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Lynne Henderson

University of Nevada, Las Vegas -- William S. Boyd School of Law

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WITHOUT NARRATIVE: CHILD SEXUAL ABUSE

Lynne Henderson*

*The more painful, dramatic, and overwhelming the narrative, the more tense, wary, and self-protective is the audience, the quicker the instinct to withdraw.*¹

I. INTRODUCTION

Feminists have been rewriting the stories of harms to women in law for some time now, drawing on the experiences of women, as well as numerous empirical studies, to define and expand understanding of the harms created by sexual violence and exploitation.² But as feminists may suspect from their experiences with rape law and law reform efforts, the criminal law continues to disadvantage the relatively powerless and perpetuate the dominant ideologies of the powerful. Resistance to effective change and to understanding sexualized violence exists even when strong

* Professor of Law, Indiana University—Bloomington. I thank Linda Alis, Donna Coker, Mary Coombs, Donald Ehrman, Karla Fischer, Jaqueline MacCauley, Marnie Mahoney, Aviva Orenstein, Michael Wald, Catharine Wells, Robin West, Susan Williams, Stephanie Wildman, and Robert Weisberg, for discussing aspects of this paper and for their encouragement, interest, and helpful comments. I also benefited from comments on presentations at the Northwestern Feminist Symposium in 1994, the Law & Society Association 1995 Annual Meeting, and a Stanford faculty works-in-progress luncheon. Special thanks also to Indiana University School of Law for providing summer research support and Paul Lornio of the Stanford Law Library for his "typical," yet extraordinary, assistance. For other very special and appreciated support, many thanks to Alan Lagod, Marnie Mahoney, Susan Signorella, and Robert Weisberg. All errors are mine alone.

¹ Lawrence L. Langer, *Holocaust Testimonies* 20 (1991). I thank Carol Sanger for introducing me to Langer's work.

² The literature on sexual violence is now voluminous. See generally, *Law and Violence Against Women* (Mary Louise Fellows & Beverly Balos eds., 1994); Catharine MacKinnon, *Feminism Unmodified* (1987); Diana Russell, *Rape in Marriage* (1990); Diana Russell, *The Politics of Rape: The Victim's Perspective* (1975); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241 (1991); Susan Estrich, *Rape*, 95 *Yale L.J.* 1087 (1986); Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *Wis. Women's L.J.* 81 (1987) [hereinafter *The Difference in Women's Hedonic Lives*].

voices and numerous empirical studies prove the widespread existence of the violence and the harms it causes. When such voices and studies do not exist, this resistance becomes almost insurmountable. This Essay explores the resistance to confronting child sexual abuse as one such example.

In 1989, Robin West argued that scholarly fascination with Foucault's theories of power had led critical scholars to render unproblematic the exercise of sexual power over females.³ In that critique, she noted a glaring omission and, accordingly, a mischaracterization, in Foucault's telling of an event in *The History of Sexuality*.⁴ Foucault's story of a village "half-wit" who "fondled" a young girl—used by Foucault to illustrate the deployment of state, medical, and social power to create a "discourse" of sexuality—portrays the event as benign and pleasurable rather than abusive or frightening: the discursive powers of medicine and the state "assembled around these timeless gestures, these barely furtive pleasures between simple-minded adults and alert children, a whole machinery for speechifying, analyzing, and investigating."⁵ As West observed, "[w]ith all the attention given to 'discourses,' neither the French officials, nor Foucault himself, nor the vast majority of social and legal critics he has influenced, have yet heard a word from the child who was molested"⁶ West points out that "[i]f we had listened, analyzed, and speechified the experience of the alert child,"⁷ rather than having her remain in silence, we might have encountered something entirely different: "we might have had an account of 'furtive violence' to analyze, categorize, speechify, medicalize, theologize, philosophize, psychologize and agonize over, rather than an account of 'furtive pleasure.'"⁸

Child sexual abuse is a form of furtive violence committed against vulnerable individuals. Most of us deplore this violence, but at the same time, paradoxically deny that it is much of a problem or issue. It is a subject that is enormously difficult to address, on both an emotional and a

³ Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. Chi. Legal F. 59, 74-75 (1989).

⁴ Michel Foucault, *The History of Sexuality* (Robert Hurley trans., 1978).

⁵ West, *Feminism, Critical Social Theory and Law*, supra note 3, at 73 (quoting Foucault, 1 *The History of Sexuality* 31-32 (Robert Hurley trans., 1978)).

⁶ *Id.* at 74.

⁷ *Id.* at 75.

⁸ *Id.* at 76.

cognitive level. Awareness of the existence of sexual abuse of children is too painful and too threatening to encounter unmediated; hence, fully understandable responses include shrinking away from thinking about it, explaining it away, or flatly denying its existence.⁹ Unlike most victims of other sexualized violence, the victims of child sexual abuse have had little or no voice, creating a literal as well as figurative absence of narrative about the harm. An unwilling or unreceptive audience for the voices that have spoken compounds the difficulty of developing narratives and information that might lead to better understanding of, and responses to, abuse.

This Essay assumes that child sexual abuse exists, that it can be enormously harmful to those who suffer it, and that we have committed moral and epistemological errors in shrinking from examining its reality. By sexual abuse, I mean everything ranging from rape to statutory rape to oral and anal contact to genital touching—"fondling" is an inapposite word—to masturbation in the presence of a child to sexualized kissing to spying, leering, and suggesting. The title of this Essay, "Without Narrative," seeks to capture the very real problem of communication and definition of what "counts" and what does not "count" as knowledge. The subject of child sexual abuse provides a context in which no explicit, stable narratives exist to support knowledge about, and interpretation of, a crime. This Essay explores what happens when no "official" story (or stories) exists, and the effects of a literal absence of narrative of violence and harm in law.

By narrative, I mean two things, neither of which necessarily entails the current debates over "narrative" or "voice" in legal scholarship.¹⁰

⁹ A number of people with whom I have spoken have indicated discomfort with the subject, with some denying its potential prevalence, some cautioning me against writing on the subject, some immediately shifting the subject, and others bringing up "false allegation" stories. Still others have said it was too depressing a subject.

¹⁰ The law reviews have been full of arguments about the merits or demerits of "voice," "storytelling," and "narrative" in terms of whether these are valuable as scholarship, legal analysis, or knowledge. See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971 (1991); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 Va. L. Rev. 95 (1990); Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 Geo. L.J. 1845 (1994); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 Stan. L. Rev. 807 (1993). My concern is to demonstrate what happens when no organized knowledge has been gathered prior to encountering the legal system, and

Rather, "narrative" refers here to the story necessary to develop a legal case and to the story's role in communicating and making the world comprehensible. When I first started trying cases as a district attorney, I naively assumed that if I could prove each element of a crime beyond a reasonable doubt and add them up for the jury, the jury would convict. It took one hung jury to disabuse me of that notion—the jury needed a story linking the elements to make the guilt of the defendant comprehensible. From then on, as both a prosecutor and a defense attorney, I approached the evidence in each case in part to develop a story to tell other attorneys, judges, and juries. I also learned that when trial lawyers ask "what's the theory of the case?," they do not mean the abstract theory of law or jurisprudence that applies, but the narrative approach, the story that the lawyer develops to "tell" the judge or jury.¹¹ (Of course, surprises in a trial can mean massive revisions in the script, but that is another problem.) Telling the story requires having witnesses who can articulate the facts within the narrative, both on and off the witness stand. To have a story requires having witnesses who can help to tell the story in terms of the "facts," and, even if the evidence is not presented in a linear form, the ultimate narrative must be linear. Stories can vary in complexity and novelty, but they are often linked in common "formats" or plots, particularly in criminal law. The criminal trial is a morality play, good versus evil.¹²

when no articulate witnesses exist. That is, I am using "narrative" to capture the conventions—or lack of them—that structure thinking about the subject of child sexual abuse.

¹¹ See Gerald P. López, *Lay Lawyering*, 32 *UCLA L. Rev.* 1 (1984), for an excellent article that develops the notion of using "stock stories" drawn from cultural understandings in relation to lawyering. Kathryn Abrams writes:

For the trial attorney, law is inevitably about presenting concrete and nonlinear stories, about sensing the features of a narrative that will engage a judge's or juror's attention Using and telling clients' stories requires trial lawyers to make constant assessments of what they mean, of what elements unite them, of which features are most important.

Abrams, *supra* note 10, at 1043. But those stories must fit within recognizable formats and understandings, and may depend on popular culture or subculture, as well as abstract categories of narrative such as romance, tragedy, comedy, and irony. The stories generally must not be too outlandish or counter-intuitive to succeed. Moreover, certain formatted stories are generalized to certain categories of cases. In criminal law, for example, there is the recurring tale of the jealous husband/lover/spouse in homicide, vindictive or provocative woman in rape, and so on.

¹² For a development of the archetypal themes of narrative in literature, see Northrop Frye, *Anatomy of Criticism* (1957). For an application of Frye's structure of narratives to jurisprudential/legal approaches, see Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 *N.Y.U. L. Rev.* 145 (1985).

Second, narrative is important to epistemological questions. I base my claim about the epistemological role of narrative on research about how we organize cognitions about events, including how we interpret the disparate data of life and organize "memory."¹³ Narrative provides individuals with cognitive and schematic frameworks for organizing, interpreting, and expressing their experiences both internally and to others. Narrative patterns construct categories, events, and associations among events, determining what is accepted as "true" and "untrue" (whether inaccurate, mistaken, or just plain "false") by imposing a meaning on those events. The explanatory, connective, and gap-filling capabilities of narrative enable us to determine our responses, adding to a sense of predictability and control over our environment, as well as providing us with the signs, symbols, and storylines to use in communicating with others. Narrative's cultural role provides a communicative bridge between the collective and the individual by providing an intelligible manner of recounting events. These stories of how the world works, based on pre-existing understandings, in turn affect memory.

For a discussion of narrative meaning in the context of a criminal trial and stories about it, drawing on conventional and "postmodern" views of storytelling, see Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 Stan. L. Rev. 39 (1994) (discussing the interpretation of "facts" in the trial of Randall Dale Adams and in the movie *The Thin Blue Line*, and concluding that a shared cultural story line creates meaning out of disparate facts). See also Vicki Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 Law & Hum. Behav. 507 (1993) (arguing that jurors have pre-existing understandings of what narratives constitute a crime, and that the impact of this prior knowledge can be minimized by altering these understandings). Of course, in a pinch, the defense lawyer resorts to the "reasonable doubt" plot, which involves a kind of un-self-conscious "deconstruction" of the prosecution's evidence, developing alternative stories for each piece of incriminating evidence and a story of why the jury should find reasonable doubt. Attorneys often place the reasonable doubt story in the context of national myths about presumptions of innocence and suspicion of the state.

¹³ For an introduction to the role of narrative in cognition, see Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 Mich. L. Rev. 2225, 2230-55, 2271-79 (1989). Winter, however, treats narratives as a kind of gloss on more "fundamental" or basic (posited) cognitive structures, such as schema and metaphor. See id. at 2230-32. He treats what he terms "Idealized Cognitive Models"—scripts, "stock stories," and "folk tales"—as independent mediators between cognition and narrative; I treat stock stories, folk tales, and scripts as narratives for the purpose of this discussion. Moreover, narrative has not only a cognitive function in the simple sense of mental processes, but also an emotive function—schemata, scripts, and stock stories tend to carry emotional valence with them as well.

Although some commentators have made much of the distinction between “narrative truth” and “historical” or “factual” truth,¹⁴ the two are not so easily separated: facts influence narrative, but narrative also influences what is seen as “fact”—those things observed that “fit” a story and those that are not observed or are discarded that don’t fit or don’t “make sense” within the context of a cultural narrative or myth. For example, as Lucie White has demonstrated in *Rethinking Welfare Dependency*,¹⁵ the myth reinforcing the notion that welfare causes poverty is entrenched in our national discourse. We screen the “facts” about the history of welfare, and the lives of people on it, against the context of this myth and its supporting cast of stories (anyone who wants to get a job, or education, or man can; people on welfare are lazy or promiscuous). Accordingly, the “welfare reinforces poverty” story overlooks or elides many relevant “facts” of the reality of welfare in the United States.¹⁶ At the same time, history and memory are enhanced by pre-existing stories, and an individual’s memory can be more accurate, even if the precise “fact” did not occur.¹⁷ That is, encoding events in an individual’s memory is not only hindered, but, at times, helped by pre-existing knowledge, experience, and narrative or schematic frames.

¹⁴ Daniel L. Schacter, *Searching for Memory: The Brain, the Mind, and the Past* 104-12 (1996); Marianne Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 *Wash. L. Rev.* 331, 331 (1985) (defining “historical truth” as “the question of what really happened in the world”). See also Richard K. Sherwin, *supra* note 12 (explaining the interaction of “facts” with “storytelling”). Historians, for example, often are aware that they construct narratives about the historical “facts” they write about. Statement of Judith A. Allen, Director, Women’s Studies Program, Prof. of History and Women’s Studies, Indiana University-Bloomington, Feb. 10, 1997, Feminist Theory Reading Group meeting.

¹⁵ Lucie E. White, *No Exit: Rethinking “Welfare Dependency” from a Different Ground*, 81 *Geo. L.J.* 1961 (1993).

¹⁶ See Kathleen A. Kost and Frank W. Munger, *Fooling All of the People Some of the Time: 1990’s Welfare Reform and the Exploitation of American Values*, 4 *Va. J. Soc. Pol’y & L.* 3 (1996); Donna Asher Vandegrift, *The “Typical” Welfare Recipient: Myth and Reality*, 3 *Va. J. Soc. Pol’y & L.* 343 (1996).

¹⁷ See, e.g., Schacter, *supra* note 14, at 102. For example, Schacter relates an experiment in which information given to subjects about a baseball game was misremembered by baseball experts, who filled in a narrative gap because the fact not provided was essential to the outcome. Those who did not know baseball did not “misremember” what they were told. Assuming the event happened, would the experts have been “wrong” or telling a false story? Or would they be more accurate historically? Schacter calls them “victims of their own extensive knowledge about baseball, which infiltrated their encoding of the story,” yet the story could not have been “true” without the missing fact they supplied. *Id.*

This Essay is not a comprehensive treatment of the subject or the law, nor is this account of difficulties of proof and legal failure the only possible one. Nevertheless, narrative failure is, I believe, an important part of the problems we currently face in this area. By exploring the issue in the context of a particular case involving vast areas of epistemological uncertainty within a climate of increased hostility to allegations of child sexual abuse, this Essay seeks to explore one way in which law and society have failed to make any particular progress in understanding or coping with the crime. I argue that unless we have narratives in which to situate evaluations of child sexual abuse, we have little legal or social power to do anything about it.

I chose the example of child sexual abuse because of my own personal experiences of and with the crime, and because it exemplifies the tensions in what we know and don't know, morally condemn and morally condone. Because there is currently no settled narrative framework in which to understand child sexual abuse, the subject is difficult to apprehend; it eludes meaning and vanishes almost as soon as it surfaces. And because the absence of narrative understandings requires an oblique approach to the subject, existing structures of "proof" and evidence in law are almost completely inadequate to dealing with the crime, leading to further denial of the existence of the harm. Accordingly, the purpose of this Essay is twofold: to examine the difficulties of proving a particular crime and to examine the role that narrative has played in shaping and maintaining these difficulties.

This Essay begins with a short summary of the background of the emergence and disappearance of child sexual abuse as a legal and social problem. It then relates the "story" of an actual case in which I was involved, a case that raises a number of issues, but which I am using here to illustrate the epistemological and moral issues currently pervading the topic of child sexual abuse. The Essay then examines some of the questions raised by this particular case under existing legal and social-scientific assumptions of what constitutes "proof" and the interplay between narrative and proof. This Essay argues that if there is no way to tell the story of sexual abuse of children, then there cannot be any way to respond. I conclude that it is incumbent upon us to continue efforts to develop narratives of, as well as other means to apprehend, abuse.

II. BACKGROUND

Primarily a hidden crime, child sexual abuse had long been considered rare and of minor import.¹⁸ Largely as a result of feminist consciousness-raising and increased awareness of sexual violence, concern about the extent and nature of such abuse has grown in legal circles, in the media, and in public consciousness in the United States over the past two decades. From an emerging story of the extent and harm caused by sexual abuse of children, particularly girls, beginning in the late 1970s,¹⁹ to a flurry of legal activity, including law reform,²⁰ Supreme Court Confrontation Clause decisions,²¹ and highly-publicized prosecutions by the late 1980s,²² attention has now turned to stories of disastrous prosecutions,²³ wronged par-

¹⁸ See *infra* notes 42-50 and accompanying text.

¹⁹ Jon R. Conte, *Child Sexual Abuse: Awareness and Backlash*, 4 *The Future of Children* 224, 224 (1994).

²⁰ Much of the law reform activity appears to have involved enacting mandatory reporting laws and extending statutes of limitations in both criminal and tort cases involving child sexual abuse. See Seth C. Kalichman, *Mandated Reporting of Suspected Child Abuse: Ethics, Law, and Policy* 9-39 (1993); Donna M. Pence & Charles A. Wilson, *Reporting and Investigating Child Sexual Abuse*, 4 *The Future of Children* 70, 70-71 (1994). See also *infra* note 199 (statutes of limitations).

²¹ See, e.g., *Maryland v. Craig*, 497 U.S. 836 (1990) (finding no Confrontation Clause violation where a closed circuit television was used to protect an alleged six-year-old sexual abuse victim from viewing the defendant); *Idaho v. Wright*, 497 U.S. 805 (1990) (holding that the out of court statements of a two-and-a-half-year-old alleged child abuse victim to a pediatrician violated the Confrontation Clause and were inadmissible as hearsay); *Coy v. Iowa*, 487 U.S. 1012 (1988) (holding that an Appellant's Confrontation Clause right to face-to-face confrontation was violated when a screen was placed between him and two 13-year-old girls whom he allegedly sexually abused when they testified at trial). See also *White v. Illinois*, 502 U.S. 346 (1992) (holding that the Confrontation Clause does not require "unavailability" for admission of a four-year-old child's statements to mother, babysitter, police officer, nurse, and doctor).

²² The most "infamous" cases include the Jordan (Minnesota) Pre-School case, the McMartin trial, and the Kelly Michaels trial. See Billie W. Dziech & Charles B. Schudson, *On Trial: America's Courts and Their Treatment of Sexually Abused Children* 73-81 (1989) (discussing the Jordan and McMartin Cases); John Crewdson, *By Silence Betrayed: Sexual Abuse of Children in America* 132-158 (1988) (McMartin); James R. Kincaid, *Child Loving: The Erotic Child and Victorian Culture* 341-58 (1992) (McMartin). See also Ronald Smothers, *In a Day-Care Case New Questions, Few Answers*, N.Y. Times, July 23, 1993, at B7 ("Little Rascals" case); Nancy Hass, *Margaret Kelly Michaels Wants Her Innocence Back*, N.Y. Times, Sept. 10, 1995, (Magazine), at 37-41 (Michaels suing "virtually every individual involved" in her prosecution).

