1

PM-1 3" x 4" PHOTOGRAPHIC MICROCOPY TARGET
NBS 1010a ANSI/ISO #2 EQUIVALENT

PRECISIONSM RESOLUTION TARGETS

**The Marginalization of Children as Witnesses:
An Exploration of the Roles of Myth and Legal Positivism**

By
Tammy McKinney

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements for the degree of

Master of Arts

Department of Law
Carleton University
Ottawa, Canada

September, 1996

Copyright, 1996
Tammy McKinney

National Library
of Canada

Acquisitions and
Bibliographic Services Branch

395, rue Wellington
Ottawa, Ontario
K1A 0N4

Bibliothèque nationale
du Canada

Direction des acquisitions et
des services bibliographiques

395, rue Wellington
Ottawa, Ontario
K1A 0N4

The author has granted an irrevocable non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of his/her thesis by any means and in any form or format, making this thesis available to interested persons.

The author retains ownership of the copyright in his/her thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without his/her permission.

L'auteur a accordé une licence irrévocable et non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de sa thèse de quelque manière et sous quelque forme que ce soit pour mettre des exemplaires de cette thèse à la disposition des personnes intéressées.

L'auteur conserve la propriété du droit d'auteur qui protège sa thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

ISBN 0-612-19442-6

Canada

Name TAMMY L. KINNEY

Dissertation Abstracts International is arranged by broad, general subject categories. Please select the one subject which most nearly describes the content of your dissertation. Enter the corresponding four-digit code in the spaces provided.

THE MARGINALIZATION OF CHILDREN IN LITERATURE

SUBJECT TERM

0325

SUBJECT CODE

U-M-I

Subject Categories

THE HUMANITIES AND SOCIAL SCIENCES

COMMUNICATIONS AND THE ARTS

Architecture 0729
Art History 0377
Cinema 0900
Dance 0378
Fine Arts 0357
Information Science 0723
Journalism 0391
Library Science 0399
Mass Communications 0708
Music 0413
Speech Communication 0459
Theater 0465

EDUCATION

General 0515
Administration 0514
Adult and Continuing 0516
Agricultural 0517
Art 0273
Bilingual and Multicultural 0282
Business 0688
Community College 0275
Curriculum and Instruction 0727
Early Childhood 0518
Elementary 0524
Finance 0277
Guidance and Counseling 0519
Health 0680
Higher 0745
History of 0520
Home Economics 0278
Industrial 0521
Language and Literature 0279
Mathematics 0280
Music 0522
Philosophy of 0998
Physical 0523

Psychology 0525
Reading 0535
Religious 0527
Sciences 0714
Secondary 0533
Social Sciences 0534
Sociology of 0340
Special 0529
Teacher Training 0530
Technology 0710
Tests and Measurements 0288
Vocational 0747

LANGUAGE, LITERATURE AND LINGUISTICS

Language
General 0679
Ancient 0289
Linguistics 0290
Modern 0291
Literature
General 0401
Classical 0294
Comparative 0295
Medieval 0297
Modern 0298
African 0316
American 0591
Asian 0305
Canadian (English) 0352
Canadian (French) 0355
English 0593
Germanic 0311
Latin American 0312
Middle Eastern 0315
Romance 0313
Slavic and East European 0314

PHILOSOPHY, RELIGION AND THEOLOGY

Philosophy 0421
Religion
General 0314
Biblical Studies 0321
Clergy 0314
History of 0322
Philosophy of 0426
Theology 0426

SOCIAL SCIENCES

American Studies 0323
Anthropology
Archaeology 0324
Cultural 0326
Physical 0327
Business Administration
General 0310
Accounting 0272
Banking 0770
Management 0454
Marketing 0338
Canadian Studies 0381
Economics
General 0501
Agricultural 0501
Commerce Business 0501
Finance 0508
History 0509
Labor 0511
Theory 0511
Folklore 0356
Geography 0364
Gerontology 0504
History
General 0476

Ancient 0575
Medieval 0581
Modern 0582
Black 0428
African 0311
Asia, Australia and Oceania 0312
Canadian 0314
European 0314
Latin American 0316
Middle Eastern 0317
United States 0317
History of Science 0587
Law 0328
Political Science
General 0615
International Law and Relations 0616
Public Administration 0617
Recreation 0814
Social Work 0452
Sociology
General 0626
Criminology and Penology 0627
Demography 0938
Ethnic and Racial Studies 0631
Individual and Family Studies 0628
Industrial and Labor Relations 0629
Public and Social Welfare 0630
Social Structure and Development 0706
Theory and Methods 0344
Transportation 0709
Urban and Regional Planning 0969
Women's Studies 0451

THE SCIENCES AND ENGINEERING

BIOLOGICAL SCIENCES

Agriculture
General 0473
Agronomy 0285
Animal Culture and Nutrition 0475
Animal Pathology 0476
Food Science and Technology 0359
Forestry and Wildlife 0478
Plant Culture 0479
Plant Pathology 0480
Plant Physiology 0817
Range Management 0777
Wood Technology 0746
Biology
General 0306
Anatomy 0287
Biostatistics 0308
Botany 0309
Cell 0379
Ecology 0329
Entomology 0353
Genetics 0369
Limnology 0793
Microbiology 0410
Molecular 0307
Neuroscience 0317
Oceanography 0416
Physiology 0433
Radiation 0821
Veterinary Science 0778
Zoology 0472
Biophysics
General 0786
Medical 0760

EARTH SCIENCES

Biogeochemistry 0425
Geochemistry 0996

Geodesy 0370
Geology 0372
Geophysics 0373
Hydrology 0388
Mineralogy 0411
Paleobotany 0345
Paleoecology 0426
Paleontology 0418
Paleozoology 0985
Polymology 0427
Physical Geography 0368
Physical Oceanography 0415

HEALTH AND ENVIRONMENTAL SCIENCES

Environmental Sciences 0768
Health Sciences
General 0566
Audiology 0300
Chemotherapy 0992
Dentistry 0567
Education 0350
Hospital Management 0769
Human Development 0758
Immunology 0982
Medicine and Surgery 0564
Mental Health 0347
Nursing 0569
Nutrition 0570
Obstetrics and Gynecology 0380
Occupational Health and Therapy 0354
Ophthalmology 0381
Pathology 0571
Pharmacology 0419
Pharmacy 0572
Physical Therapy 0382
Public Health 0573
Radiology 0574
Recreation 0575

Speech Pathology 0467
Toxicology 0383
Home Economics 0486

PHYSICAL SCIENCES

Pure Sciences
Chemistry
General 0485
Agricultural 0745
Analytical 0486
Biochemistry 0487
Inorganic 0488
Nuclear 0736
Organic 0491
Pharmaceutical 0491
Physical 0494
Polymer 0495
Radiation 0754
Mathematics
Physics
General 0601
Acoustics 0986
Astronomy and Astrophysics 0606
Atmospheric Science 0608
Atomic 0748
Electronics and Electricity 0607
Elementary Particles and High Energy 0798
Fluid and Plasma 0759
Molecular 0610
Nuclear 0752
Optics 0756
Radiation 0611
Solid State 0463
Statistics 0463
Applied Sciences
Applied Mechanics 0346
Computer Science 0984

Engineering
General 0537
Aerospace 0538
Agricultural 0539
Automotive 0540
Biomedical 0541
Chemical 0542
Civil 0543
Electronics and Electrical 0544
Heat and Thermodynamics 0545
Hydraulic 0546
Industrial 0547
Marine 0748
Materials Science 0548
Mechanics 0549
Metallurgy 0550
Mining 0551
Nuclear 0552
Packaging 0553
Petroleum 0755
Sanitary and Municipal Systems 0554
System Science 0756
Cerebral Technology 0426
Operations Research 0757
Plastics Technology 0758
Textile Technology 0994

PSYCHOLOGY

General 0421
Behavioral 0584
Clinical 0622
Developmental 0623
Experimental 0624
Industrial 0625
Personality 0626
Physiological 0969
Psychobiology 0349
Psychometrics 0632
Social 0451

Thesis Acceptance Form

M.A. CANDIDATE

The undersigned recommend to the Faculty of Graduate Studies
and Research acceptance of the thesis

**The Marginalization of Children as Witnesses: An Exploration of the Roles of Myth
and Legal Positivism**

submitted by **Tammy McKinney, B.A.**

in partial fulfilment of the requirements for
the degree of Master of Arts

Thesis Supervisor

Chair, Department of Law

Carleton University
September 20, 1996

ABSTRACT

This paper is an exploration of the marginalization of children's voices in law, specifically as witnesses. The primary question here asks how it is possible for law to maintain and legitimize marginalization. The concepts of myth, legal rationality, the ideal legal person, and the archetypical credible witness are utilized in an attempt to answer this question. Two related theoretical claims ground the paper. First is the claim that law provides exclusionary justifications for the marginalization of children through the above-mentioned concepts. The second claim is that a tension exists between two disparate discourses on children: an exclusionary discourse which focuses on rationality, and paternalistic, protective discourse which focuses on adversarial legal process. Issues of legal process and of changing perspectives on children are explored in relation to the above claims, as well whether or not attempted formal changes to the legal system have resulted in real change.

Acknowledgements

I need to thank my parents, for their encouragement and love, for letting me vent my seemingly endless frustrations, and for letting me cry when I had to.

I thank Chris for his love and patience, and for helping me to pick up the pieces when my computer crashed and erased all my revisions before my backup was complete.

I thank the members of my committee.

Finally, I would like to thank Neil Sargent, my advisor, for believing that I could write a thesis like this, and defend it, despite my difficulties in clearly articulating all the competing issues that struggled for dominance in my mind.

CONTENTS

	Abstract	ii
	Acknowledgements	iv
1	Introduction: Competing Tensions	1
2	Myth and Modern Law	13
	2.1 Examining the concept of Myth	
	2.2 Legal Positivism and the Power of Law	
3	Children as Problematic Legal Actors	40
	3.1 Historical Perceptions of Children	
	3.2 Developmental Psychological Research	
	3.3 Contemporary Research and Perceptions	
4	The Adversarial Process and Children Witnesses	66
	4.1 Law's Unfriendly Stance Toward Children Witnesses	
	4.2 Challenges Facing Children as Witnesses	
5	Conclusion: Reconciling Tensions	93
	Bibliography	104

Introduction: Themes and Considerations

This paper addresses the issue of the marginalization and exclusion of children's voices within the legal system. It will explore the how and why of children's exclusion by utilizing the concepts of myth, legal rationality, the construct of an ideal legal person and the construct of an archetypical credible witness. The exploration of myth is crucial to understanding marginalization within the legal system, and possibilities for diverse areas of research which spring from the discussion of myth in this paper may prove to be very exciting. The question of how the legal system perceives children as witnesses is of primary importance. Further, what legal efforts have been made to attempt to address and correct this marginalization and exclusion. More importantly, perhaps, how effective are these efforts likely to be?

Most research on the topic of excluding children as witnesses tends to focus on one of the following areas: psychological aspects of children's ability to provide reliable testimony, such as memory, ability to distinguish between reality and fantasy, and verbal communication skills or on strictly legal aspects such as legislative changes and exceptions to exclusionary rules which directly concern children. Here, the issue is approached from a different perspective. Legal rationality and myth sustain the legal

system. The unique roles that each play in creating and maintaining the marginalization of children are explored in detail.

Regina v. Khan ((1990) 59 C.C.C. (3d), 92) is considered to be a landmark case with respect to the voices of children being heard in court. One of the primary issues in the case was the question of whether or not the secondhand testimony of an adult was admissible in court where a child was the primary witness or victim to a crime. The facts of the case are detailed below. After a medical examination, a four year old girl complained to her mother that the doctor had offered her a piece of candy which she had never received. Instead, she claimed, the doctor had put his "birdie" in her mouth and peed. "Birdie" was the term used by mother and child to refer to the male penis. The disclosure of the assault was made approximately thirty minutes after the incident, when the mother noticed that her daughter kept toying with a wet spot on her tee shirt. That wet spot later proved to have traces of semen in it.

When the case went to court, the child was deemed to be too young to competently testify in court. The testimony of the mother, ie. the mother's account of what her daughter disclosed after the assault, was rejected as hearsay evidence by the lower court. In 1991, the case went before the Supreme Court of Canada on appeal, and it was decided that the mother's testimony was admissible on the basis of necessity

and reliability. This particular case appeared to represent a small victory for children in the courtroom. It supposedly represented increased opportunity for their stories to be heard by the justice system, if indirectly. It seemed to be a rational progression for hearsay evidence to be admitted to the courtroom where it was deemed both necessary and reliable.

"Hearsay" may be defined as evidence presented to the court secondhand, not by the individual who actually heard, saw or experienced the event in question. When a witness makes a statement such as "X told me that...", it is usually deemed to be hearsay. The court has discretion to accept or reject such a statement. Where such a statement is used in an attempt to establish a fact or prove the truth of a matter, the court will reject it in most instances. It is questionable, however, whether or not the Khan¹ case actually resulted in any real or positive change for children as witnesses. While apparently allowing children's voices to be heard indirectly through hearsay, it must be considered that hearsay is still a questionable form of testimony in the adversarial courtroom. Therefore, it may not contribute in a positive manner to efforts to raise children's potential credibility as witnesses, but instead detract from it. If the first hand evidence of a child is rejected in favor of a questionable form of evidence, what is implied as far as children's credibility on the stand? Furthermore, if the

¹ (1990) 59 C.C.C. (3d), 92

outcome of this case is seen as an attempt to right the wrongs of suppressing children's voices, it must be examined in terms of whether or not real changes resulted.

Similarly, legislative changes which have been made in attempts to redress these wrongs must also be examined in terms of the real results that they have affected. On January 1, 1988, Bill C-15 came into force. This particular bill revised Section 16 of the Canada Evidence Act², which is responsible for establishing which criteria children must meet in order to testify. Legislative changes were intended to relax restrictive evidentiary rules and introduce ways to make a child witness's court room experience more bearable. Formerly, s.16 provided that if a child of "tender years" was a potential witness, it was necessary for the judge to determine if the child was capable of understanding the nature of an oath. It was here that children were required to attest to a belief that God would punish them by sending them to Hell if they should fail to tell the truth in court. If the judge believed that the child was not capable of understanding the nature of the oath then this section provided that the child could give unsworn testimony. This was only allowed, however, where the judge was certain that the child was intelligent enough to justify the reception of his or her evidence in court and had adequately demonstrated an understanding of the duty to tell the truth in court. Unfortunately, the unsworn

² R.S.C. 1985, c. C-5

testimony of a child was not considered strong enough to secure a conviction; corroborating material evidence was necessary.

The amended s.16 reads somewhat differently. The vague term "children of tender years" has been replaced. Any child under the age of fourteen, as well as those individuals whose mental capacity is challenged, must be evaluated to determine ability to communicate evidence and demonstrate understanding of the nature of an oath or solemn affirmation. The latter has been put in place so that the witness will still be committed to telling the truth, even in the event that there is no belief in God. The solemn affirmation is aimed at getting ahold of the individual's conscience in some way that is comparable to the hold that an oath is assumed to have on a believer in God.

Those children under fourteen who do not understand the meaning of either the oath or solemn affirmation may still give unsworn testimony where necessary. The corroboration requirement has been eliminated, so that it is no longer essential for children's evidence to be supported by either adult testimony or other material evidence. Bill C-15 also repealed section 586 of the Canadian Criminal Code³, which provided that criminal convictions could not be solely based on a child's unsworn testimony. These legislative changes arising from Bill C-15 will be discussed below in terms of

³ R.S.C. 1985 c. C-46

court room innovations which were developed and how these have (or have not) affected children witnesses.

