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THE WHOLE TRUTH: RESTORING REALITY TO CHILDREN'S NARRATIVE IN LONG-TERM INCEST CASES

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I. INTRODUCTION

M.B., a fifteen-year-old girl, states that one night, after living with her stepfather for over six years, she engaged in an act of sexual intercourse with him.[1] Although she claims to have submitted to him out of fear, she concedes that he neither forced nor threatened her that night.[2] A short time after making her allegation, she runs away from home, refusing to speak to police for over two weeks.[3]

Her stepfather denies her accusation, despite being found passed out in her bed. He states that he had gotten very drunk in a bar, come home and stumbled into the wrong room.[4] Indeed, by the time the case comes to trial, the State stipulates that he had been to the bar in question, gotten drunk, and even had sex with a woman he met at the bar.[5] Why, he asks, would he then have sex with his stepdaughter?

Although an inquiry might naturally focus on the question of which story to believe, the criminal justice system asks a much narrower one at trial: Is the complainant's story believable beyond a reasonable doubt? To answer that question, jurors would strictly scrutinize M.B.'s narrative of events in light of their own ideas of what is credible.[6] Such scrutiny would likely center on the incongruity of

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1 The facts of this scenario are drawn from those of *Burke v. State*, 624 P.2d 1240, 1241 (Alaska 1980).

2 *See id.* at 1242.

3 *See id.* at 1243.

4 *See id.* at 1242.

5 *See id.* at 1244.

6 Indeed, judges instruct juries to review any witness's testimony carefully, applying to it any and all tests that jurors would use in their daily lives. 1 CRIMINAL JURY INSTRUCTIONS, NEW YORK § 7.02 (1983).

M.B.'s passive acceptance of her stepfather's unprecedented solicitation. Even though statutory rape and incest cases do not require force on the part of the defendant or lack of consent on the part of the victim, a fact-finder is likely to believe that the "normal" fifteen year old in M.B.'s position would show some signs of shock, surprise or resistance. M.B.'s failure to do so, coupled with her subsequent avoidance of the police, would likely undermine her credibility with a jury.

Jurors scrutinizing such a narrative today would also deliberate in the current atmosphere of disillusionment regarding the credibility of child victims in sexual abuse cases. Despite the public's education and acceptance that sexual abuse is prevalent in family settings,[7] some writers have recently described a child abuse "hysteria."[8] Children, some say, will independently fabricate claims of sexual abuse to control,[9] to punish,[10] or to cover up their own promiscuity.[11] Some psychoanalytic experts still argue that children fantasize,[12] and it has become increasingly accepted that parents can elicit from their children false allegations of sexual abuse where child custody is in dis-

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7 *See* DAVID FINKELHOR, CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 88-89 (1984). Finkelhor, in examining the public's knowledge regarding child sexual abuse, views 1978 as the year within which the visual and print media began to present increasing amounts of information about sexual abuse. *Id.* at 88. For other examples of press coverage since 1978, see Shari Finnell, *Sexual Abuse of Children is All Too Real*, INDIANAPOLIS STAR, March 11, 1996, at C2; Michel Marriot, *Child Sexual Abuse: Hidden Crimes Come Out of the Closet*, WASH. POST, June 8, 1984, at A1; Cheryl McCall, *Sexual Abuse of Children: The Victims, the Offenders, How to Protect Your Family*, LIFE, Dec. 1984, at 35; Jeannye Thornton, *Family Violence Emerges from the Shadows*, U.S. NEWS & WORLD REP., Jan. 23, 1984, at 66; Glenn Collins, *Studies Find Sexual Abuse of Children is Widespread*, N.Y. TIMES, May 13, 1982, at C1; Holly Morris & Richard Sandza, *An Epidemic of Incest*, NEWSWEEK, Nov. 30, 1981, at 68. *See also* Ellen Gray, UNEQUAL JUSTICE 163-70 (1993).

8 For examples of media stories and academic articles promoting the notion of child abuse hysteria or "witch hunt," see JOHN B. MYERS, *The Literature of the Backlash*, *in* THE BACKLASH: CHILD PROTECTION UNDER FIRE 86, 90-93 (John B. Myers ed., 1994).

9 John C. Yuille et al., *Interviewing Children in Sexual Abuse Cases*, *in* CHILD VICTIMS, CHILD WITNESSES 95, 96 (Gail S. Goodman et al. eds., 1993).

10 *Id. See also* Lesley Wemberly, *The Perspective from Vocal*, *in* THE BACKLASH: CHILD PROTECTION UNDER FIRE 56 (John B. Myers ed., 1994).

11 Child Psychiatrist Roland Summit reports that many hold the stereotype of the seductive young girl playing dangerous games out of her sexual fascination. Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE AND NEGLECT 177, 178 (1983) [hereinafter *CSAAS*]. *See also* Peter K. Isquith et al., *Blaming the Child: Attribution of Responsibility to Victims of Child Sexual Abuse*, *in* CHILD VICTIMS, CHILD WITNESSES 203, 204-06 (Gail S. Goodman et al., eds. 1993).

12 GRAY, *supra* note 7, at 164. Roland Summit states that even some clinical specialists still believe that allegations of sexual abuse arise out of fantasy, confusion or displacement of the child's wish for the power of seductive conquest. *CSAAS*, *supra* note 11, at 179. Jean Goodwin attributes these clinicians' beliefs to the Freudian principle that incest is based on fantasy. Jean Goodwin et al., *False Accusations and False Denials of Incest: Clinical Myths and Clinical Realities*, *in* SEXUAL ABUSE: INCEST VICTIMS AND THEIR FAMILIES 17 (1989).

pute.[13] Several widely publicized courtroom trials have also taught the public to suspect allegations that children have made against day-care workers.[14] Thus, despite an increased recognition that child molestation is a pervasive problem in society, there is also a clear message that the main, and often only witness to this kind of crime,[15] may not be credible.

Given this societal background, the incongruities in M.B.'s story, and the lack of evidence corroborating her charge, it would not be surprising to see this defendant acquitted. And yet, M.B.'s narrative describing her stepfather's conduct and her own behavior might not be incongruous or implausible at all. For it has become well-accepted in the psychiatric community that children subjected to *repeated* acts of sexual abuse will not struggle or resist, but will accommodate to such abuse over time, becoming passive and seemingly accepting of repugnant sexual acts.[16] Indeed, the phases abused children pass through and the coping behaviors they develop to adjust to repeated sexual abuse has come to be known as the "Child Sexual Abuse Accommodation Syndrome."[17] Accommodation as a component of patterned sexual abuse is not only accepted among experts—the courts have also acknowledged its relevance in cases of long-term incest or sexual abuse.[18]

M.B.'s stepfather was not charged with sexually abusing her over a period of time, however, but rather for abusing her only once. The

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13 Yuille et al., *supra* note 9, at 96. Yuille et al. concluded that as of 1983, up to 35% of sexual abuse allegations in child custody cases were false. While Yuille's percentage has been sharply criticized, *see, e.g.*, Josephine A. Bulkley, *The Impact of New Child Witness Research on Sexual Abuse Prosecutions, in* PERSPECTIVES ON CHILDREN'S TESTIMONY 208, 216 (Stephen J. Ceci et al. eds., 1989), many do not dispute the principle that false allegations in this context, while rare, do occur. *Id.*; Goodwin et al., *supra* note 12, at 32.

14 *See, e.g.*, Felix v. State, 849 P.2d 220 (Nev. 1993); State v. Babayan, 787 P.2d 805 (Nev. 1990); State v. Michaels, 642 A.2d 1372 (N.J. 1994). For examples of media coverage of such cases, see Debbie Nathan, *Witch Hunt in Wenatchee Over Sex-Abuse Charges*, SACRAMENTO BEE, Dec. 22, 1995, at B-9; Jay Matthews, *McMartin Teachers Acquitted: 52 Not-Guilty Verdicts End Child-Abuse Trial*, WASH. POST, Jan. 19, 1990, at A-1. *See also* GRAY, *supra*, note 7, at 166 (reporting that respondents to Gray's poll found the danger of "witch hunts" to be significant).

15 *See* Gray, *supra* note 7, at 17. *See also infra* notes 65-69 and accompanying text.

16 *CSAAS, supra* note 11, at 180. *See also* Roland C. Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, 1 J. CHILD SEXUAL ABUSE 153, 154-55 (1992) [hereinafter *Abuse of CSAAS*].

17 *CSAAS, supra* note 11, at 179, 181.

18 For an overview of the Accommodation Syndrome, see *infra* notes 91-92 and accompanying text. For additional information as to how the courts use and view the Accommodation Syndrome, see Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027 (1994); John E.B. Myers et al., *Expert Testimony In Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1 (1989) [hereinafter *Expert Testimony*].

other times, beginning at age nine or ten, that this defendant had abused or tried to abuse her, did not appear in the indictment.[19] The times he threatened her with a knife to make her submit, and told her that her mother would put her in a facility if she sought help, all occurred prior to the charged incident.[20] Under the rules of evidence, each of these acts thus carried the designation of "uncharged crimes or bad acts."[21] In a state like New York, evidence of these acts would be inadmissible because New York strictly bans the admission of evidence of uncharged crimes in long-term incest or sexual abuse cases.[22] In such jurisdictions, a defense attorney can thus block jurors from hearing those components of a victim's narrative that place the charged acts in a context that would make the incongruous much more understandable.

New York's approach to uncharged crimes in long-term incest cases exists at a time when the rules in most other jurisdictions vary widely, but where most courts generally do allow juries to hear evidence of uncharged crimes in sex crimes cases, despite common-law and statutory prohibitions on presenting evidence of a defendant's bad character.[23] The roots of this permissiveness appear to stem from a belief that rapists and child molesters typically go unpunished due to "legal technicalities."[24] As a result, many—but not all—states have bent traditional common law prohibitions regarding uncharged crimes and admitted them in cases involving rape and child

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19 Burke v. State, 624 P.2d 1240, 1246 (Alaska 1980).

20 *Id.* at 1247.

21 See *infra* note 23.

22 *See* People v. Lewis, 506 N.E.2d 915, 916-18 (N.Y. 1987). A minority of states take a similarly strict position regarding the admissibility of uncharged crimes in cases of long-term sexual abuse. *See, e.g.*, Getz v. State, 538 A.2d 726 (Del. 1988); State v. Rickman, 876 S.W.2d 824 (Tenn. 1994). Collectively, I refer to such jurisdictions as taking "the New York approach."

23 *See* FED. R. EVID. 404(b). Rule 404(b), which codifies the common-law view, states that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

Rule 404(b) or a common-law analog is in effect in all the states, including New York. *See, e.g.*, People v. Molineux, 61 N.E. 286, 294 (N.Y. 1901).

24 *See* David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 23 (1994). *See also* 137 CONG. REC. S4925, S4928 (daily ed. Apr. 24, 1991) (statement of Senator Dole) (speaking in support of proposed Rules 413-415 and warning of "the grave risk to the public if a rapist or child molester remains at large"). *See also* STAFF OF N.Y. SENATE COMMITTEE ON CODES, STATEMENT IN SUPPORT OF S. 5492A (N.Y.), at 2 (1994) (stating that "[t]he result [of the prior law] is that a large number of cases in which there is particularly reliable evidence that young children have been repeatedly sexually abused are either dismissed or compromised").

molestation.[25]

Recent federal enactments have injected even more uncertainty into the issue of the admissibility of uncharged crimes in sex crimes cases. On January 9, 1995, Federal Rules of Evidence 413, 414 and 415 took effect, making a defendant's past history of rape or sexual abuse presumptively admissible in federal trials involving such charges.[26] In effect, the new federal rules reverse both the common-law prohibition on uncharged evidence of bad character, as well as FRE 404(b)'s statutory codification of that prohibition.[27] The new rules have prompted writings from scholars and practitioners who are concerned about the creation of special, and perhaps prejudicial, rules for sex crimes cases.[28] Legal challenge to the new rules on such grounds seems certain, and the outcome will be significant, not only within the federal system, but in any state that has adopted or is contemplating adoption of these rules.[29]

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25 A survey of other states' rationales for admitting uncharged crimes in these cases reveals a striking inconsistency of approach where many judges routinely stretch Rule 404(b)'s exceptions of "motive," "intent," and "plan" beyond what they were meant to encompass. For survey and general criticism of these various approaches, *see* EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE §§ 3:08, 4:12, 4:13, 5:18 (1984); David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 541-44, 546-56 (1994); Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 200-04 (1993); John E.B. Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479, 503-07 (1988). Other courts rely on the purported need to show a defendant's "lustful disposition" toward his victim, a trait that veers quite close to propensity, and has been expressly overruled in New York. *See* People v. Lewis, 506 N.E.2d 915 (N.Y. 1987); *see also* IMWINKELRIED, *supra*, § 4:11; Bryden & Park, *supra*, at 557-59; Myers, *supra*, at 538-42; Reed, *supra*, at 188-96.

26 FED. R. EVID. 413-415. Since this article looks primarily at criminal cases of child molestation, Rule 414 is the most relevant of the statutory amendments. It states, in pertinent part, "(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant . . . ."

27 Karp, *supra* note 24, at 18.

28 *See, e.g.*, Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 285-89 (1995); David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 333-42 (1995). Other writers, focusing on a perceived inconsistency between the new rules and Federal Rule of Evidence 403, see the new rules as flatly violative of due process and equal protection. *See, e.g.*, Jeffrey G. Pickett, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413-415 and the Use of Other Sexual-Offense Evidence in Washington*, 70 WASH. L. REV. 883, 899-902 (1995); Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 76-87 (1995).

29 To date, two states, Missouri and Indiana, have adopted rules of evidence based on Federal Rules 413 and 414. *See* Anne Elsberry Kyl, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 ARIZ. L. REV. 659, 673 (1995). Since 34 states have evidence codes modeled on the Federal Rules of Evidence, adoption

With such challenge likely, it seems all the more appropriate to examine what could be considered FRE 414's polar opposite, the New York approach. For if FRE 414 *is* considered illegally permissive, the courts will have to consider where proper boundaries regarding the admissibility of uncharged crimes should lie. Such examination would show that New York's restrictive extreme is equally unwarranted, for the New York approach is not only doctrinally unsound, but also has devastating effects on an adolescent's ability to present a credible narrative in a case of long-term sexual abuse.

This article suggests that in a number of emotionally wrenching long-term incest cases[30] in New York, judicial roadblocks have unjustly stacked the deck against the traumatized adolescent complainant[31] who, in order to cope with continuing abuse, accommodates it to the point where she appears to be a willing participant. More specifically, the New York courts' overly broad interpretation of its evidentiary rule barring testimony regarding a defendant's uncharged crimes has prevented such a child victim from explaining for the jury how her distorted and otherwise inexplicably passive reactions to the charged sexual offenses were shaped by earlier uncharged sexual abuse at the abuser's hands. By shifting the jury's attention from the defendant's crimes to the victim's "unfathomable" behavior, the courts have made it extremely difficult for juries to perceive such victims as credible.

