of Virginia School of Law. I'm Risa Goluboff, the dean. For this episode, Professor Greg Mitchell, an expert in law and psychology as well as civil procedure and evidence, is co-hosting with me once again. Welcome back, Greg.

**Greg Mitchell:** Thanks Risa. I'm really happy to be back with.

**Risa Goluboff:** I am delighted to have you back. So tell our audience who you've invited on today.

**Greg Mitchell:** Today we're fortunate to have a true legend in the field of law and psychology, Dr. Elizabeth Loftus, professor of criminology, law and society at the University of California at Irvine. Dr. Loftus is an expert on memory and eyewitness testimony. And in fact, in 1979, she literally wrote the book on eyewitness testimony.

**Risa Goluboff:** Yeah.

**Greg Mitchell:** She's been called to testify in countless cases, and I'm hoping we'll get to talk about a couple of her high-profile cases today.

**Risa Goluboff:** We will be right back with Elizabeth Loftus from the University of California, Irvine.

[THEME MUSIC UP, THEN UNDER AND OUT]

**Greg Mitchell:** Elizabeth, thank you so much for joining us today.

**Elizabeth Loftus:** My pleasure.

**Risa Goluboff:** We've been talking to our guests about how they decided to focus on the subjects that eventually became their expertise. So how did you come to focus on memory and in particular memory as it relates to eyewitness testimony in court?

**Elizabeth Loftus:** I went to graduate school to study mathematical psychology.

**Greg Mitchell:** Mm-hmm.

**Elizabeth Loftus:** But it turned out I was kind of uninspired, I suppose.

**Greg Mitchell:** Mm-hmmm.

**Elizabeth Loftus:** While I was in graduate school, I was invited to join a research project by a professor on memory. Very different kind of memory than I would ultimately do, much more kind of theoretical work. And it wasn't until after I had my Ph.D. and I was teaching that I thought, you know, I really want to do work that has more obvious practical applicability. So I had some background in memory, I've always had an interest in legal cases and legal issues, and that perfect combination seemed to be the memory of witnesses. And that's what I started to study.

**Greg Mitchell:** It's my understanding that much of this work was being done in the laboratory with lists that subjects were being presented with, see how they could remember them, and it was very kind of – I don't wanna say artificial – but very antiseptic approach to memory. Is that fair to say?

**Elizabeth Loftus:** That's probably a good word, antiseptic. In fact, some people tried to take all meaning out of their stimuli and have people try to remember nonsense syllables, or things like D-A-X, something that's not really even a word. Or they were using word lists. Every now and then somebody would do a study of memory for stories, but I wanted to simulate what happens when somebody sees an accident or a crime. And I was using films of accidents when I started this research.

**Greg Mitchell:** And so methodologically, that was a fairly radical departure. How did you come by using these more realistic stimuli?

**Elizabeth Loftus:** I chose to use films of accidents because a former professor of mine had now taken a job at the U.S. Department of Transportation. And when I was exploring these new ideas with him, he said, well, if, if you look at accidents, there's money for research on accidents.

[LAUGHING]

**Elizabeth Loftus:** So I got a grant from the U.S. Department of Transportation to look at eyewitness memory for accidents.

**Risa Goluboff:** And what did you find in that study?

**Elizabeth Loftus:** There are just a zillion things you could look at – the effects of stress or the effects of timing. And I seized upon the idea — why don't I look at the questioning process, what happens when witnesses are questioned about their experiences. That led me into looking at leading questions and how they can affect the answer people give or even contaminate the memory. Some of the early studies looked at how fast were the cars going when they "smashed" into each other, versus how fast were the cars going when they "hit" each other. And you could see that people would give you a higher estimate of speed and they also would falsely remember other details that were more consistent with a high-speed accident, like broken glass that didn't exist. So I soon realized that these leading questions were just a vehicle for communicating something to a witness, but only one vehicle. People pick up new information when they talk to other witnesses or when they get media coverage about some event. All of these can provide an opportunity for new information, sometimes misinformation, to contaminate memory.

**Risa Goluboff:** The image one would have is eyewitness testimony is you experience something or you see something and that's how you remember it forever. And, and what your work showed was memories can be distorted, they can be malleable, they can be influenced by all kinds of, you know, external stimuli or background conditions, right?

**Elizabeth Loftus:** Absolutely — right on.

**Greg Mitchell:** When you began this work, were there fundamental misconceptions about how eyewitness memory worked among courts and lawyers?

