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Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth

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JUST THE FACTS, MA'AM: SEXUALIZED VIOLENCE, EVIDENTIARY HABITS, AND THE REVISION OF TRUTH

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I. MATTERS OF FACT

Sergeant Joe Friday, a no-nonsense kind of detective on the old television series *Dragnet*, used to confront distraught women with the clipped injunction: "Just the facts, ma'am." Everyone knew what he meant. These "hysterical" women, privileging the expression of emotion over the recitation of relevant detail, were not being good witnesses. They confused what an event felt like with what it was; they wandered off the point into a tangle of irrelevancies. They did not crisply present the sort of evidence that would allow a conscientious detective like Sergeant Friday to catch the criminal. In short, these women were not helpful to the law.

Though Sergeant Friday no longer barks commands at weeping women on television, except in reruns, women's evidence is often still suspect in law. The stories women tell in court, particularly in cases of sexualized violence like rape, sexual harassment, incest, and woman battering, are vulnerable to attack as unbelievable. Cases of sexualized violence often evolve into a "he said, she said" battle of competing narratives in which the "he," who is the defendant, wins by default simply because the evidence is contested. Default rules about the burden of proof

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and the benefit of the doubt resolve all divergent accounts in favor of the accused when there are merely contested stories with no "hard" evidence to compel choice between them. Though laws on the books look more woman-friendly on issues of sexualized violence than they used to, women do not always find that helpful laws produce victories for women.[1] The worst of the overt sexism of the law may have been dismantled: gone, for the most part, are corroboration requirements[2] and the unrestrained admissibility of the woman's sexual history in rape trials;[3] the exemption in rape law that says rape cannot happen within marriage;[4] legal

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1. Susan Estrich argues that the rape reform statutes did not accomplish as much as feminists thought they would. Instead, acquaintance rape still is hard to prosecute. *See* SUSAN ESTRICH, REAL RAPE 13, 80-81 (1987); *see also* Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1097-98, 1102 (1987). In sexual-harassment cases, judges have repeatedly found that the particular instances of alleged abuse were not serious enough to warrant a successful claim of employment discrimination. *See, e.g.*, Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986) (finding that the woman could not succeed in her sexual-harassment claim, despite vigorous dissent arguing for a "reasonable woman" standard). In Britain, Parliament passed a statute explicitly intended to allow women to get temporary restraining orders (TROs) against their battering husbands, only to find that the courts interpreted men's common-law rights of property in their homes as narrowing the effective range of cases in which such TROs were obtainable to only those cases in which the woman alone owned the house. *See* WILLIAM TWINING & DAVID MIERS, HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION 356-73 (3d ed. 1991).

2. Although the Model Penal Code draft of 1980 incorporated a corroboration requirement, *see* MODEL PENAL CODE § 213.6(5) (Official Draft and Revised Comments 1980), 35 states had already eliminated their corroboration requirements, and eight others had limited the requirement. *See* Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1367-68 & nn.16-18 (1972).

3. Forty-nine states and the federal government have enacted rape-shield laws that limit the admissibility of evidence about a victim's prior sexual history. *See* James A. Vaught & Margaret Henning, *Admissibility of a Rape Victim's Prior Sexual Conduct in Texas: A Contemporary Review and Analysis*, 23 ST. MARY'S L.J. 893, 895 & nn.9-10 (1992); *see also* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765-66 (1986) (examining how different states approach rape-shield legislation and proposing an alternative legislative solution that preserves the underlying rationale of rape-shield laws as well as the defendant's constitutional rights); Andrew Z. Soshnick, *The Rape Shield Paradox: Complainant Protection amidst Oscillating Trends of State Judicial Interpretation*, 78 J. CRIM. L. & CRIMINOLOGY 644, 644-45 & nn.1-3 (1987) (noting that 40 states enacted rape-shield laws through statute, nine states used evidentiary rules to accomplish the protection, and Arizona provided protection through judicial opinion). The federal rape-shield rule has been codified in FED. R. EVID. 412. For a brief history and discussion of Rule 412, see 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE §§ 5381-5393 (1980).

4. For an overview of recent developments, see Anne L. Buckborough, *Family Law:*

permission for husbands to beat their wives in the name of proper discipline;[5] the view that children's complaints of sexual abuse are primarily fantasy;[6] and approval of sexual harassment as an implied condition of work for women.[7] But these apparent victories are superficial. More persistent aspects of sexism have been merely pushed underground.

In this article, I argue that the law is still sexist, but now in the name of fact rather than doctrine. Courts have continued to use woman-unfriendly habits of evaluating what counts as legal evidence. Representatives of the law still want "just the facts, ma'am." But these particular facts are hardly neutral or natural. Facts must be constructed and interpreted just as laws must be,[8] and the production of facts as an accomplishment of legal practitioners is only now beginning to be examined.[9] When we begin to focus on the way in which facts are

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Recent Developments in the Law of Marital Rape, 1989 ANN. SURV. AM. L. 343, 343 (1990) (stating that "most states recognize some legal limitation on a husband's 'right' to have sex with his wife, but no consensus exists as to the extent of that limitation").

5. Such legal permission is customarily traced to William Blackstone. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 444 (Univ. of Chicago Press, 1979) (1765-1769).

6. The view that complaints by children about sexual abuse were most likely fantasy was forwarded most famously, and perhaps most powerfully, by Sigmund Freud. *See* SIGMUND FREUD, INTRODUCTORY LECTURES ON PSYCHOANALYSIS 126-35 (James Strachey ed. & trans., 1977). This view has since been widely discredited for children's complaints in general. *See, e.g.*, JEFFREY HAUGAARD & N. DICKON REPUCCI, THE SEXUAL ABUSE OF CHILDREN 149-50 (1988). It has also been discredited even about Freud's own cases. *See* JEFFREY M. MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY 50 (1984); Suzanne Gearhart, *The Scene of Psychoanalysis*, *in* IN DORA'S CASE: FREUD-HYSTERIA-FEMINISM 106-07 (Charles Bernheimer & Claire Kahane eds., 2d ed. 1990).

7. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (concluding that sexual harassment is actionable as a form of sexual discrimination).

8. *See* KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 86-108 (1988) (providing an account of the way in which the interpretation of law and the interpretation of fact go on simultaneously in the processes of lawyering and judging).

9. *See generally* Kim Lane Scheppele, *Facing Facts in Legal Interpretation*, 30 REPRESENTATIONS 42 (1990) (arguing that legal interpretation necessarily constructs accounts of law and fact simultaneously and discussing whether the flexibility judges have in interpreting facts undermines the legitimacy of legal institutions) [hereinafter Scheppele, *Facing Facts*]; Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989) (discussing evidentiary habits in the construction of stories from evidence) [hereinafter Scheppele, *Telling Stories*]. For other accounts of the practices of

presented as natural and interpreted as truth, we see that much misogynistic work is done in the construction of "reality."

This article focuses on one of many elements in the construction of facts that works to the disadvantage of women. Women who delay in telling their stories of abuse at the hands of men or who appear to change their stories over time about such abuse are particularly likely to be discredited as liars. The very fact of delay or change is used as evidence that the delayed or changed stories cannot possibly be true.[10] But abused women frequently have exactly this response: they repress what happened;[11] they cannot speak;[12] they hesitate, waver, and procrastinate;[13] they hope the abuse will go away;[14] they cover up for

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fact-interpretation in law, see W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 41-65 (1981); JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 14-36, 80-102 (1949); BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE (1988); WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE (1985); *see also* NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW (David R. Papke ed., 1992) (collection on the uses of narrative in legal reasoning). *See generally* Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (special issue on the uses of narrative in the law).

10. *See* Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1041-43 (1991); *see also* People v. Brown, 524 N.E.2d 742, 747 (Ill. App. Ct. 1988) (finding that "evidence of the victim's prompt complaint should be admissible to overcome the adverse inference which would otherwise arise from her silence"); Dawn M. DuBois, *A Matter of Time: Evidence of a Victim's Prompt Complaint in New York*, 53 BROOK. L. REV. 1088 (1988) (stating that the prompt-complaint doctrine is based on "antiquated perceptions of how women respond to rape" and suggesting an alternative to the doctrine). *But see* MODEL PENAL CODE § 213.6(4) (Official Draft and Revised Comments 1980). The Model Penal Code proposed placing strict time limits on those making rape complaints: "No prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of Public authorities within three (3) months of its occurrence." *Id.*

11. Many rape victims suffer from short-term memory loss, which may result from an attempt to escape from a fear-inducing situation. Lois G. Veronen et al., *Treating Fear and Anxiety in Rape Victims: Implications for the Criminal Justice System*, *in* PERSPECTIVES ON VICTIMOLOGY 150 (William H. Parsonage ed., 1979).

12. "During my last semester of law school, a friend tried to rape me in my apartment in Cambridge, Massachusetts. I lived alone. While it was happening, I felt disembodied and I lost my voice." Terry N. Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39, 39 (1991) (describing the author's personal experience as the victim of a violent rape).

13. Most women do not report sexualized threats and sexualized violence against them at all. In one survey conducted in San Francisco, only 9.5% of the women reported

their abusers;[15] they try harder to be "good girls";[16] and they take the blame for the abuse upon themselves.[17] Such actions produce delayed or altered stories over time,[18] which are then disbelieved for the very reason that they have been revised.[19]

The disbelief of delayed or revised stories reflects a view that the truth is singular, immediately apparent, and permanent—a view not unique to law. As this article shows, the construction of facts in law is not based only, or even primarily, on the special expertise of lawyers or on detailed knowledge of the law. Of course, lawyers have a great deal of influence in shaping the facts as they appear at trial. But lawyers, at least successful

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their rapes. DIANA E.H. RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT 31 (1984). Estimates on the number of rapes which are actually reported range from 5 to 30%. MENACHEM AMIR, PATTERNS IN FORCIBLE RAPE 27-28 (1971); *see also* Scheppele, *supra* note 1, at 1096 (stating that approximately half of all victims fail to report rapes or rape attempts and that acquaintance rapes are largely unreported). Of those who do report, many delay before calling the police. One New York study found that most victims wait two to seven days before reporting a rape, while a Massachusetts study reported that half of the rape victims waited before reporting. Torrey, *supra* note 10, at 1016 n.10 (citing studies that illustrate that only about half of rape victims report what has happened to them). Apparently, women tend to wait even longer if they know their assailant. SEDELLE KATZ & MARY A. MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 188-90 (1979); *see also* Kimberly A. Mango, *Students versus Professors: Combatting Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 CONN. L. REV. 355, 359 n.13 (1991) (citing a study of sexual-harassment victims at Cornell University that found that less than one percent of the victims actually filed complaints); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 275 (1985) (stating that experts agree that statistics underestimate the extent of woman-battering because of the victim's reluctance to report the crimes).

14. In one government study, 52% of the female victims of sexual harassment ignored the harassing conduct and did nothing about it. *See* U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 24 (1988).

15. Battered women often refuse to tell anyone that they are being beaten. *See* LENORE WALKER, THE BATTERED WOMAN 74 (1979).

16. Experience of sexual harassment caused Anita Hill to keep notes on all the work she did to show what a model employee she was. *See infra* text accompanying notes 30-31.

17. *See* Kim Lane Scheppele & Pauline Bart, *Through Women's Eyes: Defining Danger in the Wake of Sexual Assault*, 39 J. SOC. ISSUES 63, 79 (1983).

18. *See* JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 179-80 (1992).

19. *See* Torrey, *supra* note 10, at 1044.

lawyers, do not just mobilize their legal expertise to achieve these ends. They must also mobilize ordinary storytelling practices that are present outside legal settings, in which credibility, coherence, and plausibility are all judged against a background of common knowledge, itself shot through with unthinking assumptions.

