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THE ABUSE EXCUSE AND PATRIARCHAL NARRATIVES

Mary E. Becker*

We tend to perceive and understand the world around us in ways that are consistent with basic cultural beliefs and expectations. Because our culture1 is patriarchal, these beliefs and expectations are formed by patriarchal narratives, stories which make sense of the world around us in terms consistent with our version of patriarchy. In this social order, it is extremely difficult to protect children from sexual abuse because most sexual abuse is a product of patriarchal privilege. This thesis cannot be proved empirically given our limited information about the incidence of childhood sexual abuse and of the evidence available to authorities. Reactions to abuse claims, however, appear to support this argument.

We suspect that claims of childhood sexual abuse are unlikely to be true when the claims contradict patriarchal narratives and call into question patriarchal privileges.2 Conversely, we presume that claims of childhood abuse are accurate when they are consistent with patriarchal narratives and do not threaten patriarchal privilege. The amount and weight of evidence is, of course, relevant. But, holding the type and quantum of evidence constant, I contend that certain allegations of child sexual abuse are more likely to be believed than others, and these credibility determinations are contingent not on markers of psychological or legal veracity but upon the degree to which allegations resonate with dominant narrative themes. How much or how little evidence will convince us that abuse actually occurred depends, then, upon whether the claim challenges or supports patriarchal understandings of how things work.

In this Essay, I compare the general cultural willingness to believe claims of childhood sexual abuse in four settings:

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1 By “culture” I mean the “accumulated store of symbols, ideas, and material products associated with a social system, whether it be an entire society or a family.” ALLAN G. JOHNSON, THE BLACKWELL DICTIONARY OF SOCIOLOGY: A USER’S GUIDE TO SOCIOLOGICAL LANGUAGE 68 (1995).

2 Cf. Lynne Henderson, Without Narrative: Child Sexual Abuse, 4 VA. J. SOC. POL’Y & L. 479 (1997) (arguing that major difficulty for district attorney in getting a conviction in a child abuse case is that the child abuse story lacks a credible narrative framework).
1. An adult woman claims that her father abused during her childhood and confronts him, sometimes suing him for money damages as well.

2. During a divorce, a wife accuses her husband of sexually abusing one or more of their children.

3. During a divorce, a heterosexual parent claims custody or argues for severe restrictions on visitation by a homosexual parent on the ground that the gay or lesbian parent has abused or is likely to abuse the child.

4. A lesbian reports having been sexually abused as a child in a setting that does not involve a suit against her father or other confrontation with him.

I begin by describing a recurrent pattern: our tendency to disbelieve allegations of abuse in the first two settings and to believe allegations in the second two settings. I then describe the patriarchal beliefs and expectations that explain these reactions.

I. ABUSE ALLEGATIONS AND CREDIBILITY

A. Incredible Allegations

1. Adult survivors confront or sue an abusive father.—We tend to be suspicious of these claims. Women making them are likely to be regarded as fantasizing, lying, or as inordinately influenced by therapists who lack professional ethics or skills. I cannot prove this point empirically; we lack necessary information such as knowledge of the accuracy of adult survivors’ claims, how often the claims are disbelieved, and by whom. There is, however, evidence of this phenomenon in the cases imposing liability on therapists for harms caused to the accused parent(s) by allegedly “false recovered memories,” as discussed by Cynthia Bowman in her contribution to this symposium. These cases are so inconsistent with basic principles of contract and tort law, principles grounded in strong social policies, that their even transitory existence begs for an explanation.

The relationship between therapist and client begins as a contract. The therapist has contractual obligations to the client that can be enforced through breach of contract or tort malpractice claims. Third parties cannot, in general, sue to enforce contracts because they are not parties to the contract and those who are parties are unlikely to have intended or agreed to assume such broad potential liability to those who have paid nothing and

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3 Cynthia Grant Bowman, The Manipulation of Legal Remedies to Deter Suits by Survivors of Childhood Sexual Abuse, 92 NW. U. L. REV. 1481, 1489 n.28 (1998); see also Cynthia Grant Bowman & Elizabeth Mertz, A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy, 109 HARV. L. REV. 549 (1996).

4 See Bowman & Mertz, supra note 3.

5 The Supreme Court of Illinois recently rejected a third-party liability claim. See Doe v. McKay, 1998 WL 319488 (Ill. June 18, 1998). As Cynthia Bowman points out in her Article in this issue, California has cut back on scope of third-party liability in settings other than recovered memory. See Bowman, supra note 3, at nn.22-25 and accompanying text.
shared none of the risks of the transaction. Third-party suits for breach of contract are, therefore, limited to situations in which the contract was made for the benefit of the third party and third-party enforcement is necessary as a pragmatic matter because the promisee is unlikely to enforce the contract. Consider, for example, a lawyer’s obligation when writing a will to use reasonable care to ensure that the client’s wishes are given effect. In many jurisdictions, a disappointed beneficiary can sue the lawyer for breach of contract when, after the client’s death, an error by the lawyer is discovered that defeats the legacy. Here, the promisee is dead, and her executor may be reluctant or unable to sue to enforce the contract; the beneficiary is the only person with adequate incentive to enforce. And, of course, the lawyer’s obligation to use reasonable care was for the benefit of this particular beneficiary, as well as the deceased.

In third-party liability cases like *Ramona v. Isabella*, where liability is imposed on a therapist for injury to a father accused (wrongfully, according to the plaintiff father) of sexually abusing his daughter when she was a child, there is no basis for a contractual recovery by the father. He was not a party to the therapeutic contract nor was he the intended beneficiary of it. Clearly, neither the therapist nor the client would have wanted or agreed to third-party beneficiary status for the father. Indeed, such status would limit the value of the therapy to the patient and fragment the therapist’s professional responsibility by creating conflicting loyalties and duties for the therapist, who would be obligated to serve both her client and other people with potentially inconsistent needs and interests.

Cynthia Bowman and Elizabeth Mertz have demonstrated the bizarre nature of the third-party cases in light of basic tort principles. Malpractice claims can be brought in tort rather than contract and often are. But there are limits on who can sue a therapist in tort. Bowman and Mertz report that third-party liability cases against therapists have tended to arise in four situations:

(1) suits by a husband against his wife’s therapist, alleging sexual conduct with the wife-client; (2) cases involving therapists’ duty to potential victims of a dangerous patient; (3) custody battles involving reports or testimony by a therapist concerning sexual abuse by one parent; and (4) civil suits against therapists who participated in criminal proceedings involving allegations of sexual abuse, after the alleged abuser has been acquitted.