The rule barring uncharged crimes, as the Court of Appeals stated in *People v. Molineux*,[32] and refined in subsequent cases,[33] is that

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by other states seems likely. *Id.* Indeed, given that the Indiana courts had previously adhered to the New York approach to uncharged crimes in sex crimes cases, it appears that adoption of the new rules may have little to do with consistency to current state law. *See* Lannan v. State, 600 N.E.2d 1334 (Ind. 1992). The military has also formally adopted the Rules as Military Rules of Evidence 413 and 414. *See* Lt. Col. Borch, *New Military Rules of Evidence 413 and 414*, ARMY LAW, Oct. 1995, at 25-26.

30 For purposes of this article I use the term "incest" to include not just sexual relations between biological relatives, but also any repeated acts of abusive sexual conduct to which a perpetrator subjects a child with whom he has a familial, if not biological relationship. Thus, for purposes of this article stepfathers as well as paramours of biological relatives of the child can commit "incest." By "long-term," I refer to a pattern of sexual activity that begins in childhood and lasts many years, through the adolescence of the young victim. Finally, although it is certainly true that not all incest victims are female and all perpetrators male, the majority of such cases leads me to use gendered pronouns in this conventional way.

31 Setting adolescence as the time for disclosure and prosecution of long-term incest is not an arbitrary decision. In cases of long-term incest, children who voluntarily disclose often do so at an age where they would typically be striving for a measure of independence, such as adolescence. Perpetrators react to the adolescent's attempts to separate by becoming jealous and even more controlling, which can prompt a disclosure. *CSAAS, supra* note 11, at 186. Of course, many victims of incest or sexual abuse never disclose what they have been subjected to. *Id.* at 181.

32 61 N.E. 286, 293-94 (N.Y. 1901).

a jury may not hear testimony that a defendant previously committed similar crimes if the sole purpose for introducing such testimony is to instill the belief that defendant's past propensity makes him responsible for the presently charged crime. However, the New York courts also state that if a prosecutor convincingly shows some purpose, other than criminal propensity, to which the evidence is relevant, the uncharged crimes could be admitted so long as their probative value outweighs the possible prejudice to the defendant.[34] The rule and its possible exceptions thus become the battleground for prosecutor and defense counsel.

In criminal cases generally, the specific permissible purposes delineated by the *Molineux* court—identity, motive, common scheme or plan, intent and knowledge[35]—have been treated as illustrative and not exclusive.[36] However, in sex crimes cases it is quite rare to see evidence of a defendant's history of sexual abuse admitted into evidence unless offered for one of these purposes.[37] Enabling a child to provide the context for *her* otherwise "incredible" behavior by reference to a defendant's earlier uncharged crimes is not one of the stated exceptions, and in fact has been expressly rejected by the Court of Appeals in New York.[38]

However, in the last twenty years, rigid adherence to the Court of Appeals' narrow interpretation of the *Molineux* "exceptions" has had a high cost in the most severe cases of prolonged incest, because in such cases, it has been rare for prosecutors to be able to charge a defend-

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33 People v. Hudy, 535 N.E.2d 250, 258-59 (N.Y. 1988); People v. Lewis, 506 N.E.2d 915, 916-17 (N.Y. 1987); People v. Robinson, 503 N.E.2d 485, 488-90 (N.Y. 1986); People v. Ventimiglia, 420 N.E.2d 59, 62 (N.Y. 1981); People v. Allweis, 396 N.E.2d 735, 738 (N.Y. 1979).

34 *Hudy*, 535 N.E.2d at 258-59; *Lewis*, 506 N.E.2d at 917. Rule 404(b) similarly permits uncharged crimes to be admitted for a non-character or propensity based purpose. FED. R. EVID. 404(b). For a circuit-by-circuit list of cases that propound this view, see Sheft, *supra* note 28, at 61 n.23.

35 *See Molineux*, 61 N.E. at 294.

36 People v. Carter, 566 N.E.2d 119, 124 (N.Y. 1990); People v. Vails, 372 N.E.2d 320, 323 (N.Y. 1977); People v. Calvano, 331 N.Y.S.2d 431, 435-36 (N.Y. App. Div. 1972). In this respect too, the New York rule parallels Federal Rule of Evidence 404(b), which permits the introduction of uncharged crimes for "other purposes" and presents the listed exceptions as illustrative and not exclusive. *See* Sheft, *supra* note 28, at 61 n.23.

37 Typically, the *Molineux* exceptions that are utilized in sex crimes cases show *identity* in a stranger rape situation, where the perpetrator uses a unique modus operandi. *See, e.g.*, People v. Dockery, 626 N.Y.S.2d 525, 526 (N.Y. App. Div. 1995). Where forcible rape is alleged, the *Molineux* exceptions are used to show motive and intent. *See* People v. Linderberry, 626 N.Y.S.2d 876, 878-79 (N.Y. App. Div. 1995); People v. Castrechino, 521 N.Y.S.2d 960, 961 (N.Y. App. Div. 1987). In incest cases, where force is not a statutory element of the offense and where identity is not disputed, neither of these exceptions comes into play.

38 *Hudy*, 535 N.E.2d at 259-61; *Lewis*, 506 N.E.2d at 918-19.

ant with every act of statutory rape, sodomy, sexual abuse or incest he committed against the victim. Jurisdictional restrictions, both geographical[39] and temporal,[40] and notice requirements[41] pruned a large number of events from a potential indictment, particularly those that were more remote in time. If the surviving charged counts could clearly depict for a jury the forces that caused a child to apparently accept repugnant sexual acts, the child's credibility, and hence, the truth-telling process, may not have suffered. However, in the most severe of these cases, where abuse was ongoing for many years and where the child's emotional defenses were eviscerated well before the charged acts occurred, it was only by referring to the uncharged prior instances of abuse that a child could relate a narrative that established the psychological forces that enabled the defendant to successfully commit the charged crimes against her.[42]

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39 County courts have geographical jurisdiction only over crimes committed within the county. *See generally* N.Y. CRIM. PROC. § 20.40 (McKinney 1993); *see also id.* §§ 20.10, 20.20, 20.30, 20.50 (providing requirements for other geographical restrictions).

40 In a state court prosecution, the state's statute of limitations sets time limits within which cases must be brought. In New York, for example, until August 1996, felony level sex crimes could not be prosecuted if they occurred more than five years prior to the commission of the offense. *See* N.Y. CRIM. PROC. § 30.10 (McKinney 1992). On August 1, 1996, however, the periods of limitations were extended for certain sexual misconduct crimes. *See* N.Y. CRIM. PROC. § 30.10 (McKinney Supp. 1997).

41 The State is required to articulate approximate dates that the alleged crimes occurred in order to charge a defendant with the offenses in an indictment. *See* N.Y. Crim. Proc. § 200.50 (McKinney 1993). If a child complainant cannot give with "reasonable certainty" the date of an act, it cannot be the basis for a charge. *See* People v. Keindl, 502 N.E.2d 577, 579-80 (N.Y. 1986); People v. Morris, 461 N.E.2d 1256, 1259 (N.Y. 1984); People v. Beauchamp, 532 N.Y.S.2d 111, 113 (N.Y. App. Div. 1988).

42 In 1996, New York's legislature enacted statutory reforms that tangentially assist a long-term incest victim in telling "the whole story," because they make more incidents of sexual abuse chargeable in an indictment. Thus the statute of limitations is now modified in cases involving child victims by commencing the five year limitations period on the child's eighteenth birthday, not the date of the crime itself. *See* N.Y. CRIM. PROC. § 30.10 (McKinney Supp. 1997). Additionally, a new felony offense was created called "course of sexual conduct against a child." This is a continuing crime in which specific dates need not be pleaded so long as the victim is less than eleven years old at the time that the defendant abuses the child. *Id.* at §§ 130.75, 130.80 The purpose of these reforms, particularly the latter, is to permit more cases to be brought against molesters of young children. *See* N.Y. SENATE COMM. ON CODES, MEMORANDUM ON S. RES. 5492(A). However, a side benefit of the legislation is that in some cases of long-term incest, a complainant will be able to testify to more acts, because the defendant may be charged with more crimes in the original indictment.

However, the reforms do *not* render chargeable all abuse that a long-term incest victim may have suffered. Geographical limitations remain, as do specificity requirements for crimes committed after a child turns eleven years old. These weaknesses are not surprising where the beneficial effects were unintentional. By failing to confront the Court of Appeals' flawed reasoning regarding the inadmissibility of uncharged crimes in long-term incest cases, the law will continue to treat the victims of these crimes inconsistently and unequally; the clarity of a child's narrative and subsequent judgments as to her credibility

In this article, I suggest that current precedent which bars an adolescent from testifying to uncharged acts that show the context within which she was abused, is an improper restriction of the *Molineux* standard. Continued adherence to this cramped interpretation of the law will cause some juries to hear fractured narratives of events from teenage victims. As a result, jurors are likely to find repeatedly victimized teenagers unbelievable and the charges against their abusers unfounded. This danger is, ironically, most imminent in the most severe cases of Accommodation Syndrome,[43] where the complainant is so emotionally broken by the early uncharged abuse that she appears to become an uncomplaining recipient of the often-horrifying charged offenses.[44] In such cases, if juries are to be able to search for the truth, it is imperative that the courts more fully recognize the ramifications of long-term incest as a continuing crime with a strong psychological component that connects one act to another, not a series of discrete and separate events.[45] More importantly, courts must begin to act on this knowledge in those cases where judges would present otherwise credible complainants as unfathomable, and hence unbelievable.

The case study that follows in Part II more specifically illustrates and explains the problem. Part III traces how the New York courts' undue restriction of the *Molineux* rules developed in long-term incest cases. Part IV examines research and theory regarding jurors' estimations of teenage complainants' credibility generally, and forecasts jurors' likely responses to hearing their fractured incest narratives. Finally, Part V proposes how courts can use knowledge of the Accommodation Syndrome as a guide to develop a uniform response to the admissibility of uncharged crimes.

II. *PEOPLE V. HARRIS:* CAN THIS GIRL BE BELIEVED?

Defendant Joachim Harris[46] was charged in 1986 with multiple counts of statutory rape and sodomy,[47] committed against his step-

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will hinge on technical rules, not doctrinal soundness or contextual necessity.

43 *See CSAAS, supra* note 11; *see also infra* notes 91-103 and accompanying text on the Child Sexual Abuse Accommodation Syndrome.

44 *CSAAS, supra* note 11.

45 People v. Keindl, 502 N.E.2d 577, 581-82 (N.Y. 1986).

46 References to testimony from the case of *People v. Harris* were derived from the record of the trial. Transcript, People v. Harris (N.Y. Sup. Ct. 1987) (No. 3357/86) (on file with author).

47 Brief for Respondent at 1, People v. Harris (N.Y. Sup. Ct. 1987) (No. 3357/86). For statutory definitions of Rape in the third degree and Sodomy in the third degree, see N.Y. PENAL LAW §§ 130.25, 130.40 (McKinney 1993).

daughter, Anna B.[48] The *Harris* case graphically demonstrates how context, or the lack of it, can affect the perception of the credibility of the young complaining witness. Consider the narrative impact of the following *decontextualized* version of the complainant's testimony:

Anna was seventeen years old by the time she testified at trial.[49] She testified that one night between the first of October and Thanksgiving of 1984, when she was fifteen years old, her mother woke her up saying that "dad wants you."[50] She testified that she went downstairs after her mother into her mother and defendant's bedroom. She said that when she entered the room, her mother was naked, that her stepfather told her to take her own clothes off and that she did so unquestioningly.[51] He told her to get in bed with them, and she complied.[52] Anna then testified that defendant got "on top" of her mother, then got off her and got "on top" of Anna.[53] At that point, Anna said, defendant touched her body and had sexual intercourse with her.[54] Anna testified that defendant went back and forth between herself and her mother "until he was finished."[55] Throughout the incident neither Anna nor her mother protested, nor did defendant say anything.[56] When it was over, Anna said that she returned to her own room and bed.[57]

After this act, Anna testified to a series of sexual acts that defendant perpetrated against her from December 1, 1984 to May of 1986.[58] She described the acts sparsely, using similar language for each incident,[59] so similar that the parties eventually stipulated that were she to

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48 The name of the complainant in this case has been changed for purposes of this article.

49 *See* Transcript Record at 5, *Harris* (No. 3357/86). In this respect Anna is demographically typical. In MacMurray's jurisdiction survey, 20% of cases referred to a prosecutor's office involved complainants over 13 years of age. Bruce K. MacMurray, *Criminal Determination for Child Sexual Abuse*, 4 J. INTERPERSONAL VIOLENCE 233, 239 (1989). Gray's statistic across eight jurisdictions was even higher: 25.3% of child complainants were between 13 and 17 years of age. GRAY, *supra* note 7, at 75 fig.4.3. Goodwin et al., like Summit, found that disclosures of incest tend to emerge when a family reached the kind of crisis that occurs as the victim steps toward independence and away from her abuser. Goodwin et al., *supra* note 12, at 23. Such situations often arise during the victim's adolescence. *Id.*; *see also CSAAS*, *supra* note 11, at 186.

50 Transcript Record at 17, *Harris* (No. 3357/86).

51 *Id.* at 18.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at 18-19.

57 *Id.* at 19.

58 *Id.* at 19-24.

59 *Id.* Anna testified that "I would come downstairs. He had told me to come in and close the door, lock the door, and he tell me to take off my clothes and he told me to get

continue testifying regarding them, she would describe each incident in the same way.[60] She also described two more incidents of sexual intercourse that, like the first, included her mother's participation.[61] During the time period that she said the abuse was occurring, Anna testified that occasionally her mother "would start complaining about it," but that Anna would "just change the subject."[62] Finally, Anna testified that she became pregnant in February of 1986 by her stepfather and had an abortion in March.[63] These events, she said, led her to confide in a school guidance counselor in May of 1986, who notified the authorities.[64]

I take the view that Anna's passive acceptance of the first act of rape is so counter-intuitive that it violates our operational notions of plausibility.[65] While a very young child might not be expected to question or resist an authority figure, the average person would inevitably find it difficult to accept a fifteen-year-old's unquestioning sexual intercourse with her stepfather and mother. Even absent any suggested motive on the child's part to fabricate, "logical" questions arise: Why didn't Anna question her mother's arrival in her bedroom? How could she take off her clothes and get into bed with her stepfather without protest? Why didn't she leave when her stepfather began sexual relations with her mother? Why didn't she resist the defendant when he got on top of her? Why didn't she seek help immediately after such a terrible event? How could the defendant presume that he could get away with such depravity and that Anna's mother would be such a willing participant?

In the courtroom, such questions are appropriate if the jury's task is to measure the credibility of a witness by the plausibility of the story.[66] Thus, even if the court instructed a jury that the victim's young age made any "consent" to these sex acts irrelevant to its delib-

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on top of him and he will feel my breasts and my vagina and my rear end with his hand. Then he would put his penis in my vagina . . . [and] in my mouth." *Id.* at 19-20.