II. BELIEVING ANITA HILL[20]

During a riveting weekend in October 1991, many Americans tuned their television sets to the Supreme Court Confirmation Hearings of Judge Clarence Thomas. These hearings had turned to the question of sexual-harassment allegations made against Judge Thomas by his former close aide, Professor Anita Hill. The Republican members of the Senate Judiciary Committee, unfettered by technical rules of evidence that would operate in a court of law, were able to show in stark form just how such a witness could be discredited. They used every strategy they could think of to undermine Professor Hill's testimony. Prominent among the strategies was their focus on: (1) her delay in reporting the harassment; and (2) the change in her accounts of what the harassment involved as she went through successive retellings of the story. In the space opened up by Professor Hill's silences and versions, Republican senators attempted to insert various stock stories[21] about the scorned woman, the woman who

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20. At this point, this is hardly a controversial proposition. A survey of state and federal judges, taken around the time of the initial testimony, revealed that two-thirds of them believed Anita Hill. *See Hearings Turn off Judges; NLJ Survey Finds They Don't Want Top Spot*, NAT'L L. J., Oct. 28, 1991, at 1. At the time of the hearings, a poll showed that more Americans believed Clarence Thomas than believed Anita Hill. The figures stood at 40% for Thomas and only 24% for Hill. *See* Jill Smolowe, *Anita Hill's Legacy: A Year After the Clarence Thomas Hearings, Women Wonder if the Consciousness-Raising Made Enough of a Difference*, TIME, Oct. 19, 1992, at 56. A year later, however, several surveys revealed that more people believed Anita Hill than believed Clarence Thomas. A *Wall Street Journal*/NBC News survey reported that 44% of registered voters believed Hill while only 34% believed Thomas. *Id.* A *U.S. News and World Report* poll reported a 38% to 38% deadlock in credibility ratings one year after the hearings, while polls at the time registered 60% to 20% in favor of Thomas. Gloria Borger et al., *The Untold Story*, U.S. NEWS & WORLD REP., Oct. 12, 1992, at 28. It is significant to note that the percentage of people who thought Hill had been treated unfairly rose from 8% at the time of the hearings to 39% a year later. *Id.*

21. On stock stories, see ROGER C. SCHANK, TELL ME A STORY: A NEW LOOK AT REAL AND ARTIFICIAL MEMORY (1990); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984).

had lost touch with reality, and the woman motivated by political animus who was making a bid for attention.

Although the Senate Judiciary Committee members who held the hearings repeatedly emphasized that the proceedings were not a trial, legalistic conceptions of "burden of proof" and "presumption of innocence" were used throughout the three days of marathon sessions.[22] But there the legal formality ended. Evidence was introduced without supporting witnesses;[23] insinuations were made about Professor Hill's motivation and credibility that had no basis in evidence;[24] people without any expertise in evaluating psychiatric claims were asked for their opinions of Professor Hill's personality and sanity;[25] questioning was limited by the unwillingness of then-Judge Clarence Thomas to answer questions outside the scope that he deemed fit for inquiry,[26] even though much of what he refused to talk about would have been thought relevant had this been a proper trial; and witnesses who had relevant evidence to introduce were kept dangling and ultimately not asked for the information they had as part of the hearings.[27] Whatever the Senate hearings might have been designed to accomplish, they left innuendo and unsubstantiated stories in their wake.

These stories reveal some popular, common-sense biases in the evaluation of historical accounts, particularly when women are making claims that they have been the target of abuse. To see how popular conceptions of truth can be mobilized to discredit a witness, it helps to look first at the themes that politicians believe both will work to undermine a claim and be understandable to the public. Then we can see how these same strategies are used in more formal legal settings in muted form. To begin, let us look at how those defending Judge Thomas repeatedly emphasized that Professor Hill had delayed making her accusations in the first place and had changed her story once she did.

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22. *See Nomination of Clarence Thomas to Associate Justice of the Supreme Court of the United States: Hearings of the Senate Judiciary Committee*, 102d Cong., 2d Sess., Federal News Service, Oct. 11, 1991, *available in* LEXIS, Nexis Library, Fednew File [hereinafter *Hearings*].

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.*

A. *Silences*

Professor Hill's initial delay in reporting the harassment—and her public silence until the last moment before the confirmation vote was to occur—was particularly salient to the senators. Senator Strom Thurmond raised the issue in his opening statement, before Anita Hill had even testified:

> The alleged harassment she describes took place some ten years ago. During that time, she continued to initiate contact with Judge Thomas in an apparently friendly manner. In addition, Professor Hill chose to publicize her allegations the day before the full Senate would have voted to confirm Judge Thomas. While I fully intend to maintain an open mind during today's testimony, I must say that the timing of these statements raises a tremendous number of questions which must be dealt with, and I can assure all the witnesses that we shall be unstinting in our effort to ascertain the truth.[28]

In other words, why didn't Professor Hill come forward at the time with her accounts of sexual harassment? Given that she remained silent and continued on as if nothing had happened, Senator Thurmond strongly suspected that the initial silence and its revelation at the moment of the confirmation hearings spoke for itself: the message was that the harassing conduct never occurred.

Judge Thomas himself emphasized Professor Hill's initial silence in his account of events:

> I find it particularly troubling that she never raised any hint that she was uncomfortable with me. She did not raise or mention it when considering moving with me to EEOC [Equal Employment Opportunity Commission] from the Department of Education, and she'd never raised it with me when she left EEOC and was moving on in her life. And, to my fullest knowledge, she did not speak to any other women working with or around me who would feel comfortable enough to raise it with me, especially Diane Holt [Thomas's secretary], to whom she seemed closest on my

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28. *Id.*

> personal staff. Nor did she raise it with mutual friends such as Linda Jackson or Gil Hardy.[29]

Senator Arlen Specter pressed Professor Hill on her initial silence, focusing on her lack of contemporaneous notes about the harassing behavior:

> As an experienced attorney and as someone who was in the field of handling sexual harassment cases, didn't it cross your mind that if you needed to defend yourself from what you anticipated he might do, that your evidentiary position would be much stronger if you had made some notes?[30]

Professor Hill indicated that she kept detailed records of her assignments and work products while the harassment was going on because she wanted documentation of her professional performance in the event Judge Thomas tried to fire her for refusing his solicitations. But only contemporaneous records of the harassment itself would have demonstrated to Senator Specter that it had actually happened.

Talk of the "eleventh hour charges" and of Professor Hill's puzzling silence pervaded the hearings, as if the timing of her statement to the committee alone was evidence of its falseness. A number of senators believed that her only motivation for coming forward at that time was political and that politics and truth-telling were mutually exclusive motivations. So, the initial silence hung over the proceedings as evidence that political revenge was the true story.

Trying to put her initial silence in some context, Professor Hill explained how she reacted to Judge Thomas's conduct at the time:

> My reaction to these conversations was to avoid them by eliminating opportunities for us to engage in extended conversations. This was difficult because at the time I was his only assistant at the Office of Education—or Office for Civil Rights. . . . When Judge Thomas was made chair of the EEOC, I needed to face the question of whether to go with him. I was asked to do so, and I did. The work itself was interesting, and at that time it appeared that the sexual overtures which had so

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29. *Id.*

30. *Id.*

> troubled me had ended. I also faced the realistic fact that I had no alternative job. While I might have gone back to private practice, perhaps in my old firm or at another, I was dedicated to civil rights work, and my first choice was to be in that field. Moreover, the Department of Education itself was a dubious venture. President Reagan was seeking to abolish the entire department.[31]

Pressing Professor Hill on her failure to say anything at the time, Senator Leahy asked what the mechanisms for reporting complaints within the EEOC would have been then. Professor Hill responded by saying that she believed she would have had to go to the Congressional oversight committee. Asked what she believed would have happened had she done so, Professor Hill replied: "Well, I can speculate that it might have been difficult. I can speculate that had I come forward immediately after I left the EEOC, I can speculate that I would have lost my job at Oral Roberts" University, where she taught law.[32] Professor Hill did testify that she talked to close friends about the harassment, but she did not speak to anyone at work. When asked how she could have allowed this "reprehensible conduct to go on right in the headquarters" of the agency charged with enforcing sexual-harassment laws,[33] Professor Hill replied:

> Well, it was a very trying and difficult decision for me not to say anything further. I can only say that when I made the decision to just withdraw from the situation and not press a claim or charge against him, that I may have shirked a duty, a responsibility that I had. And to that extent I confess that I am very sorry that I did not do something or say something, but at the time that was my best judgment. Maybe it was a poor judgment but it wasn't a dishonest [one], and it wasn't a completely unreasonable choice that I made given the circumstances.[34]

Some of the people to whom she originally confided the sexual-harassment allegations testified on her behalf. Four friends and colleagues of Professor Hill testified to versions of the harassment story that

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31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*

Professor Hill had told them either at the time that it occurred (witnesses Ellen Wells, Susan Hoerchner, and John Carr) or when she was applying for jobs and had to explain why she had left the Equal Employment Opportunity Commission where she worked with Clarence Thomas (witness John Paul).[35] Each of the four witnesses had contacted Professor Hill after they heard of her allegations, offering to testify that she had told them these stories earlier. None of the four witnesses had met any of the other corroborating witnesses prior to appearing in Washington to testify at the Senate hearings. But none of them were able to reproduce in detail just what had occurred between Thomas and Hill, because Professor Hill's accounts to each of them had been quite nonspecific, general, and brief. Although the combined testimony of the four witnesses indicated that Professor Hill had confided in each of them at or near the time when the incidents were alleged to have occurred, the lack of detailed corroboration led the Republican Senators on to their next problem with Professor Hill's testimony.

B. *Revisions*

Many versions of events were presented during the course of the hearings. Once her allegations became known to the Senate Judiciary Committee, Professor Hill had three opportunities to narrate what had happened: once, to the FBI agents who arrived at her house one evening after work to interview her; again, to the Senate Committee staffers who were trying to work out what she would say if called as a witness; and yet again, to the whole world as it watched her testimony live on television before the Senate Judiciary Committee. In the televised account, new details emerged that had not been present in the earlier versions, though none of the new details conflicted with earlier, more general stories. But the very fact of the growing detail was used as evidence that Professor Hill was lying. Senator Orrin Hatch described her stories as "[t]hree different versions, each expansive, each successively expansive."[36] Constancy of stories over time was presented as the crucial marker of truth. Lack of constancy meant a lack of truth.

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35. *See Nomination of Clarence Thomas to Associate Justice of the Supreme Court of the United States: Hearings of the Senate Judiciary Committee*, 102d Cong., 2d Sess., Federal News Service, Oct. 13, 1991, *available in* LEXIS, Nexis Library, Fednew File.

36. *Hearings*, *supra* note 22.

Even Judge Thomas used Professor Hill's increasing detail as evidence of the falsity of the charges:

> The facts keep changing, Senator. When the FBI visited me, the statements to this committee and the questions were one thing. The FBI's subsequent questions were another thing, and the statements today as I received summaries of them were another thing. It is not my fault that the facts changed. What I have said to you is categorical; that any allegations that I engaged in any conduct involving sexual activity, pornographic movies, attempted to date her, any allegations, I deny. It is not true. So, the facts can change, but my denial does not.[37]

Judge Thomas invoked the popular idea that statements that remain the same over time appear more reliable than statements that appear to change. He was asserting that his categorical denials were more true than Professor Hill's "changing" facts precisely because his denials had never been subject to revision.

That Professor Hill's story appeared to change over time received much attention during Senator Specter's questioning. He tried to establish crucial inconsistencies and additions, markers of falsehood of the whole account, by taking each individual fact she had stated and holding it up against prior individual facts she had described. Picking apart the stories required *denarrativizing* the accounts or, in the words of Andrew Ross, engaging in "the fetishizing of detail."[38] One statement, surgically cut from its context, was compared to another, similarly surgically cut. Professor Hill, sensing that her story was getting lost in the false concreteness of specificity, told Senator Specter:

> Well, I think if you start to look at each individual problem with the statement, then you're not going to be satisfied that it's true. But I think the statement has to be taken as a whole. There is nothing in this statement that—or nothing in my background, nothing in my statement—there is no motivation that would show that I would make up something like this. And I guess one really

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37. *Id.*

38. Andrew Ross, *The Private Parts of Justice*, *in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 40, 56 (Toni Morrison ed., 1992).

> does have to understand something about the nature of sexual harassment. It is very difficult for people to come forward with these things—these kinds of things. And it wasn't as though I rushed forward with this information. I can only tell you what happened and, to the best of my recollection, what occurred and ask you to take that into account. Now, you have to make your own judgment about it from there on, but I do want you to take into account the whole thing.[39]

The *whole* story, Professor Hill argued, was more than the sum of its parts.