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6 Think, for example, of a person agreeing to buy a new car from a car dealer and then breaching the contract. Only the car dealer can sue for damages. Family members and friends who might have benefited from the new car cannot sue the breaching buyer for their losses. There is no reason to think that the parties to the contract would have agreed to such extensive liability.


8 Bowman & Mertz, *supra* note 3, at 577.
But they report that—with one exception—such suits have succeeded only in the second situation: therapists have been held to have an obligation to warn others at risk of physical injury from a dangerous patient, despite the conflicts such an obligation creates for the therapist.9

The one exception was an unusual case in the fourth set, in which a therapist was found liable for her participation in a case in which a child rightly claimed to have been raped by a stranger (as eventually established by DNA evidence), but the therapist and others worked to prosecute the father and to have the child adopted by her foster family (where she had been placed after the rape).10 Key to understanding liability in this case is that the suit was brought by the abused child as well as the father and other family members: "the party in privity—the child—was a minor and also agreed that the malpractice had occurred."11

As Bowman and Mertz argue, when the patient has not physically injured anyone and does not agree that there has been malpractice, imposition of third-party liability conflicts with basic notions of when and why we impose liability for damages to a third party for breach of contract. Although these cases are still relatively rare and will not (hopefully) be widely adopted, they are so at odds with basic legal norms that they must reflect unusual pressures on the legal system to disbelieve survivors' claims of abuse. More common are allegations made by a wife at divorce discussed in the next subsection.

2. A divorcing wife alleges that her husband has sexually abused one or more of her children.—Many judges12 and mental health professionals13
believe that allegations of paternal abuse are fabricated at divorce to give the mother an advantage with respect to custody, support, or property. Actually, what empirical evidence there is suggests that even at divorce, most allegations of paternal sexual abuse are true. Such allegations are actually rare: somewhere between two and fifteen out of every one thousand divorce filings involve allegations of sexual abuse.\textsuperscript{14} Overall, only about eight percent of sexual abuse allegations (in all settings) are "demonstrably false."\textsuperscript{15} In one of the few empirical studies attempting to determine how often false allegations are made—but in a clinical, nonrandom setting with a sample of only twenty cases involving divorce—researchers found that only twenty percent of the allegations of child sexual abuse appeared to be unfounded.\textsuperscript{16}

There are a number of reasons that mothers are unlikely to make false abuse allegations. First, mothers are likely to be regarded as responsible for the prior abuse by many who learn of it; her reputation will suffer.\textsuperscript{17} Indeed, mothers themselves may be held criminally or civilly liable for earlier sexual abuse by a husband, as described below. Thus, her allegations raise the possibility of criminal or tort penalties for herself.\textsuperscript{18}

Second, allegations made by a mother increase the possibility that she will be regarded as unfit to be the custodial parent, either because she did not prevent earlier abuse or because her allegations will be disbelieved and she will be seen as lying, vindictive and hostile. Worse still, even if she is believed, she may lose custody to the local child welfare agency or to the

\begin{footnotes}
\footnote{See Thoennes & Pearson, supra note 12, at 4 (noting that between 2-20% of all family court cases dealing with custody or visitation also contain allegations of sexual abuse; since about 10-15% of divorce cases with minor children have custody contests, these authors conclude that sexual abuse allegations are likely to occur in between 2 and 15 of every 1,000 divorces).}
\footnote{See Thoennes & Pearson, supra note 12, at 13.}
\footnote{See infra notes 26-33 and accompanying text.}
\end{footnotes}
child's grandparents or other relatives because she did not prevent the abuse. One attorney describes these problems:

Usually she says, 'I can't really believe he'd be doing this, but . . . .', or they've seen something that's got them worried but they're also feeling guilty and ashamed. It makes them feel people will consider them bad moms if it's true. People will question how observant and caring they are. Lots of times you have to convince them to discuss it. I'll explain to them that custody and visitation hinge on it, and child support flows from that. Also, if they wait [to bring the charge up] until it looks like dad will have easy access to the kids, they'll be asked 'why did you wait so long to say something?' The hardest part is that, in all honesty, you have to tell her that her concern about losing the children [because she failed to prevent the abuse] is valid.

I have elsewhere noted the dilemmas facing mothers who accuse their ex-husbands of child abuse during divorce proceedings. For example, if she is regarded as hostile to the father, the mother will be disfavored for custody under the "friendlier-parent" provisions in many state custody standards. Under these provisions, a court considers how friendly each parent is towards the other parent's continued involvement with the child. In Illinois, the law requires a divorce court to consider "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child." The Illinois best-interest statute also provides: "The court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child." These presumptions are likely to mean that if her allegations of abuse are disbelieved— are regarded as fabricated to give her an edge in divorce or custody proceedings—she will be considered less appropriate to be

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20 Thoennes & Pearson, supra note 12, at 5.


22 Id. at 26.

23 750 ILL. COMP. STAT. 5/602 (West 1994); see also COLO. REV. STAT. ANN. § 14-10-124(1.5)(f) (West 1989); FLA. STAT. ANN. § 61.13(3)(a), (j) (West 1994), amended by 1993 Fla. Sess. Law Serv. 93-188 (West); MO. ANN. STAT. § 452.375.2(8) (West 1986), amended by Mo. Legis. Serv. 162 (West); MONT. CODE ANN. § 40-4-223(1)(b) (1985); NEV. REV. STAT. § 125.480(3)(a) (1991).

the custodial parent for having voiced them. And if she does lose custody because she is not believed, custody is likely to go to the abuser himself.25

Yet if the mother stays in the marriage and does not report the father’s abuse of the children to the authorities—an event likely to be accompanied by the breakup of the family and a divorce in many situations—she can be held criminally liable herself for abuse and neglect. A parent who stays in a home in which children are abused by the other parent can lose custody and even parental rights.26 Mothers are often held criminally accountable for their children’s abuse by another, typically a father, stepfather, or boyfriend.