60 *Id.* at 26.

61 *Id.* at 27-29.

62 *Id.* at 30.

63 *Id.* at 34.

64 *Id.* at 46-48.

65 The incest taboo has been a constant in our culture. *See* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 207-08 (1988). When such a value is ingrained in our "folk psychology," deviation from the value must be *explained. See* JEROME BRUNER, ACTS OF MEANING 33, 49 (1990). In this decontextualized version of Anna's history, no explanation for her passivity exists.

66 *See, e.g.*, 1 CRIMINAL JURY INSTRUCTIONS, NEW YORK, *supra* note 6, § 7.02 (stating that "the jury, as sole judges of the facts should . . . determine which of the witnesses you believe, what portions of their testimony you are willing to accept, and what weight you will give such testimony."). *See also* People v. Alfred, 580 N.Y.S.2d 52 (N.Y. App. Div. 1992).

erations,[67] Anna's apparent readiness to be violated would still seem flatly unbelievable. Such a negative impression of the victim's credibility with respect to this act must also color the jury's judgment as to the truth of the later acts Anna describes.[68]

Nor would examining the rest of the State's evidence compensate for the skepticism that Anna's testimony would engender. In this case, as in many other cases of intrafamilial sexual abuse, there was little corroborating evidence.[69] The defendant did not confess,[70] there were no eyewitnesses,[71] and no medical evidence linked Anna's sexual activity to the defendant.[72] Indeed, the only State's witness who testified to something other than Anna's hearsay statements[73] was an older half-sister, who testified to seeing Anna go into defendant's bedroom on several occasions.[74] While such testimony might raise some suspicions of impropriety, it seems highly unlikely that such evidence would persuade a jury beyond a reasonable doubt of a defendant's guilt.

Placing Anna's decontextualized and unsupported story against the defendant's competing narrative renders her version of events

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67 *See* People v. Lewis, 506 N.E.2d 915, 918 (N.Y. 1987).

68 It is common for a judge to instruct the jury that if the jury disbelieves a witness as to any material part of that witness's testimony, the jury is free to disregard the whole of the witness's testimony. *See* People v. Perry, 14 N.E.2d 793, 796 (N.Y. 1938); People v. Bruno, 431 N.Y.S.2d 106, 107 (N.Y. App. Div. 1980).

69 Because the abuse occurs in a private setting, the potential for finding witnesses is often nonexistent. *See* MacMurray, *supra* note 49, at 236. Further, because the victim's disclosure is usually quite delayed, little or no physical evidence is generally recovered. *Id.* This is quite true in Anna's case, where she alleged that defendant took polaroid photos of her naked and the two of them in an act of sodomy, but no pictures were recovered. *See* Transcript Record at 42-43, *Harris* (No. 3357/86); *see also* GRAY, *supra* note 7, at 91-92 (finding that in 53.2% of cases referred to prosecutors across eight jurisdictions, there was neither medical evidence nor eyewitnesses); Theodore P. Cross et al., *Prosecution of Child Sexual Abuse: Which Cases are Accepted?* 18 CHILD ABUSE AND NEGLECT No. 8, 663, 670 (1994) (finding that 55% of cases referred to prosecutors were based wholly on the complainant's testimony).

70 Confessions were found in approximately 32% of cases that prosecutors actually took to trial, according to Cross et al., *supra* note 69, at 666; Gray found that across eight jurisdictions prosecutors relied on defendant's statements in 37.2% of the cases they accepted for prosecution. GRAY, *supra* note 7, at 97.

71 Cross et al. found eyewitnesses in 15% of referred cases. Cross et al., *supra* note 69, at 666; Gray's survey found eyewitness testimony in 19% of referred cases. GRAY, *supra* note 7, at 91.

72 Gray found that 39% of cases referred for prosecution included no medical evidence and that another 35.2% of cases included evidence that was only suggestive of abuse. GRAY, *supra* note 7, at 91 & fig.4.14. She suggests that the lack of such evidence may in part result from the uneven quality of medical examinations. *Id.* at 91.

73 New York, like most states has a "prompt outcry" exception to the hearsay rule that permits a witness to testify to the victim's initial disclosure of her sexual assault. *See, e.g.*, People v. McDaniel, 611 N.E.2d 265, 268 (N.Y. 1993).

74 *See* Transcript Record at 110-11, *Harris* (No. 3357/86).

even more implausible. The competing story that the defense developed was that Anna was a disrespectful teenager who fabricated the charges, because she hated living at home, and because she was trying to cover up her own sexual activity with a boyfriend.[75] In support of that story the defense extensively cross-examined Anna.[76] In addition, the defendant's mother testified that Anna hated living at home and taking care of her siblings and admitted to having sex with her boyfriend a short time before her abortion.[77] The defendant's son also testified on defendant's behalf, claiming that Anna frequently paid him so that she and her boyfriend could have sex in his bedroom.[78]

The competing narrative is powerful because it draws upon negative stereotypes regarding teenagers. Indeed, the defendant's seventy-two year old[79] mother succinctly evoked the picture of the disrespectful and rebellious teenager when she testified:

> Q: How did [your relationship with Anna] change?
>
> A: Because you know, prior to that she was such a beautiful child. She, er—she wasn't streetwise like, you know. But when she came to the house that day she was chewing gum and clicking it at me.
>
> Q: Okay, and after that day you did not have such a nice relationship?
>
> A: No. I said, oh, wow, has she changed.
>
> Q: Okay. And, you mean she changed by chewing gum or did she change in other ways?

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[75] The defense spent relatively little time trying to disprove Anna's allegations. On the acts themselves, Anna was cross-examined regarding the very young siblings that she testified slept through incidents of abuse that she suffered at the hands of defendant. *See id.* at 59-64, 102-06. She was also cross-examined regarding statements that she had previously made to the police and a child welfare worker. *Id.* at 68-72, 75-77. Finally, she was cross-examined regarding defendant's birth control practices or lack thereof. *Id.* at 85-87. Neither defendant nor her mother testified at the trial.

[76] Anna was repeatedly questioned about her "boyfriend," Paul Y. *Id.* at 56-58, 78-79, 90, 96-99. The focus of the cross-examination was that on several occasions before March of 1986, Anna and Paul would use her younger brother's room to be alone. *Id.* A sample of the testimony is as follows:

> Q: Do you know whether Paul paid [your brother] any money to use his room?
> A: Yes. . . .
> Q: How much would he pay him?
> A: A dollar. A dollar.
> Q: And how long would you be in the room with Paul?
> A: About a hour.
> Q: And you would just be there sitting and talking?
> A: We were talking, kissing.
> Q: Ever go any further than that?
> A: No.
> Q: Did you ever go—did you ever go to bed with Paul in your brother's room?
> A: No.

Id. at 98-99.

[77] *Id.* at 183-86.

[78] *Id.* at 161-66.

[79] *Id.* at 179.

A: No, just her overall appearance. She had all that makeup on and then to keep her hair down she had it glued down with grease, you know.

Q: I see.

A: And all this makeup on and, you know, the way she was talking and it just seemed streetwise, you know, that she had completely changed. And I told her father that.[80]

The defendant's story is thus a proverbial story of put-upon parents and rebellious children, based upon existing stereotypes, that the defense took to an extreme. It is a story that is so familiar within society that it can easily be summarized in a sentence or two.[81] Further, because it does resonate so well with societal stereotypes, it sharpens the sense that Anna's "implausible" story cannot be true.[82]

However, before judging Anna's decontextualized story as flatly unbelievable, consider how one's view of Anna's description of the charged acts might change if she were permitted to put those events into the context of an escalating pattern of abuse that was initiated when Anna was five years old, and had by age fifteen rendered her passive and incapable of protest. In fact, defendant began by fondling Anna when she was five, by removing her clothing and touching her on her buttocks and in her vaginal area.[83] By the time she was eight, defendant was getting on top of her and trying to have intercourse, but Anna's cries kept him from actually penetrating her.[84] By age eleven, defendant succeeded in penetrating her vaginally and began placing his penis into her mouth and vagina on a regular basis.[85] By this time, Anna did not testify to any physical resistance on her part.

During this uncharged time period, Anna did try to get help and failed. Defendant had told her never to tell anyone or he "was going

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80 *Id.* at 191-92.

81 Proverbial stories or narratives are so familiar and so accepted within our culture that they allow us to simplify and to avoid attending to every detail of a given scenario. Peggy Cooper Davis, *The Proverbial Woman*, 48 REC. ASS'N B. CITY N.Y., 7, 11-12 (1993). Such stories contrast sharply to those that would seem to violate cultural norms, and which thus require a more lengthy explanation to make them meaningful and acceptable to the listener. *See* BRUNER, *supra* note 65, at 47.

82 The simplicity of this stock story is reminiscent of the stock stories told as to why women accuse men of acquaintance rape or sexual harrassment. Such stories as "the woman scorned" or confused about her sexuality are similarly based on negative stereotypes and are so simple as to overpower a much more complex narrative from the woman victim. Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 290-91, 295-96, 299-300 (1993); Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 135-36, 137-38 (1992) [hereinafter *Sexualized Violence*].

83 *See* Transcript Record at 8-9, *Harris* (No. 3357/86).

84 *Id.* at 11-12.

85 *Id.* at 16.

to do something" to her.[86] Despite the threat, she told her mother, whose response was to tell Anna that it was up to her to get defendant to stop.[87] She was eight years old at the time.[88] Over the subsequent years, Anna's mother also told her that disclosure would mean the breakup of the family.[89] After her mother failed to help her, Anna's stepfather dominated her completely. She kept the secret and became incapable of resisting defendant, physically or emotionally.[90]

Does this context answer or shed light on the plausibility of Anna's narrative? The pattern of abuse that defendant subjected his stepdaughter to is consistent with the well-accepted clinical view of long-term molestation described by Roland Summit as the Child Sexual Abuse Accommodation Syndrome ("Accommodation Syndrome").[91] This "syndrome" is actually a pattern of behaviors that depicts the phases of a long-term incest relationship based on clinicians' observations of sexually abused children. By briefly digressing to examine these phases or behaviors in closer detail, we can see just how early incest experiences shape and define the subsequent responses of a victim like Anna.[92]

The Accommodation Syndrome phases or behaviors—secrecy, helplessness, accommodation, disclosure and retraction[93]—typically occur in cases where the abuser, like Joachim Harris, is in a caretaking and apparently loving position with respect to the victim.[94] Such a perpetrator is in the best position to engage a child to accept sexual behavior.[95] Once the initial sexual activity occurs, that activity is characterized by *secrecy*, that is, the victimizer conveys to the child that she is not to tell anyone of the abuse. The defendant is able to secure

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86 *Id.* at 14.

87 *Id.*

88 *Id.* at 15.

89 *Id.* at 36-37.

90 *Id.* at 36-38.

91 See *supra* note 16 and accompanying text.

92 No expert testified regarding Accommodation Syndrome at this particular trial, held in 1986. Since that time, it has become increasingly common for experts in New York to testify in a general way about Accommodation Syndrome, where such testimony will educate jurors as to how sexually abused children react to their abusers. *See* People v. Keindl, 502 N.E.2d 577, 583 (N.Y. 1986); People v. Benjamin R., 481 N.Y.S.2d 827, 832 (N.Y. App. Div. 1984).

93 *CSAAS*, *supra* note 11, at 181.

94 *Id.* at 182.

95 *Id.* at 181. Sgroi has coined a separate phase based on the relationship between victim and victimizer, called the "engagement phase." Sgroi uses this phrase to refer not only to the relationship, but to the behaviors defendant uses to induce the child to participate in sexual behaviors or acts. Suzanne M. Sgroi et al., *A Conceptual Framework for Child Sexual Abuse*, *in* CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE 13 (Suzanne M. Sgroi ed., 1982).

secrecy, because the child does not understand the reality of the experience; she is dependent on the perpetrator for whatever reality he assigns to it. When he tells her that the act must be kept secret, the inference that the child draws is that she has done something bad or dangerous that she cannot reveal. Consequently, while some perpetrators secure secrecy by means of intimidation, threats of violence are usually unnecessary. The perpetrator can use the child's shame and fears of abandonment to maintain secrecy.[96]

Keeping the secret causes the child to react with *helplessness* to additional acts of sexual abuse. While children may make some attempt to avoid sexual activity (for example, by feigning sleep at night), children do not naturally or normally resist perpetrators who they depend upon for love or family security. Minimal acts of avoidance are easily overcome because of the perpetrator's constant access.[97]

Since the child cannot tell, cannot resist, and cannot avoid, she responds by *accommodating* to the abuse, that is, by becoming passive and seemingly accepting of the abuse. Accommodation allows a child like Anna to accept the abuse and survive. She comes to believe that she is responsible for what is happening to her, and that she must keep her family intact by cooperating with her abuser. While the child's passivity allows her to survive emotionally, it also permits and encourages the perpetrator to escalate his sexual demands without fear of disclosure.[98] Thus, Joachim Harris had little to fear from Anna when he involved her in his sexual activity with her mother.

The pattern of abuse and accommodation ends where there is disclosure,[99] which will usually be followed by pressure to retract or suppress the outcry[100] of sexual abuse.[101] This pressure emanates from other family members who cannot accept that the perpetrator could commit these acts, cannot cope with the breakup of the family that disclosure generally requires, or cannot bear the stigma they feel that outsiders will attach to them. Those who cannot pressure the child into recanting may instead attempt to undermine the child's

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96 *CSAAS, supra* note 11, at 181; Goodwin, *supra* note 12, at 22.

97 *CSAAS, supra* note 11, at 183.

98 *Id.* at 183-85.

99 *Id.* at 186. Disclosure can be accidental if, for example, another person observes sexual behavior or finds out that the child has a sexually transmitted disease. *See* Sgroi, *supra* note 95, at 17-19. Disclosure can also be purposeful. *See CSAAS, supra* note 11, at 186.

100 "Outcry" is a term of art in sex crimes cases which refers to the victim's disclosure to another person that she has been sexually abused. *See supra* note 69.

101 *CSAAS, supra* note 11, at 188.

credibility to others.[102] Children who do not go so far as to recant will often refuse to talk about the incest experience or testify.[103]

That the Accommodation Syndrome has a clinical label and widespread clinical support[104] should not shroud its logical core from the layperson. Indeed, to consider the Accommodation phases within the specific example of Anna's experience, the early events in Anna's life should make the illogic of the charged events more understandable, even to a layperson. One can instinctively envision that a child subjected at a very young age to gradually escalating acts of abuse would come to accept that as her reality and be less likely to resist over time. One can consider that conclusion even more foregone if the person this child has confided in, her mother, the person who should be most protective of the child, has utterly betrayed her. Perhaps the only remaining question is why the child would ever make any disclosure under such circumstances.