²³ See, e.g., Lawrence Wright, *Child-Care Demons*, *The New Yorker*, Oct. 3, 1994, at 5-6; Dziech & Schudson, *supra* note 22, at 73-78, 182-87; Crewdson, *supra* note 22, at 132-58.

ents,²⁴ “false” accusations,²⁵ and to an attack on the credibility and believability of both children and adults claiming abuse.²⁶ While the public debate is currently raging over “recovered,” “repressed,” or “false” memory in adults,²⁷ that debate has become conflated with, and seriously affects, questions of the ability of children to recall or recount abuse.²⁸ Further, the “false memory” debate has deflected attention from the reality of child abuse, allowing us to avoid acknowledging that reality and the questions of moral responsibility that it raises.

Historically, we know little about how much concern existed about the sexual use of children by adults. Indeed, some have argued that the concept of “childhood” itself did not exist until late in human history, so that it might not have even occurred to people to consider children “different” sexually.²⁹ By the Victorian era, however, sexual differentiation and distinction of children from adults had certainly emerged in western European culture.³⁰ In nineteenth century England and the United States, as a clear distinction between childhood and adulthood took hold, concern with sexual exploitation of at least some, if not all, females developed. For example, legislatures enacted statutory rape laws throughout the nine-

For a study of the rise of, and changes in, media coverage, which documents initial reporting as being devoted to the need to understand the phenomenon and to raise consciousness to stories of “false accusations” and “false memories,” see Katherine Beckett, *Culture and the Politics of Signification: The Case of Child Sexual Abuse*, 43 *Social Problems* 57 (1996).

²⁴ Laura Shapiro et al., *Rush to Judgment*, *Newsweek*, April 19, 1993, at 54-60; Maria A. Gaura, *Family and Children's Services Under Fire*, *S.F. Chron.*, July 15, 1993, at A17.

²⁵ Shapiro et al., *supra* note 24, at 58-60; *Children Make Up Tale of Teacher's Sex Abuse*, *S.F. Chron.*, May 18, 1994, at A7 (fourth graders falsely claimed teacher fondled them).

²⁶ See *infra* notes 134-58 and accompanying text.

²⁷ Elizabeth Loftus & Katherine Ketcham, *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse* (1994); Cynthia G. Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 *Harv. L. Rev.* 551, 597-615 (1996); D. Stephen Lindsay & J. Don Read, *Psychotherapy and Memories of Childhood Sexual Abuse: A Cognitive Perspective*, 8 *Applied Cognitive Psych.* 281 (1994).

²⁸ This slippage appears in Loftus & Ketcham, *supra* note 27, at 95-139 (“planting” “false memories” in children and adolescents to argue that therapists can create false memories of abuse). Schacter also discusses “false memory” in children and adults in sexual abuse cases. See Schacter, *supra* note 14, at 124-33 (discussing the Michaels and Ingram cases).

²⁹ Crewdson, *supra* note 22, at 35-36; Beckett, *supra* note 23, at 71-74.

³⁰ Crewdson, *supra* note 22, at 35-36.

teenth century.³¹ One primary purpose of these statutory rape laws undoubtedly was to protect a property-like interest in a girl's "chastity" and marriageability,³² but the laws also received support from Victorian feminists in order to protect girls from, and to condemn as wrong, sexual abuse and exploitation.³³ The protection was selective, however: in the United States, at least, the statutory rape laws did not protect young African American girls from exploitation and abuse,³⁴ nor did these laws protect boys from heterosexual abuse.³⁵

Freud's late nineteenth century "discovery" of the effects of sexual abuse on his patients disappeared almost as soon as he asserted it.³⁶ While there are several explanations for his decision not to pursue his investigation of the seduction theory, it is clear that his thesis was not well-received by the medical community.³⁷ Freud's move away from the seduction theory led him instead to attribute an adult vision of sexuality to children in his Oedipal theory, which relegated much of adult-child sexual interaction to the realm of childish fantasy.³⁸ Thus, the issue of sexual use and abuse

³¹ Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. Crim. L. & Criminology 15, 27-28 (1994); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 Tex. L. Rev. 387, 402-04 (1984).

³² Oberman, *supra* note 31, at 25.

³³ *Id.* at 27. See also John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 152-54 (1988) (describing the Women's Christian Temperance Union campaign to raise the age of consent to prevent coercion of young women into prostitution).

³⁴ See, e.g., bell hooks, *Ain't I a Woman: Black Women and Feminism*, in *Law and Violence Against Women* 357, 359 (Beverly Balos & Mary Louise Fellows eds., 1994). The social purity campaign emphasized "whiteness," D'Emilio & Freedman, *supra* note 33, at 153, and blacks were considered fallen or different. *Id.* at 187.

³⁵ Rather, the laws were gender-specific. See Oberman, *supra* note 31, at 25; Olsen, *supra* note 31, at 404-06. Perhaps anti-sodomy laws could be said to have protected boys from abuse by other males.

³⁶ Crewdson, *supra* note 22, at 36-41.

³⁷ See, e.g., Judith Lewis Herman, *Trauma and Recovery* 13-20 (1992); Crewdson, *supra* note 22, at 36-41; Schacter, *supra* note 14, at 100; Bowman & Mertz, *supra* note 27, at 615-18.

³⁸ Jeffrey Masson, *The Assault On Truth: Freud's Suppression of the Seduction Theory* 107-44 (1988); but see Leonard Shengold, M.D., *Soul Murder*, 15-16, 32-40 (1989) (defending Freud and criticizing Masson); Bowman & Mertz, *supra* note 27, at 615-18. Alice Miller, *Thou Shalt Not Be Aware: Society's Betrayal of the Child* 107-18 (1986) (Hildegard & Hander Hannum trans.).

of children faded from concern. Certainly, the orthodox psychoanalytic tradition has held that patients' reports of sexual abuse memories, particularly those of females, are "fantasies."³⁹ Even the most charitable analysts would only say that if the patient believed it had occurred and was harmed, then there was harm.⁴⁰ Even today, a distinguished researcher and writer on memory comfortably supports Freud's abandonment of the theory by pointing to the lack of "corroboration" of the sexual abuse recounted by his patients, indicating continuing discomfort with the original thesis.⁴¹

In the 1950's, S.K. Weinberg's study of incest estimated that the number of English-speaking children victimized was tiny, one in every million.⁴² The therapeutic and medical establishments agreed that the rate of incest and other child sexual abuse was low. Anthropological assertions of the universality of the "incest taboo" reinforced the belief that intra-familial sexual abuse of children simply was not a serious problem.⁴³ In addition, anthropological studies of sexual activity with or between young adolescents in other cultures tended to be romanticized and celebrated by Western readers as free, erotic, exotic, and non-repressive.⁴⁴ The conventional "wisdom" was that few, if any, of those children who were in fact sexually abused were actually harmed.⁴⁵ This remains the wisdom today to some extent.⁴⁶ Even the immorality of sexualized use of children continues to be contested—if a girl child is "willing," "seductive," a "Lolita,"

³⁹ Herman, *Trauma and Recovery*, *supra* note 37, at 19.

⁴⁰ Shengold, *supra* note 38, at 38 (The assumption, "common . . . among practicing psychoanalysts—that it does make a difference whether something actually happened, but that this does not deny the pathogenic power of fantasy.").

⁴¹ Schacter, *supra* note 14, at 274.

⁴² Crewdson, *supra* note 22, at 25. Kinsey had reported a rate of nearly 25% of respondents in his study of females. *Id.* See also Jeffrey J. Haugaard & N. Dickon Reppucci, *The Sexual Abuse of Children: A Comprehensive Guide to Current Knowledge and Intervention Strategies* 32 (1988).

⁴³ Crewdson, *supra* note 22, at 34-35; Diana E.H. Russell, *The Secret Trauma: Incest in the Lives of Girls and Women* 8-9 (1986).

⁴⁴ Margaret Mead's *Coming of Age in Samoa: A Psychological Study of Primitive Youth for Western Civilization* (1961), was one such example used to say if only "we weren't so repressive" when I was a teenager.

⁴⁵ See *infra* notes 193-97 and accompanying text; Russell, *supra* note 43, at 8-9.

⁴⁶ Kinsey concurred that there was little harm done to girls, as did Karl Menninger. Dziech & Schudson, *supra* note 22, at 7-8.

or, in some cultures, an economic drain, then the use of her body and mind by an adult or older adolescent is seen as perfectly permissible, or at least not harmful.⁴⁷

In the United States, cultural beliefs about child sexual abuse appear to rest on a handful of persistent stereotypes. Sexual predation by strangers or psychopaths who kidnap and kill remains a feared stereotype. Only strangers in cars lurking around schoolyards, who are themselves at times "comic" figures such as Chester the Molester, a cartoon character in *Hustler* magazine, abuse children. Perhaps as a part of a tendency to project a negative sexuality onto others, members of the dominant culture may consider members of "outsider" groups—gays and lesbians, Roman Catholic priests—to be likely child sexual abusers. Part of the stereotype contained in homophobia, for example, is that gay men are pedophiles;⁴⁸ incest as a problem of intra-family sexual abuse is associated with stereotypes of Kentucky hill people and other marginal (and poor) groups.⁴⁹

A comfortable belief persists that only "pedophiles"—a tiny number of sexual deviants—abuse children sexually.⁵⁰ Of course, one cultural

⁴⁷ Margaret A. Healy, *Prosecuting the Child Sex Tourists at Home: Do Laws in Sweden, Australia, and the United States Safeguard the Rights of Children as Mandated by International Law?*, 18 *Fordham L.J.* 1852, 1869-70 (1995); Patricia D. Levan, *Curtailing Thailand's Child Prostitution Through an International Conscience*, 9 *Am. U. J. Int'l. L. & Pol'y* 869, 874 (1994); Marlise Simons, *The Sexual Market: Scourge on the World's Children*, *N.Y. Times*, April 9, 1993, at A3.

⁴⁸ Nancy E. Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 *Val. U. L. Rev.* 335, 354 (1995). This stereotype appeared in arguments supporting the Georgia sodomy statute in *Bowers v. Hardwick*, 106 U.S. 2841 (1986). Lynne N. Henderson, *Legality and Empathy*, 85 *Mich. L. Rev.* 1574, 1641-49 (1987).

⁴⁹ Noel McKibbin, *Defending Sexual Molestation Claims Under a Comprehensive General Liability Policy: Issues of Scope, Occurrence, and Expert Witness Testimony*, 39 *Drake L. Rev.* 477, 508 n.109 (1989/1990). As an example of how stereotyping works, the False Memory Syndrome Foundation's (FMSF) founder claims that there are two "methods" to demonstrate that the organization does not represent pedophiles: "We are a good looking bunch of people: graying hair, well-dressed, healthy, smiling . . . Just about every person . . . is someone you would likely find interesting and want to count as a friend." Kenneth S. Pope, *Memory, Abuse, and Science: Questioning Claims About the False Memory Syndrome Epidemic*, 51 *Am. Psychol.* 957, 960 (1996) (quoting FMSF executive director Pamela Freyd). The implication is that "normal" appearing people (white, upper-middle class, educated) never molest children.

⁵⁰ Joseph R. Long, II, *N.V. v. Moraine Mutual Insurance Co.: The Liability Insurance Intentional Injury Exclusion in Cases of Child Sexual Abuse*, 1991 *Wis. L. Rev.* 139, 156 (1991).

stereotype of "pedophiles" emphasizes that they are men who prey on boys, not girls. The absence of concern for females ought to give one pause. In fact, cultural images of little girls speak of them "flirting" or "being seductive." The popular image portrayed in Nabokov's *Lolita*⁵¹ gave cultural permission to sexual contact with young adolescent girls as part of a narrative of female sexuality. On the other hand, in our culture, for a male to exploit a young male sexually is seen as horrific at all times; female sexual exploitation of young males is often portrayed in narratives of rites of passage or humor, depending on the circumstances. Thus, the movies *Summer of '42*⁵² and *The Graduate*⁵³ seemingly approve of a boy's and a young man's "sexual initiation" by an attractive older woman; more recently, *Spanking the Monkey*,⁵⁴ a film about mother-son incest, was highly regarded by critics, who portrayed it as comedic, failing to scrutinize the film for any message of exploitative and damaging sexuality.⁵⁵ At the same time, however, Freudian theory considers actual sexual abuse of boys by their mothers particularly horrific and damaging.⁵⁶

If one were to search the literature on child sexual abuse and incest—even during the 1980's—one would find a relative paucity of studies in academic books and journals.⁵⁷ Therefore, to find information about or help on the questions raised by the "discovery" of the reality of child sexual abuse throughout the 1980s, one had to turn to a growing literature produced by women for women about sexual abuse.⁵⁸ As feminist consciousness-raising had done in uncovering and articulating experiences of rape and sexual harassment through women's personal stories, so, too, did

⁵¹ Vladimir Nabokov, *Lolita* (Vintage Books 1989) (1955).

⁵² *Summer of '42* (Warner Bros. 1971).

⁵³ *The Graduate* (Embassy 1967).

⁵⁴ *Spanking the Monkey* (Fine Line 1994).

⁵⁵ See, e.g., John Hartl, Highlights, Lowlights, *Seattle Times*, Dec. 25, 1994, at K1; Michael Blowen, 'Monkey' Has a Quirky Humor, *Boston Globe*, Dec. 16, 1994, at 70; Caryn James, 'Spanking' Triumphs, Despite Lurid Elements, *Indianapolis Star*, Oct. 10, 1994, at D5.

⁵⁶ See Shengold, *supra* note 38, at 155-80.

⁵⁷ Rare exceptions include Judith Lewis Herman's *Father-Daughter Incest* (1981) and David Finkelhor's *Sexually Victimized Children* (1979) and *Child Sexual Abuse, New Theory and Research* (1984).

⁵⁸ See, e.g., *I Never Told Anyone: Writings by Women Survivors of Child Sexual Abuse* (Ellen Bass & Louise Thornton eds., 1983), and *infra* notes 59, 60, and 63.

this literature rely on those narratives. For example, Louise Armstrong's *Kiss Daddy Goodnight*,⁵⁹ published in 1978, is organized around interviews and stories of incest survivors; Toni McNaron and Yarrow Morgan's *Voices in the Night*,⁶⁰ published in 1982, contains essays, poems, journal entries, and so on, which grew out of the authors' consciousness-raising and participation in a lesbian writers' group.⁶¹ Much of this literature speaks in voices not recognized by dominant epistemological or "scientific" models of what is true and how we know it to be true, and therefore, it is vulnerable to attacks on grounds of credibility, believability, memory, and bias.⁶² *The Courage to Heal*,⁶³ a handbook for women sexually abused as children, contains stories, poems, letters, and essays by women discussing the issues faced by female sexual abuse survivors.⁶⁴ Many have vilified the book as dangerous and unscientific, and its authors have not only been targeted for relentless criticism, but have also been sued for fomenting "false" memories and "false" accusations.⁶⁵

As with narratives of Holocaust survivors, personal narratives of sexual abuse are too unbearable for most listeners and readers to believe. But, unlike those of Holocaust survivors, the stories of survivors of child sexual abuse often do not have "independent" evidence of the existence of terrible facts: "corroboration" is difficult, if not impossible, to provide. Sexual abusers, unlike the Nazis, do not often keep careful documentation or extensive film records of their crimes.⁶⁶ In many instances, "objective"

⁵⁹ Louise Armstrong, *Kiss Daddy Goodnight* (1978).

⁶⁰ *Voices in the Night* (Toni A.H. McNaron & Yarrow Morgan eds., 1982).

⁶¹ *Id.* at 11-19.

⁶² Ofshe and Watters label some of this literature "pseudoscience." Richard Ofshe and Ethan Watters, *Making Monsters: False Memories, Psychotherapy, and Sexual Hysteria* 65-81 (1994).

⁶³ Ellen Bass & Laura Davis, *The Courage to Heal* (1988).

⁶⁴ *Id.* at 25-6.

⁶⁵ For criticisms of Bass & Davis, see Loftus & Ketcham, *supra* note 27 *passim*. On lawsuits, see Hallye Jordan, *Repressed Memories Come Out as New Specialty*, S.F. Daily Journal, Dec. 5, 1994, at 1, 8.

⁶⁶ It should be noted, of course, that Holocaust survivor testimony and narrative can be challenged as inaccurate as well. The Demjanjuk prosecution stands as an example of failing memory and mistaken identification of John Demjanjuk as Ivan the Terrible (although Demjanjuk had been a guard at another camp). Lawrence Langer's *Holocaust Testimonies* highlights both the difficulties of memory and the dismissal of particular memories even by sympathetic observers and interviewers. Langer, *supra* note 1, at 9, 15-16, 28, 58-60.

witnesses or liberators do not even exist. Even physical evidence of sexual abuse is non-existent—or easily explained away—in many cases: not all child victims are as “lucky” as Maya Angelou.⁶⁷ Thus, it has been relatively easy to dismiss survivor stories as “unscientific,” “anecdotal,” “advocacy scholarship,” and downright “harmful.”⁶⁸ The preexisting interpretations of fantasy and false-because-there-is-no-corroboration remain intact; as we have no “objective, verifiable” proof that there is sexual abuse, we can comfortably assume that the abuse does not exist.

Prosecutions for sexual abuse and tort suits quickly developed in response to the emerging stories of sexual abuse, however. As the legal system geared up to prosecute people charged with child sexual abuse, debate over the extent of child abuse and believability of victims became heated and quickly polarized. Virtually unsubstantiated claims that women routinely falsely accused men of sexual abuse in custody disputes and that sympathetic juries automatically believed children in all sexual abuse cases became “common knowledge” in legal circles⁶⁹; attention quickly shifted to persecution of innocent men. Deep fractures developed in the psychological and psychiatric communities over the reliability of children’s and adults’ testimony and ability to remember as well.⁷⁰ A number of heated battles at the American Psychiatric Association⁷¹ and American Psychological Association meetings⁷² in the last few years, as well as an

67 Maya Angelou, *I Know Why the Caged Bird Sings* (1969). In her autobiography, Angelou powerfully tells the story of being brutally raped (is there any other kind of rape?) by her stepfather/mother’s boyfriend, suffering internal injuries and bleeding. She was believed when she “told,” and there was even a trial in which the perpetrator was convicted, although given a very light sentence. When the man was killed, Angelou, feeling guilty, resolved to “stop talking,” for which she was punished. *Id.* at 74–85.

68 A past president of the American Psychiatric Association apparently considered therapists who gave *The Courage to Heal* to clients to be committing malpractice. See Kenneth S. Pope, *supra* note 49, at 967. Loftus takes a similar tack. Loftus & Ketcham, *supra* note 27, at 140–175.

69 See *infra* note 133 and accompanying text. I have heard attorneys make this claim in Colorado, California, and Indiana. Some judges have stated this publicly as well.

70 Pope, *supra* note 49, chronicles some of the changes and counter-changes. See *id.* at 969–970. See also Loftus & Ketcham, *supra* note 27, at 207–13 (quoting Richard Ofshe as saying “[t]his is an ideological battle with truth and justice, right and wrong up for grabs”).