A parent, whose child has been harmed by another, can be criminally liable for his or her failure adequately to care for the child; an affirmative duty to care for the child may be the basis for holding a parent criminally liable for an act committed by another. Not all states impose criminal liability for another’s abuse, but many do and the trend is towards increased parental liability for failure to protect. Most states have criminal child-abuse statutes that apply to acts of omission as well as commission.27 In some states, parents have been held criminally liable under general assault or battery,28 manslaughter,29 or second-30 or first-degree31 murder statutes as well as under child abuse statutes,32 for acts committed by another. Moth-

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25 See Laurino, supra note 12.

26 See, e.g., In re E.P., C.P., & G.P., 521 N.E.2d 603, 606 (Ill. App. Ct. 1988) (mother, who subsequently agrees to termination of her parental rights, loses custody because of sexual abuse by children’s father; mother testified that her fear of him resulted in her ignoring signs of sexual abuse of their daughters); In the Interest of A.V. & J.V., 525 A.2d 778, 778 (Pa. Super. Ct. 1987) (mother loses custody of her children because of her husband’s previous physical abuse of one of them though she is now separated from the husband); In re Jeffrey R.L., 435 S.E.2d 12 (W.Va. 1993) (mother’s parental rights terminated because child had been physically abused by unidentified perpetrator).


30 See, e.g., Boone v. Arkansas, 668 S.W.2d 17 (Ark. 1984) (mother convicted of second degree murder committed by her boyfriend).

31 In two recent Illinois cases consolidated on appeal, mothers were held criminally guilty of first-degree murder when their boyfriends killed their children. See Illinois v. Stanciel, 606 N.E.2d 1202 (Ill. 1992); see also Illinois v. Novy, 597 N.E.2d 273 (Ill. App. Ct. 1992) (stepmother liable for first-degree murder either because of her own acts or, in the alternative, her accountability for acts of dead child’s father).

32 See, e.g., New Mexico v. Williams, 670 P.2d 122 (N.M. Ct. App. 1983) (mother criminally liable under child abuse statute for husband’s abuse of four-year-old daughter despite the fact that she was pregnant and herself abused by husband); Wisconsin v. Rundle, 500 N.W.2d 916 (Wis. 1993) (overturning conviction of father held criminally liable for mother’s abuse of child).
ers have also been liable in tort for abuse by fathers, stepfathers, or boyfriends.  

Yet if the mother whose children are being abused will not be believed if she seeks custody at divorce, she may well be right in concluding that the children are best off with her continued silence. Accusing the father leads to divorce in most circumstances, and the children are probably better off with her in the home as well as the father rather than in the sole or joint custody of the father. Our inability to believe mothers when they do complain of paternal sexual or physical abuse of children is inconsistent with holding mothers criminally and civilly responsible for his injuries to the children. As with third-party liability suits discussed above, the results here are so odd that they suggest strong pressure on the legal system to view the world in certain ways. I now turn to describing two settings in which reports of abuse are generally viewed as credible.

B. Credible Allegations

1. Allegations of sexual abuse of children against gay men and lesbians.—Allegations of sexual abuse by gay men and lesbians tend to be too believable. Often these allegations are the basis for custody awards to a heterosexual parent or severe limitations on visitation with a gay or lesbian parent, despite the absence of much in the way of evidence. Reliable data on child abuse is notoriously difficult to obtain because of problems with memory, underreporting, and so on. The data we do have, however, suggests that heterosexual men are overwhelmingly responsible for most child abuse. Most child sexual abuse involves adult male abuse of a young fe-

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33 As far as I can tell, the tort cases all involve maternal liability for acts of a man. See MARY BECKER, CYNTHIA GRANT BOWMAN, & MORRISON TORREY, FEMINIST JURISPRUDENCE 290 (1993) (describing Minnesota case in which a jury held a mother jointly liable in tort for father's sexual abuse of daughter ($2.4 million award) and a Texas case in which a judge held a mother jointly liable for sexual abuse by stepfather ($3.4 million in damages)).

34 See Becker, supra note 21, at 27. This point holds even if most allegations of paternal abuse are fabricated (which in any event does not seem to be the case); routine disbelief of such allegations destroys the causal link between her failure to complain of his abuse and the children's continuing suffering. If she would not be believed anyway, speaking would not lead to safety for the children and could lead to greater harm for them, since speaking up would likely lead to a divorce, and one in which she might lose custody to him, thus increasing the harm to the child, who is no longer living with a concerned mother as well as an abuser.

35 See Marc E. Elovitz, Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research, 2 DUKE J. GENDER L. & POL'Y 207, 225 n.55 (1995) (citing Gregory M. Herek, Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 LAW & SEXUALITY 133, 156 (1991) (concluding that gay men are not more likely than heterosexual men to molest children); Charlotte J. Patterson, Children of Lesbian and Gay Parents, 63 CHILD DEV. 1025, 1034 (1992); SAM HOUSTON STATE UNIV., CRIMINAL JUSTICE CTR., RESPONDING TO CHILD SEXUAL ABUSE: A REPORT TO THE 67TH SESSION OF THE TEXAS LEGISLATURE 22 (1980) (contending that the vast majority of sex crimes committed by adults upon children are committed by adults who are the opposite sex from their child-victims).
For example, a study of 269 cases of suspected child sexual abuse at Denver's Children's Hospital found that most of the victims (81.5%) were female and 96.4% of their abusers were heterosexual males (none were gay men). In fact, the most dangerous group were heterosexual relatives of the abused child and heterosexual partners of close relatives of the child. It is true that many boys as well as girls are sexually abused by adult men. But boys tend not to be sexually abused by adult men who identify themselves as homosexuals. For example, a study of pedophiles by the Director of the Sex Offender Program at Connecticut's Department of Correction found that the men who molested boys were either only pedophiles or heterosexuals in their other relationships. Another study found that of 140 cases of male child abuse, only four (2.9%) of the perpetrators were known homosexuals. Similarly, there is no evidence that lesbians are especially likely to abuse girls. Indeed, sexual abuse of children by women is relatively rare. In the Denver Children’s Hospital study just described, of the 219 abused girls, only one (.4%) was abused by a lesbian and 6 (2.7%) were abused by heterosexual women.