To prevent the jury from hearing this "whole story" would seem as unfair to the truth-finding process as would denying the defendant the opportunity to fully respond to the charges. Yet, despite the significance of the evidence of earlier abuse to understanding Anna's passivity and defendant's emboldened behavior, jurisdictional and notice requirements prevented the State from charging defendant with these acts in the indictment. Many acts occurred before the five year statute of limitations then in effect,[105] many occurred in California and Queens, New York,[106] not Brooklyn, and many occurred when Anna was between ages twelve and fifteen, but she could not date them with any reasonable specificity.[107] Because these events could not be charged, this conduct took on the legal designation of "uncharged crimes" and became subject to strict judicial scrutiny before admission of Anna's testimony regarding those acts could be considered.[108]

Thus, in a pretrial conference, the State moved to permit Anna to testify regarding these uncharged crimes, in order to provide necessary context for the charged offenses.[109] The prosecutor argued to

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102 Sgroi, *supra* note 95, at 24-27.

103 Goodwin et al., *supra* note 12, at 27.

104 *See* Goodwin et al., *supra* note 12; Sgroi, *supra* note 95; *see also* DAVID P.H. JONES, INTERVIEWING THE SEXUALLY ABUSED CHILD: INVESTIGATION OF SUSPECTED ABUSE, 7-9 (1985).

105 Those acts that Anna described that occurred more than five years before the date of defendant's arrest, May 19, 1986.

106 *See* Transcript Record at 7-15, *Harris* (No. 3357/86).

107 *Id.* at 16-17.

108 *See* People v. Harris, 541 N.Y.S.2d 593, 595 (N.Y. App. Div. 1989).

109 Respondent's Brief and Appendix, People v. Harris (N.Y. Sup. Ct. 1989) (No. 3357/86) [hereinafter "Brief"].

the court that the testimony of years of escalating sexual abuse prior to the charged events was essential to the "continuity of the case, and to an understanding of the victim's conduct."[110] That the deviant conduct began so early in Anna's life helped explain her attitude and behavior regarding the defendant's offenses, including her failure to disclose the defendant's abuse to anyone prior to 1986.[111] In opposing the motion, the defense argued that the evidence was inflammatory and irrelevant to the charged offenses.[112]

The trial court ruled that Anna would be permitted to testify regarding the uncharged offenses. The court found that the testimony was "necessary" in order to give "fabric and texture to the entire case."[113] Thus, as the trial proceeded, Anna was able to describe chronologically how the abuse began and how it escalated. The jury was able to understand Anna's growing accommodation to the abuse and her resulting passivity. The charged offenses were thus placed in a context that did not seem wholly incredible.

The jury convicted the defendant of multiple counts of statutory rape and sodomy. On appeal, however, the appellate court reversed, finding that the admission of defendant's uncharged crimes was improper.[114] In its decision, the appellate court made no effort to compare the charged and uncharged offenses to see if the latter shed necessary light on the former. Instead, the court characterized the uncharged offenses as "merely cumulative, and was not offered to prove an element of the crimes charged."[115]

The appellate court's sketchy analysis of the facts was somewhat predictable, because higher authority in New York had previously spoken directly to the issue in an equally abbreviated way. In *People v. Lewis*,[116] the Court of Appeals reversed a trial judge's decision to permit a fourteen-year-old girl to testify to her father's ten uncharged acts of rape to explain why she didn't resist her father throughout the one charged offense.[117] The Court of Appeals held that such testimony would improperly buttress, bolster or credit the complainant, instead of provide necessary context.[118] In turn, the *Harris* court relied on the *Lewis* decision when it stated that "*enhancement* of the complaining witness's credibility [is not] one of the recognized exceptions to the *Moli-*

110 *Id.*
111 *Id.* at 3.
112 *Id.*
113 *Id.*
114 People v. Harris, 541 N.Y.S.2d 593, 594 (N.Y. App. Div. 1989).
115 *Id.* at 595.
116 506 N.E.2d 915 (N.Y. 1987).
117 *Id.* at 916.
118 *Id.* at 918.

neux rule."[119]

By placing the uncharged acts within the paradigm of "buttressing"[120] or "enhancing"[121] credibility, the *Harris* court maintained the legal fiction that long-term incest is a series of discrete and independent acts.[122] Viewed in such a fashion, the *Harris* decision is logical—if uncharged act A does not shed light on charged act B, then act A serves no purpose, except to bolster the complainant and prejudice the defendant.[123]

However, by relegating the uncharged facts to the "bolstering" paradigm without discussing them in any detail, the court itself altered Anna's narrative.[124] Decontextualized, Anna's testimony is incongruous; that artificial incongruity gives the defendant a significant advantage in presenting his stock story of teenage rebellion. On the other hand, had the court laid out the facts behind the charged and uncharged crimes, it would have been difficult to say that the progression of events over time served no purpose except to improperly credit the complainant. To the contrary, the contextualized narrative allowed both complainant's and defendant's stories to be carefully scrutinized using traditional tests of credibility.

The *Harris* result is not an isolated one. Since the Court of Appeals decided *People v. Lewis*, numerous courts have mechanically excluded evidence of prior sexual contact that a defendant has perpetrated against a child victim without considering whether the exclusion is doctrinally sound.[125] In addition to these cases, prosecutors have no doubt declined to pursue numerous others, because a complainant's description of the charged counts under *Lewis* would sound incredible. It is, therefore, well worth reviewing the doctrinal underpinnings of *Lewis*, to determine whether new consideration of the subject of uncharged crimes is appropriate.

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119 *Harris*, 541 N.Y.S.2d at 595.

120 *Lewis*, 506 N.E.2d at 918.

121 *Harris*, 541 N.Y.S.2d at 595.

122 People v. Keindl, 502 N.E.2d 577, 581-82 (N.Y. 1986).

123 Or as the *Lewis* court stated, a witness's "allegations concerning defendant's prior actions did not render [that witness's] testimony pertaining to the charged crime more trustworthy because a witness cannot buttress her own testimony by making further unsubstantiated accusations." *Lewis*, 506 N.E.2d at 918.

124 *See* Robert Garcia, *Rape, Lies and Videotape*, 25 LOY. L.A. L. REV. 711, 729 (1992) ("[t]he summary of the facts on appeal is an interpretation that reflects the values of the appellate judge writing the opinion and is many layers removed from 'what really happened'").

125 People v. Singh, 588 N.Y.S.2d 573 (N.Y. App. Div. 1992); People v. Gautier, 544 N.Y.S.2d 821 (N.Y. App. Div. 1989); People v. Sosa, 535 N.Y.S.2d 596 (N.Y. App. Div. 1988); People v. Bruce A., 529 N.Y.S.2d 593 (N.Y. App. Div. 1988).

III. *PEOPLE V. LEWIS:* THROWING THE BABY OUT WITH THE BATHWATER

The admissibility of uncharged crimes in cases of long-term sexual abuse has see-sawed wildly since 1901, when the New York Court of Appeals set out its rules for the admissibility of uncharged crimes in criminal cases.[126] In *Molineux*, the Court of Appeals followed the common law view that convicting a defendant based on his or her propensity to commit past crimes was repugnant.[127] However, at the same time, the court recognized that evidence of past crimes could, at times, establish something other than mere propensity. The now-famous exceptions listed in the decision—identity, motive, common scheme or plan, intent and knowledge—are examples of legitimate purposes for which uncharged crimes may be admitted.[128] The exceptions have become so ingrained that any criminal law practitioner can rattle them off with ease. Yet the *Molineux* court itself stated that the exceptions to the rule could not "be stated with categorical precision,"[129] and subsequent courts have considered the exceptions to be illustrative, not exclusive.[130]

In the years since the *Molineux* decision, New York courts have moved beyond these illustrative exceptions and admitted uncharged crimes where those acts provided necessary context and background to the narrative of the charged offenses.[131] For example, in *People v. Ricotta*,[132] where the defendant was accused of acting in concert with another to start a fire in his family's building, the court deemed defendant's uncharged prior arson of his family's previous residence, "inextricably interwoven into the transaction forming the basis of the charge . . . and completed the narrative of the episode."[133] In *People v. Tabora*,[134] an undercover police officer was permitted to testify not only to the drug sale that constituted the charged offense against a defendant, but also to defendant's prior sale of drugs to him, in order to complete the narrative as to how the charged transaction came

126 People v. Molineux, 61 N.E. 286 (N.Y. 1901).

127 *Id.* at 293-95.

128 *Id.* at 294.

129 *Id.*

130 *See* cases cited *supra* note 33.

131 *People v. Gines*, 335 N.E.2d 850 (N.Y. 1975), was one of the first cases where the New York Court of Appeals approved the admission, in a robbery trial, of the victim's testimony regarding a subsequently committed, but uncharged rape, on the grounds that it completed the victim's narrative of the entire episode and established her opportunity to identify defendant as her assailant.

132 498 N.Y.S.2d 422 (N.Y. App. Div. 1986).

133 *Id.* at 422.

134 527 N.Y.S.2d 36 (N.Y. App. Div. 1988).

about.[135] In *People v. Civitello*,[136] the court permitted the admission of evidence of the defendant's uncharged prior assaults against a witness in order to explain why the witness felt compelled to inform the authorities of defendant's charged activities.[137] In *People v. Bernard*,[138] where defendant was on trial for murder, witnesses were permitted to testify to defendant's many uncharged crimes as leader of their gang. The court found that the uncharged crimes were necessary to explain to the jury the unique relationship between defendant and the witnesses, who were by virtue of their common gang membership, privy to defendant's activities relevant to the charged crimes.[139] The common thread to each of these decisions appears to be a judgment that barring testimony regarding the uncharged offenses would render the witness's testimony subject to doubts that would not occur if the testimony was placed in proper context.

In relatively recent cases, the courts have utilized the context exception to admit past bad acts that a defendant has committed against a witness which have had the effect of emotionally warping the witness to such a degree that the witness's behavior would seem incredible without the contextual background. For example, in *People v. LeGrand*,[140] defendant, a cult leader, was accused of murdering two women during a party for the sixty-odd members of his "church."[141] One cult member, who acted as "guard" while the murders were being committed, testified on behalf of the prosecution, while another member of the cult confessed in open court to having committed the murders himself.[142] The trial court deemed it appropriate for the prosecution to prove by way of defendant's prior bad acts, the total domination and control that he had over members of his cult.[143] The trial court found, and the appellate court agreed, that it was only by way of these acts that a jury could understand whether these witnesses acted freely, both on the night of the murder and at the trial itself. More generally, the court found the acts necessary to explain why the defendant would not hesitate to murder in front of sixty potential witnesses.[144] In *LeGrand*, the uncharged acts so affected the witnesses that without the benefit of this context information, it is likely that the

135 *Id.* at 38.
136 543 N.Y.S.2d 1003 (N.Y. App. Div. 1989).
137 *Id.* at 1006.
138 637 N.Y.S.2d 692 (N.Y. App. Div. 1996).
139 *Id.*
140 431 N.Y.S.2d 850 (N.Y. App. Div. 1980).
141 *Id.* at 850-51.
142 *Id.* at 852.
143 *Id.*
144 *Id.*

jury would have flatly disbelieved the prosecution's account of the charged offenses.

Similar concern with context is evident in *People v. Steinberg*.[145] In *Steinberg*, the defendant was accused of killing his six year-old adopted daughter. Defendant's common-law wife testified at the trial that she saw the defendant carry the unconscious child out of the bedroom and lay her on the floor, and that he told the witness that he would take care of the child when he returned.[146] The witness further testified that she took no steps to aid the child while the defendant was away, but felt compelled to obey his instructions.[147] It was that feeling of compulsion that the court found required explanation, and to that end, it was necessary for the witness to explain that defendant had physically abused the witness for years, so severely that she lacked the free will to take any steps on behalf of her child.[148] Without this contextual information, the court held, the witness's testimony would seem "patently incredible."[149] In holding that the uncharged assaults were admissible, the court relied on the "ample case law" supporting the proposition that uncharged crime evidence may be used to support testimony that otherwise might be unbelievable or suspect.[150]

In a general sense, the *LeGrand* and *Steinberg* courts validated the proposition that "acts" do not have real meaning unless they are considered in their contextual setting, within the mutually interacting states of the participants.[151] More specifically, these decisions demonstrate that the context principle for admissibility of bad acts can include acts that emotionally warp and desensitize individuals who continue to interact with each other over time. As the victimizer's acts traumatize the victim, the victim exhibits aberrant behavior. By the time the charged acts occur, the victim's behavior is so abnormal that without explanation, a jury is likely to reject it out of hand.[152] The

145 573 N.Y.S.2d 965 (N.Y. App. Div. 1991), *aff'd*, 595 N.E.2d 845 (N.Y. 1992).

146 *Steinberg*, 573 N.Y.S.2d at 979.

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.* In its decision, the court relied on *People v. LeGrand*, 431 N.Y.S.2d 850 (N.Y. App. Div. 1980); *People v. Civitello*, 543 N.Y.S.2d 1003 (N.Y. App. Div. 1989); *People v. Fay*, 444 N.Y.S.2d 629 (N.Y. App. Div. 1981).

151 *See* Bruner, *supra* note 65, at 19.

152 For other cases in New York where courts used the context/narrative exception to fully define the relationship between an abusive defendant and his victims, see *People v. Shorey*, 568 N.Y.S.2d 436, 437 (N.Y. App. Div. 1991); *People v. Mendez*, 564 N.Y.S.2d 241 (N.Y. App. Div. 1990). For examples of cases where the exception has been utilized in other jurisdictions, see *People v. Abrams*, 631 N.E.2d 1312, 1320 (Ill. App. Ct. 1994); *State v. Currie*, 400 N.W.2d 361, 367 (Minn. Ct. App. 1987); *State v. Ryan*, 444 N.W.2d 610, 630 (Neb. 1989); *State v. Frost*, 577 A.2d 1282, 1291 (N.J. Super. Ct. App. Div. 1990); *State v. Young*, 346 S.E.2d 626, 636 (N.C. 1986); *State v. LaRock*, 470 S.E.2d 613, 631 (W. Va. 1996); *State v.*

parallels with a case like Anna B.'s seem immediately apparent.[153]

However, while the context/narrative exception as applied to cases outside the realm of intrafamilial sexual abuse has developed in a consistent way, the rules applied to this subset of cases have been much more inconsistent. The inconsistency does not stem from an initial misapplication of *Molineux* itself. Instead, it originates in the separate rules regarding sex crimes that have waxed and waned as *Molineux* has progressed, rules that have tracked society's changing views of women and children over the years.