**Elizabeth Loftus:** There are many misconceptions that people in general, jurors in particular have about the workings of memory. So for example, we know, scientifically, that there's a cross-racial identification problem. People have more trouble identifying the faces of strangers of a different race than their own race.

**Greg Mitchell:** Mm-hmm.

**Elizabeth Loftus:** Do lay people understand that? Some people think it's just a myth. Some people think they all look alike, it's only true of prejudiced people, and that's not the case. So that's just one of many examples of lay belief that is not supported by scientific work or even contradicted by scientific work.

**Greg Mitchell:** I think what was really revolutionary was your findings on how much we can not only construct but influence the memory of the event after the fact. What are some of the common mistakes you see among therapists and police investigators when they're trying in good faith to find out what happened in the past?

**Elizabeth Loftus:** The kind of mistakes that I see amongst police officers or investigators of crimes, accidents and other legally important events are a little bit different than the kind of mistakes that you see amongst the problematic psychotherapy. So for example, in one eyewitness case in which I testified, where the officer shows the eyewitness a six pack, six photographs, to try to see if the witness can identify the perpetrator, and the eyewitness says, "I don't, I don't really see him there." The officer says, "Wait a minute. I see your eyes drifting down to number six. What's going on there?" So you see some

suggestive intervention that ultimately leads this witness to now identify number six. Highly suggestive.

**Risa Goluboff:** So that's a problem with the police. What about psychotherapists? You said that was different.

**Elizabeth Loftus:** Yes. So the therapist might say, "You know, you've got all the symptoms of somebody who was sexually abused as a child. You're depressed, or you have an eating disorder," whatever the symptoms might be. Patient says, "I don't really remember anything like that." "Well, why don't you just close your eyes and try to imagine who might have done that to you? How old might you have been? Where might it have happened?" Well, this kind of guided imagination, even though these therapists somehow think it's gonna unearth some true memory, has the capability of creating false memories. People start to believe that what they had imagined is something that happened to them, even when it didn't.

**Greg Mitchell:** How have the courts changed in terms of their receptiveness to your testimony as well as other expert testimony on issues of eyewitness memory since you began?

**Elizabeth Loftus:** If I take you back to, let's say, the 1970s, typically it would be defense attorneys trying to introduce into a criminal case, a memory expert to talk about the factors that were relevant to understanding the eyewitness issues in the case at bar. Sometimes judges occasionally let the testimony in, but often they excluded that testimony. And when they excluded the testimony, the judge would typically say, "Well, it invades the province of the jury," or they'd say, "It's all within the common knowledge of the average person and therefore not a proper subject matter." That's what was going on in the 1970s, into the '80s. Then in 1983, something different happened. It was the Arizona Supreme Court that reversed a murder conviction because the trial judge had excluded my testimony. That case was *State v. Chapple*, 1983. A year later, California followed Arizona, *People versus MacDonald*, the trial judge excluded the memory scientist, California Supreme Court overturned. Since that time, we've seen a string of reversals, primarily in the state courts. It's now easier to get this expert testimony admitted. It doesn't mean it's always going to be admitted, but the fact of this string of reversals and the fact that even the National Research Council, the research arm of the National Academy of Sciences, put out a report expressing a favorable view of this method of

educating jurors, either through expert testimony or jury instructions, it's a lot easier to get this testimony admitted.

**Risa Goluboff:** Both your own experiments and your own writing, and then also your role as an expert witness, right – you're putting yourself out there to offer up these views in the courtroom – is clearly a huge part of that sea change. And I'm curious, why did that change when it did? Maybe, maybe the answer is 'Elizabeth Loftus.'

[LAUGHING]

**Risa Goluboff:** I know that's a huge part of the answer, but are there external forces, are there other aspects of what was going on in the world that you think led to that change as well?

**Elizabeth Loftus:** Thank you for that compliment, but I'd also bring in the Innocence Project in New York – now more than 350 cases of wrongful convictions, proven to be wrong through DNA testing. And when those cases have been analyzed, the major cause of that wrongful conviction is faulty memory. That has helped increase the acceptability of this kind of expert testimony.

**Greg Mitchell:** When you testify, what role do you usually play in a case? I'm familiar with testimony – your testimony in some cases – and it seems to me you usually give what our colleagues John Monahan and Larry Walker would call "social framework evidence," where you educate the jurors on relevant social science research, but don't necessarily draw any opinion about the reliability or accuracy of the testimony in a particular case. Is that a fair characterization?

**Elizabeth Loftus:** Yes, that's correct. I mean, my position is without independent corroboration, you can't know whether a memory is authentic or whether it's a product of some other process. So usually I'm talking about the factors in the eyewitness case that are known from the literature to produce difficulties for an accurate identification. I don't go so far as to say, 'This one is accurate or not.'