The emphasis in this paper is on the roles that rationality and myth play in the legal system. Examining children as a group marginalized by the legal system is one approach of many possible approaches. An inquiry could also proceed on the basis of gender, race, religion, or any other demographic that contributed to the marginalization of a particular group by law. Therefore, much of the general discussion is pertinent to groups other than children witnesses.

It is important to note that the focus on children's participation as witnesses is not meant to be limited to children who have been victims of sexual assault. Children do observe, and are victims of, other crimes. Their testimony may be valuable in numerous situations including civil cases such as custody hearings and protection hearings. Much of the literature available on children as witnesses does, however, revolve around sexual assault, particularly those studies concerned with suggestibility and hearsay. This may limit the applicability of some of the information.

Here it becomes important to introduce two disparate discourses which struggle to be in the forefront when the issue of children testifying in court arises. The first is a paternalistic, or protective discourse, and the second is an exclusionary discourse.

The paternalistic discourse is concerned with attempting to balance the need to hear the evidence that children can provide in court against the trauma that inevitably results from having to testify in open court. It is primarily concerned with the processes of the adversarial legal system. The processes are deemed to be at the heart of the problem; therefore, correcting the situation, according to this perspective, means altering processes. For instance, it has been well established that the repeated rounds of questioning involved in an investigation, the long periods of waiting, the inability to let the memory of the event go, and the hostile atmosphere of the court room tend to severely traumatize children. However, it must be considered that all evidence which aids in the truth finding process is supposed to be brought before the courts (Frank, 1949). Children are capable of providing reliable testimony. Ignoring their testimony means the potential exclusion of valuable evidence. Children's voices need to be heard, not suppressed. Achieving a balance between protecting children from trauma and recognizing their contributions as worthwhile is something to strive for within the legal system.

On the other hand, the exclusionary discourse in law emphasizes rationality and uses constructs such as the ideal legal person and the archetypical credible witness as measuring sticks. Failing to "measure up" tends to represent exclusion on a categorical basis for children; in other

possibility of real change?

authoritative voice, then what other discourses on children are deemed to be authoritative?

In examining the marginalization of children as a potential group of valuable and reliable witnesses, it is necessary to approach the problem not seeking solutions, but seeking understanding. It is necessary to understand the power the law gains from its roots in rationality. It is necessary to understand how law manages, and has historically managed, to maintain its overarching sense of authority in the social milieu. As stated above, this authority is rooted in legal rationality and is upheld by the power of myth. Understanding myth is, therefore, essential. Myth has the ability to create a sense of transcendence, to establish origins and maintain their continuity over time, as well as to sustain a belief in the existence of a "natural order" of things.

Often problematic in legal theory is categorization and definitional demarcation. What are considered to be truths are often narrow and exclusive; categories are developed that are narrow and limited in usefulness in instances that are not hypothetical. This is why it is important in the confines of this paper to demonstrate how the legal construction of the archetypical witness is severely limiting when used as a measuring stick in the evaluation of potential witnesses, particularly children. The profile of the archetypical credible witness is constructed here in order to demonstrate

how children can logically be discounted as potentially credible witnesses. Briefly, the archetype outlines the parameters of what legal practitioners belief constitutes a reliable, believable witness. Rational thought processes, strong communication skills and a positive demeanor are a few of the characteristics which fall within the parameters. This archetype and what it means for children's status as potential witnesses is discussed in great detail below.

Reconciling the two discourses is important work. As different as they seem, some of the assumptions that they operate on are similar, and are therefore problematic to both. This is especially true when evaluated in terms of affecting real change. How is it possible for real change to occur when a paternalistic discourse, although apparently rejecting the legal rationale of the exclusionary discourse, still attempts to make amends by making procedural changes or exceptions within the current framework of the legal system, and using the same measuring sticks that the exclusionary discourse does? This is essential for the reader to keep in mind.

The second chapter should be considered the most significant chapter in the paper. It explores the area of myth, and the related concepts of transcendent origins, continuity, and mediating contradictions. The latter portion of the chapter discusses the assumptions of legal positivism, as well as how legal positivism manages to mediate law's own image as a social institution and manages to mediate internal

contradictions. Here the concept of the legal actor is introduced and examined.

The third chapter focuses on children as problematic legal actors. Here, the social construction of knowledges about children is explored. Because authors speak in different languages, these social constructions may be referred to in terms of symbolic representations, narratives or stories. Children are examined in terms of historical perspectives on their capabilities, in the context of mainstream developmental psychology, and in terms of more recent research into their potential as credible witnesses.

The fourth chapter is a lengthy examination of the adversarial system and the challenges with children are confronted when drawn into the legal system. This chapter constructs the archetype of a credible witness in the legal system, and examines how the standards which inform this archetype manage to exclude children. The subject of whether or not the adversarial system is an appropriate forum in which to elicit coherent testimony from children is explored.

The final chapter attempts to evaluate whether or not it is possible to adequately accommodate children within the adversarial legal system, ie. whether their voices can be heard, or whether despite legitimate attempts to make positive change, children will remain a marginalized group. Are small accommodations enough, or does the fundamental philosophy and structure of the adversarial legal system eliminate the

possibility of real change?

Chapter 2

Myth and Modern Law

2.1 Exploring the Power of Myth

What images does the term "myth" bring to mind? Greek or Roman heroes? Fantastic stories of the impossible or improbable? Symbolic meanings of rituals? These particular images represent what may be referred to as a common sense approach to myth: it amounts to little more than telling stories and performing rituals, and has no real place in modernity. Myth is assumed to belong to the irrational world which preceded our exceedingly rational modern existence. It is deemed to be incompatible with modernity, and therefore, certainly not foundational to something as fundamentally rational as modern law. The real myth of modernity, therefore, is that myth does not exist in modernity. For instance, most individuals do not recognize two disparate perceptions of myth. Most do not see traditional Greek or Roman mythology as establishing origins, but merely as fables: they do not perceive myth to play a pivotal role in conferring authority or in attributions of "Truth."

The "mything" and "remything" of particular discourses, such as law, is what manages to confer authority to these discourses. Myth operates by problematizing and prioritizing certain aspects of social life. Myth is responsible for creating origins, establishing relations of superiority and

inferiority, resolving inconsistencies, and maintaining continuity over time. Clarifying the significance of these aspects of myth is key to understanding the marginalization of particular groups by the legal system. To understand how law as a social institution may be perceived as a modern myth, it is vital to explore the power that myth has to inform and support positive law, to aid in the maintenance of a particular image of law, to mediate contradictions, and further, the extent to which it can provide requisite justifications for exclusionary philosophies and practices in law.

Joseph Campbell (1988) and Peter Fitzpatrick (1992) have both written on the power of myth, and although it is the latter's whose argument is of primary interest here, both are discussed below. Campbell argues that myth metaphorically represents the meaning behind visible existence, and that it is responsible for the individual's sense of being alive and synchronized with the world. But it is through storytelling and ritual that myth reveals life. He contends that mythic stories have the ability to reveal particular wisdom about living and that rituals are mythologies which are necessary for civilized society to be possible. In his conception, an individual cannot become a member of society without ritual. Campbell contends that where there is no ritual, there are no initiation rites and no methods of determining roles or social mobility between roles played by individuals.

Campbell suggests that myth serves four particular functions. The first is a mystical function, whereby myth instills the individual with an overwhelming sense of awe and wonder regarding the universe and their own person. He refers to the second function as cosmological, where truths of the universe are revealed, but their mysteries are shown as well. The validation of a particular social order, the third function of myth, is a sociological one, limited in purpose. He claims that this has been the primary function of myth in the world, but it is now out of date because it is merely restricted to how life should appear in a "good" society. The fourth and final function of myth is a pedagogical one. Campbell declares this to be the most important function. According to his account, myths can teach the individual how to live successfully under any circumstances through their revelations of wisdom (1988, pp. 38-39). Essentially, then, Campbell is claiming that myth and narrative describe and explain human existence, and in fact, play an integral role in teaching humans how to live. However, that is where he ends and Fitzpatrick begins.

Fitzpatrick (1992) contends that myth as storytelling and ritual must be distinguished from myth as a mode of being in the world, as a way of accessing truths of life to make them operative in life. This imbues storytelling with a sense of authority, and prioritizes one particular socially constructed knowledge over others. Myth is foundational to modern law to

the extent that myth is responsible for providing origins, creating a sense of transcendence in the mundane world, and establishing an order, which comes to be accepted as natural in society. Fitzpatrick (1992), would undoubtedly extrapolate on the basis of Campbell's assertions by arguing that myth is responsible for designating what may or may not be deemed a civilized society, through its ability to establish and sustain a superior position for one group over others. Further, Fitzpatrick claims that myth has negative powers of definition which tend to exclude those things which fall outside defined parameters. This particular feature of myth will be discussed further below. Fitzpatrick also has a significantly different view of ritual. He claims that ritual removes an individual from a situation to the extent that he does not need to take any responsibility for actions or account for any meanings, yet the individual is still able to meaningfully participate. According to him, ritual is the formalization of the symbolic character of something. Language, song and dance become specialized to the point where they are distinct, and subject to a specific authority. This view of ritual is consistent with what legal procedure and positive legal rationale manage to do, ie., isolate law and legal problems from their social context, thereby removing the individual involved from any social context.

What aspects of myth, then, can support the claim that it informs rational legal thought and process and provides the

rational basis for the exclusion of certain groups from legitimate legal standing? A few of these important aspects, such as the ability to create a sense of transcendence, to establish origins and maintain their continuity over time, and to sustain a belief in the natural order of things, have been briefly mentioned above. They will be examined in greater detail below.

It is imperative to keep in mind that a common sense notion of myth will always be placed in a negative light when compared to discourses which are perceived to be more rational and objective, such as science and history (Fitzpatrick, 1992). Reasons for this are evident. The latter two disciplines are seen as methodologically rational and systematic, where the former is not. If myth is seen as a construct arising from an irrational world, then it is deemed to have no place in our rationally ordered world. Myth, for all intents and purposes, appears to be out of step with the real world, and out of step with law. Beyond this, if a common sense understanding of myth merely includes storytelling and ritual, as discussed above, then it naturally places any knowledge gleaned from myth as inferior to that gained from scientific or historical investigation. In most cases, anyhow, myth is seen as exaggerated fantasies of improbable feats, containing only a few potential grains of truth. Fitzpatrick would argue that it is necessary to move past any common sense understanding of myth and examine it in

terms of its power and influence, for the role that myth plays in the social world is much more than merely narration or ritual.

One of the most important things that myth does is establish origins (Fitzpatrick, 1992). By origins, I mean beginnings, roots, a finite start to a group or a practice that has every appearance of being timeless. These origins have a sacred, transcendent quality about them, which in turn indicates that mythical narrative is sacrosanct and often concerns transformation between sacred and profane realms. Fitzpatrick suggests that mythical narrative is concerned with making human existence real to those hearing it, because it describes how the sacred, or transcendent, becomes part of the mundane real existence of human beings.

The establishment of origins may be equated with the establishment of identity, and thus may prove to be the basis for a particular group of people to lay claim to an exclusive or superior humanity (Fitzpatrick, 1992). But the establishment of identity is more than merely laying claim to relations of superiority and inferiority: it is also the establishment of a way of life, of "traditions," of the way things have always been, and are meant to be. If the point of origin of a group is deemed to be sacred, then it becomes a part of everyday thought, presumptively true, resistant to challenge. The sacrosanct, inviolable nature of origins confers authority on those origins, and on the narrative which

supports those origins. This transcendent nature also manages to establish a particular order which comes to be seen as the natural order of things (Fitzpatrick, 1992). This order is then sustained by the very force of its transcendence. In other words, because it is derived from sacred origins, it is seen as a divine order, meant to be kept intact. It comes to be seen as Truth. It thus becomes resilient and incredibly resistant to change. It is possible to see how this order established by myth is similar to the legal order claimed and supported by proponents of positive law.

Fitzpatrick (1992) argues that myth has a regulative function, even though he does not refer to it as such. He claims that myth is responsible for setting certain limits as to what can or cannot be done, or said, or known, according to the natural order of things, and of what is meant and what is done; in other words, it tends to definitively guide actions and dictate decisions. This is not done through conscious thought or process, but by the force which the transcendent origins have imbued the order with -- it is just a natural part of everyday experience. The power of myth is that myth accomplishes the continuance of origins and the maintenance of identity. This is largely achieved through narrative myth. If myth is establishing meaning, then that must mean that it is continuously present, continuously working to sustain meaning and further, to keep a sense of transcendence and divinity alive. These transcendent origins are inviolable,

and provide the ultimate point of reference for individuals in society.

Myth establishes origins, and maintains force and continuity over time by mediating any contradictions which would belie the coherent unity of the myth. These origins are transcendent, are seen to represent the truth of a matter and establish a natural order in the mundane world. The origins of law are also seen as transcendent, as initially arising from divine sources. It is the appearance of a continuous link to transcendent origins, and a continuing sense of the rightness of the order and its subsequent limits which allow law as an institution to be effective and to retain its power. Law is seen as an authoritative, independent institution which is coherent and internally consistent. Any contradictions within law are mediated by law's own logic, and concealed so that the unified front is not tarnished. Myth has negative definitive powers, as does law. The law is seen as part of a natural order, transcendent in nature, presumed to have timeless qualities; particular features of positive law manage to uphold and strengthen this image. Denying that myth is foundational to law denies the very things which allow positive law to maintain its supposed coherence and unity.

Fitzpatrick (1992) argues that progression is the continuity of origins. This, then, suggests a pivotal role for myth in the progression and "betterment" of civilization (assuming here that increased rationalization and modernity

reflect progress) and the maintenance of origins over time to sustain unity and uphold order. Because origins have a transcendent quality, surviving even through changes and development of civilization, they are still deemed to be currently (and always) relevant. Fitzpatrick also contends that myth not only creates contradictions and inconsistencies, but that it mediates them. Why? Mediation of inconsistencies is required to sustain unity and coherence so that the universality and transcendence of the origins is maintained. If inconsistencies remained unmediated, then there would be a break in the continuum, a disturbance of the order, that would suggest that this natural order is not as natural as it is assumed to be. When this happens, myth is exposed as such. This occurred when science replaced religion as the authoritative voice of knowledge in society. For example, Fitzpatrick explains that if the domination of a particular group over another group is perceived as "timeless," as having always been the case, then a continuum is established (1992, p. 22). If the domination of one group over another does not appear to exist on a continuum, but within a limited time frame, then it becomes possible to question any continued claim to superiority. However, if origins have been successfully established, then the domination of a group does appear to have existed at every stage in time up to and including the present time of examination (ie. essentially, to have always existed); therefore, continuity and consistency

are maintained.

Fitzpatrick portrays such continuity of ideology as a perfection of myth. He argues that maintaining origins over time results in erasure -- erasure of groups other than the one that the story of origin is concerned with, and erasure of other possible accounts of progression. To provide an example of this, in the Preface to his book he briefly mentions what Derrida had termed "white mythology," where the history of Europe and its peoples was one which excluded color, denied that "progression" had included anyone aside from white Europeans (1992, p. x). He argues that this demonstrates that myth is not dead, but in fact very pervasive in social life.