While *Molineux* principles descended to American jurisprudence by way of the British courts, the early English courts did not prosecute offenses such as incest, fornication and adultery in the criminal courts.[154] Such matters were handled by ecclesiastical courts, which operated on the principle that these offenses related to status, that is to what the parties *were,* not what they had *done,* and were subject to proof by evidence of specific instances of sexual activity.[155] In such cases, proof of specific acts between the parties was deemed relevant to show their "lustful disposition," and thus to prove their illicit status.[156]

Because these courts had no jurisdiction in the American colonies, some of the colonies enacted statutes criminalizing incest, fornication and adultery.[157] However, it was not until the latter part of the 19th century that the women's rights movement began to lobby for enforcement of statutes to protect both women and children.[158] By that time, a dichotomy existed among those in authority[159] regarding child victims of sexual abuse. On the one hand, there was an outcry to protect women and children, who were viewed as virginal creatures who could easily be defiled by men, which led to stepped up enforcement of incest and statutory rape laws.[160] On the other, even many of

Shillcutt, 341 N.W.2d 716, 720 (Wis. Ct. App. 1983), *aff'd,* 350 N.W.2d 686 (Wis. 1984).

153 Scheppele suggests that placing the legal event itself, "the trouble," into context instead of confining the story to the event, is an approach in legal storytelling that tends to make "outsiders" more comprehensible to a legal audience. Kim Lane Scheppele, *Telling Stories,* 87 MICH. L. REV. 2073, 2097 (1989). To the extent that the law can begin to empower the outsider, the context/narrative exception is an evidentiary device that can be utilized for that purpose.

154 Reed, *supra* note 25, at 164.

155 *Id.* at 166.

156 *Id.*

157 *Id.*

158 GRAY, *supra* note 7, at 9; GORDON, *supra* note 65, at 27.

159 "Authority" refers chiefly to those middle-to-upper-class individuals who worked for social welfare institutions. These individuals most frequently interacted with perpetrators and victims of child abuse and were largely responsible for initiating and prosecuting child abuse cases in the courts. *See* GORDON, *supra* note 65, at 20, 37, 48, 52-55, 217.

160 Reed, *supra* note 25, at 168. *See also* Martha Minow, *Whatever Happened to Children's*

the early reformers had prudish views of incest victims as polluted and unredeemable.[161] It may be this latter view that prevented the courts from recognizing incest victims as true victims, distinguishable from adulterers and fornicators.[162] However, by adhering to the common law association, the courts also continued to make the defendant's "lustful disposition" a matter that could be proved at trial by way of uncharged crimes, despite *Molineux's* ban on proof of bad character.[163]

In 1914, The New York Court of Appeals appeared to resolve the inconsistency with *Molineux* by overtly validating, in prosecutions for adultery, seduction, statutory rape and incest, an uncharged crime exception, where the uncharged crime consisted of other sexual conduct between the defendant and complainant.[164] In *People v. Thompson*, a statutory rape case, the court approved the admission of the uncharged acts, because the conduct showed "the existence of a sexual passion between [the parties'] as elements in proving that they had illicit connection . . . on the dates charged."[165] While "passion" would seem interchangeable with "propensity," the court distanced the *Thompson* ruling from the prohibitions of *Molineux* in two respects: First, it deemed the uncharged acts "corroborative" of the charged crimes,[166] instead of demonstrative of defendant's propensity to commit the charged crimes. Second, by continuing to ascribe to the *victim* the same "passion" or "mutual disposition"[167] as the defendant, the court seemingly distanced its exception from the emphasis on the *defendant's* character that *Molineux* condemned.

However, while post-*Thompson* courts followed the rule of law set down in the case, the underpinnings distinguishing it from *Molineux*'s prohibition on proving bad character began to crumble. In the 1960s and 1970s, clinicians began to publicize their conclusions that victims of statutory rape and incest were unlikely to share a "passion" for their abusers.[168] By the 1980s, experts were beginning to testify in court

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Rights, 80 MINN. L. REV. 267, 278-79 (1995).

161 *See* GORDON, *supra* note 65, at 14, 215-16, 219.

162 People v. Freeman, 50 N.Y.S. 984, 987 (N.Y. App. Div.), *aff'd*, 50 N.E. 1120 (N.Y. 1898); Boyd v. State, 90 N.E. 355, 356 (Ohio 1909).

163 Reed, *supra* note 25, at 168.

164 People v. Thompson, 106 N.E. 78 (N.Y. 1914).

165 *Id.* (quoting Director of Public Prosecution v. Ball, 6 Crim. App. Rep. 31, 47 (Dec. 15, 1910) (Lord Chancellor)).

166 *Id.* at 79.

167 *Id.*

168 GRAY, *supra* note 7, at 12. Finkelhor examined the studies of the 1960s, 1970s and 1980s in his review of the research on child sexual abuse. He summarized this research by concluding that children are incapable of truly consenting to sex with adults, both because they don't know what they're consenting to, and because they don't have the true freedom

regarding children's traumatized responses to repeated acts of sexual abuse. These experts established that a defendant's sexual control over a child rendered the child more and more passive and less likely to resist or outcry against her abuser.[169] By 1985, the state legislature was so aware that sexual abuse engenders long-lasting trauma and not passion, that it authorized children's testimony over closed-circuit television in certain cases of child sexual abuse, where the victim would be demonstrably traumatized by testifying in the defendant's presence.[170]

Accordingly, the courts began to tone down the rhetoric of "mutual disposition." In *People v. Yonko*,[171] mutual passion was recharacterized as "the ongoing relationship and conduct between and among the parties . . . ."[172] In *People v. Fuller*,[173] mutuality receded entirely and mutated into a need to "show *defendant's* amorous design."[174]

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to say yes or no. FINKELHOR, *supra* note 7, at 17.

169 *See, e.g.*, People v. Keindl, 502 N.E.2d 577, 583 (N.Y. 1986); People v. Benjamin R., 481 N.Y.S.2d 827, 831-32 (N.Y. App. Div. 1984). Courts in many other jurisdictions also began admitting such testimony regarding the reactions and responses of children subjected to repeated sexual abuse. *See, e.g.*, Sexton v. State, 529 So. 2d 1041 (Ala. Crim. App. 1988); Rodriquez v. State, 741 P.2d 1200 (Alaska Ct. App. 1987); State v. Spigarolo, 556 A.2d 112 (Conn. 1989); Ward v. State, 519 So. 2d 1082 (Fla. Dist. Ct. App. 1988); People v. Beckley, 456 N.W.2d 391 (Mich. 1990); Smith v. State, 688 P.2d 326 (Nev. 1984); State v. Newman, 784 P.2d 1006 (N.M. Ct. App. 1989); State v. Bailey, 365 S.E.2d 651 (N.C. Ct. App. 1988); State v. Middleton, 657 P.2d 1215 (Or. 1983); State v. Hicks, 535 A.2d 776 (Vt. 1987); State v. Robinson, 431 N.W.2d 165 (Wis. 1988); Frenzel v. State, 849 P.2d 741 (Wyo. 1993).

170 N.Y. CRIM. PROC. LAW. §§ 65.00-.30 (McKinney 1992). New York's statutory provisions comport with the national trend to permit the use of closed-circuit television testimony in criminal child abuse proceedings in most states and the federal government. *See* 18 U.S.C. § 3509(b) (Supp. 1996); ALA. CODE § 15-23-3 (1995); ALASKA STAT. § 12.45.046 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 13-4251, 4253 (West Supp. 1996); CAL. PENAL CODE § 1347 (West Supp. 1997); CONN. GEN. STAT. § 54-86g (1994); DEL. CODE ANN. tit. 11, § 3514 (1995); FLA. STAT. ANN. § 92.54 (West Supp. 1997); GA. CODE ANN. § 17-8-55 (Supp. 1996); HAW. R. EVID. 616; IDAHO CODE § 19-3024A (Supp. 1996); 725 ILL. COMP. STAT. ANN. § 5/106B-5 (Supp. 1997); IND. CODE § 35-37-4-8 (Supp. 1996); IOWA CODE § 910A.14(1) (Supp. 1997); KAN. STAT. ANN. § 22-3434 (1995); KY. REV. STAT. ANN. § 421.350 (Banks-Baldwin 1993); LA. REV. STAT. ANN. § 15:283 (West 1992); MD. CODE ANN., CT. & JUD. PROC. § 9-102 (1995); MICH. COMP. LAWS § 600.2163a (Supp. 1997); MINN. STAT. § 595.02(4) (Supp. 1997); MISS. CODE ANN. § 13-1-403 (Supp. 1996); N.J. REV. STAT. § 2A:84A-32.4 (Supp. 1996); OHIO REV. CODE ANN. § 2907.41, 2937.11(B) (Anderson Supp. 1996); OKLA. STAT. ANN. tit. 22 § 753 (West 1992); OR. REV. STAT. § 40.460(24) (1995); R.I. GEN. LAWS § 11-37-13.2 (1994); S.D. CODIFIED LAWS §§ 26-8A-30, 31 (Supp. 1997); TEX. CRIM. P. CODE ANN. § 38.071 (West Supp. 1997); UTAH R. CRIM. PROC. 15.5(2); VT. R. EVID. 807; VA. CODE ANN. § 18.2-67.9 (Michie 1996); WASH. REV. CODE § 9A.44.150 (Supp. 1997).

171 316 N.E.2d 338 (N.Y. 1974).

172 *Id.* at 339.

173 409 N.E.2d 834 (N.Y. 1980).

174 *Id.* at 839 (emphasis added).

Ironically, it is this more appropriate way of viewing the child victim that seemed to underscore the *Lewis* decision in 1987,[175] which banned the admission of a defendant's uncharged sexual abuse of his victim in cases of statutory rape. Once "mutuality" disappeared, the Court of Appeals was left with the defendant's "amorous design," a phrase that no longer seemed so different from propensity; admitting uncharged sexual offenses for reasons of propensity seemed flatly violative of the *Molineux* rule. Indeed, the *Lewis* court held as much, concluding that "amorous design" could only be a legitimate exception to the *Molineux* rule when both the victim's and defendant's "amorous designs" were relevant to the charge.[176] Because a victim's consent is irrelevant in a case of statutory rape, the court stated, the uncharged prior crimes are also irrelevant.[177]

Nor did *Thompson*'s language of "corroboration" hold sway with the *Lewis* court. It found that corroboration of the victim's testimony was not necessary, since the legislature had removed corroboration requirements for child victims who were deemed competent to testify.[178] Even if it was required, the court did not find "the unsubstantiated accusations" of the child victim regarding uncharged crimes to be corroborative of the charged events.[179]

While abolishing "amorous design" or "lustful disposition" as an exception to the prohibition on uncharged crimes may have been logically appropriate under *Molineux*, the *Lewis* court effectively preempted consideration of the admissibility of these uncharged crimes pursuant to the developing context exception followed in *Gines* and *Ricotta*.[180] Indeed, the court made no attempt to determine whether or not the uncharged crimes could still be admissible pursuant to *any Molineux* exception, and the absolute language of the decision has prevented any court since *Lewis* from making that inquiry. Each case decided after *Lewis* has summarily reversed statutory rape convictions, even where uncharged crimes did establish the same kind of context considered admissible in *Steinberg* and *LeGrand*.[181]

The closest that the courts have come to reconsidering uncharged crimes in incest cases in light of the context exception oc-

175 *See* People v. Lewis, 506 N.E.2d 915, 918 (N.Y. 1987).

176 *Id.*

177 *Id.*

178 N.Y. CRIM. PROC. § 60.20 (McKinney 1993).

179 *Lewis*, 506 N.E.2d at 918.

180 People v. Gines, 335 N.E.2d 850 (N.Y. 1975); People v. Ricotta, 498 N.Y.S.2d 422 (N.Y. App. Div. 1986).

181 People v. Steinberg, 573 N.Y.S.2d 965 (N.Y. App. Div. 1991), *aff'd*, 595 N.E.2d 845 (N.Y. 1992); People v. LeGrand, 431 N.Y.S.2d 850 (N.Y. App. Div. 1980).

curred in the dissenting opinion in *People v. Singh*.[182] The majority opinion in *Singh*, like *Harris*, is notable for its dearth of information regarding the facts of the case. Beyond listing the charges,[183] the majority omitted any description at all of the kinds of acts defendant was charged with committing against his daughter, as well as any description of the five years worth of earlier uncharged crimes. As in *Harris*, such omissions enabled the court to apply the *Lewis* rule summarily without considering whether or not a context exception might apply.

The dissent pointed out the flaws in such a summary approach, emphasizing that when the nineteen-year-old complainant testified, she related a pattern of abuse that began many years before.[184] Through her testimony regarding the early uncharged offenses, the complainant established the dynamics of her relationship with the defendant, explaining both how these crimes continued to be committed against her and why she did not act to protect herself at an earlier date.[185] The dissent quoted the complainant's testimony to explain her failure to outcry until so many years had passed. The abuse:

> . . . started when I was a very little girl, and he led me to believe that I was supposed to be doing this. And, if I ever did state to him that I thought I shouldn't be doing this, he said that I was supposed to, he would fulfill all my needs. Once again, he made me feel very guilty, that I wasn't good enough for him, that I wasn't good enough, period.[186]

The dissent concluded that testimony like this about the uncharged offenses was necessary to truly show the defendant's dominance over the complainant, to explain her failure to outcry and to show how the crimes charged in the indictment were alleged to have actually been committed. To give this conclusion legal viability, the dissent relied on the context/narrative exception followed in other cases.[187] The dissent did not ignore *Lewis*, but it framed the case as precedent that abolished the "amorous design" exception in New York, not as precedent that precluded consideration of uncharged crimes under any other *Molineux* exception.[188]

It should not be considered accidental that *Singh*, decided in 1992, is one of the most recent cases in New York on the issue of uncharged crimes in long-term incest cases. The context exception,

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182 588 N.Y.S.2d 573, 577 (N.Y. App. Div. 1992) (Miller, J., dissenting).

183 *Id.* at 574.

184 *Id.* at 577 (Miller, J., dissenting).

185 *Id.* (Miller, J., dissenting).

186 *Id.* at 578 (Miller, J., dissenting).

187 *Id.* (Miller, J., dissenting) (referring to *People v. Steinberg*, 573 N.Y.S.2d 965 (N.Y. App. Div. 1991), *aff'd*, 595 N.E.2d 845 (N.Y. 1992); *People v. Shorey*, 568 N.Y.S.2d 436 (N.Y. App. Div. 1991); and *People v. Mendez*, 564 N.Y.S.2d 241 (N.Y. App. Div. 1990)).

188 *Id.* (Miller, J., dissenting).

while established before *Lewis* was decided, has become more accepted and relied upon in more recent years. To note this may explain in part the judicial blinders of the *Lewis* court. On the other hand, the drastic implications of *Lewis* for the credibility of a traumatized incest survivor makes reconsideration of the context exception both timely and appropriate.

IV. ASSESSING THE IMPACT OF *LEWIS* ON INCEST VICTIMS' PERCEIVED CREDIBILITY

The intuitive "that's not fair" that a prosecutor would inevitably cry at the result in *Harris* could be more easily dismissed as partisan grumbling, if the rule's deleterious effects on adolescent complainants' credibility were not so well supported by social science research into jury decision-making. Such research leads to the conclusion that a truncated narrative that does not comport with jurors' expectations or experiences is likely to be rejected out of hand. Jurors are likely to find witnesses putting forward these abbreviated narratives to be incredible.