Why didn't she tell the FBI about Coke can incident, Senator Specter asked? Why did she omit a vivid description of the specific acts Judge Thomas had told her he enjoyed when watching pornographic movies? The FBI report contained "no reference to any mention of Judge Thomas's private parts or sexual prowess or size, et cetera,"[40] noted Senator Specter. Professor Hill responded to these questions by saying, "the FBI agent made clear that if I were embarrassed about talking about something, that I could decline to discuss things that were too embarrassing but that I could provide as much information as I felt comfortable with at that time."[41] Though she later said, "I never declined to answer a question because it was too embarrassing," she also said, "I told them the nature of the comments and did not tell them more specifics." She added, "I was very uncomfortable talking to the agent about that, these incidents. I am very uncomfortable now. But I feel that it is necessary. The FBI agent told me that it was regular procedure to come back and ask for more specifics if it was necessary. And so at that time, I did not provide all the specifics that I could have."[42]

C. *Counterstories*

On the other side, Judge Thomas denied Professor Hill's allegation and substituted in part his own narrative of what had happened—that he was the true victim in the proceedings. He could present himself in this way because he called on the stock story of a man betrayed by a woman

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39. *Hearings*, *supra* note 22.

40. *Id.*

41. *Id.*

42. *Id.*

he had trusted. He had always treated his whole staff professionally, cordially, and without the interjection of personal distractions, he said. Most memorably, however, he imposed another strong narrative pattern on the proceedings:

> Senator, in the 1970s, I became very interested in the issue of lynching, and if you want to track through this country in the 19th and 20th century the lynchings of black men, you will see that there is invariably or in many instances a relationship with sex and an accusation that that person cannot shake off. That is the point that I'm trying to make, and that is the point that I was making last night, that this is a high-tech lynching. I cannot shake off these accusations because they play to the worst stereotypes we have about black men in this country.[43]

And so Judge Thomas, who had tried in his first round of confirmation hearings to epitomize "racelessness," as Toni Morrison has described it,[44] found himself invoking race as his ultimate defense.[45] As Senator Hatch led him through a series of questions concerning specific stereotypes about black men and their sexual prowess that were invoked by Professor Hill's charges, Judge Thomas confirmed in detail just which allegations partook of stereotyping and which ones did not.

Supplementing the historical race narrative, Judge Thomas added personal and political narratives. The personal narrative featured a man from Pin Point, Georgia, who had grown up to be offered the greatest opportunity in the world, only to have it snatched away from him by the demeaning politics of race. But he would survive it:

> This has been an enormously difficult experience, but I don't think that that's the worst of it. I'm 43 years old, and if I'm not confirmed, I'm still the youngest member of the U.S. Court of Appeals for the D.C. Circuit. I'll go on. I'll go back to my life of talking to my neighbors, and cutting my grass, and getting a

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43. *Id.*

44. Toni Morrison, *Introduction: Friday on the Potomac*, *in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY at vii, xxi (Toni Morrison ed., 1992).

45. *See Hearings*, *supra* note 22.

> Big Mac at McDonald's, and driving my car, [and] seeing my kid play football. I'll live. I'll have my life back.[46]

But, in Thomas's view, the country would not do as well:

> I think the country has been hurt by this process. I think we are destroying our country, we are destroying our institutions, and I think it's a sad day when the U.S. Senate can be used by interest groups and hate mongers and people who are interested in digging up dirt to destroy other people, and who will stop at no tactics when they can use our great institutions for their own political ends. We are gone far beyond McCarthyism. This is far more dangerous than McCarthyism. At least McCarthy was elected.[47]

Presenting himself as the man victimized by malicious uses of his race to discredit him, Judge Thomas allied himself with the image of the United States, which had been victimized as well.

D. *Filling in Silences and Revising Revisions*

Multiple versions from Hill's own accounting, a blanket denial and counternarratives from Thomas, as well as many other versions from various witnesses, left the Senate Judiciary Committee with a lot to pick apart. And much of the strategy of those who won by getting Judge Thomas through the confirmation process and onto the Supreme Court depended on presenting Clarence Thomas as the real victim and Anita Hill as the true aggressor. This reversal was accomplished in large measure by presenting Anita Hill's story as a revised account, growing out of a suspicious silence.

In the gap created within the initial account and in the spaces chipped out of the apparent inconsistencies in Professor Hill's multiple versions, many alternative narratives about Professor Hill were presented as plausible. Witnesses supporting Judge Thomas presented alternative stories that would explain Anita Hill's charges of sexual harassment, ranging from Professor Hill's alleged grandiosity and ambition (witness J.C. Alvarez), to Professor Hill's status as a "scorned woman" (witness Phyllis

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46. *Id.*

47. *Id.*

Berry), to her alleged flights of fantasy (witness John Doggett).[48] Other witnesses for Judge Thomas expressed disbelief that he could do the acts alleged (witnesses Nancy Fitch and Diane Holt),[49] opening up more opportunities to recast Professor Hill's story as the story of a woman bent on revenge, a woman given to fantasy, a calculating politica,[50] a decontextualized woman lost in space.

The Hill/Thomas hearings were not a judicial forum. But the tactics used in an attempt to discredit Hill's testimony borrow both from the courtroom and from daily life. Stories that emerge from silence or that are revised over time—elaborated, altered in tone, emerging in public out of a silence that went before—are presented as suspect *precisely because* they are delayed or revised. With the polls showing that the tactic worked to make Judge Thomas's counter-stories more believable (or at least no less credible) than Professor Hill's harassment narrative and with Senators apparently believing the same, Clarence Thomas was confirmed.

III. SILENCES AND REVISIONS

Anita Hill is not the only woman to have remained silent about sexual harassment. In fact, most women do not immediately talk about the details of sexual harassment in ways that are likely to make prosecuting the offenders straightforward in a court of law.[51] Women who experience rape, domestic abuse, incest, and other forms of sexualized threats and sexualized violence often have the same reaction.[52] Many women do not talk about the events with anyone at the time, and even those women willing to talk at the time do not report the threats and violence against them to the police or other officials who can mobilize the law.[53] When women first talk about the unspeakable to others, they often present initial accounts that try to make things normal again. They try to smooth out social relations by minimizing the harm of the abuse, engaging in self-

48. *See id.*

49. *See id.*

50. What else should we call a female politico?

51. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 28 (1979).

52. *See id.*; *see also* Torrey, *supra* note 10, at 1044-45 (stating that "a significant number of women who are raped do not report the rape for several days or may even experience a 'silent reaction' and not tell anyone of the assault").

53. *See supra* notes 13-15 and accompanying text.

blame, telling stories that offer alternative explanations of events so that the full consequences of the abuse do not have to be dealt with at the time, and disguising the brutality through descriptive distortions of events.[54]

In psychological terms, women who have been sexually assaulted, whether through rape, incest, domestic brutality, workplace harassment, or extended periods of "domestic captivity,"[55] often show signs of post-traumatic stress disorder.[56] Survivors of extraordinary brutality often literally cannot say what they have seen or put into words the terror that they have felt.[57] Picking through the shards of a former life, survivors can no longer put the pieces into relation with each other to tell a coherent and compelling narrative about how things disintegrated. As therapists who have worked with traumatized patients have noted, "[t]he survivor's initial account of the event may be repetitious, stereotyped, and emotionless. . . . It does not develop or progress in time, and it does not reveal the storyteller's feelings or interpretations of events."[58] As women's sense of safety in the world has been shattered, so too has their sense of narrative coherence.[59]

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54. *See supra* notes 11-12, 16-19 and accompanying text.

55. Herman, *supra* note 18, at 74.

56. *See id.* at 76-80.

57. Post-traumatic stress syndrome, as Herman's book makes clear, is not confined to women. Combat veterans often have the same symptoms, as do Holocaust survivors, political prisoners, and disaster victims, regardless of gender. *See id.* at 74-75, 181-82, 188. In the realm of criminal law, however, the vast majority of people suffering from this psychological response are women whose brutalities generally come in the name of common crimes. *See id.* at 175-87.

58. *Id.* at 175.

59. In our research on recovery from the trauma of rape, we discovered that women who were attacked when they thought they were safe had more severe reactions than women who were attacked when they believed that they were taking risks or were otherwise in danger, controlling for the severity of violence in the assault. *See* Scheppele & Bart, *supra* note 17, at 76-78. For the women with the most disoriented reactions, narrative consistency was disturbed, but so was any sense of associative logic. *See id.* One woman who had been attacked in a cornfield near her childhood home (where she felt safe) developed a terror of urban elevators. *Id.* at 69. A woman attacked at 10 A.M. coming back from the grocery store felt terrified to drive. *See id.* at 77. In one of the most severe reactions, a woman who was attacked at a party given by friends was subsequently placed in a mental institution for several years. *Id.* at 70-71. All of these women had trouble explaining why their fear spread the way it did from situations like the one in which they were attacked to other situations, apparently unrelated to the outside observer, in which the woman had previously felt safe as well. Nothing "made sense" in conscious terms.

Later, however, often through working in therapy, becoming overtly feminist, or getting enough emotional distance on the events to begin to deal with them, brutalized women revise their stories. Women who were silent begin to speak out for the first time. Women who were silent about the violence, who at the time said that nothing happened, or who took the blame themselves for anything that did happen, begin to tell stories of abuse. As these stories are told with more confidence, they "may change as missing pieces are recovered. This is particularly true in situations where [the survivor] has experienced significant gaps in memory."[60] What the survivor is trying to do at this point is to figure out a story that makes sense of her memories. The process of making coherence out of previously fragmented knowledge results in adjustments in the details that are recalled or in the way the details are put together.[61] One sign of *recovery* from the abuse is that women's stories change over time.[62]

Though the influence of extreme trauma on narrative consistency over time is quite pronounced, lesser traumas may produce something of the same effect. Women who have experienced sexual harassment at work also report many of the same symptoms as women who have suffered more extreme forms of physical abuse.[63] Women who have been "merely hassled" also show signs of extreme stress.[64] Even Anita Hill, who

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60. HERMAN, *supra* note 18, at 179-80.

61. *See id.* at 176-81.

62. *See id.*

63. The woman who has been sexually harassed may experience "severe physical effects, including irritability, nausea, headaches, loss of concentration, dizzy spells, stomach aches, fatigue, muscle spasms, hypertension and psychogenic pain." *See* Tina Kirstein-Ezzell, *Eradicating Title VII Sexual Harassment by Recognizing an Employer's Duty to Prohibit Sexual Harassment*, 33 ARIZ. L. REV. 383, 386 (1991) (footnote omitted); *see also* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1519 (M.D. Fla. 1991) (explaining that women who had been sexually harassed at work reported sleep disturbances and other signs of trauma).

64. My suspicion is that many women who experience sexual harassment as students drop out of school or otherwise significantly change their career plans to avoid the men who harass them. Because most studies of sexual harassment in schools involve women who have remained at the school, those who left are not included. Based on discussions with many undergraduate and graduate students, I can say that being "hassled" by a male teacher or by male students has led quite a few female students to lose sleep, to go into therapy, to start doing badly in their coursework, and, eventually, to leave the university. One woman student I spoke with had been the victim of a particularly cruel joke at a fraternity party. This woman was unable to attend classes without snickering men from that fraternity teasing her and reminding her of the event. She had difficulty eating and sleeping, and eventually withdrew from school. The men who did this to her have

stayed on the job and tried to ignore the harassment she later publicly described, "was hospitalized on an emergency basis for five days for acute stomach pain which [she] attributed to stress on the job."[65] Eventually, the accounts of what produced the stress may change as the details emerge from a traumatized memory and as the world feels a safer place in which to tell complete stories.[66] Or, as Anita Hill explained, she was asked a direct question ten years later and could not lie about what had happened.[67]

But we should not see this problem of shifting stories as being only a psychological response to individualized events. Larger forces are in play that provide a social and cultural context in which shifting stories appear as a response to sexualized threats and sexualized violence—and in which the threats and the violence are themselves displaced and denied through the fact of delayed accounts. Psychological explanations may be able to tell us how the individually experienced events are cognitively managed, but we need to understand more about the historical and cultural setting to understand why those cognitive strategies are necessary in the first place.