The above discussion indicates how myth has the power to limit explanations (Fitzpatrick, 1992). Previously, it has been stated that myth tends to define what is done and what is meant. This can be extended to say that myth can justify or legitimate social and legal practices. For instance, it can justify the existence of slavery in a society which claims that all humans have the right to freedom, or justify reservations or internment camps in a country which is strongly opposed to apartheid. Myth manages the construction of an essential other which serves to establish relations of superiority and inferiority. Where myth constructs an essential other, law constructs an ideal legal actor which serves to establish relations of superiority and inferiority (or rather, categorical exclusion). Exploring how myth works

in law through legal positivism to marginalize and silence children by utilizing authoritative socially constructed knowledges is what follows in the chapters below.

2.2 Legal Positivism and the Power of Law

Myth can be seen operating in law through the philosophy of legal positivism. Understanding the assumptions of positive law, and how they underpin the operation of the adversarial system is essential in understanding law as a modern myth. Questions about the fundamental philosophy of legal positivism need to be addressed. What role does rationality play in the legal process? What constitutes an acceptable legal actor, that is, defendant, complainant, or witness, according to rational positive concepts within the adversarial system? More importantly, perhaps, how does the established construct of an acceptable legal actor operate to disqualify those individuals who do not fall within the defined (or rather, assumed) desirable parameters?

To begin with, it should be pointed out that legal positivism represents how the law officially characterizes itself as an institution to the social world (Naffine, 1990; Williams, 1987; Smart, 1989). Legal positivism is a philosophy, based in liberal philosophy, which expresses a commitment to a specific, almost scientific method of truth finding, to being free of moral, political, economic, and social influences. Through this philosophy, the law is portrayed as a coherent unity, a system which is rational, neutral, objective, and impartial. Law claims to be "value free" as the natural sciences do, and to be able to dispense

justice in a manner that is fair, rational, consistent, and objective (Naffine, 1990; Lewis, 1990). In fact, as several authors indicate, legal positivism insists that the whole legal process relies on the appropriate rational application of legitimately posited legal rules (Naffine, 1990; Frank, 1949; Lewis, 1990).

Jerome Frank (1949) argues that in rationally positive terms, legal process amounts to following rational rules which state what may or may not be legally done, and further, that the courts are responsible for the application of general rules to specific cases. His claim is supported by the more contemporary work of such authors as John Underwood Lewis (1990), Carol Smart (1989), and Ngaire Naffine (1990). Lewis points out that it is a positivistic insistence that rules constitute law, but only those rules that have been either legislatively or judicially posited may be considered law. This requirement is meant to keep the source of law within the legal system and disallow external influences to be considered valid. Extrapolating from the work of Fitzpatrick, this means that the law secures its origins in mythic terms by creating a natural legal order. Using legislatively posited rules allows the entrance of the political, and therefore the social into the legal. Legal positivism mediates this contradiction in order to sustain the unity and coherence of its origins. Lewis (1990) draws attention to how this is accomplished. Legal positivism insists that because rules are law, the only

rules which are worthy of intellectual and rational discourse are those rules which are legal. This positive legal stance demonstrates some of law's power, where law itself not only justifies the maintenance of internal structures, but also helps to create and uphold the image of legal autonomy and distance from social activities by indicating that whatever is not specifically relevant to the law is not a matter of consideration for the law. So, Lewis (1990) argues that the positivistic contention that legal rules and obligations originate within the legal system denies that the political community and social context are responsible for the creation of law. This formal legal claim serves to substantiate the official separation of law from its context.

Returning to legal rules, Naffine (1990) contends that although all these legal rules supposedly are in place to ensure fairness, consistency and predictability in the dispensation of justice, they are really quite flexible in application and not as reliable and predictable as the law would have us believe. This flexibility in application aids law in mediating inconsistencies in order to maintain its mythic self. According to common law tradition, for instance, rules exist in order to ensure that like cases are treated in like manner, as in the idealized doctrine of precedent. Rules exist to ensure that reason and rationality prevail, and that

justice is served.⁴

The rationally positive contention is that the existence of these legal rules and their stringent application serves to confirm a commitment to scientific rigor, the search for facts, and the "truth", and to lend support to the official portrayal of law as internally consistent, impartial and neutral. After all, "playing by the rules," ie. acting in accordance with the legal order and thus imbuing it with validity and authority, is what allows the law to maintain its official portrayal of itself as autonomous from society.⁵

All of the above mentioned authors discuss the fact that legal positivism is what is taught to prospective lawyers in law school. Williams (1987) suggests that there are three enduring traits that are characteristic of theoretical legal approaches to problems. The first is the development and use of static categories and polarities. For example, rights versus needs, moral versus immoral, rational versus irrational, or public versus private, where one of the pair is deemed to be of great value in legal circles and the other is

⁴ Justice here may be taken to mean that the rules of evidence are adhered to, that the presumption of innocence is observed, and that the standards of proof are appropriately recognized and applied. This is a procedural conception of justice that arises from formal rationality. Refer to the classic sociology text Max Weber on Law in Economy and Society by Max Weber (1954).

⁵ As an aside, it should be noted here that it is law's search for substantive justice, not merely procedural justice, which has created a "crisis" in legitimacy. Jergen Habermas (1976), for instance, expresses concern about "juridification" in Legitimation Crisis.

detrimental. Additionally, there is very little opportunity for any change in the perception of which of the pair is potentially valuable or detrimental for legal purposes; once a perception of worth is established, it tends to remain the same. As both Naffine (1990) and Williams (1987) indicate, law students are confronted with a liberal philosophy which posits a dichotomous world view, a philosophy which very strongly influences positivistic assumptions about law and about different categories of legal actors. This dichotomy constructs pairs of polar opposites, like those above, which supposedly characterize the legal world and actors within it. In a sense, this dichotomy aids in creating a mythic legal identity. Learning this dichotomy aids law students in the exercise of the rational construction and use of ideal legal subjects. Different individuals are regarded very differently, depending on how compatible they are with positive legal ideals. An ideal legal actor has only positive attributes; those who are not credited with full legal capacity are characterized by negative attributes. Children, for example, are extremely problematic legal actors, for many reasons, not the least of which is their supposed lack of rationality, objectivity and abstract thought. This will be discussed in much greater detail below when discussing how children fail to satisfy all the elements that comprise an archetypical credible witness.

As Naffine (1990) points out, the emphasis in legal

education thus becomes learning the rules and how to follow them so that the legal order is kept intact and kept free from any contextualization. Naffine (1990), Frank (1949), and Lewis (1990) all argue that instead of being taught how to practice law meaningfully in a social context, where real situations and real people matter, law students are merely taught technical exercises in rationality and abstract thought. This means studying case law, executing mock trials, examining decisions and how they were reached, and examining precedent cases to understand the rules and tests which evolve from them. Here, the legal facts and legal rules are what matter, not the individuals involved in the case, nor the political, social or economic climate at the time of the case. Here again, law can be recognized as myth. Williams (1987) raises the point that universal truths, which are acontextual and transcendent, and "pure" processes exist in law. By universal truths and pure processes, Williams means that something has "always" existed, and is an integral part of a universal system of truths, rights and wrongs. This is a defining aspect of law as modern myth. All things which are not transcendent or universal, or which are contextual or just Not True (in the sense of being universally acknowledged as True) are not to be given any notice. Teaching this to law students is the supposed function of law school. Obviously, if cases from the nineteenth century can be used as precedent cases, or if a case from the 1950s can provide a test (ie. set

a standard) for a current case, then the point of these technical exercises is to be able to abstract from social context. Therefore, it is rational abstraction, not contextualized thought in concrete situations, which is of tantamount importance in learning and applying the rules of the legal system.

What effect does this approach to teaching law have? First, it enhances the appearance of the internal logic and consistency of the legal system (because of adherence to rules) and in effect, renders the legal system immune to outside criticisms of its operation (Naffine, 1990). This is a prime example of mythic mediation of inconsistencies, and a mythic sense of authority. Second, it supports the notion of law as an institution which is separate and autonomous from society. Refusal to acknowledge the possibility of external influences on the operation of the legal system, such as economic, political or moral considerations, aids in the protection from criticism, and enhances the appearance of autonomy. Finally, and most significantly, it refuses to give import to the individual actor's personal demographics. By removing itself from external influences, and insisting that the rules are what matter, the legal system tends to make the individual unimportant -- socioeconomic status, race, gender, age religion, or any other personal information becomes inconsequential and irrelevant. It is not only those who come before the courts as victims, defendants or witnesses to whom

this happens: it also applies to legal professionals, such as judges and lawyers. This is the third point that Williams (1987) makes. Truths are expressed in law due to the existence of objective and unmediated voices. Judges have powerful voices, but Truths are also voiced by "real" people who have "real" experiences. Tongue in cheek, "real" here must of course refer to some models which have proved to be legitimate. The legal system strives to appear impartial and neutral, and in doing so, purports to treat all individuals alike according to the position or role in which they confront the system. This creates the prospect of seeing each legal actor as less of an individual than as someone fitting into a role. A sense of interchangeability exists (Naffine, 1990), where the individual becomes lost in the consideration of the construct of the legal ideal.

This construct of the legal ideal works to mediate and justify exclusions within legal rationality. The individual is the basic unit with which law is concerned. The law's fixation with abstract thought has meant that rules can be universally applied to all because of this (Naffine, 1990). The law is concerned with the individual as its basic unit insofar as it is concerned with protecting the right to property and safety of the person. The individual is also the basic unit of legal responsibility. It is assumed, theoretically, that the legal person can be anyone, that people as legal entities can be completely abstracted from any

social context (Naffine, 1990). It is this abstraction which assures law's power and authority. It should be noted, however, that "anyone" really means anyone who fits into the parameters of the acceptable legal actor. It is further assumed the individuals coming into contact with the legal system are rational, autonomous, competitive, self-interested, and intelligent actors who thrive in a competitive society (Naffine, 1990; Dziech & Schudson, 1989). This is supported by liberal philosophy which would characterize the legal person as being a "reasonable man," who is intelligent, self-determining, autonomous, and who exists apart from the social, political or economic context that he or she operates in. It is important to keep in mind here that this "reasonable man" standard originally literally referred to men. It excluded women, children, and "savages" (Naffine, 1990). This characterization of the legal person is important to keep in mind during the discussion of the adversarial system below, particularly during the discussion of what constitutes a credible witness and how children are excluded from that profile.

Law has its own theory, methodology and testing ground, and sets itself above other discourses as the authoritative source of legal knowledge, thereby disqualifying such knowledges as sociology, political science and psychology. Carol Smart (1989) argues that much of law's power comes not only from it being presented and accepted as a unified body of

knowledge, but from referring to it as a singular entity, merely as "law." This is a perfect example of mythic mediation. The use of the singular term denies the diversity and range of issues that laws deal with. Further, the singular term also manages to conceal contradictions and conflicts that are present within law; the singular term maintains the internal consistency of the system. It does this so well, in fact, that even those who challenge law's authority tend to do so by relying on law's own logic, terms of reference and language as the basis for their criticism. Here again, it is possible to see how law mediates contradictions to preserve unity and coherence.⁶ Smart (1989) contends that this concedes too much to law, and in effect, enhances its power and grants validity to its claims. It is rather ironic that even as writers recognize and acknowledge this, there remains a tendency to use the term "law" in its singular sense, and to rely on specifically legal terms to evaluate and criticize the legal system.

Smart (1989) argues that law's ability to uphold a coherent unified front is instrumental in maintaining its power. Law is resistant to challenges from other discourses, often because they fail to present the same degree of unity of knowledge that law appears to possess. Law also lays claim to a certain degree of scientificity, which is a power claim in

⁶ This is very similar to Fitzpatrick's (1992) argument about myth presented earlier in the chapter.

and of itself. Science lays claim to authoritative knowledge because of its emphasis on method, objectivity, and impartiality; law also lays claim to this on the basis of its own unique and supposedly rigorous methods. Drawing parallels between scientific and legal discourse often appears to imbue law with the respect and authority accorded to natural sciences. This does not mean that law admits that science has knowledge which can necessarily challenge or influence law's authority, but making comparisons is apparently a way of borrowing the ready and often unquestioned respect attributed to science within the social milieu, based on methods and rationality.

On the particular topic of the strength of authority claims reliant on comparisons between scientific and legal discourses, author Laurence Tribe (1989) presents an intriguing model in which he argues that parallels between the two discourses weaken, rather than validate, law's authority claims.

Tribe (1989) examines theoretical shifts in physics, considered to be the "purest" of the "hard" natural sciences. He believes that interdisciplinary comparisons offer opportunities to see past preconceptions, and to raise new questions to direct research. In the course of his evaluation, Tribe draws parallels between three standard conceptual frameworks in physics and traditional and emerging legal paradigms.

He draws the first parallel at the level of Newtonian physics. Here, space was conceptualized as an unstructured background for actions. Parallel to this is the positivist claim that the law is distinct from the social world, ie. that a "natural order" of things exists in which the legal system is a passive entity which cannot intervene meaningfully in the real world. Newtonian physics were criticized because space was characterized as static, ie. as influencing all processes without being affected in any way. It was a basic premise of Newtonian physics that background and foreground could not be separated, that space and time were dynamic quantities, interacting with each other, and necessarily affecting each other. Tribe indicates that in the legal system, an Archimedean point outside the social world can no longer be considered valid because the law and legal decisions cannot truly be removed from the social context which they originate from and within which they are made. Each legal decision changes the face of the legal system, and it also changes the social context within which it operates. In other words, the law is caught up in a dialectical process.

Moving to quantum physics, Tribe (1989) suggests that the Heisenberg Uncertainty Principle, which is based on two main premises, can offer insights into legal studies. The first premise is that the study of a system necessarily means intervention into that system; the second principle is that the researcher cannot be certain of the degree to which that

intervention has actually influenced the system. Tribe argues that the act of judging is legal observation, and shapes not only the object of the judgement, but the judges themselves.

The parallels that Tribe draws tend not to be as positive and supportive of authority claims as most other comparisons made between scientific and legal discourses. Why? They tend to show contradictions between legal thought and legal action. Special features of the legal system -- the criminal trial, the adversarial system, the doctrine of precedent, the presumption of innocence, and particular standards of truth, to name a few -- tend to validate the rationality of law and the notion of law's internal consistency. Smart (1989) argues that the more coherence, unity consistency and predictability (all ideal features of positive law) are attributed to law, the more powerful it becomes. This power is incredibly resistant to external challenges. Internal contradictions, however, have the potential to weaken the front that rational positive law presents.

The first contradiction within law is that while law claims to be autonomous, it is really socially contingent.⁷ Law is able to impose its own definitions on everyday life because of its claims to authority and autonomy, and its resistance to challenges from outside discourses. However, law remains contingent to the extent that it cannot legitimately exist without a social group to inform it, and to

⁷ Fitzpatrick, 1992; Smart, 1989. See above, p. 20-21.

be controlled by it. Furthermore, Smart (1989) contends that law's claim to authoritative truth is merely an ideal, not a reality. Here is the myth of law -- the reality that law lays claim to is not reality, but myth.

The second contradiction represents a clear example of the influence of myth in law, in terms of divine origins and the natural order of things. Law claims that it relies on a sovereign power⁸ to posit the rules by which it functions. This supports the notion that law is impartial and neutral, divorced from external influences. However, law necessarily relies on the character of the social group which it is responsible for regulating to define the limits of control. A sense of impartiality may be supported because of the natural order of things that has been established, ie. the tendency of positive law to define relevant as law only that which is posited by the proper sovereign or legislative authority (Fitzpatrick, 1992). But this does not take into consideration the amount of properly posited law which is influenced by popular spirit, that is how much pressure is exerted on legislators by individuals and groups within the social community.⁹

⁸ By claiming a sovereign power, law attempts to further imbue itself with authority and to maintain its unified front. A sovereign power implies a divine power, in a sense, which would transcend the mundane world. In effect, by laying claim to this, law enforces the appearance of sacrosanct inviolability.

