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Susan Bandes
DePaul College of Law

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The Lessons of Capturing the Friedmans: Moral Panic, Institutional Denial and Due Process

Susan Bandes

DePaul University College of Law, Chicago

In the 1980's hundreds of childcare workers were accused of sexually abusing children in horrific ways. Arnold and Jesse Friedman, whose prosecutions are chronicled in the film *Capturing the Friedmans*, were among those convicted and sent to prison during this period. Sociologists have called this series of prosecutions a classic moral panic: a widespread, hostile, volatile overreaction to a perceived societal threat. This paper examines the concept of moral panic in the context of the day care sexual abuse prosecutions in general, and the Friedman prosecutions in particular. It begins by exploring the role of the legal system in the construction of a moral panic, asking how a system which styles itself as rational and process oriented becomes the handmaiden of institutionalized hysteria. It then considers whether moral panic is a useful heuristic for understanding how justice was derailed in the Friedman cases and so many others, and what ought to be done to address the problem. It argues that the concept is limited in its ability to distinguish normatively between cases of overreaction and cases of institutional denial. Further, it suggests that, to the extent the concept of moral panic misconceives these periods of institutionalized hysteria as a series of isolated phenomena, it does not adequately address the deeply entrenched causes of injustice in cases like the Friedman prosecutions. The paper ultimately concludes that the concept of moral panic is useful because it reminds us of the cultural and historical contingency of notions of criminal justice and criminal deviance. Nevertheless, the concept has limitations that render it inadequate to address the hurdles to justice encountered in the Friedman cases. Most prominently, the concept is hindered by its retrospective nature. Like the question of guilt or innocence, the notion of moral panic is backward-looking, and therefore not well suited to addressing the prospective question of how the justice system can be reformed to dismantle ongoing, systemic hurdles to criminal justice. *Law, Culture and the Humanities* 2007; 3: 293–319

In the 1980's hundreds of childcare workers were accused of sexually abusing children in horrific ways.¹ Some of the accusations defied belief: horses

Address for correspondence: Susan Bandes, Distinguished Research Professor, DePaul University College of Law, 25 E. Jackson Blvd., Chicago, IL 60604.
E-mail: sbandes@depaul.edu

1. In California alone, in high profile investigations in Bakersfield and Manhattan Beach, "hundreds of . . . children were naming ministers, reporters, soccer coaches, aerobics instructors, grade school teachers and babysitters as abusers." Debbie Nathan and

sacrificed in broad daylight to intimidate children, ritual slaughter of babies, alien abductions, children transmogrified into mice.² Most of these charges turned out to be entirely unfounded, though often not until the accused had been convicted and served time; sometimes many years in prison. Although many of these prosecutions have been discredited, and the majority of the sentences overturned, some of those convicted remain in prison and all continue to suffer the consequences of their ordeals. Many of the child witnesses who sent these men and women to prison have grown up living with crippling guilt or terrible confusion about their testimony and its aftermath.³

Sociologists have classified this series of day care sexual abuse prosecutions as a classic moral panic. In brief, a moral panic is commonly defined as a widespread, hostile, volatile overreaction to a perceived threat to societal well-being.⁴ It is a sort of institutionalized hysteria: the product of the interlocking acts of many institutions and forces, including pressure groups, politicians, and the media. The various institutions form a sort of echo chamber – continually reinforcing one another and increasing the decibel level exponentially. The legal system, in the conventional wisdom, should be immune to such hysteria, and indeed, should act as a rational and calming force. All too often, however, the creation of a moral panic depends on the complicity and active participation of the legal system. Legal actors – police, prosecutors, defense attorneys, expert witnesses, judges, juries – have, in various ways, the power to affirmatively fuel the creation of institutionalized hysteria, as occurred with the day care abuse cases. One might understand how parents fearful for their children become caught up in the hysteria of the moment. It is more difficult to fathom the dynamics by which the legal system, which styles itself as rational, process oriented, and transcending passion and prejudice, becomes the handmaiden of institutionalized hysteria.

Andrew Jarecki's documentary *Capturing the Friedmans*⁵ is a remarkable exploration of one of the day care sexual abuse cases. It examines the case of Arnold and Jesse Friedman, a father and his teenaged son, accused of a shocking pattern of sexually abusing boys in their care. The incidents were said to have occurred during an after-school computer class held for 8 to 11-year-old children in the Friedmans' home in affluent Great Neck, New York in the mid 1980's, a time at which concern about day care sexual abuse had reached a fever pitch both in the United States and abroad. Jarecki presents the unfolding case through multiple and often contradictory viewpoints, giving narrative voice to accused and victims, to police,

Michael Snedeker, *Satan's Silence: Ritual Abuse and the Making of a Modern Witch Hunt* (Basic Books, 1995). Investigations in Massachusetts, North Carolina, Florida and elsewhere led to scores of additional accusations.

2. Dorothy Rabinowitz, *No Crueler Tyrannies: Accusation, False Witness, and Other Terrors of Our Times* (New York: Free Press 2003).
3. See e.g. Maggie Jones, "Who Was Abused?" *New York Times Magazine* 77–81, September 19, 2004.
4. Erich Goode and Nachman Ben-Yehuda, "Moral Panics: Culture, Politics, and Social Construction," *20 Annual Review of Sociology* 149, 156–159 (1994). I will consider the concept of moral panic in more detail shortly.
5. Magnolia Pictures 2003, Home Box Office Inc.

prosecutors, defense attorneys and judges, and withholding, at least ostensibly,⁶ his own judgments on the truth of the allegations.