My suspicion is that stories that shift in their focus, detail, or attribution of blame over time are a response to violence when violence is normatively unexpected. Such violence may be very common, but it may be culturally disguised as the rare deviation from generally accepted norms. Despite estimates that as many as fifty percent of all women will be victims of domestic violence at some point in their lives,[68] and that nearly one in three women will be raped,[69] woman-battering and rape are

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graduated, but the woman has never returned to school. Another student, sexually harassed by a male faculty member, quit school in mid-semester. Years later, she returned to try to complete the courses she abruptly left, wiser about the effects of sexual harassment, but with a large gap in her resume that needs to be explained when she applies for a job.

65. *Hearings*, *supra* note 22.

66. *See* HERMAN, *supra* note 18, at 183.

67. *See Hearings*, *supra* note 22.

68. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 10 (1991) (citing LENORE WALKER, THE BATTERED WOMAN 19 (1979)).

69. This figure is contested. *Compare* Allan G. Johnson, *On the Prevalence of Rape in the United States*, 6 SIGNS 136, 144-45 (1980) (using FBI statistics and very conservative assumptions to estimate that 20-30% of women between the ages of 12 and 70 will experience a rape attack in their lifetimes) *and* Diana E.H. Russell & Nancy

still portrayed as unusual occurrences that need special explanation in the individual case. The "normal" case is constructed as the nonviolent marriage or the unraped woman, and the battered or raped woman stands out against this picture of normality as an exception. Because exceptions are generally explained by models that emphasize deviance, the women subjected to "deviant" practices come under the spotlight as participants, perhaps even willing participants, in deviant conduct. The woman is examined to see if she is to blame. For women, if violence is "not supposed to happen" or is "not supposed to happen to me," then it may be hard to narrate the violence credibly because she must first explain to herself why this particular "I" was singled out for the violence that was not supposed to happen and why this particular "him" did this. To construct such a story, a woman must narrate into some powerful cultural headwinds, forces of opposition that appear natural, unless she can cast her experience in the light of an obvious, socially comprehensible narrative.[70]

The culturally available narratives about sexualized violence are stories of provocation,[71] passion,[72] or deranged character or insanity,[73]

Howell, *The Prevalence of Rape in the United States Revisited*, 8 SIGNS 688, 694-95 (1983) (using somewhat less conservative assumptions to estimate that 46% of women will be victims of a rape attack during their lifetimes) *with* Douglas Laycock, *Vicious Stereotypes in Polite Society*, 8 CONST. COMMENTARY 395, 403-04 (1991) (using data from a 1985 Department of Justice National Crime Survey to estimate that 15% of women between the ages of 12 and 80 will experience a rape, attempted rape, or verbal threat of rape in their lifetimes).

70. We might interpret Susan Estrich's account of a "real rape" as a sexual assault that fits nicely within a culturally available story. After Estrich, who is white, was raped by a stranger, who was black and who also stole her car, police considered her a credible victim and treated her with sympathy. When women are raped by men of the same social category as their own and in a "friendly" setting, however, their stories do not fit the typical rape model and, therefore, are not readily believed. *See* ESTRICH, *supra* note 1, at 3.

71. Many people believe that most rapes would not happen if women did not provoke them. Nineteen percent of Anglo men, 25% of Anglo women, 73% of Black men, 23% of Black women, 32% of Mexican-American men and 70% of Mexican-American women believe this to be true. JOYCE E. WILLIAMS & KAREN A. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 135 tbl.17 (1981).

72. James Check and Neil Malamuth report that up to 40% of both men and women indicate that it is acceptable for a man to force a woman to have sex with him if she "gets the man sexually excited, is stoned or drunk, or has had intercourse with other men." James V.P. Check & Neil M. Malamuth, *An Empirical Assessment of Some Feminist Hypotheses About Rape*, 8 INT'L J. WOMEN'S STUD. 414, 416 (1985).

73. When asked whether rapists were mentally ill, Williams and Holmes report that

told against the backdrop of the assumed rationality of all conduct. People do things for reasons, we learn to believe. In criminal law, as in detective stories, we solve the crime by finding the motive,[74] and to find the motive, we find the reason. If a man is violent, then he must have had a reason. Perhaps he was provoked and it is really the woman's fault. Or perhaps it was a sign of passion and then perhaps the woman brought it on. Or perhaps it is a "character issue" and the accused is a sexual deviant, a pervert, or a criminal type. Or perhaps he did not have a reason, in which case, he is crazy.

Faced with the evident social competencies of many men who harass, beat, rape, or assault women,[75] the narrative routes that emphasize insanity or serious character defects often seem blocked. Only "real rapes," those committed by strangers, often with weapons, against random women,[76] are arguably good candidates for the insanity narrative. That leaves passion or provocation as available, believable narrative strategies for the routine daily violence that women often experience. But passion narratives contradict the methodical, systematic form that abuse often takes over time. Women who are subjected to repeated, deliberate, personally targeted harassment by men have a hard time seeing passion as the cause when the conduct seems quite calculated. Provocation narratives put the blame back on the woman, silencing her when she tries to make sense of what it was she did that could have produced this attack.

Suppose the woman believes the provocation story—that she is to blame after all. Women often tell stories of self-blame and complicity, if they say anything at all, at the time that sexualized violence occurs.[77]

91% of Anglo men, 92% of Anglo women, 83% of Black men, 98% of Black women, 87% of Mexican-American men, and 63% of Mexican-American women believed that this was the case. *See* WILLIAMS & HOLMES, *supra* note 71, at 136 tbl.18.

74. Technically, evidence of motive is not required for criminal prosecutions. WAYNE R. LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS 105 (2d ed. 1988). But it is hard to convince a jury that the defendant actually did the crime he is accused of unless there is a motive.

75. *See* Check & Malamuth, *supra* note 72, at 415 (noting that "[d]espite . . . numerous efforts to identify ways in which rapists are abnormal, the results have generally indicated very few differences between rapists and nonrapists which would justify any conclusion that rapists are grossly abnormal"). In a study of "normal" male college students, about 35% reported some proclivity to rape women and 20% reported a strong proclivity. *See* Neil M. Malamuth, *Rape Proclivity among Males*, 37 J. SOC. ISSUES 138, 140 (1981).

76. The term is taken from Susan Estrich. *See* ESTRICH, *supra* note 1, at 3.

77. In a study of rape victims, we discovered that many women engaged in self-

Such self-blame often comes through in a feeling of *shame*, a feeling that would only make sense if the victim were taking the blame for the actions of the perpetrator.[78] But shame may be produced by the recognition both that her own story of abuse requires, as a matter of cultural legibility, a prominent role for herself as the reason for the abuser's conduct and also a knowing judgment of what such a role would mean about herself in the eyes of others. If the victim eventually recasts her story, the story initially told from a perspective of self-blame may eventually be replaced by a story with another narrative organization—one that allows a subaltern cultural frame to be the organizing feature of such a narrative. Perhaps, just perhaps, the sexualized violence a woman has experienced is actually common enough to be believed without the requirement that she act the provocateur. Perhaps this violence is the statistical norm and not the freak exception. And perhaps the sexualized violence women experience is the result of women's disadvantaged and sexualized position in the larger society. Perhaps it is not her personal and individual fault.

These later *revised* stories, replacing either silence or an alternative version of events, lose their social authority as a statement of truth precisely because they are generally late in arriving. They also lose their legal power for the same reason. Revised stories present problems in the law because one of the implicit rules juries and judges use for finding stories to be true is the same rule that the Senate Judiciary Committee invoked in the Hill/Thomas hearings:[79] to be believable, stories must be told immediately and must stay the same over time.[80] Truth is supposed to be fixed and stable. Real truth doesn't shift with time. Victims of abuse

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blame as a way of recovering from brutal rape attacks. By telling herself that she can avoid rape in the future if only she does not walk home at night alone, if only she does not go into the park by herself, or if only she does not get into elevators with strange men, a woman can make the world seem manageable again. This enables her to recover from the assault more quickly than other women who do not tell themselves these self-blaming accounts. *See* Scheppele & Bart, *supra* note 17, at 79.

78. Feelings of shame have been common among survivors of Nazi concentration camps. *See* PRIMO LEVI, THE DROWNED AND THE SAVED 70 (Raymond Rosenthal trans., Summit Books 1988). The shame comes from one's memory of imagined complicity with the oppressor and of interpreting the horrors one has suffered as a judgment of one's self. "Coming out of the darkness," Levi writes, "one suffered because of the reacquired consciousness of having been diminished." *Id.* at 75.

79. *See Hearings*, *supra* note 22.

80. *See id.*

may tell one story at the time of the trauma and another story later. But these later stories are rarely believed.

IV. ERASING SEXUALIZED VIOLENCE IN COURT

If these presumptions in favor of immediate and coherent narratives are embedded in the culture of facticity outside of formal law, then we would expect to see delayed and revised stories being attacked as false when women press claims of sexualized violence in court. And this is exactly what happens.

A. *Unreliable Women*

In *Reed v. Shepard*,[81] for example, JoAnn Reed worked as a "civilian jailer" in the Vandenburgh County, Indiana Sheriff's Department, beginning in mid-1979.[82] The civilian jailer program employed people to take care of prisoners—guarding, feeding, transporting, and processing them—as less costly substitutes for the more expensive deputy sheriffs.[83] In 1984, Reed was fired, without a hearing, for alleged misconduct in her job.[84] Reed charged, under section 1983 of the United States Code,[85] that she had been denied due process. The district court[86] and the court of appeals[87] found that, as an at-will employee, she was not entitled to have a hearing before her employment was terminated but that the allegations of misconduct were serious enough to justify her termination in any event.[88] She had sued on multiple counts, however, also charging that her employer had engaged in sexual discrimination and that she had been sexually harassed on the job in violation of Title VII of the Civil Rights Act.[89] The story she told about

81. 939 F.2d 484 (7th Cir. 1991).

82. *Id.* at 485.

83. *Id.*

84. *Id.*

85. *See* 42 U.S.C. § 1983 (1988).

86. Reed v. Shepard, No. EV85-21-C (S.D. Ind. May 25, 1990) (unpublished opinion of Chief Judge Gene E. Brooks).

87. *Reed*, 939 F.2d at 484.

88. *See id.* at 489. The district court's conclusion on this issue is mentioned in the opinion of the court of appeals. *See id.* at 488.

89. 42 U.S.C. § 2000e (1988); *see Reed*, 939 F.2d at 488.

sexual harassment was clearly a revised story. The court of appeals quoted the trial judge:

> "Plaintiff contends that she was handcuffed to the drunk tank and sally port doors, that she was subjected to suggestive remarks . . . , that conversations often centered around oral sex, that she was physically hit and punched in the kidneys, that her head was grabbed and forcefully placed in members' laps, and that she was the subject of lewd jokes and remarks. She testified that she had chairs pulled out from under her, a cattle prod with an electrical shock was placed between her legs, and that they frequently tickled her. She was placed in a laundry basket, handcuffed inside an elevator, handcuffed to the toilet and her face pushed into the water, and maced. Perhaps others."[90]

"The record confirms these and a number of other bizarre activities in the jail office," the appeals court added.[91] "By any objective standard, the behavior of the male deputies and jailers toward Reed revealed at trial was, to say the least, repulsive."[92]

Why, then, did the court go on to conclude that however offensive the conduct of her male coworkers was, it was *not* sexual harassment? Because, the court found, the conduct was apparently not repulsive to Reed *at the time*:[93]

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90. *Reed*, 939 F.2d at 486 (footnote omitted) (quoting *Reed*, No. EV85-21-C).

91. *Id.*

92. *Id.*

93. *See id.* I should explain something important about this case to put the discussion of this opinion in context. Reed had been charged with trafficking marijuana to some of the inmates in the prison and with encouraging two female inmates to assault another inmate with whom they shared a cell. Apparently, substantial evidence existed to sustain these charges, including a confession, though the evidence does not appear in the appeals court report and the confession was later retracted. *See id.* at 487. The judges apparently believed that Reed was not a terribly sympathetic character in general, and this undoubtedly affected their treatment of her sexual-harassment claims. But the principles of law on which the three-judge panel unanimously relied and the evidence they used to illustrate such principles have implications for the consideration of sexual-harassment claims more generally. I focus on the court's treatment of the sexual-harassment claim in isolation because the reasoning presumably would also apply to more sympathetic victims.