⁹ See for instance, authors such as Dziech and Schudson, 1989; Spencer and Flin, 1994; Bala, Hornick and Vogl, 1991 who discuss how popular sentiment can influence legislation.

Law is associated with a natural order, and is representative of social stability. This idea of a natural order is a mythic mediation of law because here again, law reveals its social contingency. It is stable to the extent that over time, it remains the institution which is held responsible for protecting and regulating society. But the needs of society change over time and, historically, laws and the legal system have been responsive to those changes by degrees. If law was not socially contingent, there would be no need for revisions of criminal codes, evidence, narcotics or welfare acts, for introduction of protective legislation, for law review commissions, or for Royal Commissions to investigate injustices and to suggest how the law needs to be adjusted. Law may mediate this by claiming that certain changes may be necessary in order to sustain justice when there is a breakdown in procedural practices.

Positive law claims that all who confront the legal system are to be treated equally. However, there is an ideal of the legal person which has been constructed to which all others confronting the law are compared. This is where the negative definitional powers of law come into play. Any individual who does not fall within the defined parameters of the ideal legal person is seen as outside the realm of equal, and therefore, does not need to be dealt with in the same manner. This allows for all kinds of justified exclusions,

whether it is as a "person" legally¹⁰, as an owner of property, or as a competent witness.

Children fall outside the realm of equal because they are problematic legal actors. Law has the power to make the exclusion of children as a group of potentially valuable and credible witnesses seem a part of the natural order of things, a transcendent reality that has continuity. The exclusionary power of law is aided by external discourses, such as religion and science (particularly psychology) which lay claim to authoritative knowledges of children. The chapter which follows examines both the exclusionary and protective discourses in terms of historical perspective on children and psychological research.

¹⁰ For example, women were not actually considered to be "persons" until quite recently. See Carol Smart, 1989; Karlene Faith, Unruly Women: The Politics Of Confinement and Resistance, Press Gang Publishers, Vancouver, 1993; Constance Backhouse, Petticoats and Prejudice: Women and Law in Nineteenth Century Canada, Osgoode Society, Toronto, 1991; Olive M. Stone, The Child's Voice in the Court of Law, Butterworths, Toronto, 1981.

Chapter 3

Children as Problematic Legal Actors

How are children perceived in legal circles? Here it is argued that a particularly negative perception of children is operative in the legal system. It is further argued that this image serves to presumptively exclude children as potentially competent witnesses, regardless of legislative changes intended to enable their voices to be heard in court. The purpose of this chapter is to examine what socially constructed knowledges of children look like, and where they originate. The authors referred to below all use different languages when referring to these socially constructed knowledges. They speak in terms of symbolic representations, narrative, and stories. In reality, they amount to the same thing. They become authoritative ways of making sense of children, and exemplify how myth works. These social constructions of children are myth: they establish origins and maintain a sense of continuity.

The term "symbolic representation" comes from an article by Kristen Bumiller entitled "Fallen Angels: The Representation of Violence Against Women in Legal Culture."¹¹ Bumiller is particularly concerned with the popular representation in legal forums of women who have been the

¹¹ *International Journal of the Sociology of Law*, 1990, 18, pp. 125-142.

victims of sexual violence. Bumiller contends that all trials are symbolic in nature, to the extent that they are responsible for establishing and perpetuating authoritative knowledges about the actors involved in the courtroom, and for establishing specific identities and social relationships as true. Along similar lines, in the introduction to a text entitled The Politics of Abortion (Brodie, Gavigan & Jenson, 1992, p. 13), the authors suggest that one very powerful feature of law is the authoritative ability that it possesses to reinforce meanings and meaning systems.¹² These identities (or meanings or knowledges) are more than merely stereotypes: they relay important information to the public, to be absorbed into their everyday understanding of the legal system, about what the causes and consequences of crime are, as well as what particular legal actors (ie. the defendant, the victim, the witness) look like. This means that certain understandings of the various actors come to be commonplace. Anything unexpected or different from the expected perception is deemed aberrant.

A symbolic representation is an authoritative operative perception about a particular group, that is accepted by, acted upon, and perpetuated within the legal system. More than merely a stereotype, a symbolic representation must be perceived as a socially constructed knowledge, a story, a

¹² See also Carol Smart in Feminism and the Power of Law, Routledge, London, 1989. This is a critical and integral claim of the book.

narrative, or an authoritative knowledge.¹³ Like a stereotype, this symbolic representation, or meaning system, is based on salient, distinguishing features of members of that group -- gender, age, race, etc. More than a stereotype, meaning systems have the capacity to regulate and control social relations (or in this case legal relations and process) by managing to silence and marginalize particular groups (Brodie, Gavigan & Jenson, 1992, p.7). Specific knowledges can prioritize particular perceptions, and discourses. That is, socially constructed knowledges (or symbolic representations, narratives or stories), are accorded normative validity through law's authority and then normatively internalized by legal and social actors.¹⁴ In legal culture, a symbolic representation comes to be understood almost as a posited role, like that of the prosecutor, defence lawyer, judge, or witness. It is not just an automatic assumption about members of a particular group, it is an expectation that there will be no deviation from the accepted perception. A symbolic representation of members of a particular group is used as a measuring stick for

¹³ See Bumiller, 1990; Smart, 1989; and Naffine, 1990.

¹⁴ This is similar to Foucault's (1979) notion that within modernity disciplinary discourses encourage subjects to normatively discipline themselves, that no coercive force is necessary for control and discipline. Here, normative internalization of symbolic representations, or meaning systems, means that it should be automatic for certain perceptions to be accepted as True without question. This translates into a sense of interchangeability, where personal characteristics do not matter, but general characteristics and categories do. See Smart (1989).

individuals who fall within the proper parameters: for example, women who are victims of sexual assault find that their morality is compared to that of other women and to the image of the typical and "normal" woman who is perceived as the usual victim of a sexual assault.¹⁵ Similarly, children who find themselves providing testimony in court, either as a victim or merely as a witness, find that they are expected to measure up to expectations and informal witness standards that have developed around adult witnesses.

The law manages to confirm operative symbolic representations or narratives on children in a variety of ways.

It has various non-legal sources to support its claims about children, which come from science, religion and the social world. The following is a perfect example, taken from St. Paul's letters to the Corinthians in the Bible:

When I was a child, I spoke as a child,
I understood as a child, I thought as a child;
but when I became a man, I put away childish
things.¹⁶

Children are basically portrayed here as inferior, imperfect adults. Children and childhood are not given any import; children are perceived as "potential" adults, and childhood is perceived as a stage of life which prepares the child to be an adult (Fitzgerald, 1994, p. 13). The adversarial system is fundamentally influenced by a Judeo-Christian ethic, which the

¹⁵ See Smart, 1989 and Bumiller, 1990.

¹⁶ I Corinthians 13:11

above quote embodies. A perception of children as less than perfect adults means that they will be less than perfect legal actors, which in turns acts to justifiably dismiss them as eligible witnesses.

In the earlier discussion of myth, it was argued that myth in narrative form has the power to make particular aspects of human existence real to those who hear it. Along similar lines, Stainton-Rogers and Stainton-Rogers (1992) claim as the basic thesis of their work that the world we live in is created by stories: stories that we are told, stories that we tell to others, and stories that we create. They further argue that what is seen as "fact" is really no more than story accepted as truth. Stories are developed because of a need to establish and maintain beliefs. These stories comprise symbolic representations, merely in a different language. When those beliefs are strong enough and credible enough, what we think and believe to be true becomes fact.

Stainton-Rogers and Stainton-Rogers state that traditional accounts of childhood, which must be considered to be symbolic representations, should be seen as a conservative force, and an obstacle or challenge to progress (1992, p. 79). The substantive content of these accounts is relatively unimportant, because whatever that content is, it makes an authoritative claim about what the perceptions (and, therefore, the truths) and understandings of children and childhood are in common sense knowledges. Consistent with the

notion of mythic continuity, ie. maintaining origins and a transcendent, timeless sense of natural order, Stainton-Rogers and Stainton-Rogers also contend that childhood is portrayed as a part of a continuous past, one which bestows a specific identity on children. Included as a part of this established identity, of course, are attributions of children's capacities and competencies. What they are believed to be capable or incapable of is reflected in how they are treated by family, institutions which manage them (including law), and those who claim to be experts on them.

Historical perceptions and accounts become distorted by what we think we see, by what we want to see and by what we expect to see. Therefore, when attempting to understand in historical terms how perceptions of children have developed and changed (or remained the same, as the case may be) over time, Stainton-Rogers and Stainton-Rogers contend that all we can ever have to enlighten us are stories (1992, p.19). They claim that stories about childhood are definitive and constructive. This is why stories are symbolic representations by another name. Stories indicate not only what features of childhood are significant, but also what childhood is supposed to look like, what a child is. Stories that are told and retold tend to establish a particular account of childhood as truth. These stories tell us where to look for children, what specific features to look for and examine, and what specific features to ignore or exclude. As

the authors indicate, to be able to look for a child or to examine childhood, it is first necessary to know, or at least have a perception of, what a child and childhood is. Therefore, telling stories should be seen as myth making.

Continuity in accounts of childhood must be maintained in order for perceptions to remain constant. How is this done? First of all, as Stainton-Rogers and Stainton-Rogers (1992) indicate, it is not possible to bracket off past knowledges of children from present understandings; they must be accounted for because they aid in making sense of current knowledges of childhood. The past, or at least the implied past, cannot be ignored, even if it is not well documented. Therefore, children become a part of an ongoing epistemology of childhood at the moment that they are born. This is an essential part of myth -- there is no finite start to the story, but an unbroken continuum to which every child contributes. Stories of childhood exist before a child takes his or her place in the social milieu, and these stories tend to locate each child in a specific social space. Each child, however, contributes something unique to the continuing story, keeping it dynamic and alive (Stainton-Rogers & Stainton-Rogers, 1992, p. 7).

Here is mythic continuity. Each child is already knowledged before entry into the social milieu merely by virtue of being defined as a child. Yet each child modifies and further develops the story of childhood, as does each scientific theory or psychological experiment. The story does

not remain static, but is ever evolving; it is a continuing, never ending story. Original ideas about children are maintained and children's place in the social world is held constant, as are perceptions of their abilities, competencies and inherent value as contributing members of the social group. Fluctuations in perceptions of particular features of childhood may appear over time, but they are quickly engulfed by the encompassing perception of childhood. Different lines of thought and different theories of childhood might produce slightly different accounts of the experience of childhood, or the perception of childhood, but upon close inspection, the amount of divergence is fairly minimal.¹⁷

Traditional notions of children are deeply entrenched into both the social and the legal. Narrative is also myth making a way of perpetuating and maintaining the perceptions that have developed over time, so that they are seen as truth. The negative representations of children, as being liars, as incapable of separating truth from fiction and reality from fantasy, as incapable of accurately recalling and recounting an event, as incapable of resisting suggestion and leading questions, and as unable to communicate the story coherently and intelligently in court, come from these stories. The stories and narratives, and therefore the symbolic

¹⁷ Here the reader may wish to look at P. Aries, Centuries of Childhood: A Social History of the Family, Jonathon Cape, New York, 1962; L. DeMause, The History of Childhood, Psychohistory Press, New York, 1974; or C.J. Sommerville, The Rise and Fall of Childhood, Vintage Books, New York, 1982)

representations themselves, come from the social world. They arise from our own childhood memories, from stories told to us by our caregivers, siblings, relatives and childhood friends, and from stories inspired by artifacts such as photographs, hand-drawn pictures, and toys (Stainton-Rogers & Stainton-Rogers, 1992), and are all a part of myth. But the symbolic representation of children is also informed by philosophic and epistemological knowledges that create a space for children that is outside the boundaries of rational adult knowledge, meaning that children are excluded. These stories, or narratives, inform an operative symbolic representation of children, which in turn determines how children are responded to and dealt with by adults in the social world, by law and by legal actors.

The remainder of this chapter explores perceptions of children by examining historical perspectives on children, what developmental psychology has had to say about children, and what current research about children's abilities as witnesses has to say.

3.1 Historical Perceptions of Children and Children Witnesses

Children, and the stories that they tell, have always been viewed with suspicion by adults. Often their testimony is deemed to be potentially more detrimental to justice than helpful (Goodman, 1987). As Dziech and Schudson (1989) suggest, adults do not always understand children, nor do they tend to trust them. Several authors point out, in fact, that adults are more than prepared to accept that children lie, purposefully and knowingly, as a matter of "common sense" (Smart, 1989; Dziech & Schudson, 1989; Spencer & Flin, 1994; Goodman, 1987; Young, 1992). Further, it is often believed that children are unable to distinguish between fantasy and reality, and are likely to talk about fantasies as if they were real events. It is also assumed by many that children are unable to distinguish between truth and falsehoods, and so what they say can not be trusted based on this (Dziech & Schudson, 1989; Goodman, 1992). Because of this, children are often viewed as less than complete adults, or rather, imperfect adults. Children are perceived as irrational in legal discourse, as fanciful, infantile, and incapable of rational thought or action.

As will be discussed in great detail below, children are knowledged as seen above through narratives or stories. The knowledging of children through narrative and story within scientific, specifically psychological, literature has been a

powerful source of these mythic narratives or symbolic representations of children. In understanding the knowledging of children, therefore, this chapter will examine psychological discourses on children and their claims to be particularly authoritative sources of knowledge on children.

The work of Sigmund Freud was very influential and needs little introduction. He has been widely criticized for his work on the Oedipal complex and penis envy, as well as his earlier seduction theory (Stainton-Rogers & Stainton-Rogers, 1992). In any case where children are concerned, especially with respect to sexual assault, Freud's work managed to reinforce the then contemporary notion that children were the morally responsible party in any sexual misconduct. Because children were seen as imperfect adults whose potential for rational thought and actions had not yet been fulfilled, it was also assumed that children were immoral, and bound to be instigators and provocateurs. In cases of child sexual abuse, the child was perceived to be the one who was morally in the wrong, never the adult (Stainton-Rogers & Stainton-Rogers, 1992). For an adult to engage in such a morally reprehensive act was unthinkable and irrational, and therefore certainly had to be provoked by something or someone else. Effectively, this did not allow children to be seen as victims, but instead, portrayed them as sinners and instigators of sexual activity (Stainton-Rogers & Stainton-Rogers, 1992).

Historically, around the turn of the century, there was

a great deal of interest in the area of children witnesses.¹⁸ As mentioned above, the focus was kept on children's recall abilities and suggestibility. For the most part, early studies into children's capabilities as witnesses concluded that children could potentially be accurate witnesses. Unfortunately, even though they were considered to be capable of accurately recalling and recounting events and correctly responding to non-leading questions, it was felt that their testimony could be easily contaminated. Sources of contamination were identified as leading questions and untrained interviewers who did not properly interview children or accurately record children's responses to questioning (Goodman, 1987). Briefly, the findings of different researchers are given below.

Binet, in 1900, published a text entitled La Suggestibilite (cf. Goodman, 1987). He felt that his research had successfully demonstrated the effects of leading questions on children's accounts. He suggested that children who were to provide testimony not be questioned by authorities, but be allowed to merely write out their accounts of the incident in question. In 1910, Sterns conducted research which focused on children's suggestibility, the accuracy of their reports, contrasts between narrative and interrogative methods, and the role played by practice (cf. Goodman, 1987). Unfortunately, Goodman (1987) points out, most of his work has not been

¹⁸ See Goodman, 1987.

translated into English. His work initially utilized picture tests, but upon criticism, he began to use realistically staged event tests in order to examine children's potential as witnesses. He concluded, like Binet before him, that inaccuracies in testimony were usually the result of questioning, and that the questioner could be held responsible for false reports.