Yet, the belief that gay men are child molesters is extremely persistent. Consider, for example, J.L.P. v. D.J.P. In this case, the Missouri Court of Appeals upheld a lower court decision denying any overnight visitation to a gay father—along with placing restrictions on his “gay activities” during the child's visits. There had been no allegations that the father had molested

36 See CHILDREN’S DIV., AM. HUMANE ASS’N, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS 216 (Vincent De Francis ed., 1969) (stating that approximately 90% sexually abused children are female); Carole Jenny et al., Are Children at Risk for Sexual Abuse by Homosexuals?, 94 PEDIATRICS 41, 42 (1994) (finding that 81.5% of victims were female).

37 See Jenny, supra note 36, at 42-44.

38 See id.; see also Glen Kercher & Marilyn McShane, Characterizing Child Sexual Abuse on the Basis of a Multi-Agency Sample, 9 VICTIMOLOGY 364, 370 (1984) (finding that 40.6% of male perpetrators were fathers or stepfathers of the victim).

39 See Jenny, supra note 36, at 43-44 (finding that more than 80% of abusers were heterosexual partners of a close relative of the victim, and that 18.5% of victims were male but only one abuser was gay (2%)).

40 See A. Nicholas Groth & A. W. Burgess, Male rape: Offenders and victims, 137 AM. J. PSYCHIATRY 806, 806-10 (1980) (reporting that 38% of perpetrators in this study had consensual encounters with both men and women).

41 See Mary J. Spencer & Patricia Dunklee, Sexual Abuse of Boys, 78 PEDIATRICS 133-38 (1986).

42 See E.M. DI LAPI, LESBIAN MOTHERS AND THE MOTHERHOOD HIERARCHY IN HOMOSEXUALITY AND THE FAMILY 101-09 (Frederick W. Bozett ed., 1989); Patterson, supra note 35, at 1034; see also Anne H. Fishel, Gay Parents, 4 ISSUES HEALTH CARE WOMEN 139, 150 (1983) (reporting that children of gay or lesbian parents are less likely to be victims of parental sexual or physical abuse); cf. David Finkelhor & Diana Russell, Women as Perpetrators: Review of the Evidence, in CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 171, 181 (David Finkelhor ed., 1984) (illustrating the low incidence of abuse by females in general, not specifically lesbians); Groth & Birnbaum, supra note 40, at 87-89 (stating that child molesters are primarily heterosexual men).

43 See Jenny, supra note 36, at 42-44.

44 643 S.W.2d 865 (Mo. Ct. App. 1982).
the boys or failed to care adequately for them. Rather, the problem was that
the father “expose[d]” the son “to a homosexual environment,” by, for ex-
ample, taking the child on a short trip with “another homosexual and his ju-
venile nephews.” The trial included testimony of two experts for the
father who “asserted that most child molestation occurs between adult het-
erosexual males and female children, one of them going so far as to say that
child molestation was approximately 95% heterosexual and that homosex-
ual molestation is rare.” The Missouri appellate court nevertheless af-
irmed the trial court’s severe limitations on visitation with the explanation
that “every trial judge knows that the molestation of minor boys by adult
males is not as uncommon as the psychological experts’ testimony indi-
cated.” If the father had fought for custody, he doubtless would have lost
under the automatic rule, widely adopted at the time, that a child’s best in-
terest precluded custody with a homosexual parent.

J.L.P. v. D.J.P. is, however, a fairly old case; it was decided in 1982.
Gay and lesbian parents have fared better in custody decisions in recent
years. Increasingly, courts refuse to assume that because a parent is gay or
lesbian, the best interest of the child requires placement with the other par-
et or severe limitations on visitation with the gay or lesbian parents. Many
courts now apply the so-called “nexus” test, requiring some evidence of a
connection between sexual orientation and harm to the child before award-
cing custody to the other parent or limiting the homosexual parent’s visitation.
But in many jurisdictions, this shift has been superficial. After
individualized findings of a nexus—harm to the child associated with the
homosexual orientation of one parent—outcomes are often just as restric-
tive as under the old rule, applied in J.L.P. v. D.J.P., which assumed abuse.

In addition, as Susan Becker points out in her recent Article, allega-
tions of abuse are becoming increasingly common, “perhaps in response to

45 Id. at 866-67. The Missouri Court of Appeals also reported that the trial court found that the fa-
ther hoped his son would become a homosexual, but the factual basis for this conclusion is never de-
scribed. See id. at 866.
46 Id.
47 Id. at 869.
48 See, e.g., Nadler v. Superior Court, 255 Cal. App. 2d 523, 524 (Cal. Ct. App. 1967); see also
Nancy Polikoff, Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges, 14 N.Y.U.
REV. L. & SOC. CHANGE 907 (1986) (suggesting affirmative steps to counter the denial of custody to
lesbian mothers); Rhonda R. Rivera, Queer Law: Sexual Orientation Law in the Mid-Eighties—Part II,
11 U. DAYTON L. REV. 275, 329-35 (1986) (tracing the effect of homosexuality on custody through the
mid-1980s); Note, Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Anal-
sis, 102 HARV. L. REV. 617 (1989) (analyzing the protection afforded gay and lesbian parents by the
14th Amendment); Steve Sosoeff, Comment, Assessing Children's Best Interests When A Parent Is Gay
Or Lesbian, 32 UCLA L. REV. 852 (1985) (outlining the history of the denial of custody based on sexual
orientation and the standards currently applied in determining custody by homosexual parents).
49 See generally Julie Shapiro, Custody and Conduct: How the Law Fails Lesbian and Gay Parents
50 See id. at 625.
the adoption of the nexus test by the courts."51 She illustrates her point with a 1995 case in which she was involved as pro bono counsel: Hertzler v. Hertzler.52 Pamela and Dean Hertzler divorced following a fifteen-year marriage, during which they lived on a farm in Veteran, Wyoming, and adopted a son, Joshua, and a daughter, Miriam.53 At the time of the divorce, Dean asked Pamela whether she was a lesbian and Pamela lied, replying that she was not, "because she feared that she would lose her children."54 They agreed in 1991 that Pamela would have custody of the children with liberal visitation for Dean.55

A year later, Pamela was involved in a relationship with another woman (Peggy) and told a few family members. Her parents passed the news on to Dean, who threatened to go to court for custody. Pamela feared losing visitation as well as custody in light of the legal advice she received: "that the Wyoming court would probably view her homosexuality as automatically rendering her an unfit parent."56 In their February 1992 agreement, Pamela agreed to give Dean custody and received generous visitation. This agreement was the basis for the court's final decree.57 Pamela moved to Ohio to be with Peggy, but visited with the children frequently. The children spent the summers of 1992 and 1993 in Ohio with Pamela and Peggy. One summer they went to the local Gay Pride Parade, and toward the end of the 1993 visit "were included in the commitment ceremony between Pamela and Peggy."58

When the children returned to their father's Wyoming farm, Dean married:

The children attended the marriage and Joshua asked his father several questions about his father's marriage as compared to his mother's commitment ceremony.