Pennington and Hastie's important work on jury decision making[189] gives strong support for the principle that jurors organize the information they receive in a trial by imposing a story-type structure on that information. Such processing means that information that may come in bits and pieces from different witnesses, documents or physical evidence will be translated by jurors into a narrative, that is, a series of events or episodes that begins, peaks and resolves.[190] This encoding is more than mere process. Imposing a story structure on information is a comprehension strategy for understanding and assessing human action.[191] Once the juror assembles the story, he or she is able to compare it with knowledge that the juror has already encoded throughout his or her life.[192]

The "fit" of the trial story with the stories embedded in the per-

189 Nancy Pennington & Reid Hastie, *The Story Model*, 13 CARDOZO L. REV. 519 (1992). *See also* Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY AND SOC. PSYCHOL. 189 (1992); Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making: Effects of Memory Structure on Judgment*, 14 J. OF EXPERIMENTAL PSYCHOL. 521 (1988).

190 Pennington & Hastie, *The Story Model*, *supra* note 189, at 526.

191 *Id.* at 527.

192 *Id.* Pennington and Hastie's conclusions complement the view of cognitive psychologist Jerome Bruner, who advocates that what binds a culture together is not only its shared norms and beliefs, but its ability to explain deviations from those shared beliefs by use of narrative or storytelling. Bruner finds in cultural inhabitants a predisposition to organize experience into narrative forms and plot structures to make the happening of an event or events comprehensible. BRUNER, *supra* note 65, at 45-51.

sona of each juror is of critical importance in determining the outcome of a trial.[193] Not only do jurors examine trial stories for comprehensiveness and coherence, but they seek to match them with the stories and experiences of their own lives. Specific world knowledge about events similar to those in dispute will determine whether a particular interpretation is accepted or rejected.[194]

Pennington and Hastie's conclusions regarding the power and inevitability of story formation comports with the views of other scholars, social scientists and practitioners.[195] Thus, advocates attempt to weave evidence into a consistent story that is likely to mesh with jurors' own assessments of what is coherent and what comprehensively explains the evidence.[196] The simpler the story can be, that is, the less it deviates from the societal norm and requires explanation, the more likely it is to resonate with jurors' experiences and be accepted.[197]

The difficulty arises when evidence is not comprehensive enough to fall into a familiar narrative form. Where jurors perceive "gaps" in the storyline, they must return to their own worlds and "fill in" the trial narrative with inferred events which may have nothing to do with trial evidence.[198] Indeed, litigators exploit perceived gaps in their opponents' stories, by urging jurors to fill in these gaps with the juror's own fixed views of the world.[199] To the extent that the juror's world view is shaped by experiences, stereotypes or beliefs that contradict the narrative being offered, the tactic is likely to be successful.[200]

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193 Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55, 57 (1992).

194 Pennington & Hastie, *The Story Model*, *supra* note 189, at 529. Pennington and Hastie based their conclusion on simulated jury experiments where jurors rendered different verdicts over time even though the fact patterns presented were the same. The only difference in presentation was in the stories "attorneys" framed for the jurors based on those facts.

195 *See, e.g.*, W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGEMENT IN AMERICAN CULTURE 89-90 (1981); Amsterdam & Hertz, *supra* note 193. *See also* Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 462-77 (1995); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 688-89 (1994); Davis, *supra* note 81, at 11-12; Richard Lempert, *Experts, Stories and Information*, 87 NW. U. L. REV. 1169, 1175 (1993); Scheppele, *supra* note 153, at 2080-82.

196 Pennington & Hastie, *The Story Model*, *supra* note 189, at 522.

197 Amsterdam & Hertz, *supra* note 193, at 76; Sherwin, *supra* note 195, at 689.

198 Pennington & Hastie, *The Story Model*, *supra* note 189, at 536.

199 Sherwin, *supra* note 195, at 689.

200 Amsterdam and Hertz provide one example of this tactic in their analysis of a closing argument to a jury in a murder trial, where the sole issue was whether the defendant had the state of mind that made him guilty of murder (intent to kill) or manslaughter (recklessness). In that case, the defense was able to put forward to the jury its own narrative, in part by pointing out that the prosecutor's evidence of intent was ambiguous and far different from the stereotypical cold-blooded killer who kills for an identifiable motive, takes purposeful aim and punctuates the killing with a dramatic remark. In offering *this* portrait of an intentional killing, the defense substituted a stock story familiar through the popular

Is an acquittal under such circumstances "wrong" or "unjust?" I would suggest that where the "gap" results from a natural deficiency in the evidence it is neither. For example, a defense attorney tells jurors that a certain defendant, during a physical fight, killed a victim in self-defense. If the defendant has no apparent injuries or marks that would support the notion of a struggle, it is completely appropriate for jurors to rely on their own knowledge of brawling to decide whether or not such a scenario makes logical sense. Indeed, judges constantly instruct jurors to rely on their own experiences and knowledge in deciding whether or not a story is credible.[201]

However, if a rule of evidence excludes existing evidence that is an integral part of the storyline, the jury's dismissal of the narrative and subsequent acquittal of a defendant is less satisfactory. It is true that the rules of evidence are framed to avoid this result: Evidence is presumed admissible unless its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.[202] If the gap-filling evidence would be considered probative, the presumption weighs toward admission, unless a defendant demonstrates overriding prejudice.[203]

There are many specific examples of rules of evidence that, when considered within the paradigm of narrative or storyline, do preserve a story's integrity. For example, certain kinds of hearsay must be excluded from evidence, but such hearsay is admissible where it is necessary to explain a witness's state of mind and subsequent actions,[204] something that would be considered integral to a narrative line. Similarly, lay witnesses may not give opinions that jurors could reach themselves, and which, thus, would not be necessary to advance a narrative, but expert opinions are admissible when such opinions will give the jury the specialized knowledge that will allow it to interpret the "facts" of a case.[205] So too, in virtually all criminal cases, the courts bar evi-

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media, for the ambiguities in the prosecutor's case. Amsterdam & Hertz, *supra note* 193, at 59, 105-06.

201 *See* 1 CRIMINAL JURY INSTRUCTIONS, NEW YORK, *supra* note 6, § 7.02 (stating "[e]ach of you brings to this jury all the experience acquired in your private life. In your everyday affairs you make a judgment on the reliability or unreliability of statements made to you by others. The same tests which you apply in your everyday dealings should apply in your deliberations as jurors.").

202 *See* FED. R. EVID. 403.

203 *Id. See also* People v. Hudy, 535 N.E.2d 250, 267 (N.Y. 1988) (Wachtler, J., dissenting).

204 *See* FED. R. EVID. 803(3). *See also* People v. Ricco, 437 N.E.2d 1097 (N.Y. 1982); People v. Wood, 27 N.E. 362 (N.Y. 1891); People v. Goodman, 399 N.Y.S.2d 56, 57 (N.Y. App. Div. 1977).

205 *See* FED. R. EVID. 701, 702. *See also* People v. Cronin, 458 N.E.2d 351, 352-53 (N.Y. 1983); Doughery v. Milliken, 57 N.E. 757, 759 (N.Y. 1900). Indeed, Lempert argues that

dence of the victim's consistent after-the-fact renditions to police or other witnesses, unless to rebut suggestions of recent fabrication.[206] While helpful to a jury, such consistency is likely to be presumed until attacked, and hence, not integral to a storyline. Yet in sex crimes cases, the same courts permit testimony as to a victim's prompt outcry that she has been raped or sexually abused because "*it is natural to expect* that the outraged female will make prompt disclosure to a person upon whom she might rely."[207] The report thus becomes a part of the story itself.[208]

In contrast with the preceding examples, where the probative/prejudice balance still preserves a narrative storyline, the wholesale preclusion of early sexual behavior between defendant and complainant in long-term incest cases has such a devastating effect on narrative formation that jurors are denied the ability to render a just verdict based on the evidence. In fact, long-term incest cases uniquely require narrative development, and truncating such development can consistently render this kind of case unbelievable and unprovable.

A. THE NATURE OF THE LONG-TERM INCEST CASE

Not all criminal cases require a prolonged storyline structure for the crime itself to be understood by a jury. In many cases, the story of a crime is not in dispute, only the identity of the perpetrator. For example, where an intruder burglarizes a home in the middle of the night, assaults the victim, steals money and is apprehended days later, the defendant may not choose at trial to contest the fact of the burglary itself. Instead, the defense could attack the prosecution's contention that *this* defendant committed what is conceded is a crime. Narratives would undoubtedly be told throughout the course of this burglary trial, but there is little possibility that they would center on proof of or attack on the prosecution's claim that the victim was burglarized.[209] So too, in deliberations the jury would be unlikely to debate the story of the crime itself; that story would be accepted as given.[210]

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the importance of expert testimony lies in the expert's ability to fill in gaps in a narrative line. *See* Lempert, *supra* note 195, at 1175-76.

206 *See* People v. Davis, 376 N.E.2d 901, 905 (N.Y. 1978); People v. Coffey, 182 N.E.2d 92, 94 (N.Y. 1962).

207 WILLLIAM RICHARDSON, LAW OF EVIDENCE § 292 (8th ed. 1955) (emphasis added).

208 While he does not directly address the narrative paradigm, Imwinkelried has suggested that the most important evidentiary concept is "logical relevance," and that logical relevance transcends each specific rule. IMWINKELRIED, *supra* note 25, at ix.

209 Such narratives are likely to center on the victim's ability to observe and later identify the perpetrator or on the investigatory techniques of the police.

210 Pennington and Hastie suggest that where the issue in a criminal case is solely the

However, in long-term incest cases, there is no defense of mistaken identity. Jurors are called upon to decide whether the prosecution's narrative of the crimes themselves could have, in fact, occurred. This, in turn requires an assessment of the description of the charged events. Lawyers will argue over, and jurors will scrutinize, particular components of the story, such as whether or not others who lived in the home should have been aware; whether the victim could have acquired her knowledge of sexual acts in another way; whether her reasons for keeping the incest secret sound plausible. Once the jury's attention is focused on the story of the crimes as presented by the prosecution, the standard of proof beyond a reasonable doubt requires that the story be comprehensive and coherent.[211] To the extent that necessary contextual information is omitted, the narrative becomes less comprehensive, less coherent and less credible.[212]

B. THE TELLER OF THE TALE AND THE INCEST DYNAMIC

While technically it is always the prosecution's burden to present the story of the crime, the one-witness nature of long-term incest cases places the storytelling burden squarely on the shoulders of the adolescent complainant-victim. In this respect too, long-term sexual abuse differs from other kinds of crimes, which may take place in front of witnesses or produce physical evidence.[213] In these cases, where the jury hears a largely uncorroborated storyline, a double burden exists: both the story and the teller must comport with the expectations a jury would have about both sexual abuse and the victims of sexual abuse.[214] Because such victims are so often subject to attack on their

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identity of the perpetrator, story creation analysis may not be descriptive of the way jurors process information. Pennington & Hastie, *The Story Model*, *supra* note 189, at 551. On the other hand, where the decision in a criminal case rises and falls based on the credibility of witnesses, jurors will frequently tell themselves stories, invoking assumptions that correspond with their cultural communities. *See* Cammack, *supra* note 195, at 479.

211 In this regard, long-term sexual abuse is not unique. Virtually any kind of criminal charge can support a "what happened" defense. However, long-term incest cases are *never* "who did it cases," and always involve a determination of the child's credibility in making her accusations.

212 Bruner states that for narrative to resolve deviation from the norm in a comprehensible fashion, the teller must be able to relate a narrative not just sentence by sentence or event by event, but within whatever cultural framework is necessary to allow the teller to share her interpretation of the events with the listener. *See* BRUNER, *supra* note 65, at 64.

213 *See supra* notes 69-72 and accompanying text. *See also* Myers et al., *supra* note 18, at 37-45.

214 Child victims of long-term sexual abuse are similar, in this regard, to adult victims of rape or sexual harrassment. For further exploration of the "he said-she said" nature of these cases, see Scheppele, *supra* note 82. For discussion as to how the law diminishes "non-traditional" acquaintance rape victims, see Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

character, temperament and honesty, it becomes even more important for the young victim to testify comprehensively—to fully explain the pattern of abuse the defendant has subjected her to.[215]

Teenage girls are particularly vulnerable to negative judgments regarding their credibility. In simulated sexual abuse trials where only the age of the victim was manipulated, researchers found that jurors tended to find girls over twelve years of age to be significantly less credible than adolescent girls under the age of twelve.[216] As researchers polled their jurors, they found that as victims entered adolescence, jurors perceived them as partly responsible for the abuse they were subjected to, and that belief correlated with a decrease in their perceived credibility.[217] This correlation held with a significant number of jurors, even when consent was not an issue at trial, and the jurors were specifically instructed to that effect.[218]

In this respect, the skepticism people demonstrate toward teenage sexual abuse victims is similar to the skepticism that greets adult victims of acquaintance rape.[219] However, even if adult women face serious obstacles in pressing claims of rape, teenage incest victims face even more. For in the case of a defendant accused of raping an adult woman, consent *is* a defense and it is within the jury's purview to consider evidence of the victim's consent.[220] In long-term incest cases, which are brought primarily under statutory rape provisions, and where jurors are specifically instructed that "consent" of the victim is irrelevant, attributions of responsibility to the victim are inappropriate.

The incest dynamic itself can also affect the credibility of the trau-

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215 Lempert suggests that when juries are *unaware* of the stories that can plausibly explain witness testimony, a jury is unlikely to merely defer to the witness, and more likely to disregard the testimony. Lempert, *supra* note 195, at 1177.

216 *See* Isquith et al., *supra* note 11, at 203, 204-07.

217 *Id.* at 209.

218 *Id.* at 223. Indeed, one study suggested that an extremely explicit instruction could cause a "boomerang effect" where jurors would find teenage complainants even less credible. *Id.* at 216-22. The authors hypothesize that jurors who find their freedom infringed react to restore that freedom in "acceptable" ways, here by finding such complainants to be more suggestible. *Id.* at 221.

219 *See* Bette Bottoms, *Individual Differences in Perceptions of Child Sexual Assault Victims, in* CHILD VICTIMS, CHILD WITNESSES, *supra* note 9, at 233. Attributions of responsibility to the victims of acquaintance rape and sexual harrassment underlie some of the gender rape myths that women will lie to hide their sexual complicity or that they confuse the truth with sexual fantasies of rape. *See also* Coombs, *supra* note 82, at 282; Estrich, *supra* note 214, at 1140-41.