In 1912, Whipple conducted research on children involving memory of event tests (cf. Goodman, 1987). He claimed that there was no improvement on repeated event tests by his subjects. However, it should be noted that he was not staging events that children might actually witness and then have to recall for the court. His event testing usually involved physics demonstrations, such as the effect of centrifugal force on a vessel of water. He claimed that children understood the principles and the event, and therefore should be able to recall it (Goodman, 1987). It is uncertain whether or not there are many adults who are familiar enough with the principles of centrifugal force who could accurately recall such an event and perform satisfactorily on a memory test.

Pear and Wyatt in 1914 (cf. Goodman, 1987) contended that an account that was spontaneously given by a child was very reliable, even if the child was mentally challenged. Gross (cf. Goodman, 1987) concluded that the errors that children make are different than those that adults make, not worse. Heindl (cf. Goodman, 1987) concluded that children are

excellent observers, and are perhaps even more objective than adults, but that their difficulties in translating observations to verbal accounts were detrimental.

The work of J. Varendonck was probably the most influential at the time in this particular area. It is he who, in 1911, asked, "when are we going to give up, in all civilized nations, listening to children in courts of law?" (cf. Goodman, 1987). It should be recognized that until the early twentieth century, children were often allowed to testify in court. How much weight was actually placed on their evidence depended on the time and the judge, but many legal practitioners seemed to feel that what children had to say should at least be heard, regardless of its probative value in the end (Goodman, 1987).¹⁹ Varendonck conducted several studies in the early 1900s on children's powers of observation and recall. Without going into great detail about his work, he claimed that his studies illustrated three "facts": that children were unable to accurately observe anything; that there was no limit to the suggestibility of children; and, that no value could be attached to children's statements about an event that they either witnessed or experienced. He, like many of the other researchers of the

¹⁹ See also Spencer and Flin, 1994. This was a rather unusual discovery. Very little, if any, weight was placed on what children had to say in court, but it was still deemed appropriate to let them speak if they really wanted to. It appears that this practice came to a halt when child reform movements of the nineteenth century gained momentum. See Spencer and Flin, 1994; Dziech and Schudson, 1989.

time, argued that if a question was not appropriately asked, then there would be errors in the information given. Consider the implications here for cross-examination: if it is acknowledged that the wrong question, or a question phrased inappropriately could cause "errors" in testimony, then perhaps traditional adversarial cross-examination is an inappropriate method for truth-finding where children are being utilized as witnesses.

Unlike other researchers, however, Varendonck took this finding to be proof that nothing children perceived or stated was worth attaching value to (Goodman, 1987). He came to four specific conclusions based on his research. The first of these conclusions was that declarations made by children, of any observed details could not be trusted. The second was that children's imaginations tend to intrude on experienced reality, and confuse them. The third was that he believed children had such a strong sense of conformity, that they would immediately and uncritically accept the conviction of an adult who held any sort of power or authority over them. His final conclusion was that questions which were badly posed, whether voluntarily or involuntarily, could cause profound problems (Goodman, 1987).

3.2 Developmental Psychological Research

Varendonck's beliefs about the capabilities of children were very high profile, and confirmed common sense notions about children for many people. In other words, they fit into the myth surrounding children. But they were supported, and maintained over time, by the work of other psychologists, especially those in the developmental field. Rex and Wendy Stainton-Rogers (1992) contend that developmental psychology has been a very powerful project with respect to knowledging children. They point out that developmentalism arose from the notion that it was possible to knowledge certain aspects of the social world; in the case of developmental psychology, children were the feature of interest. The knowledging of children was concerned with the construction of a set of theories about how they were socialized by their community and thus prepared to become fully active adult participants in that community. Stainton-Rogers and Stainton-Rogers (1992) claim that developmentalism was such a powerful project that the knowledges established were deemed to be authoritative. That is, the theories and "facts" established by developmental psychology were taken as truth, and as the only ways of thinking about children that were acceptable. The two most influential developmentalists, whose work will be discussed shortly, were Jean Piaget and Erik Kohlberg. Further, Stainton-Rogers and Stainton-Rogers (1992) indicate that it is

only very recently that this "developmental hegemony" has been challenged or criticized in any way (1992, p. 41).

This particular point should be seen as an important one when considering the symbolic representation of children in legal discourse. Law is relying on science, psychology in particular, to provide authoritative information about children and their level of rationality. Developmental theories were concerned, as will be seen below, with how developmentally mature, or rational, children were at specific ages. Freud's work was less concerned with rationality than it was with morality. Considering that morality is an issue that falls outside of rationality, and the influence of Freud's work, the negativity associated with children through Freud is very influential. His work emphasizes the lack of rationality in children below a certain age by focusing on their feelings, their emotions and morality, and not on rational thought processes and actions. All of his theories of dysfunctional sexuality were related to childhood, placing even greater emphasis on it as a stage of life where rationality played little or no role in daily functioning.

For those researchers who were more focused on developmental psychology, one of the most influential thinkers was Jean Piaget. His work concentrated on developing a model which reflected the progress of logical thought in the child. His model was less of a developmental model of childhood than it was a developmental model of knowledge (Stainton-Rogers &

Stainton-Rogers, 1988). The model was concerned with leaps of logic, particularly from concrete to abstract modes of reasoning. According to this model, the reliance on concrete thought and modes of reasoning meant that an individual was developmentally immature, whereas the ability to perform abstract reasoning meant that an individual was developmentally mature. Here, the emphasis placed on rationalism is easily evident, as is the assumption that children are less worthy than adults because of their obvious lack of rational capabilities.

The first mode of thinking was associated with children, generally below the age of 12, and the second, with adolescents and adults, ie. those over the age of 12. Stainton-Rogers and Stainton-Rogers contend that his model manages to portray the child as not only a lesser human, who has a quantitatively inferior understanding, but as a lesser alien, who is qualitatively inferior in the kind of understanding that he or she possesses (1992, p. 95). Stainton-Rogers and Stainton-Rogers (1992) also discuss research into behaviorism done by Skinner and Watson. These two believed that with the use of a tightly controlled environment, they could create any type of adult that they chose to. However, most of their work focused on Pavlovian type classical conditioning of a young child, done to elicit fear at the sight of a rat. Pragmatically speaking, theories of behaviorism have tended not to have a great deal of

influence as far as children are concerned. More contemporary research, which is discussed below, is more positive about the capabilities of children than the developmental projects.

3.3 Contemporary Research and Perceptions

While the sections 3.1 and 3.2 of this chapter speak about children in terms of an exclusionary discourse, this particular section of the chapter examines children in terms of a more sympathetic, protective discourse. This protective discourse speaks authoritatively about children children, as does the exclusionary discourse. At the same time, however, the protective discourse does so from a perspective that can never challenge the authoritativeness of science's voice within the exclusionary discourse.

It is a widely held belief that children fantasize a great deal, and sometimes cannot make the necessary distinction between fantasy and reality. Especially in cases where a child claims to be the victim of sexual assault, there is a tendency for adults to believe, and to want to believe, that the accusations are something that the child has "dreamed up" (Bybee & Mowbray, 1993; Smart, 1989; Young, 1992; Dziech & Schudson, 1989). It is unlikely that a child will make a false disclosure about something like sexual assault. Furthermore, an early psychological researcher claimed that although sometimes children's stories did contain errors of fantasy, ie. that fantasy and reality were blended to a certain extent, adults are no less susceptible to the intrusion of fantasy into the reality of the experiences they recount (cf. Sterns, as quoted in Goodman, 1987, p. 20).

Dziech and Schudson (1989) maintain that children are not likely to make false disclosures about serious crimes, especially not sexual assault. If anything, there will be reluctance on the part of the child to share such an experience. The normal situation is the under reporting of such incidents, and denial that anything really happened. On the other hand, Dziech and Schudson also point out that for children, there is a need to share what they know and what they have experienced, and that three possible motivations for children to lie exist. Lying may be an expression of an intense desire for a child; for instance, a child may claim that he or she is a heroic fire fighter who has saved many people's lives, if the child wants to be a fire fighter, and be recognized for being brave when he or she grows up. Lying may also be seen as a punishment avoidance strategy. Particularly in cases where the child has done something wrong, or feels that punishment is imminent, he or she may lie in order to escape punishment; the child may blame the situation on another person, an imaginary friend, deny any involvement at all, or even deny that they had any knowledge of the incident in question. Finally, children may also lie in order to please their parents (Dziech & Schudson, 1989).

The three reasons given above all seem to be reasonable reasons for children not to tell the truth, particularly in their own eyes. But more importantly, it must be considered that they also provide reasons, especially the second and

third, for children not to make false disclosures about being victim to or witness to a crime. If the child has been a victim of a crime such as battering or sexual abuse, it is likely that their abuser has threatened them with punishment, or loved ones with harm, if they tell anyone about what has been done. Therefore, it may seem reasonable to the child to lie, and say that nothing is wrong, no one has hit him or her, no one has touched an inappropriate place on his or her body, or made him or her perform any inappropriate act. In effect, denial is lying, and this may protect the child from being punished. Related to this, children usually seek the approval of their parents or other adults which they look up to, and wish to make them happy when ever possible. If the child thinks that telling them something will upset or anger them, they are less likely to say something, or likely to lie in order that the parents will not be upset.

Other specific understandings (perhaps better termed as misunderstandings) of children's capabilities exist, aside from concerns about children making necessary distinctions between fantasy and reality, and concerns about children's propensity to lie. It is presumed that while adults have excellent and accurate powers of recall, that children are sadly lacking in this particular skill. Corresponding to their supposedly poor memory is the tendency to believe that children are incredibly susceptible to suggestion and leading questions (Goodman, 1987; Dziech & Schudson, 1989; Spencer

and Flin, 1994).²⁰ Additionally, it is assumed that even if the child witness does recall an event accurately, that he or she will not be able to appropriately communicate their recollections, in a coherent, comprehensible account. As a part of this, it is assumed that most children would not be able to impart any information to the court, because they would either freeze up or have a break down.

Current research on memory and suggestibility tends to demonstrate that children are not as susceptible to suggestion as most people assume, and that adults are not as immune to suggestion as people would assume (Dzeich & Schudson, 1989; Spencer & Flin, 1994; Goodman, 1987). The research of Loftus and Davies (1984) has shown that age is not the only, or even the main consideration of an individual witness' level of suggestibility.²¹ These authors argue that an age difference may emerge between children and adults if there is a long delay between telling the story and the incident, or if the event was not well encoded into memory in the first place. Further, they argue that where the event in question is of interest and comprehensible to the individual providing information, that there is unlikely to be any age difference.

²⁰ See earlier discussion on Varendonck and other researchers in this chapter.

²¹ In a sense, this refutes Piaget's work by claiming that age is not the only factor which affects mental capacities. This, then, moves researchers away from claiming that children need to reach a certain age before they can think in rational or abstract ways.

They also suggest that if a child can only recall fragments of an event, then the child may not be as resistant to suggestions as he or she would otherwise be. In effect, most current research has indicated children are very resistant to efforts to mislead them, particularly if it is on central details, as opposed to peripheral details, or if an event is very personally interesting or significant. In most instances, recent research has tended to provide positive information about children's capabilities as witnesses. Bybee and Mowbray (1993) indicate that contemporary research has generally been of four distinct types: case studies; lab studies; naturalistic studies; and, evaluations of the abilities of specific tools. What has been demonstrated in the course of this research about children's capabilities?

Case studies have shown that children are quite capable of providing valid and useful evidence, and further, that they are not as susceptible to suggestion as people assume. Bybee and Mowbray (1993) contend that case studies have demonstrated that children are capable of warding off efforts to confuse their recall of an event, or to mislead their evidence. This returns us to the cross-examination during the course of a trial: if a child is providing testimony, and is handled appropriately in the courtroom, there is no reason that his or her evidence cannot be considered valuable and valid.

Lab studies (Bybee & Mowbray, 1993) have demonstrated that in comparison to older children and adults, young

children tend to relate fewer details about an incident during free recall. However, the details that the children do give are accurate. One contradiction raised by lab studies is that some studies find that younger children are more susceptible to leading questions and suggestion than older children or adults, while other studies find that no such age difference exists (Bybee & Mowbray, 1993).

Naturalistic studies (Bybee & Mowbray, 1993) have also tended to provide positive information about children's capabilities. They have demonstrated that, in the course of free recall, even very young children are fully capable of providing accurate and reliable descriptions of their experiences. Central details, not peripheral details, are what they are concerned with, and children as young as three years old have demonstrated an ability to be resistant to suggestions about central details. However, responses to direct and leading questions about peripheral details tend to elicit less accurate responses from the children. One very important observation is that with young children, almost all recorded inaccuracies were errors of omission, not commission. This means that children are more likely not to mention something that occurred than they are to embellish the story or add details about what occurred (Bybee & Mowbray, 1993).

Research has also been done in an attempt to validate the use of tools such as anatomically correct dolls with sexually abused children. The research has shown a tendency to be able

to discriminate between sexually abused and non-abused children by the amount of sexually explicit play with the doll. Validity testing is still in progress for this tool (Bybee & Mowbray, 1993).

Despite research which reflects positively on children's abilities to serve as valuable and reliable witnesses, reluctance to allow very young children take the stand is still evident. Changes to legislation have been made that eliminate many formal obstacles for children, and adaptations to make their time spent in the courtroom less traumatic have also been developed (Goodman, 1987; Young, 1992). As will be discussed below, these adaptations are not always readily available, nor are they always utilized when they are available. The tension that exists between the exclusionary and protective discourse about children may be reduced to the fact that children are the most problematic legal actors imaginable. We must consider the possibility, as pessimistic as it is, that the adversarial legal system cannot accommodate children in a satisfactory manner because the fundamental philosophy and structure of the legal system cannot create an acceptable space for children. The following chapter examines the problematics of the adversarial system for children and the challenges children face when confronted with the adversarial trial.

Chapter 4

The Adversarial Process and Children Witnesses

4.1 Law's Unfriendly Stance Toward Children as Witnesses

Many authors assert that the adversarial system may be an inappropriate forum for eliciting truth from children.²² Suzanne Sgroi, quoted in Dziech and Schudson, argues convincingly that "we tolerate sexual abuse of children in our society because we continue to process cases through an adversary system that is overwhelmingly weighted against the child victim at virtually every level" (1989, p.6). It is not just the child victim against whom the adversarial system is weighted, but the child witness in general. Dziech and Schudson (1989) claim that the main problem with the adversarial system with respect to children is that historically, children were not expected to play any role at all in the legal system or to be of any force. Children were often allowed to participate, by either merely being in court or perhaps providing testimony, but they were rarely taken seriously (Dziech & Schudson, 1989). Young (1992) contends that the main problem with the adversarial system with regard to children is that it fails to recognize and account for children's psychological realities and vulnerabilities.

²² See Young, 1992; Goodman, 1987; Dziech and Schudson, 1989; Spencer and Flin, 1994.

Because children were never expected to actively participate in the legal process, these authors argue that the courts are not adequately capable of dealing with children participating as victims or witnesses.