Dean's new wife, Christine, had decided . . . that the children needed more discipline and that she would be their mother, not Pamela. After their marriage, Dean and Christine accelerated their campaign to alienate the children from Pamela; this campaign included repeatedly telling the children that Pamela was an evil person leading an evil life. They also prohibited the children from calling Pamela "Mom."59

51 Susan Becker, Court-Created Boundaries Between a Visible Lesbian Mother and Her Children, 12 Wis. Women's L. J. 331, 335 (1997).
52 See id. at 335-45 (describing Hertzler v. Hertzler, 908 P.2d 946 (Wyo. 1995)).
53 See id. at 335.
54 See id. at 336.
55 See id. at 335-36.
56 Becker, supra note 51, at 336.
57 See id.
58 Id.
59 Id. at 337.
Dean could not argue that Pamela’s lesbianism warranted a change in the custody and visitation arrangement because he had known about it when they reached their final agreement in February of 1992. But his allegations that Pamela and Peggy had abused the children were new and would warrant reopening the proceedings in light of the “substantial change in circumstances.”

Dean and Christine reported seeing the children engage in behaviors indicating that Pamela and her partner had sexually abused them:

These behaviors included masturbation and the licking of an ice tea pitcher and “Go Fish” cards by Pamela’s daughter, and the alleged use of vulgar language, such as the use of the correct names of body parts, by their son.

Only Dean and Christine—not even Dean’s parents who saw the children a great deal and cared for them during Dean and Christine’s honeymoon—observed these behaviors and, without any training in the area, concluded that the children had been abused by Pamela and Peggy. A court issued a temporary restraining order immediately limiting Pamela’s contact to a few supervised visits a year and one phone call a week.

Four months later, “a four-day hearing was held to determine whether the restrictions on Pamela’s visitation should be permanent.” There was still no actual evidence of abuse. There was only the testimony of Dean and Christine about their conclusions based on the evidence such as that described above. They also offered Miriam’s statements, for which she was rewarded, made in response to leading questions and after coaching from Christine, that Pamela and Peggy had “played with her business.”

Dean testified that he thought the children had been harmed by participating in the Gay Pride celebration and in their mother’s commitment ceremony while visiting her in Cleveland. Becker writes that Dean offered an expert, Lynn Rhodes, who testified that the children had been eroticized while visiting with Pamela and that any contact with her was and would continue to be harmful to them. This “expert” had received his Master’s Degree in counseling just two years prior to being retained by Dean and had very little training or experience in child sexual abuse or in custody and visitation disputes. Mr. Rhodes did, however, have twenty-seven years of experience as a minister in a conservative church and a strong personal view that homosexuality is morally wrong. During cross-examination, Mr. Rhodes ad-

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60 Id. at 337 (this is the usual standard for reopening a custody or visitation order).
61 Id. at 337.
62 See Becker, supra note 51, at 338 (Pamela was given less than 24 hours to respond to the accusations and she and her counsel were present at the hearing only by phone).
63 Susan J. Becker, Child Sexual Abuse Allegations Against a Lesbian or Gay Parent in a Custody or Visitation Dispute: Battling the Overt and Insidious Bias of Experts and Judges, 74 DENV. U. L. REV. 112 (1996) (discussing the testimony of one of Pamela’s experts, Dr. Larry Bloom, explaining why Miriam’s statements were not credible).
mitted that he could not identify which part of his "professional opinion" was based on his moral and religious beliefs and which was based on his training as a counselor.  

Pamela and her partner denied the allegations of abuse and testified extensively about Dean's continued efforts to alienate the children. Their witnesses included many people who had observed Pamela with her children and two experts in childhood sexual abuse, both of whom "independently concluded that the children had not been sexually abused," "that the methodology used by Mr. Rhodes to conclude otherwise was fatally flawed, ... that Mr. Rhodes' term 'eroticization' was 'not' recognized among health care professionals, and that Dean and Christine were causing serious harm to the children by trying to convince them that their mother had harmed them when she had not."  

The trial court "restricted Pamela's visitation to one Saturday and Sunday supervised visit every other month, no overnight stays, and one phone call per week," relying "exclusively on Mr. Rhodes to find that 'eroticization' had occurred when the children visited their mother." The court rejected the testimony of Pamela's experts, who actually knew something about child abuse. The trial court also placed great weight on the conflicting values of their parents and on society's interest in children growing up in a moral climate inconsistent with acceptance of homosexuality.  

The trial court ordered Pamela and Dean jointly to find a counselor and to report back to the court in six months. Dean selected Dr. Rachael Moriarty, someone with extensive experience with sexually abused children and troubled families. Pamela agreed to this selection. After a number of sessions with the children, their parents and partners, Dr. Moriarty concluded that there had never been any sexual abuse and that Christine and Dean were continuing to harm the children by trying to alienate them from their mother. Pamela then moved for a return to the original visitation schedule, but the trial court denied the request and "chastised Dr. Moriarty for failing to address the 'eroticization' which the court had found." The only change allowed by the trial court was that Pamela's visits with the children might be supervised by her parents.