**Greg Mitchell:** Yeah.

**Elizabeth Loftus:** One thing we know about people in general and jurors in particular is they are impressed with an account that's told with a lot of confidence, a lot of detail, even some emotion. That's impressive

to people. People have a tendency to want to embrace it and forget about, you know, scrutinizing it and asking, “Is this okay?”

**Risa Goluboff:** So that leads me to one of the cases that you were involved in that I think, I don’t know, maybe straddles those two categories a little bit. So that’s the George Franklin case from 1991 that is now a Showtime documentary called “Buried.”

### [Buried \(2021\) Official Teaser | SHOWTIME Documentary Series](#)

**Voices:** She had witnessed her father commit a murder. Twenty years later, her memory came back to her. It was the first murder case involving a repressed memory. Voodoo psychology. It was horrific. Deviant sexual behavior. He told me that he would kill me. No one should ever be tried based on memory alone. Even with all these horrible things, it’s just the beginning.

**Risa Goluboff:** And in that case, Franklin’s daughter recovered – or allegedly recovered – a memory of seeing her father kill her friend 20 years earlier. And she testified against her father for the prosecution. And in the documentary, you’re pretty skeptical about this recovered memory and of the phenomenon of repressed memory. So here, right, there is clearly a murder, but I would think you would put it in the latter category of kind of the construction of a memory from scratch, in a way.

**Elizabeth Loftus:** Exactly. I mean, so it is in some sense that hybrid kind of case.

**Risa Goluboff:** Right.

**Elizabeth Loftus:** I’ll tell you a little bit about my experience in the case. So I get a call from a lawyer whose name is Doug Horngrad. He said, “Well, let me just tell you who I am. I was a public defender,” which meant to me that he had a lot of trial experience. He was now in private practice. He’d handled a lot of serious cases, lot of murder cases, but he had a case and he just didn’t know what to do with it. And he tells me about this claim of the daughter, claiming that she witnessed her father murder her best friend, repressed the memory for decades, and now it’s back along with her supposedly recovered, repressed memories of other kinds of bad experiences. “Well, so what do you know about repression?” By that time, I had my Ph.D. for 20 years and I’d been writing books on memory. I said, “Well, I, you know, I’ve heard of this.

It's kind of a hand-me-down Freudian idea. I've never really examined what's the evidence for it." And when I started to scrutinize the literature in conjunction with consulting on that case, I was pretty shocked to find there was really no credible scientific support for the idea that we can take this whole collection of horrible traumas, banish it into the unconscious, wall it off from the rest of mental life, be completely unaware that all these things happened, and by this process that's too extreme to be explained by ordinary forgetting and remembering, no credible evidence. My position in the last many years since this controversy erupted has not changed, despite the fact that repression aficionados have bent over backwards to try to find support for the claim.

**Greg Mitchell:** The American Psychological Association — I read their position as agnostic, perhaps.

**Elizabeth Loftus:** Right.

**Greg Mitchell:** I got this off the APA website where they were talking about this topic. They say, "Concerning the issue of a recovered versus a pseudo memory, like many questions in science, the final answer is yet to be known, but most leaders in the field agree that although it is a rare occurrence, a memory of early childhood abuse that has been forgotten can be remembered later. However, these leaders also agree that it is possible to construct convincing pseudo memories for events that never occurred." Do you think that's a decent summary of where things stand?

**Elizabeth Loftus:** Well, what does it mean to say that you can have a childhood abuse experience that you don't remember for a while and now you remember it? If it's by a process of ordinary forgetting and remembering, if you get reminded because of a retrieval cue, yes that happens! People can be reminded of things they haven't thought about for an awfully long time. They can be reminded of awful experiences that they haven't been thinking about for a long time. But what's being claimed in many of these repressed memory cases, particularly the ones that end up in litigation, is something too extreme to be explained by ordinary forgetting and remembering. These are the kinds of experiences that I and others have been asking, you know, where's the evidence? And until we find that evidence, I just don't think we should be prosecuting people and throwing them into prison, as George Franklin actually was for, um, the six years he spent before his conviction was overturned.

**Risa Goluboff:** I would think another piece of this is – and why the memory questions are so salient here – is there's probably not other kinds of evidence that you can use for corroboration, right? That often these are acts that take place in private between two people. Where does that lead? That leads to, oh, a greater reliance on memory and therefore greater importance to the kind of work you've done, Elizabeth. Or a rejection of the possibility of finding culpability altogether. I don't know if that's the conundrum and it's not limited to these cases, but it does seem like it's often a feature of them, perhaps.