Many authors maintain that conflict has become the standard theme of the adversarial system (Frank, 1949; Spencer and Flin, 1994; Naffine, 1990; Dziech and Schudson, 1989). The theory is that by following legal rules, adhering to the appropriate standards of proof and fighting out the details of the case in the courtroom, the truth will somehow be discovered. Frank (1949) rather cryptically claims that lawyers somehow see the "fight" and "truth" theories as coinciding in order to produce the truth. Perhaps Dziech and Schudson articulate it more clearly when they state that "[t]he power of the adversaries' efforts should produce a friction that sparks the truth" (1989, p. 127). A jury is present in order to determine the truth. The truth in a case is determined by what happens in the courtroom during the trial proceedings, and is especially dependent upon presented evidence. The Crown begins by presenting evidence and witnesses in an attempt to show that the defendant is guilty. The Defense then has the opportunity to cross-examine the witness and then present evidence and other witnesses to show that the defendant is not guilty. The Crown then has the opportunity to cross-examine the witnesses presented by the Defense. The jury is to observe all of this and then decide,

upon the basis of the facts presented in court, what the truth is.

Spencer and Flin (1994) argue that rules of evidence were developed premised on three main assumptions: a) that jury members were basically deaf to reason; b) that all witnesses are suspect; and c) that all documents are forgeries. In other words, all evidence must be viewed with a certain degree of suspicion, because it cannot be assumed to be true, but must be proven so through the adversarial process. These assumptions also imply that although the jury members are instrumental in the fact finding process, they cannot necessarily be trusted to function rationally and logically at all times. Therefore, rules are necessary in order to compensate for their shortcomings. Second, these assumptions imply that all witnesses are willing to knowingly lie or perjure themselves on the stand. This justifies harsh interrogative measures taken during both examination in chief and cross-examination. Finally, these assumptions imply that even documentation cannot be accepted uncritically.

The time in court often seems to be spent in open combat. During cross-examination, each side is attempting to undermine the other's case and to damage the credibility of the other sides' experts and witnesses. Evidence may become distorted, witnesses are often accused of lying, their moral character and behaviour are called into question and they are otherwise discredited, and certain evidence is excluded because of the

manner in which a trial proceeds (Frank, 1949; Dziech and Schudson, 1989; Spencer and Flin, 1994). It is important here, however, not to forget the importance of the theme of rationality. Rational thought and process are what the adversarial system rely on. The purpose of the criminal trial is to determine the truth of a case. The examination in chief and the cross-examination must be seen as the court's way of attempting to establish the facts and the truth. Questions directed at the witnesses by the adversaries' lawyers tend to control how the evidence is presented. It is unfortunate that the time on the stand and the line of questioning that must be faced often ends up being a very traumatic experience for the witness. The atmosphere of the courtroom tends to seem very hostile, and the lawyers, especially the one who is executing the cross-examination, tend to be at the center of that hostility.

Within the adversarial system, the lawyers are asking questions, not merely to undermine their opponent's case, but to access the legal truth -- that is, the facts of the case. The line of questioning is intended, in cross-examination, to expose any possible discrepancies or any information that has been omitted. This represents a principle of falsifiability of sorts -- cross-examination is meant to test the credibility of the other side's evidence. If a lawyer becomes particularly relentless in his or her questioning, it can be very intimidating for the witness. This is especially true

for children who serve as witnesses. However, the legal system perceives this to be an unfortunate outcome of a very necessary process. Questioning is assumed to be a very rational process, necessary to establishing truth. Within the adversarial system, one side is always declared "winner" and one side is always declared "loser"; there cannot be a draw in court (Naffine, 1990; Dziech and Schudson, 1989) because there cannot be a two-sided "truth." Therefore, each lawyer engaged in the questioning process in a trial will make every attempt to ensure that the outcome is in his or her favor.

Spencer and Flin (1994) highlight some of the most distinctive features of the adversarial system, including those which pertain to witnesses. First, there is a requirement that evidence be produced orally at the trial. This can be extremely difficult for children, as speaking in front of a large, unfamiliar audience is a daunting experience. Second, the witnesses are examined adversarially during the trial. This means that there is initially an examination in chief, which is done by the lawyer who has called the witness. This is followed by the cross-examination, which is done by the opposing lawyer. The latter is primarily interested in eliciting evidence which could be damaging to the other side's case, therefore undermining anything favorable that came up during the examination in chief. If possible, the opposing lawyer may also attempt to discredit the witness. Third, the witness is expected to give

testimony in the presence of the opposing party, so that, following rules of justice and fair play, what was said is known to the other side, and the opportunity for cross-examination exists. A difficult experience for anyone on the witness stand, it may be especially tough for children to face someone who has harmed or threatened them, or who is an authority figure for them. This is most likely to arise in cases of abuse, sexual or otherwise. Finally, the adversarial trial takes place in court which is open to public and press alike.

Witnesses provide the courts with access to truth, to the facts of the case. Frank (1949) goes so far as to claim that the legal facts are in reality comprised of nothing more than the reaction of jurors to the witness. Stainton-Rogers and Stainton-Rogers (1992) argue along similar lines, claiming that what is seen as "fact" is really no more than story accepted as truth. This has particular relevance for witness testimony: if fact is as Stainton-Rogers and Stainton-Rogers say, then the story or stories which are accepted from witnesses as true in the court room will be designated as fact. The witness is basically reporting his present memories of an event that was seen, heard, or experienced by him. Unfortunately, as earlier mentioned, the telling is controlled by questions asked by the lawyers in the course of the trial, which may limit or change the shape of the story that the witness has to tell. The possibility of error always exists,

whether it is an inaccurate perception of the event at the time of the event, as when two eye witness testimonies conflict, or correct perception at the time of the event, but the witness' memory has failed. Because of these possible errors in testimony, witnesses are always viewed with suspicion, and seen as fallible (Frank, 1949).

Several other concerns also exist: will the witness perjure him- or herself and lie to the court, withhold evidence, or change the testimony he or she gives at trial from that given pre-trial? How well the witness is able to communicate and how convincing the testimony of any given witness will be must also be considered. Dziech and Schudson (1989) contend that giving testimony is much like telling a story. In order to be believed, the witness must not only be able to communicate well, speak in a particular language aimed at the audience, but also must come across as competent and capable, and therefore credible.

Several authors claim that social assumptions have always been relied on by the law, and that determination of witness competency and credibility is no exception (Goodman, 1984; Dziech & Schudson, 1989; Spencer & Flin, 1994). These social assumptions are often supported by religion and science. The work of the developmental psychologists and the reference made to Christian sentiment arising from the Holy Bible in the third chapter demonstrate this. Therefore, it becomes necessary to explore what some of these influencing

assumptions are, where they come from, and how they manage to preclude certain groups from being deemed potentially credible witnesses. After all, it is these assumptions which historically excluded children from being considered reliable, competent witnesses.

Here it is important to discuss what the archetype of a credible witness looks like. The notion of the ideal legal actor aided in establishing the parameters for this archetype. The ideal witness in the adversarial system is a rational, autonomous, intelligent adult who is confident on the stand, is trustworthy, reliable, and who has an accurate memory. These characteristics are unpacked and explained below.

First of all, there is a tendency for adult jurors to perceive adult witnesses as more reliable and trustworthy, and less likely to have memory lapses than children (Spencer & Flin, 1994; Dziech & Schudson, 1989; Frank, 1949). Perceived accuracy of memory is a very important factor in attributing credibility or competency to a witness. The more detailed information that the witness can provide, the better; that includes clearly and vividly describing events that led up to the incident in question, that happened during the incident, and that followed the incident (Dziech & Schudson, 1989). Any apparent mistakes of memory, whether of inclusion or exclusion, have a tendency to seriously damage the evidence and lower the reliability of the testimony. Beyond that, it is important that witnesses be able to recall what they have

said in previous interviews, because any changes or inconsistencies are also damning to the testimony. Here again, it is important to remember that control of evidence by questioning in the courtroom may result in discrepancies or apparent "errors."

In criminal cases, the standard of proof is "beyond a reasonable doubt." This means that if there is any doubt as to the guilt of the accused in the mind of any juror, then the jury must render a decision of "not guilty." This does not mean "innocent"; it merely means that there were some lingering doubts, usually due to lack of convincing evidence, on the part of the jurors as to whether or not the case against the accused was strong enough to convict on. If jurors presume that most witnesses who take the stand are unreliable, then the jurors must seek out specific qualities in the witnesses in order to attribute credibility to the testimony given. These standards, or ideal qualities, constitute the archetypical credible witness.

As mentioned above, accuracy in memory is very important, as is consistency in testimony across interviews and on the stand. But, if legal facts rely on the jurors' reactions to witness testimony, then the jurors' perceptions of the witness will be what affects credibility and determines whether or not testimony meets the appropriate standard. If the witness is perceived to be truthful and trustworthy, then credibility is affected positively. Intelligence and perceived comprehensive

understanding of the proceedings also seem to be important. Of course the age of the witness is a determinant: children are presumptively deemed to be incompetent to testify, while adults are presumed to be competent (Frank, 1949; Dziech & Schudson, 1989; Spencer & Flin, 1994). This notion persists despite research which indicates that children can be very valuable witnesses, and are capable of providing accurate and reliable testimony.²³

Witness demeanor appears to have the most influence on deciding whether or not the witness is to be believed or not. A confident witness is more likely to be seen as reliable than one who is uncomfortable on the stand. Body language is somehow assumed to provide information about the witness' reliability. If eye contact can be maintained with the examining counsel, this reflects positively as a sign of trustworthiness and truthfulness.²⁴ The witness is viewed favorably for maintaining composure on the stand, ie. not fidgeting, looking around, or losing focus on the proceedings,

²³ See Bybee and Mowbray (1993) in Section 3.3

²⁴ The issue of direct eye contact and witness demeanour, in the sense of comfort on the stand and clearly articulating testimony is a difficulty which has often arisen when Aboriginal people take the stand. As noted in the Report of the Aboriginal Justice Inquiry of Manitoba (Commissioners A.C. Hamilton & C.M. Sinclair, Province of Manitoba, 1991), cultural differences often result in misunderstandings and misconceptions. Native people have different ways of understanding time and the concept of individual as opposed to shared property, for instance. Where looking directly into the questioner's eyes while on the stand is valued as a sign of integrity and reliability in the course of an adversarial trial, such behavior is viewed by Aboriginal people as a sign of disrespect or aggression.

and not appearing to be too uncomfortable. Confidence in answering questions and telling the story -- ie. speaking clearly, lucidly, being consistent in giving details, not becoming flustered by questioning -- also reflects positively on the witness (Dziech & Schudson, 1989; Frank, 1949). Keeping in mind that it is the jurors' reactions to the witness which determines how well testimony is received, and the extent to which the witness is deemed credible and reliable, then it must be recognized that **perceived** objectivity, power, likability and even attractiveness all possess a certain degree of influence (Dziech & Schudson, 1989).

Potential witnesses must measure up to acceptable standards in order to be identified as a credible witness. It must be recognized that this archetype reflects an adult standard which children are expected to measure up to. Considering that children are often perceived as irrational beings and imperfect adults, it is necessary to question how these standards have served to exclude children from providing testimony in court. Beyond this, it is also necessary to explore the numerous challenges that children face in the courtroom, which will be discussed below.

4.2 Challenges Facing Children as Witnesses

It is important to recognize that psychological and legal researchers alike still know very little about children's abilities and limitations as witnesses (Dziech & Schudson, 1989; Bybee & Mowbray, 1993), although research in the last decade or so has increasingly focused on this particular area (Flin, 1993). While psychological research has been providing more and more valuable information about what children are capable of, and their value as witnesses (Goodman, 1984; Dziech & Schudson, 1989; Spencer & Flin, 1994; Flin, 1993; Bybee & Mowbray, 1993) Dziech and Schudson claim that the legal system displays ignorance of child psychology, and this manages to limit the possibility of change and accommodation whilst upholding the status quo. This is not necessarily still true. Rather, it might better be said that recent legal reforms mean that the legal system has not yet adopted enough practices to coincide with positive research on children's abilities. Some reforms have been instituted, as will be discussed in the chapter below. Even more importantly, it should be considered that until there are significant shifts in the liberal philosophy and fundamental structures of the adversarial system, the amount of appropriate space created for children will be limited. Young (1992) contends that the main problem with the adversarial system regarding children is that it fails to recognize and account for children's

psychological realities and vulnerabilities.²⁵ This is one of the main reasons that children are perceived as problematic legal actors: children were never expected to actively participate in the legal process, and in many ways, the courts are simply not adequately capable of dealing with children as witnesses.

For children who are the victims of crime, the experience of testifying may become a second victimization. Goodman (1984) argues that much like adult female victims of sexual assault, child victims, particularly those who have been victims to sexual assault, are revictimized in the court room because their credibility is challenged, as is their truthfulness. Bumiller (1990) and others (Smart, 1989; Goodman, 1984) also note that there is a tendency to ignore the victim as an individual. The rights of the defendant tend to take precedence over any rights that a victim or witness might have in the court room. This is evident in the emphasis on the presumption of the defendant's innocence, and the defendant's right to a fair trial and to face his or her accuser (Frank, 1949). The traumatic nature of testifying is viewed as an unfortunate, but necessary part of the adversarial process of determining truth. This is exceptionally problematic for children, as will be seen below when discussing confrontation in open court with the accused.

²⁵ See also Spencer and Flin, 1994 and Dziech and Schudson, 1989.

Various authors have argued that the rules about questioning children about their competency are not only illogical, but discriminatory (Frank, 1949; Young, 1992). Competency tests are considered to be a logical step in a rational process of truth finding. Because children are held in such low esteem by the legal system, and their testimony is deemed to be particularly suspect, it is considered to be especially important that children's competency is evaluated out of court by the trial judge prior to giving testimony in court. The tests attempt to establish a child's understanding of the court room procedures, of the events in question, the child's ability to articulate his or her story, and the child's understanding of the solemn nature of the oath. A child may give unsworn testimony, ie. not take the oath, if the judge feels that he or she does not fully understand what the oath means. Perhaps it is felt that if a child entering the witness stand has already been evaluated for competency that jurors will view them with a bit more respect.

Young (1992) finds it very problematic, however, that children are the only potential witnesses that face competency tests, and that no other potentially "suspicious" witnesses are so tested. Frank (1949) also found this problematic. He considered it to be rather strange that the jury was responsible in all other cases for determining the credibility of any particular witnesses, but when a child was involved, it was necessary for the judge to conduct advance testing.

Further, he also found it strange that only children's understanding of the significance of the oath was tested, not adults'.

These criticisms are entirely justified. Why are other potentially suspicious witnesses not tested for their level of competency? And why is there a need for children to be evaluated before hand, where adults are evaluated at trial? The justification for differential treatment lies in the symbolic representation discussed in the previous chapter: the assumptions contained therein are have been relied on for so long, that they have become very resistant to change. This is not to preclude the possibility of change, but here is myth in operation in law. It seems only natural to doubt children's abilities and feel it necessary to question them based on how children have been handled within the court room in the past. Suspicions about their ability to think rationally and intelligently below a certain age have always (at least for a very long documented time) existed, so perhaps it is easier to justify a continued need for advanced testing, even in light of evidence which reflects positively on children's abilities.