64 Becker, supra note 51, at 339.  
65 Id. at 339-40.  
66 Id. at 340.  
67 See id. at 339. Pamela's experts were Dr. Larry Bloom, a clinical psychologist with more than seventeen years experience "evaluating children for sexual abuse," and Dr. Carole Jenny, "a board-certified pediatrician who has devoted more than two decades of her life to working with sexually abused children; at the time of the trial, she had been serving for four years as the Director of the Child Advocacy and Protection Team at the Denver Children's Hospital." Id.  
68 See id. at 341.  
69 See id. at 343.  
70 Id. at 343.
Pamela appealed to the Wyoming Supreme Court, which held that the trial court should not have expressed its bias against homosexuals and had erred in two other ways: (1) by holding Mr. Rhodes to be qualified as an expert; and (2) by reaching unsupported factual findings, particularly the finding that the children had been “eroticized” during their visits with their mother. Nevertheless, the Court upheld the decision of the trial court because it found that the trial court did not abuse its discretion by continuing to restrict Pamela’s visitation. The court did encourage the lower court to continue to ease the restrictions, and on remand in October 1966, the trial judge did allow Pamela unsupervised visits, including several weeks each summer, but her visitation remains much less than it was prior to Dean’s allegations of abuse.

Susan Becker’s valuable article about Hertzler illustrates that—despite the empirical evidence to the contrary—gay men and lesbians continue to be seen as likely abusers of children. In part, this is because the anti-gay religious right identifies gay men and lesbians as likely child abusers who, because of the sexual abuse they suffered as children, cause those abused to become themselves lesbian and gay as adults. As Hertzler illustrates, these extreme beliefs continue to affect legal outcomes in custody and visitation cases. In Hertzler, the trial court judge rejected Pamela’s experts and accepted Dean’s, even though Mr. Rhodes had received his master’s degree in counseling two years previously, had no significant experience dealing with child abuse, analyzed the supposed harm to the children in terms of “eroticization,” a concept not used by professionals in the area, had worked for twenty-seven years as a conservative minister, and strongly believed that homosexuality was wrong.

With great candor, Lynn Rhodes described in his testimony how interrelated his judgments were as a lay “expert” on the sexual abuse issue and as a religious and moral expert on the homosexuality issue. The following interchange is between Rhodes and Pamela’s lawyer:

Q. As an issue in this case, Mr. Rhodes, if homosexuality is an issue in this case, then the recommendations that you gave to this Court are not expert recommendations, but the recommendations of a layman, isn’t that correct?

A. Well, you see, in the realm of morality and religion, I’m supposed to be an expert, there, too.

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72 See, e.g., George Grant & Mark A. Horne, Legislating Immorality: The Homosexual Movement Comes Out Of The Closet 42-43 (1993) ("Child molestation is regarded in every state as a criminal offense. Yet it’s common knowledge that homosexuals are notorious practitioners of sex with minors."); Robert K. Lewis, Patriot Knowledge Base, 11 Homosexuality & Lesbianism (last modified Feb. 26, 1998) <http://www.micro.com/~pkb/theory11.html> (urging homosexuals and lesbians to repent and turn to Jesus after noting that “[a]n extremely high number of homosexuals and lesbians are child molesters and were molested as children also” and that “homosexuals and lesbians want to legalize child molestation”).

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Q. That's not what you were retained for, was it, Mr. Rhodes?
A. That's correct, and that's why I labeled that as my opinion.

Q. So let me get this straight. Your recommendations of sexual abuse are based on your professional judgment?
A. Um-hum.

Q. Your recommendations on the termination of contact between Pamela Hertzler and Peggy Keating and those children based on their homosexuality is based on your moral judgment?
A. Partially....

Q. So you can't tell us what weight—what weight your professional judgment and what weight your moral judgment had in that conclusion?
A. I hadn't thought about it in those terms.
Q. So that's a no?
A. Given some time, I probably could.
Q. Can you do so now?
A. In terms of homosexuality, the greater weight would go to the moral issue simply because there is in the professional area so much confusion around the effects of homosexuality and how people become homosexual, what happens when kids are exposed to it, there's a lot of confusion there, so it's taught to make a professional, absolute determination there.\(^{73}\)

The trial judge also explicitly based his initial decision on the immorality of homosexuality. He stated that one factor in the decision against Pamela was her homosexuality: "Homosexuality is inherently inconsistent with families, with the relationships and values which perpetuate families."\(^{74}\) He explained:

The moral climate in which children are raised is an important factor in child custody and visitation. The Plaintiff's open homosexual relationship creates much of the moral climate surrounding her life. The moral climate is probable to have an effect on the children's development of values and character which is inconsistent with that supported by the Defendant or society.

Because the Plaintiff's open homosexuality has and is likely to create confusion and difficulty for the children, and because her lifestyle is likely to negatively affect the development of the children's moral values, and because the State has an interest in supporting conventional marriages and families, the Court would find it appropriate to reduce the Plaintiff's visitation with the children even if the issues of sexual abuse or eroticization were resolved.\(^{75}\)

Wyoming, like most other states, has a "best-interest" standard for custody and visitation at divorce: the primary concern is achieving an outcome that will serve the best interests of the children. In basing his decision on his

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\(^{74}\) *Id.* at 117-18 (quoting from Decision Letter).

\(^{75}\) *Id.* (emphasis added).
perception of the immorality of homosexuality and in accepting Rhodes's testimony as that of an expert, the trial judge ignored the children's needs and interests, though they were being hurt in many ways by Dean's and Christine's manipulative behavior and attempts to estrange them from their mother.

True, the trial court's reasoning was found to be erroneous on appeal. But few divorced mothers would have the resources, financial and otherwise, to fight as long and as hard as Pamela did. And, more important, the Wyoming Supreme Court did not reverse the outcome of the case: it held that the limitations on Pamela's visitation were within the discretionary power of the trial court. Even after the final remand and the loosening of the limitations by the trial court, Pamela's time with her children remained limited in a way it would not have been absent the false allegations of abuse.

As discussed in the next subsection, the gay and lesbian sexual abuse of children is routinely regarded as not just common, but as likely to cause those abused to themselves identify as gay or lesbian when they are adults.