**Greg Mitchell:** Particularly with the wily repeat offenders who know how to limit existence of evidence.

**Risa Goluboff:** What would such evidence look like, either to prove or to disprove repressed memories? How would you go about asking that question in an experimental way?

**Elizabeth Loftus:** I would turn this around and say, let me tell you about the evidence that people ARE using to support massive repression. And you tell me whether you think it's good evidence. I mean, if I tell you for example, about the crown jewel in the repression aficionados' arsenal, a study by a sociologist who looked at individuals who were under the age of 12 when there was a report of sexual abuse — either at a hospital or a police station — a report. Come back to these people 20 years later and interview them about their life. 'What was your life like growing up in this urban area? Just tell me all about it.' 38% didn't mention the incident that was in the report. Is that proof of repression? They weren't even asked specifically about it. They just didn't mention it. People will want to say, 'See, 38% repressed their memory. 'No, they didn't. There are so many other reasons that have nothing to do with massive repression why someone might not want to tell the sociologist researcher that this incident happened to them. Maybe just didn't want to mention it. Or how about some of them were really young when the incident happened that brought them to the attention of the authorities. So that's just one example of how poor the evidence is that's being fobbed off as proof of repressed memory.

That's a little different than the question you asked: what would be a study that might prove it? I think it would be difficult to come up with an ethical experiment. But I've actually seen some pretty good papers on that by graduate students, but there is an ethical barrier to subjecting

people to, you know, five years of brutalization, and then seeing what happens to them.

**Greg Mitchell:** So why do you think the concept of repression remains so popular despite the serious questions about it as a scientific construct?

**Elizabeth Loftus:** Many people who want to salvage the basic idea are now calling it something else – dissociation, or sometimes dissociative amnesia. But I think that there are just some people who really don't like the idea of false memories of abuse. They feel it threatens the people who have true memories, and they want to believe that when somebody gives a report, that it's necessarily true. And it makes some people very uncomfortable to contemplate false accusations.

**Greg Mitchell:** Well, let's go back to some positives here. I mean, expert evidence on eyewitness testimony and memory is actually a success story in the courts. We've already talked about the greater receptiveness to testimony by experts such as yourself, Elizabeth. There've been other positive changes, haven't there, within the police agencies and the justice system?

**Elizabeth Loftus:** There are many other, um, eyewitness scientists from around the world who have contributed to this now huge body of scientific work. And it has led to changes in the way police do things. More and more agencies are looking into using blind testing, having the person who conducts a lineup, not know who the suspect is, so that they can't inadvertently communicate their knowledge or their suspicion to the witness that they're interviewing. There have been recommended changes on the kinds of instructions to give to witnesses who you're testing. Importance of saying something like, 'The perpetrator may or may not be here. It's just as important to exonerate the innocent as to find the guilty person.' You want to reduce the pressure on a witness to pick someone, anyone. Recommendations about how you pick fillers to step into the lineup, along with the suspect. What should they look like? What characteristics? Not just that they should resemble the suspect, but you need to take into account the description that the witness gave. So there are recommendations about things that the police or other investigators can do to make things better. And also things that can happen at trial. And all that I think is – well, an important role in that enterprise of reform is the work of the psychological scientists along with members of the legal profession who have advocated for these reforms.

**Risa Goluboff:** You and Judge Jed Rakoff, who's a federal judge in New York city who actually teaches here at the law school have co-authored an article called quote, "The Intractability of Inaccurate Eyewitness Identification."

**Elizabeth Loftus:** Right.

**Risa Goluboff:** And it's about how hard it is to prevent errors based on misleading eyewitness testimony in the courtroom. So I'm curious, what role do you think the adversarial system that we have plays in this? I mean, if we had a more kind of inquisitive system, more like the European systems where the judge has greater control over evidence and you aren't expecting experts to battle it out or lawyers to battle it out, do you think that would get us closer to the appropriate use of this kind of evidence?

**Elizabeth Loftus:** You know, I worry a little bit about a judge who calls in the judge's own expert because who's the judge gonna pick? And I can tell you, I would cringe if the judge picked some of the opposing experts that I have seen in some of the cases I've been involved in. But one of the things that Judge Rakoff and I did talk about is the move to use jury instructions to help cure this problem – jury instructions on eyewitness memories, such as the Henderson instructions that came out of New Jersey. At the point we wrote our article, the studies of those jury instructions seem to suggest that they DID make jurors a little more skeptical, but they didn't teach them very well how to discriminate a good eyewitness situation from a poor one. So I'm hoping that observation will lead other people to figure out how to tweak those so we can both have some skepticism, but really better discrimination. That's what you'd like triers of fact to be able to do.