> Reed not only experienced this depravity with amazing resilience, but she also relished reciprocating in kind. At one point during her job tenure Reed was actually put on probation for her use of offensive language at the jail. At the same time, she was instructed to suspend the exhibitionistic habit she had of not wearing a bra on days she wore only a T-shirt to work. She also participated in suggestive giftgiving by presenting a softball warmer to a male co-worker designed to resemble a scrotum and by giving another a G-string. Reed enjoyed exhibiting to the male officers the abdominal scars she received from her hysterectomy which necessarily involved showing her private area. Many witnesses testified that Reed revelled in the sexual horseplay, instigated a lot of it, and had "one of the foulest mouths" in the department. In other words, the trial revealed that there was plenty of degrading humor and behavior to go around.[94]

The court emphasized that this reprehensible conduct did not happen to other women working in the jail, but only to Reed.[95] Three women working there testified that other women had not been further harassed after they asked the men to stop doing these sorts of things to them.[96] But apparently, Reed never told the men to stop. Why? Reed testified at trial:

> Because it was real important to me to be accepted. It was important for me to be a police officer and if that was the only way that I could be accepted, I would just put up with it and kept [sic] my mouth shut. I had supervisors that would participate in this and you had a chain of command to go through in order to file a complaint. One thing you don't do as a police officer, you don't snitch out [sic] another police officer. You could get hurt.[97]

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94. *Id.* at 486-87.

95. *See id.* at 487.

96. *See id.* The fact that other women had experienced this conduct and had to tell the men to stop was not used by the court as evidence of a hostile working environment. The men, after all, did stop when asked, erasing their prior conduct as far as the court was concerned. *See id.*

97. *Id.* at 492 ([sic]s in original).

court was a revised account, apparently inconsistent with what she and others said about her reactions at the time. And the Seventh Circuit Court of Appeals did not believe her.

Quoting from the Supreme Court's decision in *Meritor Savings Bank v. Vinson*,[98] the Seventh Circuit panel indicated that harassment must be so severe or pervasive as "'to alter the conditions of [the victim's] employment and create an abusive working environment,'"[99] if a claim is to succeed. But to show that this conduct was "in fact" harassing, the victim of such treatment had to indicate *at the time* that she did not welcome the behavior in question.[100] In this case, Reed's claim could not succeed because she had not indicated while these events were occurring that this treatment was unwelcome. In other words, contemporaneous evidence is required to establish any claim of sexual harassment, and this requirement is hard-wired into the doctrine.[101] Judge Manion quoted the trial judge approvingly when he said that the plaintiff had been treated this way "'because of her personality rather than her sex'" (as if the defendants were capable of separating these things) and that the "'defendants cannot be held liable for conditions created by [Reed's] own action and conduct.'"[102] Her failure to object at the time to this behavior and her attempt to deal with it by trying to act like "one of the boys" not only defeated her ability to make a claim, but also justified the conclusion that she had brought this treatment on herself and was therefore the person who was primarily responsible.

But the record sustains another story, one not narrated by her coworkers who were witnesses at the trial. The record documents that Reed was physically beaten, that she was punched in the kidneys, that she had an electric cattle prod shoved between her legs, that she was forcibly restrained by being handcuffed on numerous occasions, that her head was shoved into a toilet, that she was repeatedly tickled, and that she was maced.[103] That was in addition to the extensive and personalized verbal abuse to which she was subjected. Moreover, these individual facts were

98. 477 U.S. 57 (1986).

99. *Reed*, 939 F.2d at 491 (quoting *Meritor*, 477 U.S. at 67).

100. *See id.* at 491-92.

101. *See id.* at 492-93

102. *Id.* at 492 (quoting Reed v. Shepard, No. EV85-21-C (S.D. Ind. May 25, 1990)).

103. *Id.* at 486.

all found to be true by the court.[104] The court could have concluded that this evidence supported another story, one that did not erase the violence against Reed by constructing her as a consenting woman, but rather one that presented her as a victim of physical abuse.[105] Although Reed did not explicitly object at the time, the violence to which her coworkers subjected her could be considered felonies anywhere other than in a "friendly" setting.

The court failed to see her claim, I believe, because her sexual-harassment complaint was delayed. Her complaint did not emerge for the first time until after she had been fired. The judges obviously believed a revenge narrative, one in which a bitter employee recast "horseplay" as "abuse" to get back at her coworkers.

But another narrative possibility exists here. Women who have experienced sexual harassment say, as Anita Hill said, that they want to keep their jobs.[106] They want the abuse to stop, but they also do not want to make waves.[107] They want to fit into the workplace environment as if they really belonged there. And to fit in, they endure the abuse.[108] It is as if women are making deals that they will tolerate the abuse if the employer just tolerates their presence.

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104. *See id.* at 491.

105. *See Meritor*, 477 U.S. at 68. In *Meritor*, the Supreme Court found that the appearance of voluntary participation by the victim did not defeat a successful harassment claim. The behavior that Mechelle Vinson complained of in *Meritor* was so obviously harassment in the view of the unanimous Supreme Court that her failure to object directly to her boss, who had forced her into a sexual relationship with him, did not bar her subsequent claim. *See id.* Why should the Seventh Circuit not consider what happened to JoAnn Reed as harassment also under this standard?

106. As Martha R. Mahoney noted, women generally *need* their jobs and face a hard time finding others in an economy that does not in general pay women very well. *See* Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1291-99 (1992).

107. Women fear that they will be retaliated against if they complain, regardless of whether they win a lawsuit. They fear that their careers and their reputations will suffer if they do not put up with the abuse. Tamar Lewin, *A Case Study of Sexual Harassment*, N.Y. TIMES, Oct. 11, 1991, at A18.

108. In one survey, only nine percent of the women quit their jobs immediately after the harassment began, although more women quit once the harassment escalated. *See* LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 21-22 (1978). Another report found that fewer than five percent of sexually harassed men and women ever report the harassment or take other action. *See* Sandra S. Tangri et al., *Sexual Harassment at Work: Three Explanatory Models*, 38 J. SOC. ISSUES 33, 47 (1982) (noting that most, but not all, sexual-harassment victims failed to report the behavior).

But once a woman has been fired, that deal is off. No longer able to justify to herself that she is at least getting something out of having put up with the abuse, she files suit claiming sexual harassment. If women's greatest fears in complaining about sexual harassment are that they will be fired, then the greatest barrier against bringing a complaint is eliminated when they lose their jobs. Rather than seeing a suit following dismissal as evidence of revenge, judges might see such a suit as the evidence about what the implicit terms of continued employment were. The understandings women have about the conditions under which they work are disturbed by their dismissals. If courts looked at the conduct, like the persistent and abusive conduct to which JoAnn Reed was subjected, and they see only consent, they should ask themselves just why a woman would consent to be treated like that. Perhaps then they would see that the apparent consent reflects a lack of bargaining power and a lack of options rather than the active approval that signifies free choice.

By locking her into a revenge narrative on the sexual-harassment claim, Reed's coworkers and the judges in the Seventh Circuit were effectively penalizing her twice: once for appearing to consent to the abusive treatment in the first place, and again for changing her mind about what it all meant. Reed, in this revenge narrative, then became the problem as the court shifted attention away from the conduct of her male coworkers to Reed's own actions and accounts. It was her conduct in the first place that allowed the harassment to occur, and it was her desire for revenge after the fact that brought the case into court. Her male coworkers were presented as accessories to a story in which the active agent was Reed. It was Reed's motives, actions, and stories that the court took to be the problem. She may have come into court claiming victimization, but she left the process having become the aggressor.

How did this inversion occur? The story JoAnn Reed told in court was inconsistent with her coworkers' interpretations of her actions at the time. Her coworkers' readings of her actions on the job were presented as if those interpretations were her contemporaneous accounts of the events in question.[109] Reed's own story, when she finally got to tell it in court,

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109. *See Reed*, 939 F.2d at 490. The court also found that she had not been subjected to sexual discrimination in employment and that all the ways in which she was treated differently from her coworkers were due to her rank as a civilian jailer rather than her sex. *See id.* at 490-91. No evidence was given on the relative numbers of men and women who held the ranks of the less prestigious civilian jailer and the more lucrative and privileged position of deputy sheriff in this case, though there were clearly some men and women in each rank. *See id.* Everyone knew, however, how Reed was

was therefore presented as revised, changing over time from a story in which she appeared to enjoy the abuse, to a story in which she abhorred it.

When stories are revised, judges and juries use that very fact as evidence that the later story is false, even when the victim did not grasp the chance to tell the first story herself. In addition, victims whose accounts are revised can be blamed for bringing everything on themselves because their narrative instability makes the later story unbelievable. Such narrative instability casts doubts on the motives of the woman who comes late to her story of blame, and she becomes the aggressive initiator of trouble for others.

While this pattern is the general rule, certain special cases exist in which revised stories can be presented as credible. Such exceptions include cases in which: (1) multiple women establish a pattern of conduct on the part of a particular man; (2) corroborating physical evidence exists to back up the woman's later account; and (3) an expert reconstructs the woman's initial story as a delusion for psychological reasons. It is to these exceptions, the exceptions that demonstrate the solidity of the implicit rule against revised stories, that we now turn.

B. *Safety in Numbers*

If women are to be believed when they revise their stories, they have a better chance if they find other women to do the same. Reconstructing as nonconsensual a sexualized relationship that appeared consensual at the time is very hard to do credibly. Women typically find that they have to establish that their experience was part of a pattern that other women experienced as well. Just as Anita Hill would have been more credible if a parade of former employees of Clarence Thomas had come forward with similar complaints, other women claiming abuse, harassment, even rape, find that there is greater narrative safety in numbers. One example can be found in *Daly v. Derrick*.[110]

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and women who held the ranks of the less prestigious civilian jailer and the more lucrative and privileged position of deputy sheriff in this case, though there were clearly some men and women in each rank. *See id.* Everyone knew, however, how Reed was treated, and women who testified indicated that they had to explicitly opt out of such treatment themselves. *See id.* at 487. What sort of workplace is this in which a person is held to consent to such violent, dangerous, and abusive treatment?

110. 281 Cal. Rptr. 709 (Ct. App. 1991).

In September 1977, Maura Daly was fifteen-years old:

> Before the start of classes [at a high school in California], [Maura Daly] attended a retreat designed to encourage Alternative School students and teachers to get to know each other. [Tommy] Derrick, who taught psychology, human sexuality, and social studies, also attended the retreat.
>
> One evening, Derrick and several students were giving each other massages. As Derrick massaged Maura, he began to touch her in a sexual manner. His sexual overtures to her continued during the retreat, and she eventually acceded to his request that she orally copulate him. He impressed on her the need to keep their relationship secret.
>
> Following the retreat, Derrick had sexual contact with Maura after school once every few weeks, either at his home or inside his van. Although she was happy to be receiving special attention from a teacher whom she liked and admired, she felt uncomfortable with their sexual activities and consequently experienced confusion. In the spring of her sophomore year, she told Derrick she did not wish to see him any more. After that he sought no further sexual contact with her.[111]

During the time that their sexual relationship continued, Maura described Tommy as her boyfriend:

> The relationship was her first experience of romance and love . . . . He repeatedly told her that she could make her own decision whether to be sexually involved with him, thereby inducing her to believe that she was equally responsible for their relationship. In fact, however, Maura was overwhelmed by his attentions due to her desire for a replacement for the father she had earlier lost through divorce. She did not perceive his conduct as wrong in any legally actionable sense; the only injuries of which she was aware were pain at the distance from her that Derrick maintained at school, jealousy at Derrick's sexual attentions to other students, and from time to time a sense that,

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111. *Id.* at 711-12.

rather than being a true friend, he was using her to satisfy his own sexual needs.[112]

In November 1986, Daly sought therapy because she was having "sexual difficulties" with her current boyfriend.[113] In the course of therapy, she mentioned that she had been "molested" by a high-school teacher.[114] "Sometime around March 1987, she began to realize how painful and damaging her relationship with Derrick had been for her."[115] She filed a tort suit against him for damages for the harm he had caused her.

This case is one of a growing number now being brought as a result of the "delayed discovery" of childhood molestation.[116] While most of the cases are not brought against teachers, but are instead brought against male relatives, the gist of the complaint is the same: A minor, usually but not always female, is pressured for sexual favors by a man who has some power over her. She endures the molestation in silence, because the man tells her to be quiet. She may even feel so compromised that she actively engages in preserving the secrecy because the revelation of the activity implicates her as well. Because she does not talk with anyone else about it, she can be influenced strongly by the man's narrative about what is happening. Although she may feel the sexual advances are inappropriate, she does not know how to articulate this as a conscious matter. Sometimes the girl actively claims to enjoy the sexual encounters at the time, valuing the attention they bring. Years later, almost always through therapy, the now-grown woman "learns" for the first time how to name what happened and what these events have done to her.[117]

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112. *Id.* at 718.