220 *See* N.Y. PENAL. LAW §§ 130.00(8), 130.35(1) (McKinney 1987). To prove first degree rape, the State must prove that a defendant acted by means of forcible compulsion, which is defined as "use of physical force; or . . . a threat, express or implied, which places a person in fear of immediate death or physical injury to . . . herself . . . or in fear that . . . she . . . will immediately be kidnapped." *Id.* § 130.00(8).

matized teenage storyteller, because such victims do not tend to testify in ways that jurors would typically expect. Just as victims of long-term abuse tend to become more passive over time with their abusers, so too can they withdraw from others; they are plagued by low self-esteem, and their communication and social skills are often weak.[221] Jurors who expect an incest survivor to relate a narrative in an expressive, direct and tearful way are likely to be disappointed. On the contrary, it is entirely likely to see such a witness testify flatly, without emotion, tears or even eye contact.[222] While some prosecutors might elect to call expert witnesses to try to educate the jury as to the link between trauma and demeanor,[223] such experts might be of limited use with a jury pool that has educated itself by way of "L.A. Law" and the sexual abuse TV movie of the week.[224]

Finally, severe trauma from long-term molestation can also cause a victim to recant her allegations prior to trial. Recantations can occur as a result of pressure applied to a young victim by other family members, but they can also arise from the traumatized victim's own desire after her outcry, to preserve the family unit.[225] Assuming that the victim regains the strength to pursue her initial complaint, the fact of her recantation becomes one more incongruity that is difficult to explain without reference to the entire pattern of the sexual acts.

Underlying all these obstacles facing the adolescent complainant are the stock stories or negative stereotypes that consistently portray teenage girls in a negative light. Indeed, media and popular culture consistently portray adolescent girls as conniving, would-be seductresses of unwary men.[226] The few actual cases where the evidence

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221 *See* Sgroi et al., *supra* note 95, at 112-20.

222 Gray's trial observers found that in one-third of the observed trials involving children of all ages and sexual abuse of varying degree and length, children described the abuse flatly, that in a significant number of trials observed, the victims avoided any kind of eye contact, and that children broke down and cried in only 14% of observed cases. GRAY, *supra* note 7, at 156. In the more severe and long-term cases of sexual abuse, these passive reactions could be even more prevalent.

223 In order for such expert testimony to be placed before the jury in a state like New York, the trial court would have to rule that a victim's flat demeanor is explained by Accommodation Syndrome and that jurors would not normally expect this demeanor from one who has been repeatedly sexually abused. *See* People v. Taylor, 552 N.E.2d 131, 135-36 (N.Y. 1990); People v. Keindl, 502 N.E.2d 574, 583 (N.Y. 1986).

224 Once internalized, these stereotypes or schemata resist change. People tend to avoid and discount conflicting information, and seek out corroboration of the stereotype. *See* Ronald A. Farrell & Malcolm D. Holmes, *The Social And Cognitive Structure Of Legal Decision-making*, 32 THE SOC. Q. 529, 533 (1991).

225 *See* Sgroi et al., *supra* note 95, at 24-26; CSAAS, *supra* note 11, at 188.

226 See JOSEPH W. REED, AMERICAN SCENARIOS: THE USES OF FILM GENRE 144-46 (1989), for a description of the sexually promiscuous teenaged girls and helpless older men that populate the "high school genre" in film. Reed also notes the presence of the "vicious girl clique" that plots against the innocent protagonist(s). *Id.* at 155.

suggests that adults were wrongfully accused of molestation, primarily in the daycare area, receive so much publicity that it is easy to expand upon them to negatively generalize about children and adolescents.[227]

That people internalize these stereotypes is not necessarily blameworthy; stereotypes are important organizing structures that provide the holders with a manageable way to view the world.[228] However, while the thought process itself should not be condemned, the courts should correct the legal inequity that exacerbates the process's negative result. It defeats the truth-finding function of the jury when defense attorneys can routinely tap into these pre-existing stereotypes without giving the victims the opportunities to provide the context that might level the playing field.

Absent this context, jurors' unfounded adoption of the stock stories will not only affect their perception of the victim's credibility, but will also play into the competing narrative that the defense will generally put forward in a long-term incest case.[229] That is, a defendant will, through cross-examination of prosecution witnesses or through defense witnesses, tell the jury a story as to why the victim should not be believed.[230] Where narratives compete in such a head-to-head way, jurors will look for the one that "rings true" in terms of their own

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227 *See supra* note 15 and accompanying text. For additional examples of media stories focusing on false allegations by children, see William Claiborne, *No 'Healing' in Wenatchee; Girl's Change of Testimony Rekindles Charges of Witch Hunt in Sex-Ring Case*, WASH. POST, June 14, 1996, at A1; Jack Puerling, *What Happened to Innocent Until Proven Guilty of a Crime? Proposed Legislation Makes It Easier to Falsely Accuse People of Child Abuse*, MILWAUKEE J. & SENTINEL, Dec. 20, 1995, at 17.

228 *See* Farrell & Holmes, *supra* note 224, at 532.

229 The defense attorney in the *Harris* case capitalized on such stock storytelling in his questioning of witnesses regarding Anna's "boyfriend." *See supra* notes 76-78 and accompanying text. Such questioning is common. In another case where the State alleged that a fourteen year old girl had been raped and sexually abused by her stepfather, the defense attorney ended his cross examination of the complainant by attempting to suggest that her accusations were made to mask her own promiscuity:

Q: Do you know somebody named Fabian?
A: Yes.
Q: Did you have a boyfriend named Fabian?
A: No. Fabian was never my boyfriend.
Q: Did Fabian go to school with you?
A: Yes.
Q: And did you and [your older brother] Jorge at one point go to the school for Jorge to speak to Fabian about you having him as a boyfriend?
A: No, that is not true.
Q: Was there a conversation that Jorge went to school to have with Fabian?
A: No.

Transcript at 85, People v. Martin Narranjo (Kings County Indictment No. 1173/90) (tried Oct. 31, 1990) (on file with author).

230 *See, e.g.*, People v. Porcaro, 160 N.E.2d 488 (N.Y. 1959); People v. Respass, 623 N.Y.S.2d 337 (N.Y. App. Div. 1995), *rev'd*, 653 N.E.2d 635 (N.Y. 1995); People v. Greenhagen, 433 N.Y.S.2d 683, 684, (N.Y. App. Div. 1980).

experiences.[231] If the child's narrative is truncated in such a way as to raise skepticism regarding the child's credibility, the competing narrative is that much more likely to be accepted.

C. THE ADVANTAGES DEFENDANTS HAVE OVER COMPLAINANTS IN CREATING COMPETING NARRATIVES

A defendant in a case of long-term sexual abuse has advantages over a complainant in the construction of a competing narrative. First, a defendant has the advantage of simplicity. As much as a prosecutor will try to simplify a narrative of continuing incest, this kind of storyline is not subject to simplification. Even where a jury can view the entire pattern of abuse, jurors must still attend to dates and descriptions of sexual acts, remember who was present in the house for each act described, and scrutinize any threats of force or retaliation that a defendant might have made, either in the beginning or over time. In addition, jurors must attempt to understand and accept the underlying dynamic that would explain the defendant's acts, the victim's trauma and her subsequent responses.

A defendant putting forward a competing narrative need not make any attempt to refute the allegations on a date-by-date basis or attempt to explain his own psychology. He need only generally deny the allegations (through himself or his attorney), and either explicitly give or implicitly suggest to the jury a reason as to why the complainant would make a false allegation.[232] Since these reasons will generally capitalize on myth and stereotype, they have the advantage of simplicity:[233] The victim was a rebellious teenager trying to get back at a disciplinarian defendant;[234] she blamed defendant for acts she con-

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231 Pennington and Hastie found that jurors who heard competing narratives, or "both sides of the story," tended to be more confident in their decisions than jurors who heard only one side. Pennington & Hastie, *The Story Model*, *supra* note 189, at 543. Such "confidence" would seem to exacerbate any discomfort jurors might have with a truncated or partial narrative.

232 Again, the parallel to adult victims of acquaintance rape is apparent. *See* Coombs, *supra* note 82, at 282.

233 *Id.*

234 *See, e.g.*, Soper v. State, 731 P.2d 587, 589 (Alaska Ct. App. 1987) (defendant claimed that complainant had always been a problem child, and that she had run away from home because of her inability to get along with her family); *Respass*, 623 N.Y.S.2d at 337 (defendant claimed that complainant had always hated him and was therefore fabricating charges against him); People v. Karst, 560 N.Y.S.2d 577, 578 (N.Y. App. Div. 1990) (defendant claimed that complainant was a troubled child who made up her allegations out of anger and to get attention); People v. Laundry, 504 N.Y.S.2d 840, 841 (N.Y. App. Div. 1986) (defendant argued that complainant fabricated charges to gain sympathy from a relative); *Greenhagen*, 433 N.Y.S.2d at 683 (defendant argued that complainant made up her allegations in part, because he enforced strict rules about her dating).

sensually engaged in with a boyfriend;[235] she accused him, because her mother put her up to it.[236] These stories are so simple that if an inexplicable gap exists in the complainant's storyline, the competing narrative is likely to ring true to many jurors.[237]

Second, in devising a competing narrative, a defendant often can capitalize on the trauma that he has inflicted upon his victim because that trauma can cause the complainant to engage in negative behavior. Repeated and constant sexual abuse can cause victims to react by being rebellious and hostile at home, or by running away from home.[238] Victims of this kind of abuse *can* become sexually promiscuous out of a belief that it is the only way to get attention or love.[239] A defendant who has brought about such behavior by way of his own crimes can thus reap benefits: He can give his narrative enough "smoke" based on actual events to direct the listener to adopt his story of false accusation.[240]

In a system where the jury must decide between competing stories, the only viable way to proceed is to let each party put his or her narrative before the jury. However, in so doing, it becomes crucial to permit the victim to give the jury enough background into the charged offenses to illuminate the context within which the abuse occurred. Only at that point can jurors intelligently judge whether the narrative itself makes logical sense and whether the teller of the tale is credible.

V. EXPLORING THE CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME AS A PARADIGM FOR CONTEXT

Once it is apparent that a victim of long-term incest may be placed at a significant disadvantage, one that is legally inconsistent

235 *See, e.g.*, People v. Martin Narranjo (Kings County Indictment No. 1173/90) (tried Oct. 31, 1990). *See also* the discussion of *People v. Harris*, *supra* notes 76-78; Lloyd v. State, No. 239-1990, 1991 WL 247737, at *1 (Del. Super. Ct. Nov. 6, 1991) (unpublished disposition) (defendant claimed that complainant fabricated allegations due in part to his animus against her boyfriend).

236 *See, e.g.*, State v. Getz, 538 A.2d 726 (Del. 1988) (defendant argued that his wife used the complainant to create a misconduct ground for their divorce); People v. Porcaro, 160 N.E.2d 488, 492 (N.Y. 1995) (defendant claimed that child's mother manipulated child into making allegations); People v. Williams, 591 N.Y.S.2d 390, 391 (N.Y. App. Div. 1992) (defendant claimed that complainant's mother, under the influence of hallucinations, persuaded the child to fabricate charges).

237 This result is consistent with those theorists who argue that the stories of "outsiders" are routinely excluded from the courtroom. *See* Scheppele, *supra* note 153, at 2084.

238 *See CSAAS*, *supra* note 11, at 186; Goodwin et al., *supra* note 12, at 23.

239 *See CSAAS*, *supra* note 11, at 186.

240 For an exploration as to how male defendants exploit weaknesses in the narratives of complainants in rape and sexual harrassment cases to further their own narratives of false accusation, see generally Scheppele, *supra* note 82.

with the context exception to *Molineux*, the challenge lies in determining the limits of the incest storyline. How far back in time should a court go in determining that previous acts should be admitted as necessary context information?

Emphasizing the need for a full narrative is inherently problematic because a story can begin and end anywhere that the teller deems appropriate.[241] Stories consist of events that take place among actors, which in turn give rise to new events.[242] In fact, narrative episodes can continue not only as the actors continue to interact, but even after they stop.[243] This lack of "natural" beginnings and "natural" endings[244] is particularly evident in attempting to determine the story of a crime committed within a family, where the parties act and react to each other years before and years after the actual "crime" occurs.

Theoretically, a narrative of long-term sexual abuse could "begin" during defendant's childhood, well before the victim is even born, and these events could foreshadow defendant's later molestation of his own child. Yet, while such a narrative might be psychologically illuminating,[245] few would argue that it would or should be within the bounds of admissible evidence.

I suggest that we look back at the difficulty facing the incest complainant in presenting her narrative, to seek some limits as to the narrative's "beginning" and "end." That is, the unfairness of *Harris* and *Singh* is that the curtain rises on the victim's unexplained and inconceivable passivity: her cooperation with her assailant in particularly violative acts; her failure to prevent their reoccurrence; and her failure to disclose the acts to anyone. In determining what, if any, prior conduct the jury should learn of, a court should focus on conduct that will help the jury understand the array of forces that have caused this passivity. Drawing this line in the sand is also consistent with the context exception to the *Molineux* rule, which would deem prior conduct probative if it is necessary to explain the actions and reactions of the defendant[246] or the complaining witness.[247] Thus, before trial, upon

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241 *See* Anthony G. Amsterdam, *Excerpts From the Files of a Never-Published Article on* Prigg v. Pennsylvania *and* Freeman v. Pitts *as Narratives with an Invitation to a Campfire*, 31-32 (unpublished manuscript on file with author).

242 *See* Amsterdam & Hertz, *supra* note 193, at 63 n.19.

243 For example, in a long-term incest setting, events that occur between defendant and complainant that give rise to the complainant's outcry can prompt resentment among family members, even after defendant and complainant no longer have contact. If family members pressure the complainant to recant or go out of their way to demean the complainant, this, in turn, can affect the story of the trial itself.

244 Amsterdam, *supra* note 241, at 31.

245 *See, e.g.*, FOX BUTTERFIELD, ALL GOD'S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE (1995); *see also* MIKAL GILMORE, SHOT IN THE HEART (1994).

246 *See* People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930).

motion of the prosecutor, the trial court should determine whether the complainant's description of the charged events would sound patently improbable without contextual explanation.

Once a court has made that determination and finds that the complainant's narrative requires further explanation, the Accommodation Syndrome is a paradigm that can effectively guide a trial judge seeking to determine the limits of admissibility of uncharged sexual acts.[248] The Accommodation Syndrome, at its most basic, illustrates that early acts of incest can cause a victim to become passive and accommodating, even to escalated levels of abuse.[249] The syndrome thus demonstrates how early events explain and give context to later events. Therefore, if, in a given case, the uncharged background demonstrates how the victim's otherwise unexplained passivity developed, a judge should find that a contextual basis for admission of the accompanying acts exists.[250]

Using the example of the *Harris* case, it would be appropriate for the judge to conclude, much as she did in this case, that Anna's passive acceptance of shocking sexual exploitation, along with her failure to outcry, require contextual explanation. She could next determine that Anna's responses were shaped by: (1) her young age at the time the abuse began;[251] (2) defendant's initial threats to secure her secrecy;[252] (3) his constant access, which permitted him to continue to abuse her;[253] (4) her accommodation, which permitted him to escalate the abuse;[254] (5) her mother's rebuff of Anna's one attempt at disclosure;[255] and (6) her mother's complete betrayal by becoming an

247 *See* People v. LeGrand, 431 N.Y.S.2d 850 (N.Y. App. Div. 1980).