71 See Katy Butler, ‘False Memory’—True Problem or Bad Therapy?, *S.F. Chron.*, May 27, 1993, at A1, A19.

72 Loftus’ and Ketcham’s *The Myth of Repressed Memory* contains numerous attacks on those who disagree with their contentions that recovered memories of abuse are false and

outpouring of books on the subject,⁷³ reflect this polarization. Again, although much of the furor has focused on the debate over the existence of recovered memory—a very narrow category of cases⁷⁴—it has also arisen over questions of whether there is such a thing as Child Sexual Abuse Accommodation Syndrome (CSAAS),⁷⁵ whether children are automatically telling the truth or lying, whether children are coached by venal adults,⁷⁶ and whether children are able to recall events accurately.⁷⁷ In addition, debate continues over whether sexual abuse is damaging to chil-

the result of therapeutic malpractice (or worse). Loftus & Ketcham, *supra* note 27, at 171-75, 218-26. Unfortunately, the American Psychological Association's Working Group on Investigation of Memories of Childhood Abuse, appointed in 1993, was comprised of psychologists who had already declared virtually intractable stances, with researchers Loftus, Ornstein, and Ceci on one side, claiming that science proves recovered memories are often false, and clinicians Alpert, Brown, and Courtois on the other, claiming that memories are often true. Although it can be portrayed as simply a "bitter skirmish[] between the scientific and practice communities," the inconclusive Final Report, containing only a few points of agreement, appears to be the result of a bit more than simple methodological disagreements, as several participants are suing each other, have resigned from the APA, and so on. See Robert Barasch, Ph.D., Next Big Quake? APA False Memory Group Sharply Split, *Nat'l Psychol.*, Vol. 5, No. 4, July/August 1996, at 1-2.

⁷³ See, e.g., Louise Armstrong, *Rocking the Cradle of Sexual Politics: What Happened When Women Said Incest* 187 (1994); Ofshe and Watters, *supra* note 62.

⁷⁴ See Bonnie Miller Rubin, *Presumed Guilty*, *Chi. Trib.*, May 30, 1993, at 1; Ross E. Cheit, *The False Memory Crisis: An Empirical and Social Critique*, paper delivered at 1995 Annual Meeting, Law & Society Ass'n, Toronto, Canada. Cheit's report on data he is gathering refuted the claim that massive injustices are occurring or that disgruntled adult children are suing their parents gratuitously.

⁷⁵ Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 *Cardozo L. Rev.* 2027, 2039-40 (1994) (quoting Dr. Roland Summit, the "originator" of CSAAS). The authors go on to argue that the studies of child sexual abuse are flawed and difficult to verify, *id.* at 2086, and that CSAAS and expert testimony in child sexual abuse cases "is not sufficiently reliable to be admitted, even when ordered by the most qualified and experienced expert witness." *Id.* at 2101. See also Robert P. Mosteller, *Syndromes, Abuse, and Politics in Criminal Trials and Evidence Law*, 46 *Duke L.J.* (forthcoming 1997) (manuscript at 12, on file with author) (arguing that CSAAS cannot be used diagnostically but could be used to rehabilitate an impeached child witness, and cautioning against "abuse" of this evidence).

⁷⁶ Leora N. Rosen & Michelle Etlin, *The Hostage Child* 101-06 (1996) (discussing claims of "false allegations" in custody disputes). See also *infra* notes 154-58.

⁷⁷ Daniel Goleman, *Studies Reveal Suggestibility of Very Young as Witnesses*, *N.Y. Times*, June 11, 1993, at A1, A23; Kathleen McCarthy, *Kids' Eyewitness Recall is Focus For Conference*, *APA Monitor*, July 1993, at 1, 28-29. See also *infra* notes 135-49 and accompanying text.

dren,⁷⁸ as well as whether it has effects as significant as other forms of abuse and neglect.⁷⁹

In 1990, the media were still reporting sympathetically on efforts to combat child sexual abuse and incest,⁸⁰ but by 1994, U.S. News and World Report attributed some of the backlash against “recovered memories” of sexual abuse to a belief that concern about sexual abuse of children is related to “a radical feminist agenda, another avenue for women to voice rage against sexual violence.”⁸¹ Thus, within a very short period of time—less than a decade—the dominant narrative explanations for claims of sexual abuse reemerged in the form of vehement denials from a variety of quarters, in line with the backlash against feminism’s work to end violence against women generally.

Undoubtedly exacerbated by a resort, through the criminal law, to an adversarial legal system, resistance to claims of sexual abuse of children strengthened in light of a series of legal disasters that played into the dominant narratives of fantasy, falsehood, and non-existence. These legal disasters included the highly publicized *McMartin* and *Michaels*⁸² day-care cases in California and New Jersey. The *McMartin* case alone cost million dollars to prosecute,⁸³ lasted a total of thirty-three months, and resulted in acquittal of two remaining defendants on fifty-two counts of molestation.⁸⁴ The jury failed to reach a verdict on thirteen counts against

78 Cf. Haugaard & Reppucci, *supra* note 42, at 74, 82, 98.

79 *Id.* at 84–6.

80 See, e.g., Beckett, *supra* note 23, at 69 (quoting *People* magazine).

81 Miriam Horn, *Memories Lost and Found*, U.S. News & World Report, Nov. 29, 1993, at 52, 55. Ironically, Horn’s article concerns Prof. Ross Cheit’s recovered, and corroborated, memory. See Katy Butler, *S.F. Boys Chorus Settles Abuse Case*, S.F. Chron., Sept. 1, 1994, at A2 (Cheit’s 25-year-old recovered memory supported by “substantial evidence”).

This rhetorical move discrediting efforts to communicate a harm as part of a “feminist agenda” is depressingly familiar: the same arguments have been and continue to be made against reforming (and enforcing) rape and other sexual abuse laws. See, e.g., Katie Roiphe, *The Morning After* (1994) (criticizing feminist rape reform efforts); Neil Gilbert, *The Phantom Epidemic of Sexual Assault*, 103 *The Public Interest* 54 (1991) (criticizing feminist efforts); Nancy Gibbs, *When Is It Rape?*, *Time*, June 3, 1991, at 48, 53 (some feminists “too quick” to classify “sex” as “rape”).

82 *State v. Michaels*, 625 A.2d 489 (1993), *aff’d*, 642 A.2d 1372 (1994) [hereinafter *Michaels I*].

83 Dziech & Schudson, *supra* note 22, at 76.

84 Kincaid, *supra* note 22, at 343.

one defendant.⁸⁵ (Charges against five codefendants were dismissed by the District Attorney before trial.⁸⁶) The trial, based on the testimony both of children who were coached and cajoled and of their panicked parents, also involved bizarre stories of ritual abuse; the case stands as a horror story of irresponsible prosecution.⁸⁷

In the *Michaels* case, a jury convicted Kelly Michaels, a day-care supervisor, of 115 counts of assault and child endangerment.⁸⁸ The New Jersey Superior Court, Appellate Division, reversed the convictions,⁸⁹ and the New Jersey Supreme Court affirmed.⁹⁰ The appellate court rested the reversal both on the grounds that an expert's testimony on Child Sexual Abuse Accommodation Syndrome was improperly admitted⁹¹ and that the trial judge failed to interview the children individually before deciding to allow them to testify by closed circuit television.⁹² The appellate court also expressed concern that the trial judge had shown bias by expressing concern for the children who testified from his chambers by closed circuit television.⁹³ The judge had held the children in his lap, played with them, whispered to them, and apparently had generally manifested tenderness and concern that could influence the jury (although also making testifying more comfortable for the children).⁹⁴ The New Jersey Supreme Court affirmed the appellate division on different grounds, focusing on the impermissible taint of statements and testimony because of the pretrial interrogation of the children by law enforcement.⁹⁵ Unless the prosecution

⁸⁵ *Id.* A second trial on those counts also resulted in a hung jury. *Id.*

⁸⁶ *Id.* at 342; Crewdson, *supra* note 22, at 153-54.

⁸⁷ Crewdson, *supra* note 22, at 150-151.

⁸⁸ *Michaels I*, 625 A.2d at 493.

⁸⁹ *Id.* at 489.

⁹⁰ *State v. Michaels*, 642 A.2d 1372, 1385 (1994) [hereinafter *Michaels II*].

⁹¹ *Michaels I*, 625 A.2d at 524, 593-605. The exact rationale for the finding of prejudicial error is unclear—that is, whether it was the expert's "ultimate fact" diagnosis of the children's symptoms as being "consistent with" Child Sexual Abuse Accommodation Syndrome, or doubts about the testimony's scientific validity, or simply that the testimony was admitted in the case-in-chief rather than to rehabilitate the children's testimony.

⁹² *Id.* at 506-08.

⁹³ *Id.* at 508.

⁹⁴ *Id.*

⁹⁵ *Michaels II*, 642 A.2d at 1384-85.

could prove by clear and convincing evidence that the children's testimony "nonetheless retain[ed] a sufficient degree of reliability to warrant admissibility at trial," a burden that the court seemed to think was insurmountable, no child could qualify to testify in a new trial.⁹⁶

The appendix to the New Jersey Supreme Court's opinion contains several transcripts of police interviews confirming that law enforcement officers did exert an unacceptable degree of pressure on the children involved. For example, one transcript of an "interview" with a young child, who had stated repeatedly that he did not want to talk and "I hate you,"⁹⁷ quotes the investigator as stating, "Tell me what happened. . . . I'll make you fall on your butt again," and "Tell me what Kelly did to your hiney and then you can go. If you tell me what she did to your hiney we'll let you go."⁹⁸ A major problem in the *Michaels* case, therefore, lies in the detectives' unconscionable bullying, pressuring, and cajoling of the children, although courts regularly shrug at similar—or worse—tactics used by law enforcement to interrogate suspects and witnesses in other kinds of cases.⁹⁹

The *McMartin* and *Michaels* cases preserved the "innocence" of children, in that neither case really centered on claims that children were purposely lying; rather, the problems were with the intimidation, coaching, and manipulation of child witnesses by adult authority figures. Nevertheless, suspicions about the credibility of child witnesses in other sexual abuse cases increased dramatically as a result of these and other legal disasters.¹⁰⁰ Popular culture and the media moved from shocked accounts of horrible abuse and—as is typical in media coverage of criminal cases—rapid conclusions that those accused were guilty, to outraged accounts of innocent people railroaded by false accusations, overzealous prosecutors,

⁹⁶ *Id.*

⁹⁷ *Id.* at 1388.

⁹⁸ *Id.* at 1387-88.

⁹⁹ Long and badgering interrogations of exhausted prisoners, for example, still pass constitutional muster; other ploys and suggestive interviewing of defendants and witnesses are fairly commonplace. See generally Yale Kamisar, *Police Interrogation and Confessions: Essays in Law and Policy* (1980); Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 *Law & Soc'y Rev.* 259 (1996); Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 *Va. J. Soc. Pol'y & L.* 3 (1996); Richard Jerome, *Suspect Confessions*, *N.Y. Times*, Aug. 13, 1995, (Magazine), at 28.

¹⁰⁰ See *supra* notes 22-26 and accompanying text.

and over-reactive adults.¹⁰¹ As a result, any progress made toward understanding child sexual abuse appears to have been stalled, if not reversed, and attempts to prove its existence have become extremely difficult again.

Unfortunately, my reaction to all this is an unscholarly rage, but I also have my moments of denial and confusion. I, too, wish it would all just go away.¹⁰² But witnessing the pain and anguish of adults who were abused, having worked with girls in juvenile hall who often had documented histories of sexual abuse, as well as my own background and involvement in an actual case a few years ago, render it impossible for me to ignore these issues.

III. THE (PARTIAL) STORY OF A LITTLE GIRL

The denigration of, and backlash against, assertions of child sexual abuse results in part from the fact that sexual abuse, especially of female children, is a harm that exists in an epistemological vacuum and is surrounded by denial, resistance, ignorance, and fear. To work at all, law must at a minimum rest on some consensus about what constitutes a believable story and what does not. Because no stable or widely accepted narratives or categories of knowledge about sexual abuse existed prior to the resort to legal solutions, the destabilization of an already tentative understanding and narrative of abuse was perhaps inevitable. At the same time, however, the cost has been staggering: gains in knowledge about the crime have been stymied. As a result, cases remain difficult, if not impossible, to bring in criminal or civil court successfully. This in turn raises questions of how, indeed, one can prove anything to an unwilling or resisting audience, an audience unreceptive to assertions, because of the absence of cognitive, emotional, or narrative frames for understanding.

I hope to illustrate the very real contemporary difficulties with confronting child sexual abuse by recounting my own experience of how difficult it was for me to "prove" its existence in one case without the aid of any agreed-upon narrative to support my interpretation of a group of facts

¹⁰¹ See Beckett, *supra* note 23, at 69-70.

¹⁰² Someone comes to me in a panic because a two-year-old female relative may have been sexually abused by her father. Another has a "flashback," re-experiencing an assault, while working on a sexual assault case. A student writes a reflection piece about her incest experiences. I suggest counseling, sometimes offer names of therapists I believe are knowledgeable and responsible, and sit in my office thinking, "Oh, God."

as abuse, and against the existing contextual background of stories defining what is “real” and what is “imagined.”

As Langer observed in *Holocaust Testimonies*, written texts or memoirs invent a narrative voice that “seeks to impose on apparently chaotic episodes a perceived sequence, *whether or not that sequence was perceived in an identical way* during the period that is being rescued from oblivion by memory and language.”¹⁰³ Thus, while the following story does contain a narrative sequence, and describes how the narrative came to be, it fails to capture what was, for me, a truly chaotic experience of realizing that something was terribly wrong, trying to stop that wrong by using the options I believed to be available, and experiencing additional events that confirmed that a child was in danger. Re-telling is also a reconstruction, an embellishment perhaps, that itself could be challenged as inaccurate, convenient, or the product of self-serving memory, at least in some of the details, but I have tried to be faithful to the facts. The original version of narrative that follows was written close to the time during which the events occurred, but I have added some memories and deleted others that I believe distract from the telling. Further, although I kept detailed notes of events as they occurred, and I have attempted to follow those notes, I also have tried to delete any information that could potentially lead to identification of the child. This in itself changes the narrative, highlighting some things while omitting others that might be important elements of “truth.” Perhaps in an effort to sustain my hopes of credibility, I may have filled gaps that I ought not have. As readers, you may identify major gaps that remain in the story, and ask yourself how you might fill them and why. At the end of the section, you might ask what counts as the known and unknown, and what role law plays in defining the known and unknown, in this particular case.

One summer, I acquired a new downstairs neighbor at an apartment that I had rented for many years. This white, presumably middle-class man was not alone; he had a little girl with him. (I didn’t know her age; she was young but not a toddler.) It took little time for me to become aware of the seemingly constant—but actually, only frequent, daily,—yelling by the man and crying by the child. The child was seldom outside; I never saw her playing with other the children in the complex. When she was outside, she was always close to, if not actually holding hands with,

¹⁰³ Langer, *supra* note 1, at 41.

the man who had introduced himself as a single parent raising the child alone.

The noise—the yelling, the refrain of “Shut up! Shut up! I’m trying to work,” and the child’s responses of “Daddy please,” went on morning, afternoon, and evening. I’d turn up my television or radio and still hear his yelling and her pleas and cries. One morning when things seemed particularly acute to me, I knocked on the door and asked the man if everything was “O.K.” He said yes, everything was fine, he was only trying to get some work done. But the noise continued daily and into the evenings—yelling, crying, pleading, fighting, bumps, thumps, running feet. I grew more concerned. Finally, I tried to talk to the apartment manager about my concerns, but I was cut off abruptly by the manager, who said, “I know what you’re thinking. . . . She’s a brat.” I replied with some annoyance that the manager did not know what I was thinking, but I did not elaborate.

Apparently, someone spoke to the neighbor, identifying me as the complainant. In a subsequent interaction, the man saw me as I was going upstairs and declared that he wasn’t yelling at her anymore, that things had been quiet. I demurred, knowing full well that I had continued to hear his yells and her screams. I definitely had been cast as the intrusive, snoop neighbor! Was I a crank? Was I overreacting? Or was the child being abused in some way? I didn’t “know;” all I knew at this point was that it didn’t *feel* right to me. I also “knew” a number of stories: parents have rights, alternatives to custody are often terrible, juvenile court is a disaster. I also had parts of my own story, a story for which I have no coherent narrative, and which reverberated every time I heard her cry or him yell. It all seemed so familiar to me, and thus, so wrong. (In memory, it could have been my sister’s or my own cries and pleas.) I tried earplugs in the evenings and mornings when I was there, but perhaps my “hypersensitivity” allowed me to hear anyway.

A few weeks later, I was awakened around 11:30 at night by a sound that I had never heard a human child make—I initially thought it was a cat fight or a hurt animal. Shortly thereafter, I heard the man yelling “Shut up! Shut up!” The next morning, I called Child Protective Services (CPS), convinced that something was terribly wrong. At some level, I just “knew” it was sexual abuse, but of course I had no “proof.” This was to be the first of a year-long series of telephone calls to the police and CPS.

I alternately thought that I was crazy, overreacting, ridiculous, and completely accurate in my assessment that the child was being sexually abused and perhaps abused in other ways. (I certainly thought the daily routine of yelling at the child was emotionally abusive, but probably not actionable.) I talked with people, agonized over whether I was imagining things, doubted my ability to assess the situation—a single parent raising a child alone might be “stressed out” and yell, but that isn’t a crime. Friends with children assured me that kids yell and cry all the time. I have no children of my own, so even though I had taken care of young children for long periods of time in the past, the fact that I was not a parent myself meant that I could be easily discounted. Further, my own history of growing up in a violent and abusive household did not make me any more credible; to the contrary, it seemed to make me less so. I might be overly suspicious and unrealistic, exaggerating because of personal bias, or hypersensitive and over-reactive.

My awareness of the epistemological and legal problems with proving anything I thought did make me doubt my intuitions and even my hearing. I hadn’t seen any indication of injuries to the child—no bruises, unexplained injuries, broken bones—and I had obviously not witnessed what was physically happening when I heard those sounds. Also, I knew that I might actually be endangering the child by meddling; he might escalate the abuse in retaliation if the manager or the authorities got involved. During a holiday break, I heard crying, screaming, thumps, bumps, “Shut up!”—and remained silent. (I also spent as little time at home as possible to avoid hearing.)

The noise was constant and distressing one weekend a few months later. I called the police, because the bangs, thumps, crashes, and screams made me unable to ignore the situation any longer. This call resulted in a police officer calling to inform me that he had been to the home, the child was fine, the man had said he was trying to get some work done, the house was clean, and that there was no problem. The officer said a CPS worker would also call me the following week. I did receive a call from a CPS worker who assured me that the house was clean. (Why was that important? I wasn’t calling about a “dirty house!”) She also told me that no one had made any effort to talk to the child at her school or away from her parent. (What was the girl going to say to an authority figure in her father’s presence? “This is my daddy who I love and he abuses me?”)