113. *Id.* at 712.

114. *Id.*

115. *Id.*

116. For an explanation of this issue, see Jocelyn B. Lamm, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189 (1991).

117. California has had a particularly dramatic history with these cases. In DeRose v. Carswell, 242 Cal. Rptr. 368 (Ct. App. 1987), the court rejected the claim of a woman who alleged that her grandfather had molested her repeatedly when she was between the ages of 4 and 11, finding that the statute of limitations had tolled on the case. *See id.* at 377. Because she knew everything she needed to know to file the claim within the statute of limitations, the court reasoned, she should not be allowed to proceed with the case after that time. In 1990, the California legislature enacted a statute designed

In *Daly*, the court was called upon to decide whether the lower court had been correct in throwing out the case on grounds that the statute of limitations had tolled.[118] Ruling that there was a triable issue in the possibility of a delayed discovery of a material fact, the court let the case proceed.[119] But given the judges' emphasis that a new California statute made them do it out of consistency, it is doubtful that the court would have allowed this complaint to proceed without the push from the legislature.[120]

The *Daly* case presents a stark case of a revised story. Daly clearly thought at the time that her relationship with Derrick was romantic, consensual, and wonderful—usually. Only later did she come to believe that this relationship was abusive and that he had taken advantage of her innocence and immaturity. *Daly* starkly presents a case of a complete reframing, in which consent at the time is later cast as consent that was not "real." Though the court allowed her case to proceed, Daly would probably have had a hard time establishing her initial nonconsent. But she had help.

As it turned out, two other women had experienced the same treatment from Derrick while he was their high-school teacher. In fact, all three of these women were friends in high school and had not realized that Derrick had a sexual relationship with each of them at the same time.

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to supercede *DeRose* by extending the statute of limitations on childhood molestations to eight years from the date the plaintiff attains the age of majority or three years after all of the relevant facts could have been discovered, whichever is later. *See* CAL. CIV. PROC. CODE § 340.1(a) (West 1993).

118. *See Daly*, 281 Cal. Rptr. at 716, 720.

119. *See id.* at 718.

120. In fact, in Marsha V. v. Gardner, 281 Cal. Rptr. 473 (Ct. App. 1991), the court dismissed an action brought by a woman against her grandfather 15 years after the last molestation occurred. The molestations had continued for nine years, during which time her grandfather had allegedly sexually abused, threatened, and used physical violence against her. Nonetheless, the court held that 15 years after the last event was too late to bring the suit because the plaintiff had always *known* that her grandfather had sexually molested her and that his acts were committed against her will and without her consent. *See id.* at 477. The fact that the woman claimed she suffered from "dissociation and psychological accommodation" only created uncertainty as to the amount of damages and did not keep her from knowing enough to file the case within the statutorily defined limits. *Id.* She said that she was not fully aware of the events, however, until she received therapy. *See id.* at 474. The dissent emphasized that Marsha V. could have possibly won in court under the new statute, because she filed within three years of discovering the injury. *See id.* at 478-85 (Johnson, J., dissenting).

Only after Maura Daly had gone into therapy and came to see Derrick's treatment of her as abusive did Daly's mother then call around and find that two other high-school classmates of Maura's had similar stories to tell. They later joined the lawsuit.

Does this change the credibility of the revised narratives of each of the women? For most people, it probably does. But why should three women revising their stories in the same way be more believable than one woman doing this alone? In the case of a lone woman accusing her former lover of abuse, it is easier to tell a stock counter-story about a particular relationship gone sour. But when three such relationships exist that were all being maintained at the same time in an apparently monogamous culture, then each woman appears entitled to adjust her story to take into account that Derrick was misrepresenting to each of them just what the specific relationship was at the time. Derrick's violation of another norm, the norm of monogamy, makes the violation of other norms about abuse seem more plausible. He can be constructed as a deviant all around, not the innocent man whose former lover now takes advantage of a convenient feminism to turn him into a monster after the fact. With three women providing evidence of collective misrepresentation, Derrick looks less like a poor guy with bad judgment in relationships and more like a predator.

Several women, each changing their stories in the same way independently, seem more believable than one woman who does this alone. The sheer volume of the revised stories changes the credibility of each one. Derrick's conduct becomes part of a *pattern* that each individual woman could not have seen alone. This new story is a different story, told for the first time when the narratives of the three women intersect. Taking the three relationships *together*, against backdrop assumptions about monogamous sexual affiliations, Derrick looks less "normal" and the basis of a deviance narrative is laid. There is a way to distinguish him from ordinary men, at least ordinary men in their public presentations. Nothing about the norms of ordinary male conduct is threatened by allowing these women's accounts to be believed as revised. By finding safety in numbers, women may be able to have their revised stories appear credible.

C. *Corroborating Evidence*

Revised stories may also be believed when other evidence, preferably physical evidence, corroborates the changed story. Corroboration requirements may be formally gone in rape law, but their residue remains

in the habits of belief. If a revised story is to be credible, it needs something more than itself as proof.

For example, in *Simmons v. State*,[121] the Indiana Supreme Court upheld a rape conviction even though the victim told inconsistent stories.[122] Significantly, however, in both accounts she claimed she was raped.[123] First, she said that she had been taken from the Payless Supermarket to the Grandview Golf Course where she was raped.[124] Later, she said that she had been taken from the Anderson High School parking lot to some nearby railroad tracks where she was raped.[125] She testified at trial that her statements were inconsistent because the defendant forced her to "tell a different version of the incident that he furnished to her."[126] With the introduction of expert testimony from a psychologist and from a social worker to the effect that rape victims often feel under the sway of a rapist even after he is no longer physically present,[127] the defendant was convicted of rape.[128] But the experts did not accomplish this extraordinary feat alone. It helped that the woman had never seen the defendant before the attack, that she had been abducted with the understanding that he had a gun, that he had threatened her with a knife and a heavy pipe during the rape, and that the defendant also stole her car.[129] But crucially, the police found the pipe with which the defendant had allegedly threatened her in the grass by the train tracks. This was, in short, a "real rape"[130] backed up with physical evidence of the pipe and the stolen car.[131] Her revised story did not stand alone.

When a revised account changes some of the elements of the initial story that one would expect to remain invariant across descriptions, the account generally becomes much less credible. In this case, the woman originally said she left voluntarily from the Payless Supermarket parking

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121. 504 N.E.2d 575 (Ind. 1987).

122. *See id.* at 577-79, 582.

123. *See id.* at 578.

124. *Id.*

125. *Id.*

126. *Id.* at 579.

127. *See id.* at 578-79.

128. *Id.* at 577, 582.

129. *See id.* at 577-78, 581.

130. ESTRICH, *supra* note 1, at 3.

131. *See Simmons*, 504 N.E.2d at 577, 581.

lot,[132] and then later said she was abducted from the Anderson High School.[133] The "voluntarily left" and "abducted" descriptions can be seen as two plausible interpretations of the same physical events, perhaps relying on different interpretations of her mental state that may not have been easily visible to others. But the Payless Supermarket parking lot was nowhere near the Anderson High School,[134] and so those descriptions seem flat-out irreconcilable, not just a matter of variable interpretation. Had there been no further corroborating evidence, this inconsistency would probably have been fatal to the credibility of the story.

Why is this? Often revisions of the latter type ("flat out") are used as evidence for inconsistencies of the first type ("matter of interpretation"). When a witness reveals inconsistencies in parts of descriptions that are usually matters of general agreement among observers (like where we are physically located when something occurs), this is taken as evidence that she must also be suspect in matters about which there would not necessarily be general agreement among observers (like the mental state of the speaker). Stories look suspiciously reconstructed when some facts that generally produce similar descriptions across observers appear to have been altered since the first account.

But much can be forgiven when physical evidence exists to back up the later story. With corroborating evidence, narrative instability can be "resolved" one way or another. Credibility of the lone woman may be bolstered with some help from physical evidence but otherwise, women's narratives are suspect when they change over time.

D. *Expert Reconstructions*

Sometimes a lone victim's changed story of sexualized abuse can survive scrutiny, even without corroborating physical evidence. But not without some assistance. In recent years, credibility of revised stories has been established through the testimony of expert witnesses. These expert witnesses generally testify that the victims of sexualized violence suffer from a form of post-traumatic stress disorder and therefore have *first* reactions that are not to be trusted, allowing later accounts to be believed. In *State v. Frost*,[135] the expert testimony that was introduced made the

132. *Id.* at 578.

133. *Id.*

134. *See id.*

135. 577 A.2d 1282 (N.J. Super. Ct. App. Div. 1990).

victim's revised story credible to the jury, and later to the judges on appeal.[136]

Early one April morning in 1986, L.S. was still sleeping when her former boyfriend, Gregory Frost, tapped on her shoulder.[137] He had broken into her house.[138] As she started to wake up, he started to yell at her. He hit her.[139] Their baby began to cry, so L.S. picked up the child and ran to the front door to escape.[140] Before she was able to open the door, Frost caught up with her and cut her arm deeply with a razor-edged box cutter.[141]

The relationship between Frost and L.S. had been plagued by Frost's frequent outbursts of violence against L.S., and she estimated that he had hit her at least once per month during the time they had been romantically involved, starting on the second day that they knew each other.[142] Police testified that she had called them to the house at least nine times to stop his violence.[143] After suffering through three and a half years of battering, L.S. had left Frost to go to live with her mother. She obtained a restraining order to keep Frost away from her and the baby.[144] Eventually, Frost was sent to prison for theft from another person. L.S. had been responsible for his arrest in that case and, on the day he broke into her house and cut her with the razor, he had just been let out of prison. His first act as a free man was revenge.

Knowing how out-of-control he could be, L.S. tried to talk with him, eventually suggesting that they have sex because "that would calm him down."[145] After they had sex, they went to the place where L.S.'s mother worked to get her car keys to go to the hospital to have the wound treated. L.S. asked her mother not to call the police. At the hospital, L.S. said she had cut her arm on the refrigerator. Her arm needed four sutures underneath the skin and eleven stitches to close the wound.

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136. *See id.* at 1286-88.

137. *Id.* at 1284.

138. *See id.*

139. *Id.*

140. *See id.*

141. *Id.*

142. *See id.* at 1285.

143. *Id.*

144. *Id.* at 1285.

145. *Id.* at 1284.

After L.S. was treated, she, Frost, and the baby went to Frost's mother's home to get money, and then went to a park where they drank beer and talked together. Eventually, they went back to L.S.'s home again. L.S. was supposed to pick her mother up at work, but never did. When L.S.'s mother arrived, angry at having to find another ride home, she and L.S. got into such a huge fight that neighbors called the police. When the police arrived, they saw Frost running from the apartment wearing no shoes, socks, or shirt. They recognized him as the person against whom a restraining order had been issued, and they arrested him.[146] They charged him with contempt of court for violating the restraining order, as well as burglary for breaking into the house, assault for stabbing L.S., and various weapons charges for possessing the razor.[147] Notably, he was not charged with rape. He was convicted on all counts.[148]

At the trial, Frost had claimed that L.S. had consented to spend the day with him, which he thought should cast doubt on any claim that he had broken in and attacked her that morning.[149] After all, Frost argued, why would this woman spend the whole day with him unless she wanted to? To respond to this, prosecutors introduced expert testimony to the effect that L.S. was suffering from Battered Woman's Syndrome, an identifiable medical condition that was characterized by the court as follows:

> The battered woman places herself in the role of a victim. She blames herself, thereby becoming even more vulnerable to the point where she almost expects it. She is reluctant to tell anybody about what occurs, usually for a variety of reasons. She may be embarrassed, the man might keep her isolated from others, she may hope the situation will change, or she may fear it will get worse if she reports anything. Most significantly, the battered woman cannot just walk away from the situation. She is emotionally dependent on her "man" and is often involved in a love-hate relationship.[150]

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146. *See id.* at 1285.

147. *See id.* at 1284-85.