**Risa Goluboff:** Thank you so much for talking with us, Elizabeth.

**Greg Mitchell:** Thanks so much.

**Elizabeth Loftus:** Great talking with you.

[THEME MUSIC IN, THEN UNDER, THEN OUT]

**Greg Mitchell:** You really can look at Elizabeth Loftus' work and say there's a direct causal path between her work and many of the changes we see now in how police, therapists, investigators and lawyers

approach eyewitness testimony. One of the things we didn't talk about and Elizabeth didn't mention: Elizabeth, Gary Wells, another eyewitness researcher, and our former colleague Brandon Garrett have a recent article out in "Psychological Science in the Public Interest," which is a kind of a monograph that's meant to give policy advice. And they go through the evidence discussing how important it is that police not repeatedly interview suspects and give them chances to identify the witness because with each time they repeat the identification, they become more confident in it. And by the time you get to trial, you've got a witness who may be much more confident about the identification than the witness was very shortly after the crime occurred. And so that's just another example where if the agencies will follow their advice, we'll avoid some of these post-event influences on eyewitness testimony.

**Risa Goluboff:** You know, I'm an optimist, so I like to find the silver linings. But one of the things that I think is exciting is that she often testifies at the moment of the case, right? But this work, what you were just talking about, and a lot of her work pushes back in time to affect how do the police do their job, how to investigators do their job, trying to start at the beginning of the process to try to make how we use memory or testimony, eyewitness testimony, more accurate, even if we can't ever get to perfect accuracy.

**Greg Mitchell:** Yeah.

**Risa Goluboff:** We're just launching this Project for Informed Reform that is trying explicitly to build on the work of the Law School's Innocence Project, to push back and say, 'Here's what we've seen on the backend of where things go wrong' and work with social scientists and legal scholars to try to create public policies that are less likely to result in wrongful convictions in the first place. And that's one of the things that I think is so exciting about her work is trying to push back in time and figure out what are best practices, how should we be going about investigations, whether therapeutic or forensic, you know, in the first instance.

**Greg Mitchell:** Let me just say, people do have a much better understanding of memory within the culture now, I think. Because if you look at surveys done in the '80s about what people thought about how memory operates versus some more recent surveys, people are more skeptical about the reliability of eyewitness identifications and memory than they used to be.

**Risa Goluboff:** I absolutely agree, and I think it's part of our culture now to be skeptical. And I mean, my kids came home – I don't know if yours did, middle school maybe – to show us excitedly the little film clip of playing basketball and the gorilla comes on the basketball court and you were told to, you know, count the number of times they pass the ball or whatever, and you don't see the gorilla! And my kids, each one in turn, came home and said, 'Oh my God, I have to show you this thing!' Right, so, that's part of what they're learning is we have to be skeptical and the brain is a complicated machine that doesn't just have an imprint and then relay the imprint back again. And I think there has been a real sea change.

[THEME MUSIC IN, THEN UNDER]

**Greg Mitchell:** I think you're absolutely right.

**Risa Goluboff:** Well, this was a fantastic conversation, Greg. Thanks so much for co-hosting with me again.

**Greg Mitchell:** It was my pleasure Risa. I look forward to doing it one more time.

[THEME MUSIC UP, THEN UNDER]

**Greg Mitchell:** That does it for this episode of Common Law. If you'd like more information on Elizabeth Loftus and her research on eyewitness testimony, please visit our website [Common Law Podcast dot com](http://CommonLawPodcast.com). You'll find links to past episodes, our Twitter feed and more there.

**Risa Goluboff:** And in two weeks, discrimination and Black hairstyles with UVA Law graduate Doriane Nguenang.

**Doriane Nguenang:** I was just thinking about how me bringing my whole self to my firm, including bringing my hair, whether that was going to be a liability for me and what that would mean in terms of my career prospect.

**Risa Goluboff:** We can't wait to share that with you. I'm Risa Goluboff.

**Greg Mitchell:** And I'm Greg Mitchell. Thanks for joining us.

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**Emily Richardson-Lorente:** Do you enjoy Common Law? If so, please leave us a review on Apple podcasts, Stitcher, or wherever you listen to the show. That helps other listeners find us. Common Law is a production of the University of Virginia School of Law and is produced by Emily Richardson-Lorente and Mary Wood.

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