The CPS worker asserted that all was well and went on to inform me that the parent was aware of support services but was uninterested in assistance. (So much for the “stressed out parent” story.) Yet, even while I was on the phone with the CPS worker, the man was yelling at the child, and I simultaneously reported to the worker precisely what I heard him saying: “Shut your mouth! Shut up! I’m sick and tired of people knocking at the door! I’m tired of people not minding their own business! Shut up! . . . And I hope you can hear me, lady.” (The latter apparently was addressed to me. Was it evidence that I was putting the child in danger?)

A few months later, in the early evening, I heard a crash, followed by a scream. I had despaired both of trusting my instinct that something was wrong and of my ability to do anything about it. After all, I had inquired, I had spoken with a number of people and “the authorities” a number of times. A while later, there was loud knocking at the door; the neighbor stood outside with the little girl, dressed in pajamas and a robe, by the hand. He announced, “She wants to apologize to the lady upstairs for making noise.” It broke my heart and prompted me to try to do something yet again. I called CPS the following day, spoke with the worker with whom I had spoken before, and related the incident. Rather than using what I had come to believe were my past incoherent bleats, I tried to put together a story that invoked my authority as a law professor and lawyer familiar with abuse and neglect cases, the sequence of events, and a demand for action. The CPS worker disclosed some information to me that she should never have told me according to the law governing confidentiality in child welfare cases. That information, however, convinced me that CPS should have acted immediately, despite my incoherence or the vagueness of my calls. It appeared by the end of our conversation, however, that the social worker did not plan to do anything beyond what she had already “done” about the situation. (I guess this is in sharp contrast to the model of the overly intrusive social workers favored by critics of CPS; she was clearly “rooting for” the parent.)

Again, I agonized over what I should do; I had nightmares, consulted with experts, and drove my friends crazy. Yet I doubted my perceptions. Rather than saying that, as a survivor, I had access to experiential knowledge that made me a kind of expert, I discredited myself, believing that maybe this whole thing was a fantasy. “Just because” I was abused didn’t mean that she was being abused; was I one of those overzealous types spotting abuse whenever and wherever? I also had to ask what my motives were. That became very clear: protect the little girl, make it stop.

Selfishly, I just couldn't stand hearing her screams anymore, but less selfishly, I did want to make sure she wasn't in danger.

I knew that, according to *DeShaney v. Winnebago County Department of Social Services*,¹⁰⁴ the state has no duty to protect children from "private" violence. I knew about overworked CPS workers, I knew about "proof"—"No bruises? Well, then . . ." "Is she starving? Is she being left alone?" (No, quite the opposite.) "Is she missing school?" No, no, no. I knew that I had already done "more than most," and some advised me that there was nothing else that I could do, other than move if it bothered me so much. One friend responded to my anguished (and obsessive?) dilemma by trying to find ways to appeal to "higher authorities," supporting my quest for one last way to stop it.

I anguished some more. I decided I had to try one more time before I gave up completely. I decided to invoke the written word and as authoritative a voice as I could muster in my last attempt to "do something." I spent one late afternoon writing a four-page letter to the CPS worker, documenting in chronological order much of what I had heard, seen, and reported. I put many things I had observed and heard into a narrative framed by and invoking my knowledge of and expertise with the law of abuse and neglect. (I didn't bother with the part about my own history.) I strove to make the letter "real," "balanced," "objective," and "detached;" I tried to write a coherent and balanced narrative account of a sequence of events: who, what, when, how, and where, with due acknowledgment that I had no "direct" proof (sounds and words and observations being subject to varying interpretations), but emphasizing that I did have a basis for my concern. I made indirect reference to the breach of confidentiality by the CPS worker as a bit of a threat (which was probably useless as a catalyst for action after *DeShaney*)¹⁰⁵ and emphasized my "expertise" as a lawyer who had worked on abuse and neglect cases. I included information from another neighbor who had been afraid to report. By that time, I had definitely crossed into the snoop neighbor category, conducting my own little "investigation."

¹⁰⁴ 489 U.S. 189, 195 (1989).

¹⁰⁵ I am grateful to Marnie Mahoney for the observation that one of the effects of *DeShaney* is to lessen incentives for state actors to respond to or investigate properly complaints and concerns about child abuse. Combined with criticisms of state intervention in family matters, lack of funding, and overburdened agencies, a lack of any legal means of making agencies responsible for omissions only undermines efforts to help children in danger.

After I had mailed the letter, I saw the girl once when I was petting another neighbor's cat on a porch between apartments. She stood, watching me, and I heard the man yell at her to get inside. After the second time he yelled, she turned and ran into the apartment. I also heard him yell at her once, dismissing her efforts to point out a flower—"Flower, daddy! Look, flower!"—with a "shut up, get moving." (That one still makes me cry.) There was an awkward interaction another time, when he appeared, gripping her hand, and stood and stared at me while I was chatting with someone outside. (Was he trying to intimidate me? Or was I just being paranoid and hypersensitive?) Another time, I saw him on the front porch, cutting her very long hair and sharply saying, "Stand still" over and over.

Then I noticed that she didn't seem to be around. (When one is used to constant yelling and crying, one also notices its absence.) Another neighbor, concerned about the little girl, asked if I had seen her. I replied that I would call CPS if she didn't appear by the following Monday—after all, she could be at camp, or visiting someone, or something—replacement narratives for my fear that something terrible might have happened. That weekend, I got a call from a different CPS worker asking if she could use my letter for "legal proceedings." Properly trained in confidentiality, she revealed absolutely nothing; I finally asked her, "I haven't seen [the child] around; can you tell me this—is she safe?" There was a long pause, then a soft reply: "Yes, she's safe."

Later, I was able to confirm that someone had interviewed the child at her school, and, on the basis of whatever she said, she was taken into state custody immediately. Heaven knows what trauma that must have caused. The new CPS social worker and I talked about whether and when the letter could be used for a dependency proceeding in juvenile court. Again, silencing doubts crept into my thoughts: was out-and-out removal of the child good? Where was she? Isn't it harmful to remove children from their homes? Knowing the paucity of good alternatives and the horrid places she might have been taken, the studies indicating the often devastating effects of foster care, and the stories of people who would have been—or were—devastated by "removal from the home," I worried a great deal. On the other hand, I was developing a very strong opinion against the neighbor. As I learned a little more about the abuse, I personally wanted his parental rights terminated. (That was my most noble sentiment.)

Almost a month later, I learned from a neighbor that the police arrested the man. The next information I received was not from the prosecu-

tor's office or the detective for the case; rather, I learned that the Public Defender's Office was trying to contact me to determine whether to declare a conflict of interest in the case. The reason? I personally knew some lawyers in the office, I guess. And over time, I learned that there was widespread agreement that "the theory" of the defense (the story that the defense planned to use) would be to attack me and my credibility. As explained to me later, the PD indicated in his motion to "conflict out" that the defense would attack me as an identified rape survivor. Why on earth did a rape that had happened over ten years ago have anything to do with my credibility as a witness in a present criminal prosecution? How about attacking me for being one of those man-hating feminist law professors? (The lying vengeful woman story.) Worst of all, what if they discovered that *I* had been abused as a child? (Something that would have been relatively easy for a conscientious defense investigator to unearth.) Does that completely discredit me as a rape survivor/lawyer/witness to other child abuse? Or does it mean that I might have an enhanced sensitivity, alertness, or awareness?

The detective investigating the case contacted me about reading my letter to CPS in court before he testified in the preliminary hearing. After the preliminary hearing, the court held the man to answer on charges of felony child abuse and felony child molestation. The detective and others told me that I wouldn't need to testify if there was a trial. Experts were assuring me that there was nothing I could testify to—I hadn't seen anything, or heard a specific set of words that added up to a believable narrative. The gaps in my narrative were huge, and the unknown became the unknowable became the unprovable. Yet I knew all along that I would be subpoenaed. I had been the reporting party; I had written the letter, and I might lend some "corroboration" for whatever evidence the district attorney had.

I was, indeed, subpoenaed for trial. The thought of the child having to testify against her parent distressed me, as did the thought that she had endured who knew how many repeated interviews with various strangers after she was removed from her home. (I later learned that repeated interviews did not occur, fortunately.) The thought of some defense attorney cross-examining this little girl who loved her daddy appalled me. (The thought of my having to testify and be cross-examined didn't thrill me, either, to be honest.) In my mind, it came down to a narcissistic (law professor's) belief that the case depended on me and an undoubtedly frightened little girl. I had to be as accurate and perfect in my recollections as

possible. I carefully made notes of what I could say I had objectively "heard," said, when, where, how. I tried to impose order and meaning on chaos without invention to fill in the huge gaps in "my" story. I thought of what I would do if I was cross-examined about my feminist beliefs, my rape articles, my life.

I wanted to make it all go away as well. Stories of bad foster care, trauma to children separated from their parents, disastrous criminal cases, and of my own selfish inability to stand her cries battled with my belief that not to have acted would result in immeasurable harm and, to me, would have been morally indefensible. In November of that year, the neighbor entered an *Alford*¹⁰⁶ plea—a plea that does not require the defendant to admit guilt but that is the functional equivalent—to one count of felony child abuse and one count of felony child sexual abuse. I arrived in my office early one morning to find a message from the District Attorney's office on my answering machine: "We couldn't have done it without you."

The man was sentenced to serve a year in jail and placed on eight years felony probation. The conditions of probation included counseling, no contact with children without a "responsible adult present," and registration as a sex offender. In my own moral outrage, I wanted the man locked up for life, but to put the child through a trial would have been awful. And the result was not "bad:" as the DA later said, she could protect the little girl until she was fourteen.

But ultimately, what did I do? I tried to stop abuse by telling a story, by trying to create a coherent and acceptable narrative of abuse on very fragmentary "objective" information and a source of knowledge that no one would recognize as objective or valid. That story ultimately landed me and a little girl in the quagmire of the criminal process, and in a realm of power and knowledge that seeks to silence such stories once and for all. That in this case I was "right"—I have more information now than I did when I contacted CPS¹⁰⁷—does not now mean that the story I told CPS was any more coherent or believable at the time.

¹⁰⁶ North Carolina v. Alford, 400 U.S. 25, 37 (1970).

¹⁰⁷ I have found those officially involved extraordinarily reluctant to talk about the case; some of this has to do with confidentiality concerns, no doubt, even if, by proceeding with a criminal prosecution, much information became public record. The Deputy District Attorney a year later told me I "didn't want to know" what the man had done to the child, or what she had said, for example. The DA was much more forthcoming about her anger that

IV. NARRATIVE, PROOF, AND CREDIBILITY

Generally, in common discourse, to call something criminal is to call it immoral as well. Criminal law is first and foremost about defining and applying moral values that determine, shape, and define facts, whether we are always conscious of this or not. Indeed, feminism's project over the last two decades has included a sustained effort to persuade legislators, courts, and the public that harms to women—including rape and battering—are serious moral wrongs that criminal law ought to address. As part of this effort, feminists have worked to displace the conventional moralities of gender relations through law reform.

As I have argued elsewhere, the resistance to rape reform stems at least in part from conventionalist beliefs and narratives about the morality of heterosexuality which render women morally responsible for sexual intercourse.¹⁰⁸ The mixed success of these efforts in turn illustrates how the "objective" and the "moral" worlds of criminal law interact. Prosecutors', judges', and jurors' tenacious insistence on corroboration or prompt complaints in rape cases—because a woman's word is not sufficient to prove a rape—is one example of the demand for "objective," "verifiable" "facts."¹⁰⁹ (Note, however, the devaluation of a woman's word or voice as a "fact.") The continuing belief that rape shield statutes block access to relevant information is another.¹¹⁰

her office had forced her to "settle" the case, in part because of the expense of trial, while she realized it would have been difficult for the little girl. She was aware that the man was "making progress" in therapy, but she had lost contact with the child, who had been doing well, because of the "confidentiality" surrounding placement, etc. The investigating officer was reluctant to speak about the matter or to be identified, but he did provide reassurance that the child had only been interviewed once, in keeping with what is now considered to be sound practice. He indicated that "other" evidence—the child's drawings, her statements, the man's statements, and a physical exam—could be interpreted in a number of ways. He also stated that a number of officers had their suspicions about the man, but since there is no "profile" of a perpetrator, and hunches are not enough, they could do nothing. Yet another officer who was involved in the arrest of the man expressed her delight in having been able to participate in the arrest.

¹⁰⁸ Lynne Henderson, *Rape and Responsibility*, 11 L. & Phil. 127, 130-31 (1992); Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 Tex. J. Women & L. 41, 42 (1993).

¹⁰⁹ See Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. Davis L. Rev. 1013, 1041 (1991).

¹¹⁰ Rape shield laws have been criticized for denying defendants their Sixth Amendment right to confrontation. See, e.g., Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 Wis. L. Rev. 1219, 1220 (1985).

The feminist critique and use of criminal law to prevent (or punish) sexual violence has been only mildly successful, in part because the epistemological and narrative assumptions upon which the criminal law is grounded rely upon "objectivism" and "moral conventionalism" as the keys to understanding an event as a crime or not a crime. By "objectivism," I mean a rigid adherence to a belief that there are known, observable "facts" that can be weighed, measured, observed, and quantified, regardless of the identity of the weigher, measurer, observer, or quantifier.¹¹¹ By "moral conventionalism," I mean what is ordinarily assumed to be right and wrong, good or bad, in a culture, or at least the dominant culture. Both objectivism and conventionalism have disadvantaged women in the criminal process, but let me be clear: I am not saying that empiricism is wrong, or that attempts at objectivity are wrong, only that they are always partial and incomplete. Nor am I saying that moral conventionalism is necessarily wrong—although I believe it to be more suspect than objectivism or empiricism, given its use to justify oppression and discrimination against women and other groups. In any event, objectivism and moral conventionalism in turn define what is seen as knowable and not knowable, what is believable and what is not.

Furthermore, objectivism and moral conventionalism are interrelated, and this interrelationship has deeply affected research in the field of sexualized gender violence. This may be in part because of the reluctance of criminal law, objectivism, and conventionalism to absorb feminist knowledge and insights.¹¹² The struggle is over epistemologies, moralities, and challenges to settled conventions, and, as Catharine MacKinnon has written, "who does what to whom and gets away with it."¹¹³ As I argue below, concern about child sexual abuse has reproduced the same pathologies and patterns of resistance to changes in understanding that have existed in response to the feminist challenges to comfortable assumptions about rape, battering, and sexual harassment, but, here, disrupting the patterns is even more difficult.

¹¹¹ Sandra Harding, *Whose Science? Whose Knowledge? Thinking from Women's Lives* 138-39 (1991).

¹¹² For a sympathetic account of feminist efforts that nevertheless accepts the conventions and "theories" of criminal law, see Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. Pa. L. Rev. 2151 (1995).

¹¹³ Catharine A. MacKinnon, *Towards a Feminist Theory of the State* 138 (1989).

As already noted, the subject of child sexual exploitation and abuse is uncomfortable to contemplate or think about, even for the most open-minded and thoughtful of us; the possibility is too painful to admit into awareness. When discomfort arises, we tend to choose the more comfortable narrative, the story that appears to enjoy epistemological favor, the narrative that reinforces our understanding of probabilities.¹¹⁴ In the instance of child sexual abuse, alternative explanations, counter-narratives, and general resistance even to believing claims all enable us to avoid the discomfort. As in the case in which I was involved, alternative explanations and stories such as “stressed out parent” and “kids cry all the time” can provide a comforting, if negating, counterpoint to a troubling reality.

The (re)discovery of child sexual abuse in the early 1980s led to an alarmed, but relatively uninformed rush to “do something” legally—particularly through criminal prosecution. Unfortunately, because child sexual abuse had been denied and ignored for years, little empirical research or accepted knowledge of the crime existed; objectivism had in turn facilitated ignorance. While moral conventionalism certainly condemned sexual contact with children, conventional belief was—and appears to remain—that sexual abuse is a rare crime committed by identifiable monsters. As in any criminal case, the adversariness and high stakes for those charged with sexual abuse demanded objective certainty and moral simplicity. The demand for certainty, within a context of disbelief and sympathy for the wrongly accused, began to drive commentary, scientific research, and legal rhetoric.

A recent book, *Child Loving*,¹¹⁵ by a professor of English literature, highlights the quandaries of the subject matter, the resistance to doing anything, and the detrimental impact of the *McMartin* trial. The author, who attended the trial, combines narratives of abuse of state power and denial of harm in his examination of the sexualization of children in Victorian literature. Ostensibly a deconstructive critique of our sexualization of children and of existing “power” structures, the book simultaneously projects adult sexuality onto children and asserts that children use sex both to feel loved and to entrap unsuspecting and vulnerable adults.¹¹⁶ Follow-

¹¹⁴ I am grateful to Janet Halley for this insight.

¹¹⁵ Kincaid, *supra* note 22.

¹¹⁶ *Id.* at 71-210, 385-86. Throughout, the book emphasizes the gentleness of the pedophile and the harshness and violence of others against children, and describes children taking advantage of the pedophile.

ing Foucault, the author strongly suggests that invoking the state's legal system and disciplining mechanisms perpetuates harm to innocents by reinforcing narratives absolving most of us from our own complicity in the sexualization of children, by portraying the pedophile as Other.¹¹⁷ The book does challenge comfortable narrative assumptions and stereotypes of child molesters,¹¹⁸ and reveals uncomfortable narratives of societal sexualization of children.¹¹⁹ But the author's analysis of children and sexuality paints children as adult-like in sexual response, interest, and feelings of pleasure in a way reminiscent of Freud, an image in ostensible contrast to both Victorian and current social insistence on children's sexual and moral innocence.

After the ritual incantations against child abuse that characterize all current writing on the subject, the author examines literature and selected research to infer that sexual encounters with adults are actually pleasurable for children, and that children, either because they seek out these contacts or because pedophiles are "loving," are not really "victims."¹²⁰ Because one study of twenty-five boys reported that "'the sexual contacts with the adults appeared to have been a predominantly positive experience for virtually all of the boys,'"¹²¹ the author concludes that there was no harm. Because yet another researcher suggested that there was "little evidence" of lasting harm to children, and that pedophiles are "typically unaggressive, 'gentle and rational,'"¹²² the author concludes that we ought not "empower" children to allege abuse or take legal action.¹²³ *McMartin* is the paradigm case the author cites to support his claim that legal action is wrong.¹²⁴ *Deflecting attention from sexual abuse, the author says that the*

¹¹⁷ Id. at 378-91.

¹¹⁸ Id. at 202-10, 388-89.

¹¹⁹ Id. at 306-11.

¹²⁰ Id. at 205-10.

¹²¹ Id. at 386-87.

¹²² Id. at 387.

¹²³ Id. at 385-86.

¹²⁴ Id. at 341-56. The author writes that there is no need for a "story" of child molestation and pedophiles "apart from our need for it." Id. at 355. He claims that social scientists and workers in the field, and even the police, tell a story among themselves that is entirely different. "This shadow/silent [sic] story readjusts every part of the public legend: there is no evidence that any child-abduction . . . rings exist; no commercial child-erotica is now published, except by the F.B.I. for Sting operations; pedophiles, such as may exist, are gentle

more important question is cruelty to children¹²⁵—as if sexually using children were not cruel—leading us back to the comfortable state of believing that sexual abuse is not a problem of any significance.