2. An adult lesbian claims that she was sexually abused by a heterosexual family member in a nonconfrontational setting.—When a woman claims that she was sexually abused as a child by a heterosexual family member, there is a tendency, evidenced by the third-party liability cases discussed earlier, to disbelieve her. But the reaction seems quite different when the woman is a lesbian and the setting is nonconfrontational. There is a controversy here. But the controversy is not about whether lesbians accurately remember child abuse. Instead, the controversy is over whether heterosexual child abuse causes lesbianism. The anti-gay religious right strongly believes that it can, and that religious healing can help such women become their true "heterosexual" selves.76

Although the professional literature is uncertain about whether lesbianism is more prevalent among childhood sexual abuse survivors than in the general population, it does report that many lesbians wonder whether

76 See, e.g., Eagles' Wings Ministry, Sexual Abuse and Homosexuality (visited April 1, 1998) <http://www.ewn.org/essay_sexabuse.html> ("If violent abuse occurs with an opposite sex person, the victim may become fearful of heterosexual sex. This may set them up for denying their own gender even to the point of desiring to become the opposite sex."); Rob Geotze, New Direction for Life Ministries Canada, Sexual Abuse as a Contributing Factor: Expanding on the Developing View of Homosexuality (last modified Sept. 9, 1997) <http://www.execulink.com/~newdirec/fs_abuse.html> ("An extremely high number of homosexuals and lesbians are child molesters and were molested as children also.") This article urges gays and lesbians to "repent of your sins and ask Jesus to come into your life."); San Diego Christian Conference on Trauma and Sexuality (last modified Aug. 17, 1998) <http://www.tsconf.org/index.html> (announcing 13th San Diego Christian Conference on Trauma and Sexuality and specifically mentioning a San Diego support group for those "struggling with Homosexuality").
their experiences of childhood abuse "caused" their lesbianism.\textsuperscript{77} And a number of professionals have suggested that some lesbians identified victims of heterosexual abuse may be experiencing a public reaction to the abuse.\textsuperscript{78}

I have argued elsewhere that many women do not have a sexual orientation in the sense of one fixed sexual preference for lovers with either the same or the opposite physical sex.\textsuperscript{79} For these women, sexuality is very fluid, though most are likely to assume that they are heterosexual because they feel normal and our society teaches that normal women are heterosexual. Many of these women might have strong preferences for relationships with men or women, but this preference would not be based on the partner's physical sex, but rather on the many differences between being the intimate partner—emotionally as well as sexually—of a man versus being the intimate partner of a woman.

If, in fact, women who have been sexually abused as children are more likely to be lesbians as adults, this phenomenon could be understood as indicating the fluidity of many women's sexuality. The experience of heterosexual abuse as a child might make a woman more conscious of alternatives to heterosexuality and, after experiencing a lesbian relationship, aware of her preference for relationships with women though she actually has no stable fixed sexual orientation at all in terms of a preference for lovers with physically female bodies.

What is interesting about the professional discussion of possible correlation between childhood sexual abuse and lesbianism, is that none of the participants regard a correlation as evidence of the fluidity or women's sexuality. Rather, their attitude is that any correlation is evidence that lesbianism is an unhealthy reaction to childhood trauma: "To believe that incest causes lesbianism is to imply that lesbianism is an affliction rather than a healthy, comfortable option for women."\textsuperscript{80} This is also the conclusion, described at the beginning of this subsection, of the religious right, who see religion as a cure for lesbianism consequent to childhood sexual abuse.

\textbf{II. PATRIARCHY}

What can explain the disparate social reactions to allegations of child sexual abuse described in Part I? Why are allegations of abuse believed in some contexts and disbelieved in others? The explanation lies in the content of our patriarchal narratives, the myths and stories we use to make sense of the world around us in a patriarchal culture. Patriarchy is a social

\textsuperscript{77} See, e.g., CHRISTINE DINSMORE, FROM SURVIVING TO THRIVING: INCEST, FEMINISM, AND RECOVERY 107 (1991).

\textsuperscript{78} See note 80 and accompanying text. (criticizing such interpretations).

\textsuperscript{79} See Mary Becker, Women, Morality, and Sexual Orientation, 8 UCLA WOMEN'S L.J. 165, 207-12 (1998).

\textsuperscript{80} DINSMORE, supra note 78, at 107.
system that can take many forms: feudal, capitalist, socialist. But all patriarchal cultures are "male dominated, male identified, and male centered." And patriarchal culture is centered around "the core value of control and domination." Catharine MacKinnon’s explication of the systemic sexualized subordination of women to men has offered perhaps the most rigorous and influential radical analysis of the social forces producing the power differentials we observe between women and men today. MacKinnon views inequality between women and men as the central phenomenon of a system of male control over and domination of women achieved through heterosexuality:

Male dominance is sexual. Meaning: men in particular, if not men alone, sexualize hierarchy: gender is one. As much a sexual theory of gender as a gendered theory of sex, this is the theory of sexuality that will be advanced as feminist here. It is supported by recent work, both interpretative and empirical, on rape, battery, sexual harassment, the sexual abuse of children, prostitution, and pornography. These practices, taken together, express and actualize the distinctive power of men over women in society: their effective permissibility confirms and extends it. The male sexual role centers on aggressive intrusion on those with less power. Such acts of dominance are experienced as sexually arousing, as sex itself. They therefore are. The evidence on the sexual violation of women by men thus frames an inquiry into the particular place of gender in sexuality as such.

A theory of sexuality that is feminist in my sense here locates sexuality within a theory of gender inequality; gender inequality is a critical term for the social hierarchy of men over women. [A] theory of sexuality becomes feminist to the extent it treats sexuality as a construct of male power—defined by men, forced on women, and constitutive in the meaning of gender. Such an approach centers feminism on the perspective of the subordination of women to men as it identifies sex, that is, the sexuality of dominance and submission, as crucial, as a fundamental, as on some level definitive, in that process.

This description of the social forces producing inequality between women and men is far too narrow and, ironically, too focused on women (and sexuality). Patriarchy is not primarily organized around the interactions, let alone the sexual interactions, of women and men. I quote from a description of the broad phenomena by Allan Johnson:

More than anything else, patriarchy is based on control as a core principle around which entire societies are organized. What drives Patriarchy as a sys-

82 Id. at 84.
tem—what fuels competition, aggression, and oppression—is a dynamic relationship between control and fear. Patriarchy encourages men to seek security, status, and other rewards through control; to fear other men's ability to control and harm them; and to identify being in control as both their best defense against loss and humiliation and the surest route to what they need and desire. In this sense, although we usually think of patriarchy in terms of women and men, it is more about what goes on among men. The oppression of women is certainly an important part of patriarchy, but, paradoxically, it may not be the point of patriarchy.\footnote{Johnson, supra note 82, at 86.}