148. *See id.* at 1284.

149. *See id.* at 1285.

150. *Id.* at 1287.

The effect of the expert testimony was to provide a context within which a jury could believe that all the things L.S. said on the day of the attack were motivated by fear. Such a fear-induced account could be overridden by a revised story later. Without this expert testimony, however, a jury might reasonably conclude, as Frost tried to argue, that she was now trying to get Frost in trouble because they had had a falling out after a pleasant day. After all, L.S. presented repeated and consistent explanations on the day in question about how she was okay, how she had simply cut herself on the refrigerator, and how no one should call the police because she was fine.[151] But the specific violent history of the relationship between Frost and L.S., as well as the use of expert testimony, convinced the jury that Frost had committed these acts and that L.S. had not consented.[152] On appeal, the admissibility of the expert testimony so crucial to the prosecution's case was upheld.[153]

Expert testimony can be very helpful to women in these situations. But it comes at a price. Such testimony is effective with jurors because it gives them an explanation for a victim's conduct at the time in question by saying she is suffering from a form of mental illness. The victim may have *thought* things were going to get better; she may have *thought* he loved her; she may have *thought* that she wanted to be with him. But she was wrong, deluded, and not a good judge of these things at the time. As a result, whatever she may have *thought* happened on the day in question can be dismissed as the result of temporary mental incapacity. But this sort of transformation from a credible first story to an even more credible revised story is very hard to do without an expert. The expert allows a woman's revised story to be believed, but at the cost of making her out to be a woman who could not know her own mind.

In this case, L.S. apparently wanted Frost convicted for these crimes. But she also visited him eleven times while he was awaiting trial back in prison.[154]

V. THE PROBLEM OF TRUTH IN LAW

So, how do judges and juries know when they have found the truth? It is an astonishing accomplishment that courts as well as ordinary

151. *See id.* at 1284-85.

152. *See id.* at 1285-88.

153. *See id.* at 1288.

154. *See id.* at 1285.

individuals manage to operate on a daily basis as if the bases of factual judgments were clear and solid. While the idea of truth has been a contested subject among philosophers for as long as philosophy has existed, the idea of truth in daily life seems to generate much less debate. When asked to find "the facts" of a case, judges and juries do not puzzle over the meaning of that instruction. Why? The simple answer is that judges and juries, spectators and litigants, ordinary folks in their daily lives and specialists in creating knowledge, "know truth when they see it." Within our own system of truth-finding, some cases may be easier and others harder, but the idea of truth itself is rarely in doubt. If the truth is unclear in a particular instance, default rules, like rules about burdens of proof or about how certain one has to be to convict, are employed to settle matters provisionally so that cases can be resolved with certainty.

American courts rely on the widespread facility of ordinary citizens in reasonably workable practices of truth-finding. The jury system is premised on the idea that citizens, selected to serve on juries, can listen to the presentation of evidence and work out "what happened" independent of any specialized knowledge of the law.[155] Lawyers and trial judges generally receive no special training in determining the credibility of evidence or in discerning truth, and so they too often draw on socially situated, unremarkable methods for determining "what happened." It is generally assumed that anyone who is not connected with the parties to the dispute and who does not have a special interest in the outcome of the case can figure out what to believe from evidence presented in a trial without specialized instruction. This is done because in the business of the evaluation of evidence, almost everyone is thought to be enough of an expert to be entrusted with finding facts.

But as we have seen with the examples explained above, truth-finding is a socially situated practice. We all have a set of interpretive conventions, practices of truth-finding, that tell us when a particular story seems more credible than another and when one witness appears to be telling the truth and another seems to be lying. Most of us engage in the evaluation and construction of truth on a routine basis, finding the activity generally nonproblematic and straightforward. Never mind that we are often dead wrong in assessing credibility, regardless of our experience and professional training.[156] Most of the time, we are successful enough or

155. *See* Scheppele, *Facing Facts*, *supra* note 9, at 42.

156. *See* BENNETT & FELDMAN, *supra* note 9; Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOL. 913 (1991).

blind enough to the consequences of our inaccuracies not to reevaluate our practices. Whenever our failures call attention to our inadequacies in this regard, we engage in a patch-up effort to work out what went wrong in the particular case, but we rarely rethink our entire scheme for evaluating the evidence that daily life presents us. Furthermore, when we have to deal with the law, whether as professionals who do this all the time, as jurors or litigants who are called upon to do this on rare occasions, or even as observers or scholars of the judicial process, we bring our interpretive conventions with us.

So, what do people operating in the legal process see when they are presented with evidence? What interpretive conventions do judges and jurors invoke when called upon to figure out "the facts" of cases?

The attribution of truth by judges and juries depends on properties of the stories witnesses tell.[157] Of course, this attribution goes on against a backdrop of cultural expectations about what sorts of stories are credible in the first place, and those expectations are dependent on visions of normality and aberration, drawn from experience and from widely available stock representations. But judges and juries decide whether a witness is telling the truth by evaluating *how the story is constructed* rather than by working out whether the story has a "real" referent. Some of the properties that matter in deciding whether stories are believable include internal consistency, narrative coherence, reliance on "hard" or physical evidence, and perhaps most importantly, the stability of the storytelling over time.

Given that most people have a naive sense that language is supposed to pick out things in the world, this view that the credibility of stories is generally determined by reference to the internal properties of the stories themselves may be disturbing. But it is not new. Clifford Geertz is one teller of a tale that reports a cosmology in which the world rests on the back of an elephant, which stands on the back of a turtle. When asked what the turtle stands on, an informant answered, "[a]h, Sahib, after that it is turtles all the way down."[158] This is not exactly a comforting answer if one wants to believe that some bedrock exists somewhere. But in stories, as with the elephant and its turtles, it is narrative all the way down.[159] Narratives often become their own best evidence.

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157. *See* BENNETT & FELDMAN, *supra* note 9, at ix.

158. CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, *in* THE INTERPRETATION OF CULTURES 3, 29 (1973).

159. *See* JEROME BRUNER, ACTS OF MEANING 43 (1990) [hereinafter ACTS]; DAVID

Much historical reconstruction, like the reconstruction in courts, proceeds from narrative evidence. Historians most frequently work with texts and they find themselves composing their own narratives to make sense of the narratives they have encountered. Even those historians who work with physical evidence, like archeological discoveries or other tangible bits of a distant past, make sense of them by placing them in the context of narratives. But saying that historical reconstructions are often narratives "all the way down" is not to say that such reconstructions are fictional. One can have a sense of faithfulness to the records and still be constructing narratives of narratives of narratives as a record of "what happened." Though it is notoriously difficult to draw any distinct boundary between fictional and nonfictional narratives, one can credibly claim to be constructing a narrative of evidence one has not invented out of one's imagination. This is what passes for fact, both in historical research and in courts of law.[160]

Why is this? In courts of law, judges and juries cannot do what a correspondence theory of language would have them do; they cannot hold up testimony against events in the world to see which versions "match" better. The most obvious reason for this is that the events are long over before the cases come to trial and the "reality" in question is not around to hold any descriptions up against, if such a thing could be done. Some procedures would have to be devised for working out when a description corresponds to reality and then those procedures, not the "matching," would be doing all the work. Most of the time, the traces left over from historical events are *accounts* by people who were present at or otherwise involved in the event, and such accounts—narratives—are often the best evidence available.

Even if the descriptions were being constructed simultaneously with events or if the events in question were preserved in some other form—as happened in *California v. Powell*,[161] in which a citizen's videotape

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CARR, TIME, NARRATIVE, AND HISTORY 4-5 (1986); Theodore R. Sarbin, *The Narrative as a Root Metaphor for Psychology*, *in* NARRATIVE PSYCHOLOGY: THE STORIED NATURE OF HUMAN CONDUCT 3, 9 (Theodore R. Sarbin ed., 1986); Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 5-6 (1991).

160. For an example of essays providing a range of views on the process of writing history, with a particular focus on what cannot be asserted as true, see PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE "FINAL SOLUTION" (Saul Friedlander ed., 1992) [hereinafter PROBING THE LIMITS].

161. No. BA035498 (L.A., Cal. County Ct., Apr. 30, 1992) (unpublished opinion of Judge Weisberg).

recorded several Los Angeles police officers beating motorist Rodney King—judges and jurors could not work out which single description best "matched" the world. The whole idea of matching descriptions against the world is misleading because, apart from being metaphorical, it assumes that there is only one perspective, only one point of view, only one ideology, no room for multiple readings, and no potential for disagreement. In short, it assumes no problem with understanding how accounts as socially situated cultural products relate to evidence of the world. But particular "true" stories and particular descriptive statements are often selected from among a set of arguably accurate versions of reality[162]—it is just that other descriptions in the set give very different impressions about what is going on. The vexing question is not just whether the descriptions are accurate in some way, though it is crucially important to screen out lies, but rather, how it is that some particular description instead of some other description comes to be forwarded as the authoritative version of events.[163] This raises questions of power and ideology, of the "situatedness" of the descriptions that pass for truth, and of the social agendas they support.[164]

In law, these questions are not explicitly raised as problems, though practitioners know that they are crucially important. Questions about multiple versions of reality are largely ignored in the subject of evidence, in which the greatest concerns are limits to the sorts of statements that might be taken as accurate. Rules of evidence screen out *types* of information that are thought to be misleading,[165] prejudicial,[166] non-

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162. The exceptions to this generalization pose special problems for historians. *See* Carlo Ginzburg, *Just One Witness*, *in* PROBING THE LIMITS, *supra* note 160, at 82.

163. *See* NELSON GOODMAN, WAYS OF WORLDMAKING 20, 97 (1978). In a more distinctly legal context, see Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729 (1988).

164. *See* Donna J. Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, *in* SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE 188-89 (1991). For an account of the truth/ideology distinction in the history of Marxist thought, see MICHELE BARRETT, THE POLITICS OF TRUTH: FROM MARX TO FOUCAULT (1991).

165. *See* FED. R. EVID. 801; *see also* Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974) (explaining that hearsay is excluded because of inaccuracies attributed to ambiguity, insincerity, faulty perception, and erroneous memory).

166. *See* FED. R. EVID. 403 (excluding evidence in circumstances in which its probative value is substantially outweighed by the danger of unfair prejudice).

probative,[167] or just plain unreliable.[168] But the rules of evidence themselves are at best probabilistic judgments about categories of information and their likelihood of being false or irrelevant.[169] Following the rules of evidence is certainly no guarantee of finding truth, especially because most of us frequently use legally excludable evidence in making judgments outside of courtroom settings without apparently being wrong much of the time and because legally admissible evidence may well be unreliable. Rules of evidence proceed on the assumption that individual bits of information can be screened out as unreliable, misleading, or untruthful and that any "reasonable" assemblage of what is left counts as truth. But this is at best a hopeful fiction.

For one thing, rules of evidence provide no guidance about what to do once particular bits of information are admitted as evidence. In practice, judges and juries do the best they can to evaluate evidence the only way they can—through assessing the way the stories hang together with what else they know about the world and through spotting key characteristics in the stories that they hear, characteristics they believe are signs of truth. Judges and juries cannot do anything else. They have to use ordinary conventions of truth-finding.

Given the dependence of law on these ordinary conventions of truth-finding, it is worth asking just what these ordinary conventions are, for several reasons. First, the outcomes of individual cases are highly dependent on what is found to be "the truth" in that instance, so the integrity and reliability of the judicial process depends on these factual determinations. How they are made and what conventions they invoke should be made explicit if law is to be justifiable to those who are subject to it.[170] Second, interpretations of fact and law are not easily separable activities in the process of legal reasoning,[171] and so any theory of

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167. *See* FED. R. EVID. 402 (excluding evidence that is not relevant).

168. *See* FED. R. EVID. 801 (defining hearsay as, inter alia, "a statement, other than one made by the declarant while testifying [in court], offered in evidence to prove the truth of the matter asserted"; hearsay is not admissible except as provided by the Rules or the Supreme Court); *see also* Tribe, *supra* note 165, at 958 (explaining that hearsay is excluded because of inaccuracies attributed to ambiguity, insincerity, faulty perception, and erroneous memory).

169. *See generally* 1 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 6.5 (Peter Tillers rev. vol. 1983) (arguing that the drafters of the Federal Rules of Evidence did not consider whether the procedural techniques used to regulate the presentation of evidence would be successful in achieving accuracy).