At another level, the themes described by Mary Coombs in her article on the legal and cultural strategy of imposing meta-narratives of “Not True” and “So What?” on women’s stories of rape and sexual harassment in order to dismiss them as not objectively “real” have appeared with a vengeance in coverage and treatment of child sexual abuse.¹²⁶ Briefly, Coombs writes that “the range of ‘credible’ stories [of sexual violation] is narrower than the range of true ones.”¹²⁷ In the “Not True” interpretation, the fact finder concludes that the woman is lying and the allegation is false. Juries, judges, or others “conclude that the events did not happen as she claims. The story she tells is radically different from what they already ‘know’”¹²⁸ What others already know are received cultural understandings about who is a “real” perpetrator and who a “real” victim in the context of accepted narratives that determine what constitutes “real rape” or “real harassment.”¹²⁹ In the instance of the “So What?” response, the juries or judges decide that the facts do not constitute a violation, because the facts do not fit the preexisting story of violation; alternatively, they may conclude that the facts, though true, are not a violation, because the victim is either unworthy or unharmed.¹³⁰ These interpretations that

and unaggressive, usually but not always male; almost all child-molesting comes not from outside but from within the family circle.” *Id.*

¹²⁵ *Id.* at 362.

¹²⁶ Mary Coombs, *Telling the Victim’s Story*, 2 *Tex. J. Women & L.* 277, 280-281 (1993).

¹²⁷ *Id.* at 280.

¹²⁸ *Id.* at 281.

¹²⁹ The construction of such received understandings is itself something worthy of study; the construction involves an interaction of legal and popular culture in determining which narratives “count” and which don’t. For example, the made-for-TV movie about helpless victims or enraged victims and nasty perpetrators has constituted a whole genre and commodification of victim narrative. These television films apparently even have an industry “name”—“Jep” films, short for “jeopardy” (women in jeopardy). Jeffrey S. Neal, *A Woman’s Place: Hollywood’s Depiction of Violence Against Women and the Backlash Female Attorney Film Movement of the late 1980s* (unpublished student paper, on file with author) (citing Richard Zoglin, *Oh the Agony! The Ratings! Violence Against Women on Television*, *Time*, Nov. 11, 1991, at 88; Mark Harris, *Dangerous Women*, *Entertainment Weekly*, April 24, 1992, at 36, for terms).

¹³⁰ Coombs, *supra* note 126, at 282. A variation on this theme is that the adult is simply not responsible for the molesting. In 1996, for example, a seven-year-old girl in foster care

counter narratives of sexualized abuse do not necessarily exist separately; they may combine and reinforce each other in a particular case. The meta-narratives in turn, reinforce existing beliefs, practices, and myths that permit a large number of sexual violations of adult women to go unrecognized and unpunished by the legal system.

These same meta-narratives have emerged in the case of child sexual abuse. Assertions that children lie, fantasize, are too suggestible to be believed, or are coached by vindictive or overzealous adults contribute to perpetuating a meta-narrative of falsity. Adults who say they were abused as children are also to be disbelieved, because they are lying about suddenly recovered memories out of vengeance or because of therapeutic malpractice.¹³¹ The no harm interpretation is less present, but it exists in beliefs that sexual contact with adults does not harm children—it's the reactions of others that harm them—that a child abused by one person is not damaged by further abuse, or that children are seductive and seek out sexual play.

Yet, the feminist uncovering of child sexual abuse has suggested that the assertion that children, especially female children, have lied or fantasized about sexual abuse was itself false, as was the comfortable assumption that there was no harm in sexual contact for children.¹³² The horror, perhaps, of that realization led to counterclaims that children *never* "lied" about abuse¹³³ and that they were irreparably damaged by such abuse. These claims in turn were vulnerable to empirical and cultural challenge, and by their very challenge to conventional understandings, kept these possible interpretations of fantasies and lies in the foreground.

because of sexual abuse in her family was "allegedly" molested by the foster father. The district attorney dismissed a felony charge against the man because the girl "was very sexually provocative" and "the accused did have the sense to stop the act and immediately told his wife;" the district attorney stated that he was "not going to ignore the mitigating circumstances in the case." Ruth Anne Long, *Foster Parent Faces Molesting Charges*, *Warsaw, Indiana Times-Union*, April 12, 1996, at 1A, 2A.

¹³¹ Loftus & Ketcham, *supra* note 27, at 176-205; Bowman & Mertz, *supra* note 27, at 620-22.

¹³² Herman, *Father-Daughter Incest*, *supra* note 57, at 28-32.

¹³³ Stephen J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 *Psych. Bull.* No. 3, 403, 433 (1993) [hereinafter *Suggestibility of the Child Witness*] (attributing claims both that "children never lie" and that "children are incapable of getting it right" to "the media").

As child sexual abuse claims grew more frequent in prosecutions and custody disputes, pressures mounted once again to prove that children lied or made up things to please adults, or that women lied and coached their children to lie in custody disputes.¹³⁴ Numerous attorneys with whom I have spoken have confidently asserted that children make things up in these cases and that women make false allegations in a high percentage of custody disputes despite a lack of reliable empirical knowledge.¹³⁵ (I've heard "as many as 80 percent.") Ironically, while reports of stories of victimization are dismissed as "mere anecdotes," stories of wrongful accusations are taken at face value. The "Witch Hunt" trope began to pervade the characterization of child sexual abuse cases, and, as we all "know," that was a hideous moral error founded on lying children.

Perhaps as a result of the threat posed by the topic,¹³⁶ developments in both law and research appear to be moving towards a return to the earlier state of affairs, in which child sexual abuse was invisible. Given the automatic, and necessary, adversariness of the criminal system, this current trend may have been inevitable. Because of their reliance on criminal law, and in the absence of a settled narrative understanding, researchers and legal actors began to make assertions about children and sexual abuse without any foundation of cultural and empirical understanding or even any "agreement" about the extent of the crime.¹³⁷ Others, in turn, took opposing positions to the assertions and mustered data for their posi-

¹³⁴ Richard Gardner, M.D., has claimed that those making supposedly false accusations suffer from "Parent Alienation Syndrome," a product of "their mothers' paranoid fantasies." Rosen & Etlin, *supra* note 76, at 102-03.

¹³⁵ One California Superior Court Judge writes in his California Divorce Handbook that molestation charges made "during a custody battle or dissolution are often untrue. They are the neurotic response of a litigant filled with rage and hate for the other parent. *Although I have no statistics, my sense is that less than 40 percent* of the allegations against a *natural* parent in the context of a dissolution appear to be true. The percentages resulting in criminal charges are less, and provable charges still less." Judge James W. Stewart, California Divorce Handbook 94 (1990) (emphasis added). Judge Stewart is highly regarded by his colleagues and is highly intelligent; yet he, too, promulgates the dominant story with no evidence other than his hunches. See also the Hon. Patricia S. Curley, Some Suggestions for Dealing with Sexual Assault Allegations in Family Court, 13 Wis. J. Fam. L. 96 (1993) (arguing that accusations of sexual abuse serve "personal agendas" and hinder fact-finding in family court).

¹³⁶ Conte, *supra* note 19, at 227 (quoting Olafson et al., Modern History of Child Sexual Abuse Awareness: Cycles of Discovery and Suppression, 17 Child Abuse & Neglect 7 (1993)).

¹³⁷ Conte, *supra* note 19, at 224; Haugaard & Reppucci, *supra* note 42, at 31-59.

tions.¹³⁸ As Robin West has noted in her criticisms of Foucault's story of sexuality and the village idiot, there is still no discussion of the silent, watchful child.¹³⁹ She remains hidden, unheard, and without voice.

A. Child Testimony and Proof

In most criminal cases, the testimony of the victim is foundational to establishing the elements of the offense. The demand of law and society for proof of a crime calls for a kind of journalistic narrative from victims and witnesses—who, what, when, where, and how—leading to the common lawyer's technique of mixing up events and sequences during cross-examination to disrupt a witness' recall and credibility, or objecting during direct examination to interrupt the witness' narrative flow. We tend to expect detailed knowledge and recall from a witness, despite the fact that no one's memory is perfect, in order to find her credible. Inaccuracy about some parts of an event or inattention to detail is frequently used to impeach or discredit a witness' testimony. Yet witness' inconsistencies are seldom scrutinized by legal actors, appellate courts, or laypersons with the kind of microscope that has been applied to the testimony of rape and sexual assault victims and child sexual abuse victims.¹⁴⁰

In child sexual abuse cases, reliance on the testimony of children is fraught with difficulties even without the impassioned debates over the existence of sexual abuse. Because sexual abuse of children, like rape and sexual harassment of adults, often has no witness except the victim and no physical injury, "proof" is especially difficult because of problems in tes-

¹³⁸ Ceci & Bruck, *Suggestibility of the Child Witness*, supra note 133, at 403, 408-414.

¹³⁹ West, *Feminism, Critical Social Theory and Law*, supra note 3, at 75-78.

¹⁴⁰ Compare, for example, the psychological evidence attacking eyewitness identification testimony with the relatively tolerant view of the admissibility and weight of eyewitness identification on the part of trial and appellate courts. See *U.S. v. Wade*, 388 U.S. 218 (1967). Despite decades of research and writing attacking the reliability and admissibility of such evidence, see, e.g., Howard E. Egeth & Michael McCloskey, *Expert Testimony about Eyewitness Behavior: Is it Safe and Effective?*, in *Eyewitness Testimony* 283, 284 (Gary L. Wells & Elizabeth F. Loftus eds., 1984); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 *Stan. L. Rev.* 969 (1977), eyewitness identification is routinely admitted and believed, even when there are extremely suggestive circumstances involved. Moreover, despite the efforts of Loftus and others to challenge the accuracy of identifications, in many instances identifications are accurate. This does not mean that there are not many false positives, only that memory can be reliable in many instances.

timonial evidence. Although courts and laws historically excluded younger children from testifying,¹⁴¹ for the past several decades laws and courts have admitted children's testimony. While questions about children's competence, reliability, and truthfulness as witnesses in both civil and criminal cases exist,¹⁴² generally speaking, beyond rather simplified procedures for determining their basic competence to testify, children presently testify as witnesses in custody, juvenile, criminal, and tort cases without much controversy.¹⁴³ Moreover, courts and legislatures have determined with increasing frequency that even pre-adolescent children are competent to be tried for crimes, sometimes even as adults, implying a disposition to see children as cognitively capable of testifying and of being able to engage in the cognitively complex activity of "assisting in their own defense."¹⁴⁴

Although Justice Scalia's dissent in *Maryland v. Craig*¹⁴⁵ articulated the view that children ought to be treated as all other witnesses for the purposes of face-to-face confrontation, cross examination, and credibility under the Confrontation Clause,¹⁴⁶ to assume that testifying children ought to be treated exactly the same as testifying adults overlooks developmental differences between children and adults. Children of all ages are at more of a disadvantage compared to most adults in testifying in formal, adversarial settings, although the disadvantages differ and change accord-

¹⁴¹ Dziech & Schudson, *supra* note 22, at 134.

¹⁴² *Id.* at 135-36.

¹⁴³ *Id.* at 133-36. When I was practicing in juvenile court in the early 1980s, judges never questioned the competency of child witnesses beyond asking if they knew the difference between telling the truth and telling a lie.

¹⁴⁴ Peter Fimrite, Prosecutor of Boy Softens His Stand, *S.F. Chron.*, June 22, 1996, at A17, A17-18 (quoting District Attorney as saying "He may not be competent now . . . but in a year from now he may be."). A 12 year-old girl in Texas was recently tried as an adult for murder; she was convicted by a jury of "criminally negligent homicide" and "intentional injury to a child." Up to 20-Year Sentence for Girl Who Killed Tot, *S.F. Chron.*, Aug. 10, 1996, at A6.

¹⁴⁵ 497 U.S. 836, 860 (1990) (Scalia, J., dissenting). Scalia raises the specter of a parent sentenced to prison because he or she could not ask the child "personally or through counsel, 'it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?'" *Id.* at 861. He points to the *Jordan Pre-School* case as an example of injustice caused by denial of confrontation. *Id.* at 868-69. The textual right to confrontation, for Scalia, could not be balanced against anything, but was absolute. *Id.* at 870.

¹⁴⁶ *Id.* at 862, 868-69 (discussing the Sixth Amendment's value in requiring confrontation to determine truth generally, and in the *Jordan*, Minnesota case in particular).

ing to age and experience. Younger children are at a distinct disadvantage in a process that demands the ability to give a journalistic form of narrative, as they simply may not have the cognitive and linguistic skills to use this form of communication effectively.¹⁴⁷ This does not mean, however, that they do not use scripts or have a concept of story and of telling stories.¹⁴⁸ It is communicating that is more difficult: language skills develop over time; young children may have neither the complex language skills nor the vocabulary to describe what occurred, or who did what to whom. A younger child lacks the complex web of connections we develop through experience and learning to retrieve and communicate an event in intelligible form.¹⁴⁹ Nor do younger children have the grammar and syntax skills necessary to understand complex or compound questions asked of them by lawyers.¹⁵⁰ Further, a younger child's sense of dates, sequences, and time can be quite different from that of adults or older children.¹⁵¹ Although older children and adolescents do have better knowledge and abilities to communicate, they are generally not cognitively, emotionally, or linguistically "just like" adults, even if they seem "mature" or articulate.¹⁵²

As a result of well-intentioned but highly suggestive techniques used by some investigators, egregious cases of out-and-out coercion by others, and a skepticism toward child witnesses' testimony in general in sexual abuse cases, researchers and legal actors are subjecting children's testi-

¹⁴⁷ Dziech & Schudson, *supra* note 22, at 69-72; Cathleen A. Carter et al., *Linguistic and Socioeconomic Influences on the Accuracy of Childrens' Reports*, 20 *Law & Hum. Behav.* 335, 336-37 (1996).

¹⁴⁸ John H. Flavell et al., *Cognitive Development* 85-88 (3d ed. 1993). Younger children may be perplexed if scripts aren't followed, and narratives of rudimentary cause and effect are easier than conceptual or generalized categorical groupings. *Id.* Further, "[y]ounger children are more suggestible because they are overly dependent on scripted knowledge and incorporate discrepant or novel events (which could be a suggestion) [sic] into their script of the event rather than keeping them tagged as separate events." Ceci & Bruck, *Suggestibility of the Child Witness*, *supra* note 133, at 416.

¹⁴⁹ Jerome Kagan, *The Nature of the Child* 224 (10th ed. 1984).

¹⁵⁰ See Dziech & Schudson, *supra* note 22, at 70-72 (summarizing research on language skill acquisition); Carter et al., *supra* note 147, at 336-37, 343-47, 349-50.

¹⁵¹ See Dziech & Schudson, *supra* note 22, at 68-69. The ability to deal with abstract concepts such as time grows as a child matures. *Id.* at 71.

¹⁵² Dziech and Schudson suggest that children, rather than being treated as deviant adults, ought to be treated on their own terms in court. *Id.* at 169-72.

mony to increasingly intense scrutiny. Indeed, a kind of “cognitive war”¹⁵³ has broken out over the believability of children, shifting the focus of authorities from direct consideration of the reality of sexual abuse to bitter fights over memory and reliability.

In an effort to compensate for children’s difficulties in communicating and testifying about sexual abuse, social workers, therapists, and investigators turned to using “anatomically correct dolls” to enable them to construct a narrative. Although the dolls were introduced in 1978 “to enable children to identify body parts and functions . . . and to demonstrate and/or clarify what had happened to them,” within ten years the dolls became “the focus of heated controversies” about their alleged stimulation of “sexualized fantasies in children.”¹⁵⁴ Researchers not only argued that the dolls produced “fantasies” in children, but also condemned their use for interviewing or investigative purposes, claiming that the dolls fomented false allegations of sexual abuse.¹⁵⁵ Claims of falsity, suggestibility, and damage effectively ended the use of dolls to reinforce children’s narratives.

The controversies in culture and law have also affected social science research on children’s testimonial and recall capacities. While much research on children’s acquisition of memory skills and strategies had been done by the 1960s, that research involved testing learning and the ability to memorize and retain discrete facts, rather than the ability to recall complex events accurately.¹⁵⁶ By the 1980s, research on children’s memory became increasingly defined by the sexual abuse controversy and the demand for certainty about the reliability and believability of children’s legal testimony.¹⁵⁷ This is not necessarily objectionable, but it does mean

¹⁵³ Janet Halley suggested this formulation to me.

¹⁵⁴ Barbara W. Boat & Mark D. Everson, *The Use of Anatomical Dolls in Sexual Abuse Evaluations: Current Research and Practice*, in *Child Victims, Child Witnesses: Understanding and Improving Testimony* 47, 48–49 (Gail S. Goodman & Bette L. Bottoms eds., 1993) [hereinafter *Child Victims, Child Witnesses*].

¹⁵⁵ *Id.* at 56–57. There are real advantages to allowing children to communicate through play. The strident opposition to the use of anatomically correct dolls is unfortunate. At the same time, however, we must also recognize that the child’s communication may not extract the kind of precise information demanded by the legal system. And if an adult is suggesting—or demonstrating—how to play, then the communication may have little to do with any particular event and more to do with pleasing the adult, experimenting, or creating.

¹⁵⁶ See, e.g., Flavell et al., *supra* note 148, at 231–72.

¹⁵⁷ *Id.* at 268–69; Ceci & Bruck, *Suggestibility of the Child Witness*, *supra* note 133, at 408.

that no relatively independent norms or understandings of memory and recall development in children existed prior to the focus on the specific questions of "suggestibility" and factual accuracy in the context of urgent, adversarial legal demands.¹⁵⁸

Despite calls for caution in taking absolute positions on children's ability to recall events and to resist suggestion or adult pressures,¹⁵⁹ positions in the field of psychology on the ability of children to testify accurately appear to be hardening. One leading researcher, Stephen Ceci, whose work frequently refers to and emphasizes as paradigmatic the injustices and errors of *McMartin* and *Michaels*, has increasingly emphasized the innocent defendant and the false accusation. In a presentation to the 1993 APA meeting in Toronto, Canada, Ceci stated:

I also do not make any apologies for being [one who emphasizes the possibility of false accusations and puts a pro-defense spin on the data]; my best reading of the corpus of scientific research leads me to worry about the possibility of false allegations. It is not a tribute to one's scientific integrity to walk down the middle of the road if the data are more to one side.¹⁶⁰

Implying throughout his lecture that children's recall is highly vulnerable to suggestion and inaccuracy, Ceci did not, however, advocate barring children from testifying, finding that "the data are somewhat off-center, though not so egregiously off-center as to discredit children from testifying."¹⁶¹ Another expert on child development, on the other hand, drew a more optimistic conclusion despite recognizing the vul-

¹⁵⁸ See Ceci & Bruck, *Suggestibility of the Child Witness*, *supra* note 133, at 403.

¹⁵⁹ See McCarthy, *supra* note 77, at 1, 28-29.