248 For purposes of this article, I assume that the trial judge would be sufficiently knowledgeable about the Accommodation Syndrome to determine the admissibility of uncharged crimes *in limine*, without the need for expert testimony. However, the *in limine* nature of the determination does afford the trial court the opportunity to take expert testimony regarding the Accommodation Syndrome, compare the charged and uncharged crimes and reach a decision, if necessary.

249 *See CSAAS supra* note 11, at 184-85; *see also Abuse of CSAAS, supra* note 16, at 154-55.

250 The Accommodation Syndrome has been criticized by some who see it being misused as a diagnostic tool. Summit himself cautioned against prosecutors' use of the syndrome in court as *proof* that a child has been sexually abused, considering it invasive of the jury's function to determine the truth of the allegations. *See Abuse of CSAAS, supra* note 16, at 157-58. However, description of the accommodation pattern does rebut myths which might prejudice or preclude an understanding of a victim's accommodation, passivity and delayed or inconsistent disclosure. *Id.* at 160. In this respect, the Accommodation Syndrome is contextually important.

251 *See* Transcript Record at 8, *Harris* (No. 3357/86).

252 *Id.* at 14, 35.

253 *Id.* at 7, 10, 15.

254 *Id.* at 16, 17-19.

255 *Id.* at 14-15.

abuser as well.[256] Once a judge reached such a conclusion, the decision to admit the illustrative acts as necessary context logically follows.

More generally, using this paradigm, a judge can consider whether the early acts might have shaped the charged crimes. Do they show how the perpetrator was able to secure his victim's secrecy? Were there enough of them to engender feelings of helplessness on the part of the victim? Do the acts demonstrate the child's increasing passivity? Did the child make any attempts at disclosure that were rebuffed? If the child subsequent to disclosure recanted, were there obvious pressures on her to do so? If any of these questions can be answered in the affirmative, the uncharged acts may be probative.

The courts' willingness to permit experts to testify in a limited fashion to the existence of Accommodation Syndrome[257] suggests not only that a growing understanding of the psychological components of child molestation is making its way into the courtroom,[258] but also that the syndrome's validity as a tool to develop a true incest narrative would be well-founded. Under the current practice in most jurisdictions,[259] experts are already permitted to testify regarding the syndrome much in the way suggested by Summit: not as a diagnosis of sexual abuse, but to disabuse jurors of myths they might hold as to how sexually abused children should act.[260] The expert may make no judgments regarding the child's allegations. Such judgments are the sole province of the jury.[261]

If an expert can already testify about the Accommodation Syndrome, is testimony regarding uncharged crimes still necessary? Yes. First, an expert is much less likely to be called to testify where her testimony will seem to be at odds with the child complainant. If a child cannot testify regarding the origin and development of the

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256 *Id.* at 17-18.

257 *See* People v. Benjamin R., 418 N.Y.S.2d 827, 832 (N.Y. App. Div. 1984); *see also* People v. Ivory, 556 N.Y.S.2d 742, 743 (N.Y. App. Div. 1990).

258 Earlier judicial interpretation of the statutory sex offenses considered each act of sexual abuse as a separate and discrete act, without connection. *See* People v. Keindl, 502 N.E.2d 577, 581-82 (N.Y. 1986); People v. Beauchamp, 532 N.E.2d 111, 114 (N.Y. App. Div. 1988).

259 The overwhelming majority of jurisdictions will allow testimony based on the Accommodation Syndrome when it is used to explain the significance of the child complainant's seemingly self-impeaching behavior, such as delayed reporting or recantation. *See* Askowitz & Graham, *supra* note 18, at 2040 n.57.

260 *See* People v. Taylor, 552 N.E.2d 131, 136 (N.Y. 1990); *Ivory*, 556 N.Y.S.2d at 743.

261 To permit the expert to give a diagnostic opinion is seen as exceeding the bounds of jury education and allowing the expert to decide the ultimate issue in the case. *See Taylor*, 552 N.E.2d at 138-39; *see also* Russell v. State, 712 S.W.2d 916 (Ark. 1986); Powell v. State, 527 A.2d 276 (Del. Super. Ct. 1987); Allison v. State, 353 S.E.2d 805 (Ga. 1987); State v. Williams, 858 S.W.2d 796 (Mo. App. 1993); State v. Catsam, 534 A.2d 184 (Vt. 1987); State v. Hazeltine, 352 N.W.2d 673 (Wis. Ct. App. 1984).

charged acts of sexual abuse, her truncated narrative is likely to conflict with that of the expert, who must explain the Accommodation pattern from the beginning. For example, an expert who would testify as to how accommodation develops over time would appear to be in conflict with Anna B., who, if restricted to the charged crimes, appears completely passive from the "beginning." In fact, in such a case, expert testimony would likely exacerbate doubts regarding the credibility of the adolescent complainant.

Second, the role of the expert is likely to be misunderstood by jurors, who would expect her to be offering information about the complainant in the case. This is exactly what the expert cannot do, since she cannot meet with the child or offer any opinion as to the allegations. The expert is therefore vulnerable to a defense narrative that again hurts the complainant: the hired gun who speaks without knowledge of "the facts."[262]

Third, general information regarding the Accommodation Syndrome does not provide the specific context for the particular case at issue. If a narrative is an episodic set of actions and reactions among *actors*, an expert can only substitute hypothetical (albeit likely) possibilities for actual events. Such general testimony would thus seem more likely to invite speculation than it would to shed light on the charged acts.

Thus, the better practice would be to let the child victim provide the factual context for the charged abuse. Admitting the uncharged crimes for this purpose redresses the wrong done to the child, and may at the same time preempt the need for an expert to testify at all.[263] If the child can provide a clear context for the charged acts, a judge could well conclude that the jury does not need the assistance of an expert to determine the facts in issue.[264]

In fact, in cases like *LeGrand* and *Steinberg*, the decision to admit prior uncharged bad acts appears to stem from just this kind of judicial approach. In those cases, the courts recognized that the witnesses

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262 While little research has been conducted to determine the weight jurors give experts in cases of child sexual abuse, in the areas of battered woman syndrome and rape trauma syndrome, research does indicate that jurors are somewhat skeptical of experts. *See* Askowitz & Graham, *supra* note 18, at 2095-96.

263 The use of expert testimony has been sharply criticized because in some jurisdictions the Accommodation Syndrome or other "syndromes" are misrepresented as *diagnostic* of child sexual abuse in particular cases. *See id.* at 2044-47, 2048 n.101.

264 Current opinion is divided as to whether or not the public has become knowledgeable enough about child sexual abuse as to render expert testimony unnecessary. *Id.* at 2093-94. However, if the child is not sufficiently articulate to make the narrative comprehensible to jurors, an expert can assist in making the accommodation narrative understandable to them.

had traumatizing relationships with their respective defendants, relationships that prevented the witnesses from being able to react or respond to the violence of the charged offenses. The courts further recognized that unless the witnesses could testify to the full character of the past relationships, their testimony regarding the charged offenses would be considered inexplicable and hence incredible. Both courts, in allowing testimony regarding the defendants' uncharged crimes, thus linked the explanation of the deviant relationship with the context exception to *Molineux.* Traumatized victims of long-term sexual abuse merit equal treatment.

Indeed, in some jurisdictions the courts *have* explicitly designated as probative prior uncharged acts of sexual abuse between defendant and complainant, where these acts tended, consistent with the Accommodation Syndrome, to clarify a complainant's otherwise "inexplicable" behavior.[265] In *Pounds v. United States,* the District of Columbia court found that prior acts of incest between a defendant and his fourteen year old daughter were highly probative, in part because it was important to explain complainant's failure to inform her mother, her apparent lack of hysteria or trauma when she did disclose and her matter-of-fact way of describing the charged incidents.[266] In admitting the evidence, the court viewed the uncharged crimes as akin to situations where the evidence is inextricably interwoven with the charged crimes.[267] In *State v. McKay,*[268] where a defendant was charged with one incident of sexually abusing his fifteen year old stepdaughter, an Oregon court held that the complainant could testify to two years of uncharged incidents of sexual abuse.[269] The court found that the uncharged crimes provided necessary context since they showed that the charged incident did not happen "out of the blue," which a jury could find incredible.[270] In *State v. G.S.,* a New Jersey appellate court found uncharged acts of sexual abuse more probative than prejudicial, because of their high value in explaining the victim's failure to outcry.[271]

In Alaska and Michigan, the courts have consistently found that

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265 *See* Pounds v. United States, 529 A.2d 791, 795 (D.C. 1987).

266 *Id.*

267 *Id.*

268 776 P.2d 1316 (Or. Ct. App. 1989), *aff'd,* 787 P.2d 479 (Or. 1990).

269 *Id.*

270 *Id.*

271 State v. G.S., 650 A.2d 819, 824 (N.J. Super. Ct. App. Div. 1994). For additional cases where courts have admitted uncharged crimes to give necessary context to the charged offenses, see *People v. Calcagno,* 574 N.E.2d 420 (Mass. App. Ct. 1991); *People v. Volstad,* 287 N.W.2d 660 (Minn. 1980); *People v. Diaz,* 558 N.E.2d 1363 (Ill. App. Ct. 1990).

their state rule equivalents of *Molineux*[272] include a context exception in cases of long-term sexual abuse. In *Covington v. State*,[273] for example, the Alaska appellate court found proper the trial court's admission of three years of early, uncharged incest acts that defendant committed against his daughter. In recounting the facts of the case, the court noted that the charged acts began only *after* complainant had moved into defendant's bedroom and the two were engaging in sexual intercourse on a nightly basis.[274] The court, relying on *Burke v. State*,[275] found that the uncharged crimes placed the victim's testimony in context by indicating why she would so readily acquiesce to the defendant's demands.[276] Similarly, in the Michigan case of *People v. Demartzex*,[277] the court found that where uncharged crimes provide "a link in the chain of testimony," without which the complainant could be deemed incredible, they should be admitted.[278] Since *Demartzex*, the Michigan courts have regularly admitted uncharged crimes in child sexual abuse cases, where they provide context for the charged offenses.[279]

Certainly, not all cases of long-term sexual abuse will require contextual clarification. In those cases where a complainant does not exhibit severely traumatized responses, or where enough of the pattern of abuse is evident by way of charged offenses, a court should retain the discretion to find that uncharged crimes are not sufficiently probative to warrant admission.[280] The Accommodation paradigm is useful in that small subset of the most severe cases, where a child complainant has been so traumatized by acts of sexual abuse that her responses and behavior seem incredible without contextual clarification. In this class of cases, the paradigm illustrates the link between past acts and present behavior. The trial judge who wishes to go no further than to admit those bad acts which explain otherwise un-

272 Both states have adopted Federal Rule of Evidence 404(b) into their state evidentiary codes. *See* ALASKA R. EVID. 404(b); MICH. R. EVID. 404(b).

273 703 P.2d 436, 441 (Alaska Ct. App. 1985).

274 *Id.* at 438.

275 624 P.2d 1240 (Alaska 1980).

276 Covington v. State, 703 P.2d 436, 441 (Alaska Ct. App. 1985), *cert. denied*, 114 S. Ct. 2763 (1994).

277 213 N.W.2d 97 (Mich. 1973).

278 *Id.* at 99 (quoting People v. Jenness, 5 Mich. 305, 323 (1858)).

279 People v. Wright, 411 N.W.2d 826 (Mich. Ct. App. 1987); People v. Bailey, 302 N.W.2d 924 (Mich. Ct. App. 1981).

280 For example, in *People v. Hammer*, 296 N.W.2d 283 (Mich. Ct. App. 1980), one might condemn the court's actions as going beyond the scope of placing complainant's testimony and behavior in context, where the court permitted the introduction of uncharged acts of abuse committed against the complainant's siblings.

fathomable behavior would be well-served by the Accommodation model.

VI. CONCLUSION

The ability of a long-term incest victim to present a credible narrative of her abuse varies widely from jurisdiction to jurisdiction. In New York, Delaware, and Tennessee the rules of evidence require that Anna B.'s story be shorn of the contextual background that makes it comprehensible.[281] In other states, where any act between victim and defendant is admissible as evidence of defendant's lustful disposition toward his victim,[282] Anna could testify to defendant's prior abuse. And in Missouri, Indiana or any other jurisdiction that adopts Federal Rule of Evidence 414, any act of sexual abuse that Anna's stepfather committed against her *or anyone else* could conceivably be used as evidence against him.[283]

The enactment of the new federal rule increases the possibility for more widespread review of these differing standards. While such review would likely center on traditional analyses of what the uncharged acts say about the defendant in terms of propensities and prejudice, the opportunity does exist to incorporate the increased insight into victim psychology that the last twenty years of clinical study has brought.

That the courts do accept and act upon psychological principles of victimization is evident. The possibility of having a traumatized child testify over closed-circuit television and the availability of expert testimony regarding the Accommodation Syndrome are two relatively recent innovations that courts have sanctioned in appropriate cases. Both stem from the recognition that in long-term sexual abuse cases, children adapt to their abusers in order to survive within their families. The Accommodation Syndrome details that adaptation explicitly; closed circuit testimony is an implicit recognition of the power that the abuser continues to hold over his victim even after the acts themselves have ended.

Yet, these innovations are, at best, peripheral in a long-term incest case being tried in a restrictive jurisdiction like New York, since the courts undermine the credibility of the adolescent victim before she even begins to testify. The "her versus him" nature of these cases places paramount importance on the narrative of the teenage com-

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281 *See supra* note 22.

282 *See, e.g.*, State v. Rojas, 868 P.2d 1037 (Ariz. Ct. App. 1993); Tharp v. State, 724 S.W.2d 191 (Ark. 1987); Hicks v. State, 441 So. 2d 1359 (Miss. 1983). *See also supra* note 23.

283 *See supra* note 29.

plainant. Where her narrative is truncated to commence with the unbelievable—her seemingly passive acceptance of horrifying acts of sexual abuse—the victim faces a burden that may be impossible to overcome.

Whatever the fate of FRE 413-415, the New York approach is no longer viable, even under traditional *Molineux* analysis. Where a complainant's reference to uncharged crimes can make her "inexplicable" behavior quite understandable, those crimes demonstrate something quite different from a defendant's propensity; they show the context within which the charged crimes could be carried out, and they complete the victim's narrative. These are not new "*Molineux* exceptions"—they are commonly accepted, even in New York.

The courts should not ignore what is now quite obvious: The admissibility of uncharged crimes in long-term incest cases should parallel the wide variety of cases where uncharged crimes are routinely admitted to provide necessary context. Only when the child victim has this opportunity to tell the jury this "whole truth," can there be the likelihood of a just outcome.