Exclusionary rules, specifically hearsay rules, are problematic.²⁶ Their official purpose is to discount

²⁶ Hearsay rules are intended to limit testimony acceptable in court to first hand evidence. That is, a witness who testifies that "I was told that...." or "He said he saw..." will be using hearsay. If the information does not come from the mouth of the original speaker, then it may be qualified as hearsay. In many

evidence which has more prejudicial than probative value in the case; that is, they are in place to ensure that evidence does not unduly prejudice the jury against either party. The premise is meant to ensure justice. However, these rules have been developed over time by the judiciary (Spencer & Flin, 1994), and these rules leave a great deal of room for discretion by the judge. This sometimes results in the suppression of crucial evidence so that it does not get heard in court. It has to be considered, especially where a child victim or witness is concerned, that hearsay may very well be the best evidence, or at least provide necessary corroboration to support the credibility of the child's testimony. In the case of R. v. Khan²⁷, the Supreme Court of Canada determined that the admission of hearsay evidence was justifiable where the reception of that evidence was reasonably necessary and reliable. A so called "rule of thumb" of the adversarial system is to not attempt to act on evidence that is presumptively weak in and of itself, because this evidence will not stand up against stronger or more credible evidence provided by the adversary. The testimony of children is presumptively weak, because of how they are perceived as witnesses. Therefore, it seems reasonable in a rational

cases, judges use their discretionary powers to determine whether or not to accept hearsay, and a cluster of exceptions to hearsay rules has been developed over time. However, hearsay will **not** be used in order to establish the facts of a case.

²⁷ *Supra*, p.1

system to want to substantiate their claims wherever possible, so as to present the strongest case possible. In this light, it does seem reasonable to want to admit hearsay wherever possible, as in the Khan case, for example.

As Dziech and Schudson (1989) astutely point out, the admission of hearsay as evidence does not mean that the judge is claiming that evidence to be truth; it means only that the judge is allowing the jury members to fulfill their role, ie. to evaluate testimony and find the truth. Over the years, and through both common law and legislation, several exceptions to the hearsay rule have evolved. The first exception arises from traditional evidence law. It is commonly known as "first complaint" or "complaint of sexual conduct." According to legal rationale, the statement of a victim to a trusted person is significant, in that it indicates lack of consent (particularly where sexual misconduct is involved) and "proves" lack of fabrication (Dziech & Schudson, 1989). This particular exception has raised problems where adult female victims of sexual assault are concerned, because the typical victim will not usually disclose such an event immediately to anyone, if there is any disclosure at all. At one point, first complaint was expected of adult female victims, and their case was immediately discredited if there was no disclosure to a trusted individual as soon as possible after the event. It is more typical for children, like adult females, to deny sexual assault or sexual misconduct, than it

is to immediately divulge any information about the event.

The second exception, the "tender years" exception, allows the jury members to hear a child's previous statements, made out of court, about abuse. Medical records, and statements made to the examining doctor for treatment purposes, are a common hearsay exception. The excited utterance exception, or *res gestae*, is the admission of a child's spontaneous disclosure of an event, an exclamation in reaction. It is assumed here that a spontaneous disclosure, whether it is delayed or not, is reliable because there is no chance for fabrication. There is also a residual exception, which results in the admission of hearsay when no other exception appears to apply (Dziech & Schudson, 1989).

The standards of proof in criminal trial provide an additional challenge for children as witnesses. In civil cases, the standard of proof is the "balance of probabilities". This is a much less stringent standard than the standard used for criminal cases, which is "beyond a reasonable doubt". This standard provides another justification for hostile trial tactics by lawyers. Smart (1989) argues that it is problematic to expect a child witness to be able to withstand the rigors of an adversarial cross-examination, like an adult, in order for the Crown counsel to meet the required standard of proof. But the standards of proof co-exist with other premises of positive law, including the presumption of innocence, the right to a fair trial, and

the right to confront one's accuser. It is assumed not only that adversarial interrogation methods will access the truth, but that they are the only way to access the truth. The presumption of innocence and attempting to establish guilt beyond a reasonable doubt necessitate, according to legal rationale, open confrontation in the court room, where adversaries battle it out, and the accused can face the accuser. The atmosphere in the court room is hostile, to say the least, and very frightening for the child.

A significant stress factor for children who are called on to testify in court is the period of waiting that is inevitable between the event and the court appearance (Flin, 1993; Goodman, 1984). The period is likely to be many months, at best, and possibly even years. Goodman (1984) claims that the waiting period is at least six months in most cases. That is a long period of time for a child to have to deal with the specter of the trial hanging over his or her head. It also needs to be recognized that during that waiting period, the child is likely to be subject to repeated questioning by police, lawyers, judges and social workers. This increases the chance that the child's recall of the event will be perceived to have been contaminated by suggestion, even if it has not been (Spencer & Flin, 1994; Dziech & Schudson, 1989). Further, this period of waiting also means that the child cannot confront the incident and attempt to put it behind them; it also increases the likelihood that

therapeutic interventions will be ineffective because the child cannot be allowed to forget (Spencer & Flin, 1994; Flin, 1993). On the other hand, if the child does not discuss the event, then there is the possibility that he or she will forget certain things, and then the evidence will be perceived as weaker than ever. The anxiety level remains constant, not only because of reliving and remembering the event all of the time, but also because of worrying about what will happen in the court room. Entering a situation without knowing what exactly to expect is daunting for even an adult. Where the environment and the procedure is unfamiliar, it can be very frightening, especially for a child. Most children lack knowledge about what happens in a criminal trial. Flin (1993) quotes the results of a survey geared to measure the level of legal knowledge that children possessed. The four major findings were that legal knowledge increases with age, children show misunderstanding along with lack of knowledge about legal terms and constructs, children often give erroneous answers when questioned about the meaning of words that they claim to understand, and adults tend to possess an excellent understanding of basic legal terms and procedures (cf. Flin, 1993, p. 286). This would suggest, then, that children will be fearful of the impending court experience because of their lack of knowledge. But this is not the only reason for them to be fearful. The prospect of confronting the accused individual and giving testimony in an open court

room is a major stress factor for children. As mentioned above, a confrontation between the accused and the accuser is considered necessary in the adversarial system. In both Canada and the United States, the accused has a constitutional right to confront his or her accuser in court.²⁸

Confrontation should be considered as the most disturbing aspect of testifying for a child (Flin, 1993), particularly where the accused is someone that the child knows personally or is an authority figure in the child's life. In fact, Flin argues that it may be counterproductive for children to have to meet the accused in the court room, because the child might refuse to talk, or be unable to coherently present his or her evidence. Dziech and Schudson (1989) argue that attempting to ease the experience for a child does not necessarily mean an infringement of the rights of the accused. Additionally, Frank (1949) points out the confrontation rights granted to accused individuals implies distrust for any other method of introducing testimony, including and especially hearsay. Positivist legal rationale insinuates itself into the process, insisting that the clash of adversaries and the interrogation of witnesses provides the best access to truth. Until recently, it has not been considered that this method, and the forced confrontation, might not be the best method for eliciting reliable evidence from children. As will be discussed later, innovative methods for easing the trial

²⁸ See Spencer and Flin, 1994, and Dziech and Schudson, 1989.

experience for children, such as the use of a protective screen in the court room and testimony by way of closed circuit television, have been introduced to the legal system. Unfortunately, despite what Dziech and Schudson (1989) and others may argue, these innovations are often seen as not only an infringement on the defendant's rights, but as a way to prejudice the jury against the accused (Dziech & Schudson, 1989; Spencer & Flin, 1994; Flin, 1993; Ross et al. 1994)

Along with having to face both an unfamiliar situation and the accused in court, the child witness also has to handle the court room environment. Not only are procedures and legal constructs often unknowns for children, but the court room itself may be frightening (Flin, 1993). The layout is formal and unfamiliar, even to adults. Many of the people in the room will be dressed strangely, in robes and perhaps even wigs. Chances are that the child will have to enter this strange place alone, and upon reaching the stand, will be facing a sea of strange faces. In open court, the child has to face not only the attorneys who will be questioning him or her, but also the person that has been accused. This is a very daunting experience when little is understood about what will happen and why things are the way that they are. Additionally, although it is common practice to attempt to have children give their testimony as early as possible during the course of the day (Dziech & Schudson, 1989), it is likely that the child will have to wait for what seems like forever

in the court house waiting facilities. Unfortunately, it is unlikely that the child will have anything to keep him or her occupied, and that the facilities will be overcrowded (Flin, 1993). Not only will this serve to increase the child's anxiety about the experience to come, but it is entirely possible that the child will either be too bored or too exhausted to manage to testify coherently. It is important to consider that waiting facilities and court room procedures have been designed with adult participants in mind, not children.

Judgements are made about the child's demeanor on the stand (Goodman, 1984; Dziech & Schudson, 1989). The evaluation is based on many different qualities and abilities of the witness, some of which have been mentioned above. A good witness must be able to be attentive to the proceedings for a long period of time, and must not display any nerves, fussing or fidgets (Dziech & Schudson, 1989). A good witness should not be, or at least should not appear to be, intimidated or daunted by the proceedings and the environment of the court room (ie. hostile attorneys, facing the defendant, the strange experience of being in the court room) (Dziech & Schudson, 1989; Spencer & Flin, 1994). The witness must be able to remember what was said in past interviews with police, lawyers, social workers and judges, as well as in past court appearances and any videotaped interviews given. Any contradictions in testimony will damage that testimony, and

reduce the individual's credibility. This is particularly significant for children. Unlike adults, who usually only face one or perhaps two interviews before trial, children are subjected to repeated questioning (Frank, 1949; Dziech & Schudson, 1989; Spencer & Flin, 1994). It is entirely possible that errors of omission will be made, or new evidence will come to light in subsequent interviews. It is all very difficult for the child.

Beyond this, it is also important that the witness has a cogent understanding of what the attorneys are actually saying, is able to fully and intelligibly answer questions, and coherently relay his or her story to the court. But managing to relate a story in the adversarial setting is difficult, at best. Bumiller (1990) contends that there is an attempt in court to construct reality, and that reality does not necessarily reflect the reality of the witness. Attorneys are attempting to construct a story which is favorable to their case; this does not necessarily mean that the truth is told. If, as stated earlier, the truth is determined by what is said on the stand by witnesses, then it must be considered that criminal trials are centered around storytelling. Furthermore, it must also be considered, as discussed earlier, that these stories will not only be critically tested by cross-examination, but they will be shaped by it to a certain degree as well.

What does this mean for children? First of all, it means

that they must attempt to fully relate their story to the court without distortions. However, this is almost impossible to do. Adversarial questioning tactics will not only confuse the child, but distort the story. Questioning often makes the story appear incomplete or inaccurate because of inconsistencies; this tends to be due more to the questions asked than the child's ability to recall the event (Frank, 1949; Dziech & Schudson, 1989). Another aspect of telling stories in court is more problematic for children, however. Because children are expected to measure up to adult standards as witnesses, it is also expected that their stories will be articulated in a similar manner. Failure to do so negatively affects the credibility of the story and of the witness, and often results in truthful accounts being rejected as untruthful (Bennett & Feldman, 1981). At the same time, if a child's story is not told in language that is age appropriate, there are necessarily concerns about rehearsal and contamination of the evidence (Spencer & Flin, 1994; Flin, 1993; Goodman, 1984). This is a problem related to the number of pre-trial interviews that a child endures. Children are plainly in an difficult position.

As mentioned above, concern has been expressed by several authors that the adversarial process is just not the appropriate way in which to elicit testimony from children (Spencer & Flin, 1994; Flin, 1993; Dziech & Schudson, 1989; Young, 1992). The adversarial cross-examination is obviously

Finally, the use of screens has been introduced to court rooms as a way of reducing the child's stress without infringing upon any rights of the accused or reducing the emotional impact of the testimony on the jury (Spencer & Flin, 1994; Dzeich & Schudson, 1989). However, some defense lawyers have argued that the mere presence of the screen in the court room serves to condemn the accused before any decision has been made (Spencer & Flin, 1994; Flin, 1993). However, like the use of closed circuit television, the use of the screen increases the likelihood of obtaining a coherent and candid account from the child. The courts must balance the risk of having an overly distraught child on the stand who is incapable of testifying coherently against the risk of prejudice that may arise from the use of the screen.

It is indeed a delicate balance that must be reached in order to allow children to testify. What rights does the accused have that cannot be violated in attempts to alleviate challenges facing children? It is hard to justify subjecting children to such an unfamiliar and seemingly hostile environment. At the same time, however, it is also difficult to justify the exclusion of valid and often crucial evidence in a case. Of course, it should be considered that justifications for the exclusion of children's evidence are not usually based in concern for the stress and trauma facing the child. Concerns are more likely to be raised about the child's capability to testify in a coherent and intelligent

incredibly stressful for all witnesses, regardless of age. But for children, who lack the knowledge to completely understand what is going on around them and why, it is even worse. Flin quotes Eileen Vizard, a child psychiatrist, as saying that "...there is not the slightest chance of a traumatized sexually abused child surviving cross-examination.....not to be unduly critical of lawyers but simply to state common sense" (cf. Flin, 1993, p. 291). The cross-examination is stressful not only because of the hostility that will probably be directed at the child by the attorney, but also because the child will be accused of lying (Dziech & Schudson, 1989; Flin, 1993). This is very upsetting. The child may also become confused during the cross-examination, because his or her story is being questioned for truthfulness. This is not like being accused of lying, but it may seem to the child that although the adults around them believed his or her story beforehand, they have changed their minds (Dziech & Schudson, 1989). It must also be remembered that telling a story, especially a personal one, can be embarrassing (Dziech & Schudson, 1989), and embarrassment may be enough to make a child reluctant to speak in front of a host of strangers whose reactions are uncertain.

But Flin (1993) suggests that the examination in chief is just as problematic as the cross-examination. Why? She offers four possible reasons. The first is the formality surrounding the proceedings and the order of questioning. A

child does not expect and is not used to that level of formality. The second reason is the unfamiliarity of "legalese" to a child's ears. To hear someone speaking directly to you in a way that you do not understand can cause a great deal of discomfort. Third, is, of course, the hostile nature of the cross-examination. Finally, is the length of time required for the interrogation, both in chief and in cross, to be completed. For an adult, the questioning seems to take an inordinate amount of time. For a child, the time it takes brings on boredom and exhaustion.

Taken as a whole, the challenges and disadvantages facing children who testify in court are amazing. The level of anxiety for children is high, and saying that the experience is an unpleasant one is an understatement. However, even if hearing a child relate his or her story is contingent upon changing procedures, developing special procedures, and making exceptions to rules, it is still necessary to ensure that the story gets told. Perceptions of children need to change, and understanding needs to be gained about children and their abilities and limitations. Accommodations can be made so that children can gain justice through the courts. These are discussed in the concluding chapter.

Chapter 5

Conclusion: Reconciling Tensions

The ultimate function of the adversarial process is to establish the truth of a matter in court. The rules and procedures of the courtroom trial were originally designed, and have further evolved, with the goal of determining the truth as a motivator. It would be logical to assume, based on the legal system's reliance on rationality, that this search for truth would necessitate the inclusion of all available evidence. However, the legal system has often managed to rationalize the exclusion of certain groups from participation in the trial process. In both the past and present, legal rationale has successfully managed to limit the extent to which children's input as reliable and credible witnesses can be considered useful.

At certain points historically, the courts rarely ever lowered themselves to listen to children at all; when children's stories were paid any notice at all by legal practitioners, they were still restricted by stringent rules of evidence (Dzeich & Schudson, 1989; Spencer & Flin, 1994). In order to testify, children not only needed to demonstrate a clear understanding of their duty to tell the truth under oath in court, but also of their understanding of the spiritual ramifications if they were to perjure themselves on the stand. In a legal system based on a Judeo-Christian ethic, this meant that the child had to recognize that lying

would result in going to Hell.²⁹

Of course, this reliance on a Judeo-Christian ethic has proved to be problematic in certain ways. Children who lack education in or who were not raised in one of these faiths are at an automatic disadvantage. It is difficult for a child to convince a judge and jury that he or she truly believes that God will punish him or her in Hell for lying on the stand if it is a concept which is either not familiar to the child or merely not consistent with the child's known religious belief system. These particular restrictions which relied so heavily on the children's understanding of religious consequences of their actions were eventually relaxed so that a child could be eligible to testify if it was evident that he or she understood the solemn nature of the oath, the importance of telling the truth, and adult corroboration was available (Spencer and Flin, 1994; Dziech and Schudson, 1989; Goodman, 1987; Collings, 1989). This was also problematic, however. Sometimes, adult corroboration or other convincing material evidence is available to support the child's testimony. But what happens when the child is the victim and the sole witness? This is why the Khan³⁰ case is so important. It provides an example of how the legal system is attempting to make it easier for children's testimony to be heard.