A patriarchal culture is, of course, misogynistic: women are devalued and aggression against them is justified by their own depraved nature. In a patriarchal culture, women "can't be trusted, especially when they're menstruating or accusing men of sexual misconduct."\footnote{Id.} Because it is misogynistic and male identified, women and men become invisible under different conditions in patriarchal culture:

In general, women are made invisible when they do something that might elevate their status, such as raising children into healthy adults or coming up with a brilliant idea at a business meeting. Men, however, are often made invisible when their behavior is socially undesirable and might raise questions about the appropriateness of male privilege.\footnote{Id. at 156.}

Taboos on lesbian and gay relationships play a number of roles in supporting patriarchy and patriarchal privilege for heterosexual men. Two are relevant to the issues of child abuse discussed earlier. First, homophobia protects men who conform to the requirements of patriarchal masculinity—men who act like real men—from sexual assault by other men. Men understand the aggressive nature of male sexuality in our patriarchal culture. They understand and\textit{fear} it. They fear that another man might control and subordinate them sexually were they viewed as his sexual objects. Men tend to be paranoid about this danger, and heightened vigilance against gay men as extraordinarily dangerous to little boys helps heterosexual men feel safer. At the same time, this phenomenon gives all men an incentive to be normal, heterosexual men, rather than likely pedophiles who cannot even be trusted spending a night in an apartment with their own young sons.

Second, a key aspect of women's oppression is rooted in heterosexual relations that subordinate women to men's right to sexual access and control.\footnote{See id. at 70.} Lesbian relationships threaten patriarchal privileges because lesbians reject intimate relationships with men. Part of the payoff to men, after all,
for being "normal" is sexual access to girls and women. The tendencies described in Part I—to believe or disbelieve allegations of childhood sexual abuse depending on the setting—can each be understood in light of the patriarchal beliefs and attitudes described thus far in this Part.

Earlier, I noted a tendency to disbelieve adult survivors of childhood sexual abuse who confront their abusive fathers, as well as a tendency to disbelieve a wife’s allegations at divorce that her heterosexual husband sexually abused her children. We saw a tendency to believe allegations that a gay man or lesbian has sexually abused a child in divorce proceedings. And we also saw a tendency to believe that there is a correlation between lesbianism and childhood sexual abuse, and that the correlation is evidence that lesbianism is an unhealthy response to childhood trauma rather than as evidence that women have a fluid sexuality and might find significant advantages in lesbian relationships.

The allegations that, in the absence of extremely strong evidence, are disbelieved challenge patriarchal narratives and call into question patriarchal privileges. According to patriarchal beliefs, fathers—and perhaps some male relatives, at least with the fathers’ explicit or implicit agreement—have the authority, power, and right to treat family members in the manner they consider most appropriate. Stories inconsistent with this norm, particularly those that suggest that fathers should not have so much power because they so often abuse it, are suspect. And the man who is accused of misusing his power tends to disappear. Our field of vision is instead consumed by the wife or adult child who has accused the father for reasons that must be vindictive, manipulative, fantastic, and unrelated to reality. Thus, the adult survivor or the divorcing wife is disbelieved and seen as the guilty party while the man accused disappears into the background, an innocent shadow.

On the other hand, allegations that are consistent with patriarchal narratives about how the world operates tend to be believed, even on slight evidence. According to patriarchal narratives, homosexuality is an immoral and perverse distortion of human sexuality; natural, moral, sexuality is between a male sexual subject who pursues and a female sexual object who is pursued. Gay men are particularly disgusting; because of their perverse sexual natures, they are essentially sexual and immoral and quite likely to abuse children. Great pressure is imposed on all men to conform to patriarchal standards of masculinity by the opprobrium heaped on men who do not conform. Therefore, allegations that gay men abuse children are inherently credible and often accepted without much in the way of evidence. Lesbians are also perverse, immoral, and hypersexual; allegations that they abuse children are also quite credible though unsupported by evidence.

The final example of the effect of patriarchal understandings on our reactions to abuse allegations is the continuing belief by many that lesbians may have been sexually abused as children by men at higher rates than other women. The fact that lesbians are somewhat more likely to have been
sexually abused than are other women—if true—could be understood in ways that either support or undermine patriarchy. It supports patriarchy if it indicates that lesbianism is an unhealthy reaction to childhood trauma; women are not “truly” or innately homosexual. But it undermines patriarchy if it indicates that some (many?) women have a fluid sexuality; for these women, sexual orientation is not fixed or “hard-wired” but a choice made in light of advantages and disadvantages of available alternatives. Not surprisingly, even professionals assume that if there is a link, it would indicate that lesbianism is an unhealthy reaction to trauma.

III. CONCLUSION

Feminists, particularly feminists in the legal academy, seem averse to analyzing power relations in terms of patriarchal narratives and beliefs and even avoid using the word “patriarchy.” Perhaps part of the reason is concern that the word is too radical, too “in your face,” too aggressive. Its use will make people, particularly men, so defensive that they cannot listen. Feminist academics may—realistically—fear retribution from their male colleagues if they use threatening theoretical constructs. Men often don't notice the patriarchal pressures they feel and exert. And because patriarchy is built on male fear of other men, most men do not feel—and actually are not—all that privileged. They therefore treat feminist analysis of male dominance as unrealistic and shrill.

An understanding of patriarchy explains this reaction. Most men are far from the top and under great pressure to conform to patriarchal norms. Men, as well as women, can be and are caught in self-perpetuating patriarchal culture. Patriarchy not only gives those men who conform privileges vis a vis “their” women. It punishes, too: men who do not conform to patriarchal norms are severely disciplined. Patriarchal social orders establish a set of rewards, punishments, incentives, attitudes, and values that reinforce and perpetuate power inequities between women and men, but also, and more fundamentally, power inequities between and among men: for instance, hierarchies between men of different races and classes and hierarchies among men of even the same race and class.

In thinking about how to more effectively address the problem of sexual abuse of children in our culture, it is necessary to see the systemic causes of the problem and of our difficulties in dealing with it effectively. Although most violence against women—including child abuse and incest—is “perpetuated by men . . . in a society that is clearly male dominated, male identified, and male centered,”90 the connection between these two is difficult to see. We cannot, however, understand or address sexual abuse of children unless “we understand how these two are connected, how the patriarchal character of society contributes to a pattern of
violence by members of the gender-dominant group against members of the gender-subordinate group."  

91 Id. at 95.