¹⁶⁰ Stephen J. Ceci, *Cognitive and Social Factors in Children's Testimony*, Master Lecture Presented at APA 4 (Aug. 20, 1993) (transcript on file with author).

¹⁶¹ *Id.* Ceci became embroiled in the impassioned debate about "false memory" and has been identified with Elizabeth Loftus and Peter Ornstein, both of whom have strenuously denied that there is any proof of "repressed memory," asserting instead that recovered memories are implanted by misguided or malevolent therapists and irresponsible techniques. Though Loftus, Ornstein, and Ceci apparently take the position that they are the true "scientists" in the debate, and that clinicians who assert that repressed memory exists are not scientific, Ceci's alignment with Loftus is unfortunate at this point. Loftus has resigned from the APA allegedly because the APA was "turning away from scientific principles." For a summary, see Barasch, *supra* note 72, at 1-2.

nerabilities in children's memories. John Flavell and his co-authors conclude a review of the research on memory with the observation that "[e]ven young children . . . do not appear to make up memories that would wrongfully condemn a defendant in a child-abuse case."¹⁶²

The existing research on children and memory does demonstrate that children's ability to recall events accurately and their susceptibility to suggestion vary according to age, cognitive development, adult influence, and other social and psychological factors.¹⁶³ Complicating things further is so-called "childhood amnesia," an observed and repeated phenomenon in which children (and adults) have little ability to recall even significant life events from the first years of life.¹⁶⁴

Generally, memories of events, particularly the details of those events, can decay over time absent repetition or recollective frameworks. Thus, without rehearsal, anyone's memory of an event fades. Children are unlikely to have developed the sophisticated recollective capacities of older adolescents and adults,¹⁶⁵ nor are children any more likely than adults to mentally rehearse memories of events as a general matter.¹⁶⁶ Moreover, the contexts in which abuse occurs may themselves be chaotic and unpredictable, without cause and effect for the child, so that the child has no sense of sequence or ordering of events in a way that facilitates memory and that a journalistic narrative demands. Isolated instances of abuse may be easier to identify and recall with some specificity than abuse continuing over a period of time or sexual abuse occurring in a context of frequent physical or emotional abuse (a likely occurrence).¹⁶⁷

¹⁶² Flavell et al., *supra* note 148, at 269.

¹⁶³ See, e.g., Ceci & Bruck, *Suggestibility of the Child Witness*, *supra* note 133, at 431.

¹⁶⁴ See Schacter, *supra* note 14, at 229. But see Flavell et al., *supra* note 148, at 234 (noting that it is unclear whether infantile experiences can be recalled by adolescents or adults, though infants demonstrate memory capacity over time).

¹⁶⁵ Flavell et al., *supra* note 148, at 245-47.

¹⁶⁶ *Id.* at 237.

¹⁶⁷ See generally, Lenore Terr, *Too Scared to Cry: Psychic Trauma in Childhood* (1990). Some jurisdictions have dropped the date-specificity requirement for pleading or proof in cases of continuous child sexual abuse. In California, for example, in order to convict a defendant for continuous sexual abuse of a child—a crime defined by three or more discrete instances of sexual abuse—a jury need agree only that acts occurred, not which acts constitute the requisite number to fulfill the crime. Cal. Penal Code § 288.5(b) (West Supp. 1997).

Further, because some children are admonished by abusers not to tell, either through bribes or threats,¹⁶⁸ the child *may* cease to remember much or any of a sexual assault. Told "not to tell," the child may try to forget and is quite unlikely to keep refreshing her memory through repetition of the sequence of events mentally or, if she is old enough, by writing about the abuse. And while we may believe that there is no way a child can "forget" abuse, much of the confusion and pain a child experiences might manifest itself in "I forget," dissociation, or inability to tell the story.¹⁶⁹ Finally, although a first interview or reaction by an adult or authority figure can affect a child's encoding of the memory, as one researcher has noted:

"we shouldn't delude ourselves" that the first interview is done by a professional "The mother whose child says, 'Do you know what Uncle George did to me in the garage?' does not step back and think, 'Now, let's see, free-recall is best, and I shouldn't interrupt for 11.3 seconds.' It's more likely there's lots of shrieking" ¹⁷⁰

Analyses of children's ability to remember and accurately report events often get confused with children's susceptibility to suggestion.¹⁷¹ Indeed, one way we maintain an interpretation that the child's story is false, while avoiding blaming or condemning children, is by employing a narrative that asserts that suggestible children are coached by adults with their own motives and purposes, ranging from overreaction to vindictiveness. Providing intelligible explanations of the world for children and teaching them is a "natural" adult role, one not easily surrendered because of the demands of a legal system. Because children generally wish to please adults and rely on them to make the world intelligible, they can be

¹⁶⁸ See Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 *Child Abuse & Neglect* 177, 181-82 (1983) (describing abusers' threats, pleas to child, extraction of promises to keep secret, and so on, leading a child not to disclose abuse).

¹⁶⁹ Claims that adults don't "repress," based in part on studies demonstrating the ability of many adults to recall war trauma, etc., seem inapposite. That some—many—recall does not prove that others don't, and an adult's experiences over time enhance their ability to recollect and remember extreme experiences as distinguished from daily occurrences. See Schacter, *supra* note 14, at 228-30.

¹⁷⁰ McCarthy, *supra* note 77, at 29.

¹⁷¹ See Carter et al., *supra* note 147, at 336-39.

influenced by adults' reactions, leading questions, and by suggestions that fill gaps in the child's knowledge or recall.¹⁷² Perhaps it is the children's lack of narrative skills, rather than some more venal purpose, that explains the impulse of at least some of those working with sexually abused children—or children they believe might have been sexually abused—to “coach” them or to suggest things, rushing to fill in the gaps in a child's story with adult interpretations.

“Suggestibility” itself can mean a number of things. As Ceci and Bruck note in their thorough review of the research concerning children's “eyewitness” recall, “*suggestibility* concerns the degree to which children's encoding, storage, retrieval, and reporting of events can be influenced by a range of social and psychological factors.”¹⁷³ While age matters in sensitivity to adult response, pressures, and phrasing of questions, “young children were able to accurately recollect the majority of the information they observed, even though they did not recall as much as older children. They may be more likely to succumb to erroneous suggestions than older children, but their vulnerability is a matter of degree only.”¹⁷⁴ Yet the vulnerability to suggestion has deeply affected Ceci and Bruck's conclusions about the reliability of children's testimony regarding sexual abuse. Thus, they appear to recommend some form of *in camera* determination of the credibility of a child's testimony through an examination of “the conditions prevalent at the time of the child's original report . . . in order to judge the suitability of using that child as a witness in court.”¹⁷⁵ If any condition is not met, “it ought to raise cautions in the mind of the court.”¹⁷⁶ Finally, they suggest that courts consider giving “cautionary instructions about children's reliability risks,”¹⁷⁷ unless the courts believe

¹⁷² For example, in the “Sam Stone” experiment, children saw a person about whom they had been told for a few minutes. They were later asked suggestively over several weeks if certain things had occurred or if he had been dressed in certain ways. The children reported that they saw Stone, which was true, but also provided embellishments that were untrue and responsive to suggestions. Ceci & Bruck, *Suggestibility of the Child Witness*, *supra* note 133, at 416-17.

¹⁷³ *Id.* at 404 (emphasis in original).

¹⁷⁴ *Id.* at 433.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

such instructions “may exaggerate jurors’ preexisting skepticism of children’s competencies to a point that is undesirable.”¹⁷⁸

Another interpretation that permits dismissal of a child’s word rests on the claim that children regularly falsify charges of sexual abuse, in much the same way that women ostensibly lie about rape to gain some advantage.¹⁷⁹ This approach fits comfortably with parental “intuitions” that lead to off-hand observations that children lie all the time. But, facile statements that “children never lie” or “children always lie” are empirically false. Children can dissemble strategically, as anyone who has worked with children is aware; this is perhaps the source of the belief that children are fabricators or liars or easily led into telling “factually untrue” tales. Not surprisingly, even young children will misrepresent things to avoid punishment or gain advantage in specific situations.¹⁸⁰ And as children grow older and develop more complex cognitive and communication skills, they have the capacity to create inherently believable stories of abuse and make “false” accusations. Some stories of abuse are undoubtedly fabrications and manipulations, but that hardly justifies concluding that children routinely lie about sexual abuse in order to manipulate adults.

What of stories of children “recanting” allegations of sexual abuse—do they not prove that children lie? Much can be made of recantations by children of different ages in cases as proof that nothing occurred and the child lied, as has been the case with recantations by women of rape and sexual assault complaints. But to assume a recantation is itself “true” manifests a particular bias away from believing that sexual abuse of children occurs. Children are much less likely to have confidence in their perceptions of reality in the face of adult opposition or indifference. As Summit noted in *The Child Sexual Abuse Accommodation Syndrome*,¹⁸¹ the child is unlikely to find easy acceptance of an assertion of abuse, or a narrative framework in which to place her experience, leading to uncertainty that the events in question occurred at all. A child faced with adult challenges to her assertions may decide she is mistaken; adults are power-

¹⁷⁸ Id. at 434.

¹⁷⁹ See Ann Althouse, *Beyond King Solomon’s Harlots: Women in Evidence*, 65 S. Cal. L. Rev. 1265, 1274-77 (1992); Henderson, *Rape and Responsibility*, supra note 108, at 162; Torrey, supra note 109, at 1041.

¹⁸⁰ Ceci & Bruck, *Suggestibility of the Child Witness*, supra note 133, at 427.

¹⁸¹ Summit, supra note 168, at 181-82.

ful and all-knowing, and thus elaborations, changes, confusion, and retraction should hardly surprise us. It is possible, then, that we can draw no general conclusions at all from recantations. The proper "answer" to the question of whether children lie about sexual abuse is "it depends." Ceci and Bruck concluded in one survey, however, that, because of the "horror story" cases of *McMartin* and *Michaels*, and the (unfounded) belief that juries inevitably believe children's testimony,¹⁸² professionals ought to be skeptical of claims of sexual abuse and should seek alternative explanations for the children's statements and symptoms.¹⁸³

As with rape and sexual harassment, where the victim's own voice is not enough to secure conviction, and the law may require corroboration,¹⁸⁴ those involved in child sexual abuse cases (and research) also emphasize the need for corroboration and "prompt complaints."¹⁸⁵ Providing corroboration is often difficult, however, because the crimes are typically committed behind closed doors, and many perpetrators, at least, do not keep pictorial or written records of their activities. Moreover, the accused usually strenuously denies the allegations. "Prompt complaints" of abuse may be unlikely because of the dependency of children on adults, the difficulty of communicating, and the confusion and denial surrounding many instances of sexual abuse.¹⁸⁶

¹⁸² Stephen J. Ceci and Maggie Bruck, *Child Witnesses: Translating Research into Policy*, Soc'y for Res. in Child Develop., XX Social Policy Report No. X (1993) [hereinafter SRCD]. This "folk tale" does not yet have much empirical support. Indeed, juries may disbelieve older children, particularly girls, who allege abuse. See Michael R. Lippie et al., *Discernability or Discrimination?: Understanding Jurors' Reactions to Accurate and Inaccurate Child and Adult Eyewitnesses*, in *Child Victims, Child Witnesses*, supra note 154, at 169, 169-70; Peter K. Isquith et al., *Blaming the Child: Attribution of Responsibility to Victims of Child Sexual Abuse*, in *Child Victims, Child Witnesses*, supra note 154, at 203, 204.

¹⁸³ Ceci and Bruck, SRCD, supra note 182, at 13.

¹⁸⁴ Catharine MacKinnon, *Feminism Unmodified*, 103-16 (1987); Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 815-16 (1991); Torrey, supra note 109, at 1041.

¹⁸⁵ A related issue to the authority of the victim's voice and prompt complaint is the admissibility of hearsay—that is, a child's statement to an adult authority figure—to prove something occurred. See *White v. Illinois*, 502 U.S. 346 (1992); cf. Aviva Orenstien, "My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 Calif. L. Rev. (forthcoming 1997) (arguing for statutory modification to allow later statements of abuse as "excited utterances" given studies demonstrating silence as the initial response to rape).

¹⁸⁶ Explaining reasons for delayed reporting are one of the concerns that led Roland Summit to identify a "child sexual abuse accommodation syndrome." See supra note 168

B. Attempts to Support Children's Testimony

The discrediting of children's narratives and testimonial abilities is, of course, only a part of the problem with proving sexual abuse of children. Important as identifying victims, hearing their stories, and having their testimony is to a case, other evidence further increases the chances of successful prosecution or resolution. But absent "objective" evidence (e.g., "hard," tangible, and testable things observable by everyone; or a confession by the defendant), proof of sexual abuse beyond a reasonable doubt is daunting under current conditions. And even with such observable "things," other stories or explanations often overwhelm a confirmation of sexual abuse.

When there is a patterned explanation or story for a phenomenon, people tend, consciously or not, to aggregate information and place it into the explanatory narrative framework, even if that framework doesn't quite "fit" or when they find the meaning uncomfortable or painful. If the available information reflects an expected narrative pattern, people will assume a high probability that the event or phenomenon occurred and fill in narrative gaps by referring to pre-existing frameworks. But where no pre-existing "format" exists—where no observed, recognized, and recorded pattern in an agreed-upon narrative exists—there may be a tendency to disaggregate information, myopically scrutinizing each piece of data and finding it inadequate to support a thesis or assertion and therefore unworthy of credence. This is particularly true in the child sexual abuse area, where observers can readily discount, explain away (or more comfortably explain), or ignore each piece of information and evidence.

1. Physical Evidence

Researchers and other professionals frequently offer many alternative and benign explanations for such physical evidence as a girl's damaged hymen or a child's infection with STDs.¹⁸⁷ Females, in seeking to over-

and accompanying text. See also Mosteller, *supra* note 75, at 17-18 (arguing evidence admissible to rehabilitate child if defense impeaches on failure to report the incident promptly).

¹⁸⁷ See, e.g., Douglas J. Besharov, *Responding to Child Sexual Abuse: The Need for a Balanced Approach*, 4 *The Future of Children* 135, 150-51 (1994) ("For instance, medical symptoms such as unusual vaginal or urethral irritations or discharges . . . can also have an alternate medical explanation or they can be the result of excessive rubbing (during cleaning), poor hygiene, or self-stimulation. And it is often impossible to tell which it is."). A recent, and tragic, example of the interpretation (or lack of interpretation) of physical evi-

come the enormous disadvantages historically associated with the lack of an intact hymen, suddenly find the alternative explanations for its absence used to explain away a female child's claim of molestation. And, although it appears that the presence of some forms of sexually transmitted disease provide "medical certainty" of abuse,¹⁸⁸ the presence of other sexually transmitted diseases in a child ostensibly has alternative explanations.¹⁸⁹ Similarly, alternative explanations exist for other types of evidence in child sexual abuse cases, including children's behavior, drawings, and use of language, all of which re-enforce the tendency to disbelieve allegations.

Indeed, an alternative explanation existed for each piece of evidence in the case I described earlier in this Essay. Attorneys, investigators, and others with whom I spoke used these alternative interpretations to dismiss each piece of evidence and then opined that the case could not be proven. The child's statements and the terms she used for physical parts were explained away. Ironically, if a child uses euphemisms for genitals, there is a claim the child has no sexual knowledge and therefore cannot have been abused; if the child uses technical terms, then the claim is that she was coached or that in this liberated day and age, children learn the proper terms. Her drawings could be interpreted in a number of ways, many of which were benign or dismissive. According to one person involved in the case, the man's elusive admissions, as long as they weren't out-and-out confessions, were not "proof;" he always had a plausible alternative explanation or characterization of whatever had happened. The physical evidence apparently was "inconclusive" as well. Although the child had a damaged hymen, entirely consistent with child sexual abuse, a doctor would have to testify that there could be "other reasons" for the dam-

dence of injury is the case of JonBenet Ramsey, a little girl who was murdered in Boulder, Colorado. A District Judge "released portions of the autopsy," on February 14, 1997. James Brooke, Part of Autopsy Is Released in Slaying of Colorado Girl, N.Y. Times, Feb. 15, 1997, at 10. The evidence prompted a denial from the child's pediatrician that no prior evidence of any abuse existed. A "chronic inflammation," "which could be an indication of prior sexual abuse," led the doctor to say "he never saw any indication that [the girl] was sexually abused." Autopsy: Ramsey was Strangled, The Herald-Times (Bloomington, IN), Feb. 15, 1997, at A2; Doctor Denies JonBenet was Abused, The Herald Times (Bloomington, IN), Feb. 16, 1997, at A3.

¹⁸⁸ David L. Kerns et al., The Role of Physicians in Reporting and Evaluating Child Sexual Abuse Cases, 4 The Future of Children 119, 129 (1994).

¹⁸⁹ Id.

age.¹⁹⁰ No one appeared to step back and look at all the pieces taken together, at least when talking to me, as constituting parts of an interlocking narrative that would create a strong legal case against the man.

2. Syndrome Evidence and Uncharged Conduct

To combat children's inability to provide a believable narrative, and the tendency to interpret the statements of children and physical evidence in a "benign" light, prosecutors and legislatures have tried to supplement or bolster the children's testimony in a number of ways, including the use of "syndrome" evidence and uncharged conduct. Yet many of these attempts have also failed. The following excerpt from a book by an adult incest survivor who finally reported her father to the police after discovering that he had continued to abuse his daughters and grandchild illustrates some of the difficulties an accused faces when trying to prove sexual abuse within the constraints of current law and understanding:

First you had to deal with your own abuse, figure out how to admit that it happened, come out of the comfortable cocoon of denial, confront the issue, the shame, and the risk of Dad's wrath. Then you had to convince the social worker and the police that you had a problem. Then you had to put together a case, wait a year, have the judge rule that Cee Cee's charges under California law did not qualify as rape and that Diedre and Anne's counts exceeded the six-year statute of limitations The judge had also ruled that Keely's therapist could not testify regarding Keely's behavior or any conversations she'd had with Keely.¹⁹¹

. . . .

¹⁹⁰ Given these difficulties of proof in a criminal case, one might wonder why the prosecutor ever charged the man and why the matter wasn't simply handled through a dependency proceeding, where the standard of proof is a preponderance of the evidence. Dependency proceedings do not entail termination of parental rights, which triggers a higher burden of proof, nor incarceration of the parent, and one need not worry about convincing a jury beyond a reasonable doubt that abuse occurred. I don't have an answer to this question; perhaps the difficulties of proving sexual abuse in any context remain the same at this time. Certainly there appears to be a heightened scrutiny of such claims in the custody context and a tendency to disbelieve assertions of sexual abuse. Perhaps the same is true of dependency cases.

¹⁹¹ Donna L. Friesse, *Cry the Darkness* 262-63 (1993).