170. STEPHEN MACEDO, LIBERAL VIRTUES 50, 69-70 (1990).

171. *See* SCHEPPELE, *supra* note 8, at 86-102 (detailing the interrelationship between

judging needs to include some account of the interpretive conventions used in the construction of facts to adequately represent the process.[172] Third, law often pretends to be above politics, prejudice, and partiality by virtue of the principled nature of its practices in judging. Insofar as a large part of that practice depends on unexamined and possibly prejudicial conventions for assessing the facts on which judicial judgment depends, the practice of judging can hardly be said to be above these "contaminating" influences. So, we should explore these influences before relying on the assumption that law manages to sanitize bias through its appeal to principle.

In addition to these worries about abstract legal legitimacies, a more immediate practical issue is involved in working out *whose* conventions of truth-finding are to be invoked when more than one set of conventions applies in the social settings that a given legal system embraces. If we have learned anything in recent years about the operation of social practices, it is that they are usually specific to time, place, social location, and embodiment in the lives of particular people. Saying that "we" have a set of conventions for truth-finding begs the questions of who the "we" are and whether "we" share these practices at all.[173] So, working out how information is constituted as fact or, at the risk of creating an unwieldy neologism, how information is "enfacted" requires both looking at the way conventions of practice are historically, socially, and culturally situated in the lives of particular people and asking whose truth is being found when jurors and judges find it. But when we look more closely, we see that the whole metaphor of "finding" rather than "constructing" the truth relies on the assumption that truth is "out there" to be located rather than constituted through the operation of social practices. This way of talking about truth shows how the "facticity" of a truth-claim must be presented as if it is compelled by the "external-ness" of its referent rather than compelled or allowed by the agreement on conventions of description.

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interpreting facts and laws).

172. *See id.* at 103-04; *see also* Scheppele, *Telling Stories*, *supra* note 9, at 2080-83 (stating that the way people interpret what they see depends to a very large extent on prior experiences, on the ways in which they organize their observations, and on patterns of their daily life; this poses a particular problem in the law because judges and jurors are not first-hand witnesses and can only weigh other people's perceptions).

173. *See* Scheppele, *Telling Stories*, *supra* note 9, at 2079 n.21.

VI. EVALUATING REVISED STORIES

With these theoretical considerations in mind, we can now return to the specific problem of revised stories. If judges and juries generally believe that the first versions of stories are true and that later versions must be suspect unless some special reason exists to distrust the earlier version, what must their picture of truth look like? And how adequate is this picture to the complicated world that judges and juries are trying to represent through the construction of the facts of a case?

To believe initial versions over revised versions, people must have an image of a precarious and fragile truth that decays over time or is subject to the continual risk of subsequent distortion. As a result, information gathered before these inevitable processes of decay and distortion set in is considered to be especially important in figuring out "what happened." If accounts seem to change over time, it must be because something other than the initial, accurate perception of reality is being incorporated into the story.

Some basis for this belief exists, as the work of Elizabeth Loftus on eyewitness testimony makes clear.[174] People do revise their accounts based on new information that insinuates itself into the original memory as if this later information were part of the initial perception. But the possibility of such reconstructions should not eliminate the possibility that victims, particularly those who have been traumatized by the events for which they now want to seek legal redress, may be reinterpreting their experience in a new frame—one that in many ways is more adequate than their initial self-blame and denial.

The distinction people make between initial stories and revised stories obscures an important feature they both share. They are both narratives, and as such, they both represent strategies for organizing and making sense of evidence.[175] Neither story represents "perception without conception." The first version of any story is *not* merely raw material, processed by the mind without interpretation, that revised stories take and then shape through interpretive processes absent in the first version itself. As Wittgenstein showed in the duck-rabbit demonstration, "seeing" initially is often "seeing as."[176] We do not first see things "as they are"

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174. *See* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 70 (1979); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (2d ed. 1992).

175. *See* ACTS, *supra* note 159, at 55-59.

176. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 194-95 (G.E.M.

and then interpret them. We see with the interpretive frameworks we bring to events as much as we see with our eyes. When we change interpretive frameworks, especially when the new frameworks create new accounts of blame, others may see us as making things up.

For example, the woman who sees her abusive husband as revealing his love for her through his violence is not processing raw material that is *then* later interpreted through consciousness-raising. She is interpreting her husband's actions as they are happening—and those initial interpretations feel like untainted perception. But her initial perceptions are already interpretations, though they would be different in their organization from the perceptions of her husband's defense lawyer or a feminist observer seeing those same events unfolding before their eyes. The difference in accounts that the battered woman and the feminist lawyer would give of this event is not the difference between truth and falsehood. Instead, it is the difference in the interpretive framework through which the events are seen in the first place.

Different *versions* of events may be related by different people witnessing the same thing at the same time. For identical reasons, different versions of events may be related by the *same* person who sees what once happened in a new light that only switches on when some time has elapsed since the event. But why should we favor the first framework that the victim happens to have over another framework that might be brought to bear on the event with more reflection?

The puzzle is deepened when we note that most people believe that reflection aids accuracy in everything but reports of perception. Generally, people believe that *considered* preferences are more reliable than preferences listed off the top of one's mind.[177] And ethical judgments that have been weighed for a period of time are better than "snap judgments." Even academic papers that have been through revisions are considered better, more polished, than those that have not been through the process of revision. Why is it, then, that reports of "facts" are not similarly thought to be improved with reflection and thought?

We learn to describe first impressions as *true* because they appear to involve no conscious alteration, even though there may be a physical basis for other reports of those perceptions. Nelson Goodman reports that when most of us report seeing a round table from the side, we still describe it

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Anscombe trans., 3d ed. 1984).

177. In an earlier version of this paper, I called revised stories "considered stories" to emphasize their connection with considered preferences.

as round, even though our eyes are perceiving the shape as oval because of the angle of vision.[178] Clearly, there is a large element of construction, however rapid and implicit, even in the most apparently uncontroversial descriptions.

What this all amounts to is that first accounts appear to be *simply true* as if perception were somehow free of organizing concepts and categories that are themselves social products. First versions are the "obvious" way to describe what has happened, while revised versions seem to involve conscious hard work to "make sense" of what has happened and are therefore more obviously contestable. The accounts we take to be "simply true" feel as though they are "straight" read-outs of unbiased perception. The accounts we arrive at by revising our stories to "make sense" of things seem to pull away from those initial perceptions and are consequently distrusted.

But this contrast between a picture of pure and untainted perception and an alternative picture of a contaminated, altered, or revised account should now appear naive. If all narratives are constructions and all descriptions are socially situated, making use of concepts and categories that are made available through the cultural location one occupies, then why should we favor the *first* framework that this particular narrator happens to bring to the description of events? In the context of sexualized violence, in which a victimized population of women has come to see such abuse as a persistent feature of daily life, saying that initial stories are the only believable accounts amounts to saying that a potential defendant's guilt or liability rests on the defendant's choice of victim. Women who have accepted continuing victimization with the resignation of self-blame and denial can be abused without anyone being able to gainsay such women's initial narratives of complicity. When women learn that they do not have to put up with such treatment, however, they see their own pasts differently. But such reconstructions are then discredited as lies.

This is a general problem in the believability of narratives. The preference for first versions of stories looks like a neutral rule. But it falls particularly hard on women. As this article has shown, experience, social-science research, and observation of the legal process tell us that women who are the victims of sexualized violence often need to take time to understand what has happened to them. This is because women have learned both to put up with sexualized violence as a feature of daily life and to blame themselves for it as a first-pass explanation. Courts'

178. GOODMAN, *supra* note 163, at 92.

exclusion of revised stories works disproportionately against women because women are disproportionately the victims of a socialization that masks the immediate recognition of sexualized abuse *as* abuse. Overcoming the first reactions takes time—but it is precisely these delays that courts generally suspect as evidence of lying. The first stories we tell are not constructed in the absence of frameworks that help us to make sense of what has happened; they are simply constructed with our most uncritical frameworks—frameworks that may or may not be the ones we would think best to invoke upon further reflection.

Women's initial reactions in sexually abusive situations may lead others, particularly the men with whom they interact and those who judge women's reactions in court, to conclude that women enjoy the abuse and are encouraging the conduct. In a study of rape victims in Chicago, for example, I was surprised to find out how many women reported that they attempted to fight off their attackers by crying, by telling the rapists their life stories, and by apparently agreeing to sex to lower the violence level in the assault.[179] Each of several of the women in our sample of nearly 100 women said she began to tell the rapist, often a stranger, intimate details of her life in the attempt to get him to see her as a human being. If he saw her as a person, she thought, then he could not do this to her. Many women reported crying and bargaining rather than punching and screaming. Talking, crying, and bargaining very rarely worked, but women viewed these strategies as aggressive attempts to defend themselves while the rapists no doubt interpreted these reactions as a lack of meaningful resistance. In the absense of bruises and scratches that come with a physical struggle, these women often had great difficulty proving their nonconsent in court. Their first reactions were constructed as initial narratives of consent. As a surprising number of first reactions revealed in this study of sexual-assault victims, women are afraid to stop being polite, even when they are being attacked. This may be because women learn to be concerned with maintaining relationships and keeping them from breaking apart.[180] But regardless of the source of these reactions, they make women's later narratives of rape unbelievable.

In cases of sexual harassment, what victims seem to want most is for the conduct to stop. They do not want to leave their jobs, to file formal grievances, or to rip up their lives to avoid what was not their fault to

179. Unpublished study (on file with author).

180. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE 62-63 (1982).

begin with.[181] Women often do not report sexual harassment, hoping it will go away.[182] By the time they decide to fight it, it is too late. The initial story that they were consenting, or at least not objecting, has already stuck.

If we have a legal system that uses rules of evidence and principles that are hostile to revised stories in judging truth, then women will continue to be victims in court when they press cases of sexualized violence. But the few revised stories that *are* currently accepted by courts are not an unqualified good thing in empowering women.[183] In the absence of multiple complaining witnesses and physical corroborating evidence, the revised stories that courts currently accept are generally the versions urged by expert testimony, not just by the woman herself. But the presence of experts may remove a woman's individuality and unique voice by substituting a statistically derived average experience that women typically share for the detailed, potentially idiosyncratic experiences each of us has. What a woman gains in solidarity with other women as a result of being lumped into the averages, she may lose in distinctiveness if her own experience veers from the statistical norm. As the women's movement succeeds in breaking women free from a single conception of femininity, such statistical averages will become less and less accurate as descriptions of particular women's experiences. The reliance on expert witnesses is immensely useful as a transition device between the world today and a world in which women's stories have more power as a source of fact. In the future, however, reliance on such witnesses may be seen as urging another single oppressive image of how women should react to sexualized violence on women who have diverse experiences and diverse reactions.

The use of expert testimony currently allows a woman to win a case against a man by having a "qualified person" testify that she was suffering from trauma or delusion and thus was not in her right mind when she blamed herself, acted from numbness like nothing had happened, tried to

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181. *See* Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 51 (1990) (stating that women often quit jobs, request transfers, and even request demotions as a result of sexual harassment in their work environment).

182. *See* Mango, *supra* note 13, at 359-60.

183. *See generally* Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986) (arguing, in part, that the "battered woman syndrome" defense, as told through expert testimony, often perpetuates gender stereotypes of female incapacity).

show her deluded love for her attacker, or changed her story. What she *really* meant (only the expert can say) was something else. Certifying the later stories, experts succeed in establishing their own credibility while establishing that women are individually unstable at the time of abuse. Such psychologizing of the problem avoids recognition of the scale and scope of sexualized violence against women. Understanding the narrative strategies of women as the result of social and cultural forces larger than the individual case, as this article has tried to do, reempowers women to talk in their own voices and not just through the voices of experts.

Not all revised stories should be believed. Nor should all first drafts of accounts be immediately accepted either. Strategies of belief need to be more complicated than that to do justice to the variety of knowledges present in any given society. Understanding how the stories are socially constituted as believable in the first place is one important step in the process of making the legal system a force for the liberation of women from sexualized violence. At a minimum, fact-finders need to understand that early narratives about sexualized violence may reveal not some deeper truth, but rather the effects of oppression on women. Not allowing women to reinterpret their own experiences as they learn to oppose the abuse is a way of furthering that oppression.