Increasingly, children have come to be seen as necessary

²⁹ See Spencer and Flin, 1994; Dziech and Schudson, 1989

³⁰ *Supra*, p.1

This means that the categories themselves are not disrupted per se, but that they are pushed aside in order to make room for new categories. By including some formally marginalized groups within the embrace of law, law still claims to itself the power to determine who remains "outside" of law. In this context, law's mythic authority to exclude or marginalize particular groups is never fundamentally challenged.

This appears to be the effect that legislation regarding children as witnesses has had. Attempts at change are made, attempts to make a space for children within the legal system. But if law's authority to exclude is never fundamentally challenged, nor is the adult standard which is used as a reference for measuring children as witnesses. Therefore, we have to question whether attempts at change really work, or whether these attempts merely push old categories aside and create new ones for children?

At the end of the second chapter, it was stated that science was the myth which replaced religion as the authoritative source of knowledge for the social world. Considering this, and considering what Razack (1995) has to say about pushing categories aside to make room for new ones, the possibility that law and legal positivism as it exists now could be replaced is an intriguing one. If law is a modern myth, then the potential for the remything of law does exist. After all, the authority of the Church was unquestioned and inviolable for a very long time before science replaced it.

courtroom process which would decrease stress, reduce the effects of secondary trauma and minimize the revictimization of children (Goodman, 1987; Young, 1992). Realistically speaking, however, if children are considered to be the most problematic legal actors by an exclusionary discourse because of their perceived deficiencies, then should not those involved in the paternalistic discourse seek to have children participate outside a system that is obviously hostile to them? It is problematic that within the protective discourse there is still an expectation that the current legal system can be adapted to include children's voices. Is it really possible to do this, when the very rationale that grounds the adversarial system presumptively excludes children?

Perhaps the most significant legislative changes that have recently come about are court room innovations that have developed with the child witness in mind. Some of these were suggested in Bill C-15, but others have developed out of legal practitioners' increasing sense of urgency about alleviating the stress of the court room experience for children. This reflects the protective discourse. Many of these innovations have been used, although sparingly, in Great Britain and the United States, and to a smaller extent, in Canada.³² The innovations include the use of video-taped testimony, closed

³² See Spencer and Flin , 1994 for the most detailed description of these innovations. The reader may also refer to Bybee and Mowbray, 1993; Goodman, 1987; and Dziech and Schudson, 1989

circuit television, and the use of screens in court.

Dzeich and Schudson (1989) indicate that videotaped testimony may be of two specific types. The first type is the investigative video taped interview. This interview is useful because the child's statements are being received while memories of the event are still fresh in the child's mind. The taped interview may also demonstrate the child's demeanor on questioning and serve to eliminate any suspicions about whether or not the child's testimony is being guided by an adult prompter. Beyond this, it can spare the child repeated rounds of questioning, identified earlier as a major stressor for children. For legal practitioners, investigative interviews captured on video tape may be useful in dealing with recantations later by the child, or in prompting guilty pleas. In this sense, this particular use of video tape may be beneficial to both defense and prosecution counsel (Dzeich & Schudson, 1989).

The video tape deposition is the second form of video evidence. Testimony given in this particular format can be used in court in the stead of the child's live testimony. During this deposition, the defendant is present, and the child will be cross-examined by defense counsel. Because of this fact, this format is preferred over the investigative interview on tape by legal practitioners. It is not intended to give the child witness any sort of advantage, or to infringe on the rights of the defendant (Dziech & Schudson,

1989). It seeks to eliminate the disadvantages and stressors, mentioned previously, that children witnesses must face. Depending on the court and the nature of the case, the videotaped evidence may be seen either as hearsay, or the functional equivalent of live court testimony by the child (Dzeich & Schudson, 1989).

Closed circuit television or live video links were developed with the child in mind, and aimed at reducing stressors. They allow a child to testify in court without actually testifying in court (Dzeich & Schudson, 1989) which greatly decreases trauma for the child. Closed circuit television, while protecting the child, approximates the child's actual appearance in court. The accused, judge and jury are able to watch the examination and cross-examination, and the accused is able to contact his or her counsel at all times. This forum generally allows children to relay a fuller and more candid accounting of the incident with less stress on the child because the accused is not right there, and the public has also been removed. Alongside this, the overwhelming formality of the court room disappears. Unfortunately, this is very rarely utilized because of the claim that it infringes on the accused's right to confront the accuser (Spencer & Flin, 1994). Beyond this, some legal practitioners argue that it lessens the emotional impact of the child's testimony if it is not given in court (Spencer & Flin, 1994).

Finally, the use of screens has been introduced to court rooms as a way of reducing the child's stress without infringing upon any rights of the accused or reducing the emotional impact of the testimony on the jury (Spencer & Flin, 1994; Dzeich & Schudson, 1989). However, some defense lawyers have argued that the mere presence of the screen in the court room serves to condemn the accused before any decision has been made (Spencer & Flin, 1994; Flin, 1993). However, like the use of closed circuit television, the use of the screen increases the likelihood of obtaining a coherent and candid account from the child. The courts must balance the risk of having an overly distraught child on the stand who is incapable of testifying coherently against the risk of prejudice that may arise from the use of the screen.

It is indeed a delicate balance that must be reached in order to allow children to testify. What rights does the accused have that cannot be violated in attempts to alleviate challenges facing children? It is hard to justify subjecting children to such an unfamiliar and seemingly hostile environment. At the same time, however, it is also difficult to justify the exclusion of valid and often crucial evidence in a case. Of course, it should be considered that justifications for the exclusion of children's evidence are not usually based in concern for the stress and trauma facing the child. Concerns are more likely to be raised about the child's capability to testify in a coherent and intelligent

manner.

This point brings the paper full circle. Children, as a group, are still marginalized as witnesses. An encompassing belief system, which covers their abilities to communicate, to tell the truth, to distinguish between fact and fiction, fantasy and reality, to clearly remember events, and to resist suggestion and outside influences, is seemingly adhered to in legal circles. It is not to say that change is not possible, or that the situation had not improved at all. However, the two competing discourses which cause tension still manage to keep children's voices suppressed. Until fundamental shifts occur in the philosophy and the structure of the adversarial system, children will continue to be excluded. It is this adversarial structure and the assumptions of legal positivism which maintain children's exclusion. This is a pessimistic outlook. Real change in how children are perceived and dealt with in the legal system cannot be effected until there is a possibility of creating a space for them in the philosophy of the legal system which does not attempt to force children to measure up to adult standards.

Sherene Razack³³ (1995) suggests that a familiar legal strategy used when confronting issues of categories in law is to replace existing categories with apparently different ones.

³³ This article is about attempting to include all women in feminist legal theory, and is concerned with how particular disadvantaged groups of women are excluded from mainstream feminism.

This means that the categories themselves are not disrupted per se, but that they are pushed aside in order to make room for new categories. By including some formally marginalized groups within the embrace of law, law still claims to itself the power to determine who remains "outside" of law. In this context, law's mythic authority to exclude or marginalize particular groups is never fundamentally challenged.

This appears to be the effect that legislation regarding children as witnesses has had. Attempts at change are made, attempts to make a space for children within the legal system. But if law's authority to exclude is never fundamentally challenged, nor is the adult standard which is used as a reference for measuring children as witnesses. Therefore, we have to question whether attempts at change really work, or whether these attempts merely push old categories aside and create new ones for children?

At the end of the second chapter, it was stated that science was the myth which replaced religion as the authoritative source of knowledge for the social world. Considering this, and considering what Razack (1995) has to say about pushing categories aside to make room for new ones, the possibility that law and legal positivism as it exists now could be replaced is an intriguing one. If law is a modern myth, then the potential for the remything of law does exist. After all, the authority of the Church was unquestioned and inviolable for a very long time before science replaced it.

This is something to keep in mind when considering the possibilities and limits of legal change. Razack's (1995) argument is relevant in considering the impact of legal changes on children as witnesses.

The reconciliation of the tensions between the exclusionary and protective discourses is virtually impossible until fundamental shifts are seen. In the mean time, children will continue to struggle against the system that marginalizes them. The driving force of rationality in the legal system, and the belief that the adversarial trial is the best way to arrive at the truth will continue to disadvantage children. It has been argued by authors such as Goodman (1987) and Young (1992) that the adversarial system is not the best truth finding method where children are concerned, for children were never intended to participate, and the courts are not prepared for the participation of these problematic legal actors. It must be understood that the courts are exceedingly reluctant to relinquish any of the adversarial procedures which have served so well in the past, regardless of whether or not these procedures are appropriate for children (Frank, 1949; Dziech & Schudson, 1989; Spencer & Flin, 1994).

Before it is truly possible to change things for the better for children as witnesses, like any other marginalized group, it is necessary to understand why they are marginalized. In order to do this, it is essential to understand the legal rationale and reasoning behind any

exclusions, and how they have been justified in legal circles. It is also vital to know the degree to which the social milieu accepts the version that law promotes and the degree to which it is willing to fight or replace it. Beyond this, in order for children to have a place in the legal system, significant and integral changes to the essential, fundamental philosophy and structure of the adversarial legal system must be made. Without these changes there cannot be real assuagement for marginalized children. Accommodations within the existing system are not, and never will be enough.

Bibliography

Aries, P. (1962) Centuries of Childhood: A Social History of the Family. Jonathan Cape, New York.

Backhouse, C. (1991) Petticoats and Prejudice: Women and Law in Nineteenth Century Canada. Women's Press, Toronto.

Bill C-15, *An Act to Amend the Criminal Code and the Canada Evidence Act*, 2d Sess., 33d Parl., 1986

Brodie, J., Gavigan, S. & J. Jenson. (1992) The Politics of Abortion. Oxford University Press, Toronto.

Bumiller, K. "Fallen Angels: The Representation of Violence Against Women in Legal Culture," *International Journal of the Sociology of Law*, 1990, 18, 125-142.

Bybee, D. & C.T. Mowbray. "An Analysis of Allegations of Sexual Abuse in a Multi-Victim Day-Care Center Case," *Child Abuse and Neglect*, 1993, 17, 767-783.

Campbell, J. (1988) The Power of Myth. B.S. Flowers, ed.

Cambridge University Press, Cambridge.

Canada Evidence Act, R.S.C. 1985, c. C.5

Child and Family Services Act, S.O. 1984, c.55

Collings, P. d'A. "Assessing the Second-Hand Evidence of Children, *Advocate*, 1989, 47, 369-375.

Criminal Code, R.S.C. 1985, c. C-46

DeMause, L. (1974) The History of Childhood. Psychohistory Press, New York.

Dzeich, B.W. & C.B. Schudson. (1989) On Trial: America's Courts and Their Treatment of Sexually Abused Children. Beacon Press, Boston.

Faith, K. (1993) Unruly Women: The Politics of Confinement and Resistance. Press Gang Publishers, Vancouver.

Fitzgerald, W.A. "Maturity, Difference and Mystery: Children's Perspectives and the Law," *Arizona Law Review*, Spring 1994, 36(11).

Fitzpatrick, P. (1992) The Mythology of Modern Law.

Routledge, London.

Flin, R.H. "Hearing and Testing Children's Evidence," in G.S. Goodman and B.L. Bottoms (eds.) Child Victims, Child Witnesses: Understanding and Improving Testimony. The Guilford Press, New York, 1993, 279-299.

Foucault, M. (1979) Discipline and Punish: The Birth of the Prison. Penguin, Harmondsworth.

Foucault, M. (1980) Power/Knowledge: Selected Interviews and Other Writings 1972-1977. Harvester Press, Brighton.

Frank, J. (1949) Courts on Trial. Oxford University Press, London.

Genereux, A. "The Protection Hearing," in N. Bala, J.P. Horwick, and R. Vogl (eds.) Canadian Child Welfare Law: Children, Families and the State. Thompson Educational Publishing, Inc., Toronto, pp. 55-76.

Goodman, G.S. "The Child Witness: An Introduction," Journal of Social Issues, 1984, 40(2), 1-7.

Goodman, G.S. "Children's Testimony in Historical Perspective," Journal of Social Issues, 1984, 40(2),

9-31.

Goodman, G.S. "The Child Witness: Conclusions and Future Directions for Research and Legal Practice," **Journal of Social Issues**, 1984, 40(2), 157-175.

Habermas, J. (1976) Legitimation Crisis. Heinemann, London.

Hobsbawm, E. & T. Ranger (eds.) (1992) The Invention of Tradition. Cambridge University Press, Cambridge.

Lewis, J. Underwood. "The Unreality of Positivistic Conceptions of Law," **Windsor Yearbook of Access to Justice**, 1990, 10, 385-399.

Loftus, E.F. & G.M. Davies. "Distortions in the Memory of Children," **Journal of Social Issues**, 1984, 40(2).

Naffine, N. (1990) Law and the Sexes: Explorations in Feminist Jurisprudence. Allen & Unwyn, North Sydney.

Razack, S. "From Consent to Responsibility, from Pity to Respect: Subtexts in Cases of Sexual Violence," **Law and Social Inquiry**, 1995, 20, 891-922.

Regina v. Khan (1990) 59 C.C.C.(3d), 92.

Report of the Aboriginal Justice Inquiry of Manitoba, A.C.

Hamilton & C.M. Sinclair (Commissioners, Province of Manitoba, 1991.

Report on Child Witnesses, Ontario Law Reform Commission,
Toronto, 1991.

Ross, D.F., Hopkins, S., Hanson, E., Lindsay, R.C.L., Hazen, K. & T. Eslinger. "The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse," **Law and Human Behavior**, 1994, 18(5), 553-566.

Skolnick, A. "The Limits of Childhood: Conceptions of Development and Social Context," **Law and Contemporary Problems**, 1975, 39(3), 38-77.

Smart, C. (1989) Feminism and the Power of Law. Routledge, London.

Smith, L. "The Courts and Different Kinds of Objecivity," **Advocate**, 1987, 45, 17-29.

Spencer, J.R. & R.H. Flin. (1994) The Evidence of Children: The Law and the Psychology. Blackstone Press, Ltd., London.

Stainton-Rogers, R. & W. Stainton-Rogers. (1992) Stories of Childhood: Shifting Agendas of Child Concern. University of Toronto Press, Toronto.

Sommerville, J.C. (1990) The Rise and Fall of Childhood. Vintage Books, New York.

Stone, O.M. (1981) The Child's Voice in the Court of Law. Butterworths, Toronto.

Tribe, L. "The Curvature of Constitutional Space: What Lawyers Can Learn from Physics," **Harvard Law Review**, 1989, 103, pp. 1-39.

Twining, W. (1985) Theories of Evidence: Bentham and Wigmore. George Windenfield and Nicolson, London.

Williams, P. (1987). The Alchemy of Race and Rights. Basic Books, New York.

Weber, M. (1954) Max Weber on Law in Economy and Society. Simon & Schuster, New York.

Young, A. Harvison. "Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues," **Canadian Journal of Family Law**, 1992, 11(1), 11-40.

END

1 7 10 6 - 9 7

FIN