During the first two weeks of the trial, the new judge ruled that a major portion of the evidence was inadmissible. No mention of the histories of the noncharge victims could be entered. None of Dad's photographs of partially nude children . . . could be entered. . . In fact . . . if any of us so much as uttered a word about our own abuse in from of the jury, it would result in a mistrial.¹⁹²

A number of prosecutorial strategies to overcome the difficulties of proving child sexual abuse have met with resistance that initially appears consistent with concerns for due process and evidentiary fairness. But when examined in light of the acceptance of similar approaches outside the area of sexual assault and gender violence, such resistance suggests that the strength of these fairness concerns depends on how well the prosecution can tap into an accepted narrative of wrongdoing, harm, or "badness."

Since the early 1980s, prosecutors have introduced expert testimony in selected sexual assault cases to provide an authoritative narrative for the victim by explaining the victim's behavior and providing an interpretive account of sexual abuse in the form of "syndrome" evidence. Thus, "Rape Trauma Syndrome" evidence is admissible in some rape cases in order to provide corroboration, explanation, and rehabilitation for a victim's story.¹⁹³ Prosecutors similarly have attempted to introduce evidence of "Child Sexual Abuse Accommodation Syndrome" in cases involving child sexual abuse.¹⁹⁴ But efforts to use expert testimony about "Child Sexual Abuse Accommodation Syndrome" or "Child Sexual Abuse Syndrome" to corroborate a victim's story have met with considerable resistance.¹⁹⁵

¹⁹² *Id.* at 261.

¹⁹³ See, e.g., *State v. Marks*, 647 P.2d 1292, 1299 (Kan. 1982) (admissible when consent is the defense); *People v. Taylor*, 552 N.E.2d 131, 132 (N.Y. 1990) (admissible to explain responses and to rebut myths). Many courts refuse to admit RTS evidence, however; others have admitted it to establish a woman was not raped. See *Henson v. State*, 535 N.E.2d 1189 (Ind. 1989).

¹⁹⁴ Askowitz & Graham, *supra* note 75, at 2034-35, 2042-44, 2048-51, 2058-62.

¹⁹⁵ See, e.g., *State v. Michaels*, 625 A.2d 489, 496-502 (N.J. Super. 1993), *aff'd*, 642 A.2d 1372 (1994); Comment, *Restricting the Admissibility of Expert Testimony in Child Sexual Abuse Prosecutions: Pennsylvania Takes It to the Extreme*, 47 U. Miami L. Rev. 201, 204-5 (1992).

Originally identified by Roland Summit in 1983,¹⁹⁶ Child Sexual Abuse Accommodation Syndrome (CSAAS) was a descriptive explanation of why children failure to report abuse and why they might "recant" or change their stories. Investigators, therapists, and medical professionals began to use the list of behaviors found by Summit to be associated with the syndrome and child sexual abuse to diagnose children as victims for courts, although that was not Summit's purpose in identifying the syndrome.¹⁹⁷ Summit's work demonstrating the reality of and reasons for a child's delayed reporting of sexual abuse did support lengthening statutes of limitations for child sexual abuse charges by taking into account the difficulties of any formal or informal "prompt complaint" requirement.¹⁹⁸ But the lengthening of statutes of limitations to accommodate a child's development and ability to recount an intelligible story creates fertile ground for attacks on children's memory and suggestibility.¹⁹⁹ And because the category was not designed for dispositive diagnosis, but rather to increase understanding among those working with children, courts became increasingly skeptical of any testimony based on child sexual abuse syndromes.²⁰⁰

Many of the common objections legal scholars have invoked to oppose the introduction of expert testimony on "syndrome" evidence generally apply equally to CSAAS, including the claims that the syndrome is based on "anecdotal" or "soft" data and that expert testimony unduly in-

¹⁹⁶ Summit, *supra* note 168, at 177.

¹⁹⁷ "The purpose of this paper . . . is to provide a vehicle for a more sensitive, more therapeutic response to legitimate victims of child sexual abuse and to invite more active, more effective clinical advocacy for the child within the family and within the systems of child protection and criminal justice." *Id.* at 179-80.

¹⁹⁸ See, e.g., 18 U.S.C. § 3509k (1994); Ala. Code § 15-3-5(a)(4)(1995); Colo. Rev. Stat. § 16-5-401 (1986 & Supp. 1996); Wash. Rev. Code § 9A.04.080 (Supp. 1997); Wis. Stat. Ann. § 939.74 (West 1996 & Supp. 1996). Statutes tolling until discovery: Ariz. Rev. Stat. Ann. § 13-107 (1989); Okla. Stat. Ann. Tit. 22 § 152 (West Supp. 1997); until age sixteen: Fla. Stat. Ann. § 775.15(7) (West Supp. 1997); Mass. Gen. Laws Ann. Ch. 277, § 63 (West 1994); until age eighteen: Ark. Stat. Ann. § 5-1-109(h) (1993); Ill. Ann. Stat. Ch. 720, para. 5/3-6(d) (Smith-Hurd Supp. 1996); Nev. Rev. Stat. § 171.095 (Supp. 1995); N.J. Rev. Stat. § 2C:1-6-b(4) (1995); N.M. Stat. Ann. § 37-1-30 (Michie Supp. 1995).

¹⁹⁹ As the above excerpt suggests, many cases still fall outside the specified statutes of limitations.

²⁰⁰ See *State v. J.Q.*, 617 A.2d 1196, 1209 (N.J. 1993); *Michaels*, 625 A.2d at 496-502 (summarizing objections and other court opinions).

fluences juries.²⁰¹ If the source of testimony about sexual abuse accommodation syndrome is a therapist or a clinician, her testimony is likely to be discounted, because clinical observations are not considered “scientific” enough.²⁰² Some critics claim clinicians and social workers routinely over-diagnose sexual abuse,²⁰³ although the research thus far indicates the opposite.²⁰⁴ Moreover, two leading research psychologists have stated that:

The mental health professional who testifies on the diagnosis of sexual abuse or who describes to a court the symptoms associated with sexual abuse must also take into consideration competing hypotheses that might explain why the child in question, or children in general, demonstrate particular symptoms or make allegations of sexual abuse.²⁰⁵

These commentators have identified a significant problem with the current definitions of CSAAS in diagnosing sexual abuse. Many of the behavioral symptoms identified as evidence of sexual abuse in children—such as sleeping disorders, eating problems, regression to earlier behav-

²⁰¹ See, e.g., Gary Melton, *Doing Justice and Doing Good: Conflicts for Mental Health Professionals*, 4 *The Future of Children* 102, 112 (1994); Robert J. Levy, *Using “Scientific” Testimony to Prove Child Sexual Abuse*, 23 *Fam. L.Q.* 383, 393-94 (1989). This is also Ceci and Bruck’s position. See Stephen J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness*, *supra* note 133, at 424. I have always wondered why commentators persist in the belief that psychological and psychiatric experts regularly hoodwink awe-struck juries. Given the societal suspicion of mental health professionals and mocking of defense-related psychological claims in criminal cases, it is difficult for me to believe that juries cave in to “soft” expert testimony.

²⁰² *Id.*

²⁰³ Diana Younts, Note, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 *Duke L.J.* 691, 692 (1991).

²⁰⁴ *Id.* While there are undoubtedly individual practitioners who do over-diagnose sexual abuse, there are also practitioners who “over-diagnose” a number of other disorders—such as “schizophrenia,” “borderline” personality disorder, or “sociopathic” personality disorder—with no strong societal objection, suggesting that something else may be happening here. Schizophrenia, for example, was the diagnosis of almost every person I represented in civil commitment hearings in 1981, despite the fact that many may have suffered from other disorders such as manic-depression (bi-polar), autism, etc. The term “borderline” was commonly attributed to people suffering from the effects of severe trauma. Dr. Grigson’s unwavering diagnosis of sociopathic or antisocial personality of capital defendants has not met either social or judicial disapprobation. See *infra* note 214 and accompanying text.

²⁰⁵ Ceci & Bruck, *SRCD*, *supra* note 182, at 15.

iors, new fears, changes in school performance, or sexual preoccupation—are maddeningly vague and are applicable to other forms of abuse, neglect, and trauma. This may stem from the fact that children may have a more limited repertoire of responses than adults. The symptoms, therefore, remain open to a number of interpretations, and, again, a more “benign”—or at least less disturbing—interpretation may replace the one suggesting sexual abuse.²⁰⁶ Of course, in combination with other forms of evidence, these symptoms should be probative. But detached from other pieces of evidence and without a narrative to give the syndrome credibility, it is easy to justify excluding CSAAS testimony.

Some commentators have gone farther with their critique of CSAAS, however. They assert that because “symptoms associated with sexual abuse (delayed reporting, retraction of the allegation, inconsistent accounts, inappropriate knowledge of sexual behavior, or unusual play with anatomically correct dolls) have been observed in nonabused children who have been exposed to suggestive influences,”²⁰⁷ mental health professionals and courts should be wary of concluding that a child has been sexually abused.²⁰⁸ One can wonder how researchers can know with certainty that children have not been sexually abused given the lack of any recognition that reliable criteria for identifying abused children exist. Note also that once again, suggestibility becomes the explanation for children’s symptoms of and reactions to sexual abuse, placing the false accusation meta-narrative in the foreground of these cases. And even if “suggestibility” does not carry the normative condemnation of a claim of fabrication, it nevertheless deflects attention away from the reality that children are in fact abused.

Standard prosecutorial and legal measures have also largely failed to overcome the basic presumption against child sexual abuse. A number of legal reasons, including due process and concerns about prejudice, stifle the use of uncharged priors under a kind of “sexual predator/pattern or

²⁰⁶ Deflection from adult involvement or responsibility for a child’s distress occurs when certain symptoms that may indicate many different problems are linked with self-inflicted problems. For example, anyone familiar with those supposedly informative advertisements listing “symptoms” of drug abuse in teenagers, should note that the identified symptoms can also apply to depression, distress caused by parental drug or alcohol abuse, or several other problems. See also Besharov, *supra* note 187, at 151.

²⁰⁷ Ceci & Bruck, SRCD, *supra* note 182, at 15.

²⁰⁸ *Id.*

practice" theory.²⁰⁹ Yet some skepticism about these concerns is probably in order in the context of child sexual abuse, especially considering that courts have allowed defendants to introduce evidence of a child victim's "prior sexual conduct" to demonstrate that the victim has fabricated the charges.²¹⁰ In prosecutions of adult rape, modern rape shield laws now limit the admission of such victim's sexual history evidence.

Even when a court does admit uncharged prior conduct to prove a pattern or practice of abuse under a theory of identification or *modus operandi*, or under a specific statute, any testimonial evidence will be undermined by disbelief and attacks on the credibility of the witnesses at trial. Even though adults and older children may be far more articulate witnesses, and can perhaps provide a coherent narrative of abuse, the fierce attacks on memory, combined in some cases with irresponsible therapeutic interventions, may sharply undermine the usefulness of other victims' testimony.

3. Unauthorized Sources of Knowledge

Generally, the legal system privileges some epistemological claims over others and is rigorously positivist. Accordingly, the insistence on objective, observable facts in legal cases precludes the use of so-called subjective knowledge as evidence; such knowledge is relegated to the realm of the "not real," unless some exception exists. "Vibes" are not scientific and cannot be studied in a laboratory; positive science cannot affirm their veracity, reliability, or source. Thus, experience, opinion, or hunch is not credible evidence of anything, whether it comes in the form of clinical evaluation or intuition, law enforcement suspicion, or individual experience. Yet when there are identifiable "profiles" or accepted stories about how to substantiate a hunch, the law often allows hunches to provide a foundation for legal action, under the pretense of objectivity.

²⁰⁹ See, e.g., Fed. R. Evid. 413-415 (1995); *Lannan v. State*, 600 N.E.2d 1334, 1338-39 (Ind. 1992) (striking down "depraved sexual instinct exception" allowing evidence of uncharged acts in favor of Fed. R. Evid. 404(b)). See also Katherine A. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 Harv. L. Rev. 563 (1997) (discussing and criticizing admission of prior acts under F.R.E. 413); Harriet Chiang, *Defense Lawyers Protest Sexual Assault Statute*, S.F. Chron., July 27, 1996, at A15 (new California law allowing introduction of evidence of past sexual offenses even if they did not result in conviction).

²¹⁰ Christopher B. Reid, Note, *The Sexual Innocence Inference Theory as a Basis for the Admissibility of a Child Molestation Victim's Prior Sexual Conduct*, 91 Mich. L. Rev. 827, 842-50 (1993).

As noted above, many critics resist the admission of clinical evaluations by mental health professionals of children's sexual abuse claims, arguing that the evaluations are not scientific. That courts and commentators have attacked the admissibility or validity of clinical judgments by psychiatrists, psychologists, and social workers about a variety of phenomena is hardly confined to the child sexual abuse area, of course.²¹¹ Attacks on clinicians' expertise pervade the literature on civil commitment, battered women, rape trauma, "diminished capacity," and determinations of dangerousness in death penalty cases.²¹² When clinical testimony runs counter to our comfortable narrative beliefs about how the world works or how people behave, courts are reluctant to admit it. Thus, the tendency to disbelieve and the frequently emphasized narratives of outrageous prosecutions provide an often unacknowledged background for excluding such testimony as invalid. Yet courts routinely admit clinician's testimony if it confirms existing beliefs, assumptions, and stories, as it does in the civil commitment and death penalty cases.²¹³ In the specific context of child sexual abuse, however, the combination of "horror story" literature, claims of overdiagnosis, and cases illustrating clinicians' and social workers' botched or malevolent manipulations all reinforce background stories of distrust and disbelief that allow for the exclusion of psychiatric testimony.²¹⁴

²¹¹ One example is the early testimony on Battered Woman Syndrome. For attacks on battered woman syndrome evidence, see Anne M. Coughlin, *Excusing Women*, 82 Cal. L. Rev. 1, 4-5 (1994); David Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 Va. L. Rev. 619, 622 (1986).

²¹² See, e.g., Faigman, *supra* note 211 (battered women); Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 Yale L.J. 639 (1992) (criticizing deference to professionals in mental health law); Mosteller, *supra* note 75 (criticizing Battered Women's Syndrome).

²¹³ See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 897-905 (1983) (upholding psychiatric testimony predicting dangerousness in the penalty phase of capital cases). But see Steven R. Smith & Robert G. Meyer, *Law, Behavior, and Mental Health: Policy and Practice* 607-12 (1987) (criticizing the admissibility of psychiatric evidence to show likelihood of future dangerousness in both death penalty sentencing and civil commitment proceedings); Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693, 696 (1974) (criticizing the admission of psychiatric testimony to resolve issues of civil confinement).

²¹⁴ See, e.g., *State v. Michaels*, 625 A.2d 489 (1993), *aff'd*, 642 A.2d 1372 (1994). Ceci & Bruck repeatedly point to *Michaels* as a paradigm. See, e.g., Ceci & Bruck, *Suggestibility of the Child Witness*, *supra* note 133, at 403-04; Ceci & Bruck, *SRCD*, *supra* note 182, at 17.

Resistance to law enforcement intuitions rests on somewhat different grounds, as honoring law enforcement hunches and suspicions presents enormous dangers to individual liberty and safety. Allowing the police to act on hunches invites intrusion and invasion into citizen's lives; thus, we require law enforcement officers to point to objective, observable, non-subjective facts under the rubrics of reasonable suspicion and probable cause before they may take action. Although "reasonable suspicion" based on "profiles" or observable behavior is often no more than hunch,²¹⁵ we still insist on a formalized articulation of "facts" that others can consider in determining whether a claim is objectively plausible or "true" before we condone a given law enforcement action.

Informally, law enforcement officers act on hunches and suspicions all the time and make up post-hoc reasons to justify the hunches, as anyone who has worked in criminal justice knows.²¹⁶ But in child sexual abuse cases, as with domestic violence cases and perhaps with child abuse cases generally, police appear to feel quite constrained. In the case in which I was involved, the police did not act despite the fact that a number of officers had been suspicious of the man for some time. As no "profile" of abusers exists, there wasn't anything they could do. Again, the lack of an acceptable narrative, in this instance an agreed-upon cluster of sights, sounds, objects, and other information about abusers, became a reason not to believe or investigate a possible reality. No profile exists: first, because the subject has not been studied much at all; second, because of the difficulty of identifying perpetrators caused by the context of denial that surrounds child sexual abuse, those studies that do exist are of the relatively few offenders who have been convicted; and third, because the focus of many of the studies has been on developing efficacious treatments of identified perpetrators rather than on piecing together a perpetrator pro-

²¹⁵ The so-called "drug courier profile" cases provide an excellent example of court approval of law enforcement's one-size-fits-all criteria. See *U.S. v. Sokolow*, 490 U.S. 1581, 1583-87 (1989); *U.S. v. Mendenhall*, 446 U.S. 544, 547 n.1 (1980). A study by the N.I.J. in the early 1980's found "nearly half" of searches following a determination by DEA agents that airline travelers exhibited suspicious behavior and/or demographic characteristics resulted in the finding of some evidence of illegal activity. John Monahan & Laurens Walker, *Social Science in Law: Cases and Materials* 340-341 (2d ed. 1990).

²¹⁶ Cf. Morgan Claud, Judges, "Testifying," and the Constitution, 69 S. Cal. L. Rev. 1341, 1355-87 (arguing that ostensibly "objective" tests provide officers with incentives to lie in search and seizure cases, and noting widespread "police perjury").

file.²¹⁷ Additionally, it may be that most sexual abusers, like batterers and rapists, are not distinguishable from non-abusers in any significant way.

Finally, what might be termed a sixth sense or intuition that some abuse victims seem to develop, alerting them to the potential abuse of others, has no recognized valance, and thus does not “count” as knowledge worthy of belief. My certainty that the neighbor was sexually abusing the little girl, based on refracted associations with sound (certain intonations and things he said, but especially the inhuman cry), tone, and emotion from a long-ago childhood, had no empirical anchor and no basis in “objective” reality. At the same time, of course, I could easily have been completely wrong; I absolutely do not advocate intuition as the sole basis for legal action. Yet perhaps we could develop some acceptance of this form of specialized knowledge out of a narrative understanding of the characteristics of sexual abuse, against which the intuition’s accuracy could be gauged.

V. DISABLING THE NARRATIVE

If an established narrative understanding of child sexual abuse existed, pieces of evidence that supported that interpretation might cumulatively “prove” that a particular child in a particular case was abused. If we could interpret evidence of the child’s behavior, statements, and evaluations, in addition to the child’s drawings and other physical evidence, as probative of whether sexual abuse had occurred, then we could justify a conviction in a criminal case, a finding of dependency in a juvenile case, or an award of custody to the non-abusing parent in a custody case. Yet this opens up the question, “why act at all?” Thus far, this question has been answered in two ways that put children at risk: a deflection of attention away from the harm of sexual abuse to the potential overreaching of state action and its associated harms; and a resort to a meta-narrative of “no harm” concerning child sexual abuse.

A. Suspicion of State Power

The focus of attention on the harm caused by taking legal action in cases of suspected child sexual abuse has come in the form of narratives

²¹⁷ Judith Becker, *Offenders: Characteristics and Treatment*, 4 *The Future of Children* 176 (1994).

of suspicion of state power, the damage caused by an adversary legal process to children, and, in cases involving dependency proceedings and custody, the harm to children of removing them from the home or denying them contact with a parent.²¹⁸ These narratives are often buoyed by an ever-growing rhetoric and narrative that attack feminist efforts to end sexual abuse generally.

There are strong narratives against—and fears of—state overreaching and intrusion into private lives, fears that are empirically grounded in totalitarian realities and law enforcement abuses. Yet these concerns only receive serious attention in the criminal law context when voiced by members of dominant groups, rather than by those who are subordinated by the state's power. The frequent solicitude of judges, legislators, and commentators to the rights of defendants in rape and child molestation cases, for example, stands in sharp contrast to concern for the rights of most defendants in other criminal cases.

B. Use of the Rights of the Accused

The power of moral conventionalism and of the status quo has been rediscovered in the rights of the accused, and concern for these rights has been weighed against the use of the law to combat child sexual abuse. For a particularly blatant twisting of ostensible concern for rights, a *U.S. News and World Report* article, after alleging a "radical feminist" connection to efforts to end child sexual abuse, asserts in shocked tones: "Due process is sometimes thrown to the wind: For \$10.00 and the name of an alleged perpetrator, one organization will inform neighbors, police and local employers without the accused (sic) having ever to be named."²¹⁹ That persons accused of other crimes—say, purported drug dealers—do not receive such solicitous concern from the media suggests that our culture's resistance to acknowledging the actuality, or perhaps even the immorality, of sexual abuse of children is still quite strong.

²¹⁸ Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 *Stan. L. Rev.* 625 (1976), discusses claims and abuses, while arguing for a preference that children remain in the home. To my knowledge, the basic framework of the debate has not substantially changed since this important article appeared.

²¹⁹ Horn, *supra* note 81, at 21.

"Progressive" social commentators have also used due process concerns to dismiss the issue of child sexual abuse instead of taking it seriously. In the words of Murray Edelman, for example, when concerns about child sexual abuse started coming to light, "child abuse was constituted as an urgent problem with the result that psychologists, police officials, teachers, physicians, and neighbors all found that it could bolster their authority, and district attorneys tried to build political careers on the prosecution of alleged abusers."²²⁰ As a general rule, we don't speak of "alleged robbers" or "alleged dope dealers" or "alleged burglars," but "alleged rapist" and "alleged child abuser" pervade the lexicon. The reduction of "abuser" to "alleged abuser," together with Edelman's immediate rhetorical appeal to hidden suspicions of "authorities," fears of authoritarian control, and stories of nosy neighbors, further illustrate the deflection of our attention from a terrible reality. Edelman claims that child abuse,

like drug abuse and the Soviet threat, offers opportunities for controlling the behaviors and the language of large numbers of people who wield little power and may be suspect on other grounds; a focus on the problem reinforces established inequalities . . . [while a] serious effort to deal with homelessness . . . would entail a reexamination of established economic and social institutions and so might threaten existing power inequalities[.]²²¹

Edelman's deflection from the harm of child sexual abuse to the threat of power inequalities helps enable the reader to maintain the long-standing story that child sexual abuse is rare or harmless.

Edelman does rightly observe that resorting to the criminal law makes it look as if political and legal actors are taking care of a problem simply by increasing the monitoring of outsiders, rather than actually dealing with the problem itself.²²² Yet it is just as mistaken to deny that evil exists or simply cede the criminal law to entrenched narratives. That misguided, inept, and destructive prosecutions have occurred ought not cause us to

²²⁰ Murray Edelman, *Constructing the Political Spectacle* 21 (1988).

²²¹ *Id.*

²²² *Id.* at 24.

turn away from facing the real horror of child sexual abuse. Distressingly, however, the horror itself remains contested.

C. Difficulties in Studying the Effects of Child Sexual Abuse

As exemplified by *Child Loving*, many "authorities" still deny that the effects of sexual abuse are devastating to the victims;²²³ others argue that, compared to other forms of abuse, the overall effect of sexual abuse is not significant enough to merit expending massive resources to address it. The narratives remain that children are sexual and seek sexual contact with adults with little harm,²²⁴ or that it is the reaction of adults to and consequences of a child's report of sexual abuse that harms them.²²⁵ The problem of examining the damaging effects of child sexual abuse is compounded by the denial that it exists in any significant way, the attack on clinical and anecdotal reports and narratives by survivors, the resistance to claims of sexual abuse by women generally, and the very real fact that the subject can often only be studied indirectly. Thus claims about harm have to be somewhat tentative, because we simply do not "know" enough yet, either in terms of "objective, empirical facts" or in terms of victims' narratives (themselves a "fact").²²⁶ Moreover, it is often difficult to separate the effects of sexual abuse from the effects of other forms of abuse and

²²³ Haugaard & Reppucci, *supra* note 42, at 69, 73-76, 97-98 (summarizing clinical and empirical studies indicating no harm or little harm). Richard Green, *Sexual Science and the Law* 148-50 (1992). Green, in a letter protesting a book review describing his position as being that "we have no reliable psychiatric evidence that [child-adult sexual] relations harm children," stated that he simply reported the findings of 1986 and 1991 "reviews" that raised doubts about harm. Green states: "Not all reports . . . document harm." Richard Green, Letter to the Editor, *N.Y. Times Book Review*, Feb. 28, 1993, at 34 (emphasis in original).

²²⁴ See *supra* note 130.

²²⁵ This varies from claims that exposing children to the trauma of interviews/interrogation is damaging to the criticisms of the harm done children by removing them from the home or "breaking up the family." Others persist in arguing there is "nothing . . . inherently wrong with nonviolent, noncoerced sexual relations between adults and children, and that society's reaction is generally the sole cause of the negative consequences . . ." Haugaard & Reppucci, *supra* note 42, at 81-82. In the case in which I was involved, the state having jurisdiction over the child had a mandatory family reunification policy; "reunification" is a current popular goal in cases of abuse and neglect.

²²⁶ *Id.* at 60-64, 82-84; Crewdson, *supra* note 22, at 207-10; John N. Briere & Diana M. Elliot, *Immediate and Long-Term Impacts of Child Sexual Abuse*, 4 *The Future of Children* 54, 54-64 (1994).

neglect.²²⁷ At least in the case of families in which sexual abuse takes place, the sexual abuse is unlikely to exist in isolation from other forms of abuse, and, indeed, emotional and/or physical abuse can confound the effects. Thus, the “causes” of harm cannot be isolated sufficiently to be studied separately. But to conclude that this difficulty makes study impossible is to dismiss the harm; to conclude that there has been no harm would be grave error.

The costs of the sexual abuse of children may be staggeringly high. Psychologically, economically, and socially, sexual violation of adults and older adolescents causes them enormous harm, and there is no reason to believe that sexual violation does less harm to children simply because they are younger. The following summary speaks primarily of the harms to females, because less information about the effects of sexual abuse on boys exists.²²⁸ Although the Freudian narrative of the harms done by the engulfing mother has some cultural valance,²²⁹ and background narratives supporting homophobia include the premise that sexual abuse of boys by men is a terrible evil, less empirical research or survivor narrative exists as of now.²³⁰ Second, it appears that girls suffer a rate of sexual abuse twice that of boys throughout childhood and adolescence, although both genders experience abuse at an intolerably high rate.²³¹ Finally, as Robin West has pointed out in a different context, males do not live under a life-long threat of sexual abuse, while females remain under the threat of sexual violence and exploitation throughout their lives.²³²

Sexual abuse of children may cause a number of difficulties for individual women, as well as reinforce gender inequalities. I say it “may”

²²⁷ See generally Haugaard & Reppucci, *supra* note 42, at 60-100.

²²⁸ See David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 *The Future of Children* 31, 46-48 (1994).

²²⁹ In an excellent psychoanalytic book by Leonard Shengold on the effects of various kinds of abuse on children, the discussions of sexual abuse are framed by Freudian Oedipal theory and abuse by mothers, never fathers or other male figures, of boys. Shengold, *supra* note 38, at 41-68.

²³⁰ To the extent that information exists, it appears that the harmful effects on boys are similar to the harms for girls, except that male sexual abuse victims may be more likely than female victims to become abusers themselves. Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, *supra* note 228, at 46-47.

²³¹ See *id.* at 46.

²³² West, *The Difference in Women's Hedonic Lives*, *supra* note 2, at 107.

cause because of the historical failure to recognize that child sexual abuse occurs with any frequency and that it might have harmful effects. Even recently, when presented with evidence of widespread sexual abuse of girls, some conscientious researchers have failed to consider what long-term effects the abuse might have on women's lives. The authors of *Women's Ways of Knowing*, for example, are maddeningly silent about the significance for their conclusions about women's learning and cognitive styles of their finding that thirty-eight percent of the women they contacted in colleges and schools in their study—and sixty-five percent of the college-age women they contacted through social agencies—reported prior incidents of “incest, rape, or sexual seduction by a male in authority over them—fathers, uncles, teachers, doctors, clerics, bosses.”²³³ A cursory glance at their data suggests a connection between what they term “silent women”—the women least “sophisticated” cognitively—and a history of abuse, but the authors do not develop this connection.²³⁴

Existing research does support the thesis that sexual abuse of girls can produce a number of harms over the course of a victim's lifetime, although I cannot claim any direct “causal” connection between sexual abuse and particular harms to women's lives, because multiple factors interact to produce effects in a single woman. Diana Russell's study suggests that incest and sexual abuse can have life-long effects on women's lives, including an increased likelihood of divorce, lower socio-economic status, subsequent sexual assaults, rape, and violence.²³⁵ It may be that early abuse renders females more vulnerable to subsequent abuse, although we must be careful not to assume a “damaged goods” causal relationship.²³⁶ Some studies indicate that a great number of prostitutes and performers in pornography were sexually abused when they were girls.²³⁷

²³³ Mary Field Belenky et al., *Women's Ways of Knowing* 58-59 (1986).

²³⁴ Id. at 23-24, 158-60.

²³⁵ Russell, *supra* note 43, at 157-67, 194-99.

²³⁶ To conclude with some that sexual abuse so devastates a child that she is doomed to a life of suffering would be erroneous, as many who were abused can have productive and happy lives. The extent of harm undoubtedly depends on the nature and extent of the abuse, the individual's characteristics and opportunities, and other factors. That many women are not destroyed by sexual abuse hardly means that it does not harm, however.

²³⁷ Mary E. Gilfus, *From Victims to Survivors to Offenders: Women's Routes of Entry and Immersion into Street Crime*, 4 *Women & Crim. Just.* 63, 78-87 (1992); Crewdson, *supra* note 22, at 208.

Further, and linked to prostitution and pornography, there may be a relationship between drug and alcohol addiction of women and a history of sexual abuse.²³⁸ With the resurgence of societal interest in the "bad mother," a woman who fails to protect her children from abuse by a man may be considered as blameworthy as the man, even if she herself was abused or continues to be abused.²³⁹ Yet women who try to protect their children from suspected abuse are themselves suspect and accused of lying, especially in divorce and custody cases; at times, women are criminally prosecuted or held in contempt for hiding their children and/or refusing to cooperate with authorities.²⁴⁰ Unfortunately, there are also adults who were sexually abused by caretakers or parents who remain silent as their abuser abuses the next generation.²⁴¹ Therefore, to dismiss concern about child sexual abuse would be to abandon efforts—legal and otherwise—to identify offenders and victims, to prevent and reduce the frequency of harms to many individuals, and to respond constructively to a terrible reality. The remainder of this Essay suggests some ways in which we might overcome the current impasse through developing narrative and understanding.

VI. THE USE OF NARRATIVES IN CLAIMS OF CHILD SEXUAL ABUSE

Developing sound narratives of sexual abuse in the face of opposition is no easy task; even when the narrators are articulate adults supported by

²³⁸ Crewdson, *supra* note 22, at 208. In turn, women who use drugs and/or alcohol who are also pregnant become a focus for state power and punishment. Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419, 1420-21 (1991).

²³⁹ Marie Ashe & Naomi R. Cahn, Child Abuse: A Problem for Feminist Theory, 2 Tex. J. Women & L. 75 (1993); Naomi R. Cahn, Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions, 44 Vand. L. Rev. 1041 (1991).

²⁴⁰ The most widely known case, perhaps, is that of Dr. Elizabeth Morgan, who spent two years in jail in contempt of court rather than reveal the whereabouts of her daughter, Hilary, and rather than comply with a court order to allow Hilary's father unsupervised visitation. Susan B. Apel, Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt, 38 Am. U. L. Rev. 491, 491-493 (1989). A private bill in Congress led to Dr. Morgan's release; Hilary had been taken to New Zealand, in the meantime, where a court gave her grandparents custody. See Rosen & Etlin, *supra* note 76, at 2-96 (case histories); Dziech & Schudson, *supra* note 22, at 202-06.

²⁴¹ Friesse, *supra* note 191, is only one case study, but it is a troubling one, as the adult daughters of an extremely abusive man used a number of strategies of denial and avoidance before finally acting against him.

volumes of empirical support, law resists deviations from its accepted narratives, as demonstrated by the painfully slow legal progress in responding to the extensive testimonies and empirical literature on rape. When the narrators are traumatized children or adults struggling to recapture and communicate painful and terrifying memories, the prospects for success in eliciting efficacious legal responses seem even more remote. But that does not mean success is impossible, if we commit ourselves to conscientious listening, analysis, and exploration of alternatives.

The next step is not to abandon narratives of abuse by children or adults in the wake of the political, psychological, and media attacks on these stories. Individual testimonies are vital to understanding. No researcher can ethically replicate or reproduce the cognitive, emotional, or physical effects of sexual abuse; but if we are to understand those effects, and to have even a partial narrative to displace the narratives of denial and deflection, we need to hear from those affected. We need to provide safe ways of telling, and we need to develop sensitive ways to interview and record experiences—not only should we worry about “suggestibility,” but we also need to worry about efforts to suppress telling.

The inductive method of observing repeated phenomena is a standard way to begin scientific and social scientific inquiry. Repeated observation of the particular allows for generalizations that may then be tested. Induction is a perfectly respectable and scientific way to apprehend the world, both in terms of gathering data and in terms of generating hypotheses about the world, and, in this instance, gathering information through individual accounts is indispensable. Thus, individual narratives ought to be heard, read, listened to, and studied. Analysis of a broad sample of narratives ought to reveal patterns that in turn may provide a narrative framework that can support the believability of claims of abuse.

We also need to develop information about those who commit child sexual abuse. Some of this information obviously will come from victim narratives; some will come from those involved in criminal justice and child protection work. Currently, we know very little and, thus, stereotypic images of “child molesters” provide a narrative that excludes many offenders from consideration. (“He’s a good citizen; he doesn’t look like a pervert.”)

At the same time, actual cases cannot simply be abandoned “until we know more.” Certainly, stereotypes of perpetrators as identifiable deviants have to be overcome by educating prosecutors, judges, and juries as much

as possible in light of what we know, including indications that race and socioeconomic status are not predictors of sexual abuse.²⁴² More importantly, we must watch out for the counter-narratives of falsity and no harm, and have ways to counteract them. The belief that children cannot be reliable witnesses is belied by the research.²⁴³ Awareness and use of already developed, improved interviewing techniques for child victim-witnesses can eliminate or at least diminish the easy dismissal of the credibility of children's testimony.²⁴⁴ We also should ensure that those involved understand child development and treat children in age-appropriate ways. Noting patterns in each jurisdiction that aid in successful prosecution or disposition of cases can also provide some baseline for establishing narrative credibility.

Using flexible responses to sexual abuse cases is also important. If resort to criminal law hardens opposition to sexual abuse claims, then creative use of dependency and neglect law provides an avenue of hope; if that is foreclosed, then other alternatives should be developed through legislation and education of those working in the fields of criminal law and child protection.²⁴⁵ As things presently stand in many jurisdictions, cases go unaddressed or languish, caught between the conflicting demands and agendas of dependency, family law, and criminal courts and lawyers.²⁴⁶ As many have recommended,²⁴⁷ coordination and communication of efforts to protect children and deal with offenders across jurisdictions need

²⁴² Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, *supra* note 228, at 48.

²⁴³ See *supra* notes 159-62 and accompanying text.

²⁴⁴ Ceci & Bruck, *Suggestibility of the Child Witness*, *supra* note 133, at 433; Besharov, *supra* note 187, at 135, 147-151.

²⁴⁵ Although the authors of one book on the issue of sexual abuse and child custody argue that the problem of sexual abuse be redefined as a public health issue and the matter be removed entirely from the jurisdiction of the courts, such a recommendation overlooks a number of problems, including Constitutional issues regarding parental rights. And placing trust in social workers or public health officials will likely reproduce any of the same pathologies that exist currently, including narratives that deny or blame victims. See Rosen & Etlin, *supra* note 76, at 193-210.

²⁴⁶ See generally California Child Victim Witness Judicial Advisory Committee Final Report (1988); John E.B. Meyers, *Adjudication of Child Sexual Abuse Cases*, 4 *The Future of Children* 84, 96-97 (1994).

²⁴⁷ See, e.g., California Child Victim Witness Judicial Advisory Committee Final Report, *supra* note 246; Meyers, *supra* note 246.

to be increased. Coordination would eliminate some of these difficulties and would undoubtedly be better for the children involved.

Finally, all who seek to use law to combat child sexual abuse must face their own fears, biases, and comforting narratives about sexual abuse and children. This cannot be accomplished all at once, but recognition of the uncertainty and emotionality the subject entails is vital to developing narratives to support legal action. Otherwise, we run the risk of immediately imposing a pre-existing meta-narrative or understanding on any evidence we gather and any stories we hear. Pure objectivity is not possible or even desirable in this field, but we must avoid our own distortions and resistances to the greatest extent possible. We need to be equally aware of the problems our own moral outrage can create, problems that manifest themselves in the inept handling of interviews and the poor judgment of those investigating and prosecuting the *McMartin* and *Michaels* cases. Anger and outrage are normal reactions, but they must be channeled productively. If we accomplish even some of these tasks, we can slowly overcome the current difficulties and impasse these cases exemplify.

VII. CONCLUSION

In a law-driven culture such as ours, if something is not provable in court, it does not exist as a cognizable harm. The difficulties in proving cases of child sexual abuse in a context of epistemological instability has led to a reversion to denial that the crime exists at any significant level, that harm occurs, or that anyone ought to be concerned about it. The lessons we can draw from the past decade's experiences with child sexual abuse cases and research ought to caution us against resorting to existing legal frameworks when there is no accepted account for the harm involved. Yet slipping back into comfortable denial, as appealing as it may be, is unjustifiable.

We need desperately to overcome the efforts to let abuse go unaddressed by the legal system, and resist the campaign to discount or submerge these criminal acts. We have so few tools, and those tools that we do have can be erased by criminal law's demand for objectivity and conventionalism. Against such resistance, what can we do? We listen. We continue to develop knowledge so that we can deploy the law usefully.

Until we gather more stories, and know more truths, these cases will remain extraordinarily difficult for all involved. We have sought to deny

the narrative of sexual abuse at every turn. Yet the voices keep trying. They undoubtedly have for centuries, but now they have some small grip on public and legal consciousness. We must not let them go unheeded.