The film's apparent template is *Rashomon*⁷ (the film about multiple perspectives that has come to represent the impossibility of arriving at an objective or omniscient truth)⁸ rather than *The Thin Blue Line*⁹ (a film that sought to document and correct a miscarriage of justice).¹⁰ *Capturing the Friedmans* tells a complex, challenging story without clear heroes and villains, without an omniscient narrator or even a strong narrative voice, and without the all important "sense of an ending"¹¹ that an audience generally requires. Audiences leave the theater shaken; uncertain of the moral of the filmic story,¹² but jolted from complacent belief in the stock legal story of dispassionate justice.¹³ Yet though the film casts off or challenges familiar narrative conventions, it succeeds in telling a galvanizing story, suggesting that there is some organizing principle, some overarching theme, perhaps even a moral, lurking in this studiously "neutral" work.

One potentially useful way of framing the story is as a close-up view of the construction of a moral panic.¹⁴ The moral panic construct is itself a kind of narrative structure; a way of making sense of a seemingly disparate series of events by placing it in a cultural context. I will begin by considering the value

6. Several critics argue that Jarecki's belief that injustice had been done was obvious. See e.g. Sharon Waxman, "Victims Say Film on Molesters Distorts Facts," *New York Times*, February 24, 2003 (arguing that the film's selective use of evidence created undue sympathy for the Friedmans); "'Capturing the Friedmans': Art, Truth, and Marketing," April 20, 2004 (www.richardwebster.net) (arguing that the film only pretended to be even-handed, and actually conveyed a belief that the Friedmans were railroaded); Harvey Silvergate, "Picture of Injustice," *The Boston Phoenix*, September 15, 2004 (arguing that Jarecki's "studied ambiguity" was morally problematic in light of his apparent conviction that the Friedmans were innocent). See also *infra* note 64 (discussing Jarecki's own views, as expressed to Charlie Rose).
7. *Rashomon*, (Daiei Motion Picture Co., 1950; RKO Radio Pictures, Inc., 1952).
8. See Orit Kamir, "Judgment by Film: Socio-Legal Functions of *Rashomon*," 12 *Yale J.L. & Humanities* 39, 39 (2000) ("*Rashomon* has come to embody a general cultural notion of the relativity of truth.")
9. *The Thin Blue Line* (Third Floor Prods., 1988). The film, an expose of the process which led to the conviction of Randall Dale Adams for murder, "triggered an official inquiry into the case that culminated in Adams' release from prison." Richard K. Sherwin, "Law Frames: Historical Truth and Narrative Necessity in a Criminal Case," 47 *Stan. L. Rev.* 39, 46 (1994).
10. As I will discuss later, the film bears a closer resemblance to a *Thin Blue Line*-style expose than is immediately apparent.
11. Frank Kermode, *The Sense of an Ending* 127 (1967) (Oxford: Oxford University Press, 2nd ed. (2003)) (discussing closure as an essential element of storytelling).
12. As Robert Cover observed, "every narrative is insistent in its demand for its prescriptive point, its moral." Robert Cover, "The Supreme Court 1982 Term, Foreword: Nomos and Narrative," 97 *Harv. L. Rev.* 4, 5 (1983).
13. See generally Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998) (discussing grand narratives of justice).
14. Jarecki hints at this possibility in the film, by giving significant screen time to Debbie Nathan, a freelance journalist who has devoted many years to exposing the injustices of the day care sex abuse cases. See e.g. Nathan, *supra* note 1. Nathan, in the film, explicitly places the Friedman prosecutions in the context of the day care panics of the 1980's, and describes the Friedman investigation as a moral panic.

of moral panic as a frame for understanding what went wrong in the Friedman cases, and as a heuristic for understanding how justice is derailed and what can be done to address the problem. I will ultimately conclude that the concept of moral panic is useful because it reminds us of the cultural contingency of notions of criminal justice and criminal deviance. Nevertheless, the concept has limitations that render it inadequate to address the hurdles to justice encountered in the Friedman cases. Most prominently, the concept is hindered by its retrospective nature. Like the question of guilt or innocence, the notion of moral panic is backward-looking, and therefore not well suited to addressing the prospective question of how the justice system can be reformed to dismantle ongoing, systemic hurdles to criminal justice.

A better way to understand the film is as a cautionary tale about dysfunctional systems, both familial and legal.¹⁵ The film's refusal to present us with a coherent story of guilt or innocence, good or evil, justice done or justice derailed, will disturb not only those who find indeterminacy threatening, but also those who believe the film should have weighed in (either pro or con) on the outcome of the Friedman prosecutions. Yet *Capturing the Friedmans'* most powerful lessons are inseparable from this refusal. The film offers a searing indictment of the legal system's difficulties seeking justice when caught in the grip of fear, revulsion, prejudice and inexorable public pressure. These difficulties cast doubt on the legal system's ability to competently determine the Friedmans' guilt or innocence, and they need to be faced whether or not the Friedmans did what they were accused of doing.

The film approaches the legal system as a complex organism consisting of multiple institutional actors. We observe, listening to investigators, prosecutors, defense lawyers, judges, judicial clerks, defendants, victims and victims' families, that many of their differences in perspective are to some extent inevitable, given their varying roles.¹⁶ Jarecki's approach conveys something essential about systemic dysfunction: that it is often the result of the acts of numerous individuals, each acting in good faith rather than with malevolent intent. To convey this insight on film is a considerable achievement; neither systemic wrongdoing nor moral complexity is very filmic.¹⁷ Stories of complex bureaucratic dysfunction confound the insistent narrative demand for "uncomplicated villains who have deliberately done bad things to good people."¹⁸ The legal actors in this drama on the whole seem

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15. Much of the film focuses on the painful dynamics of the Friedman family, and although these dynamics both exacerbate and are exacerbated by Arnold and Jesse's legal problems, they are not the focus of this discussion.
 16. This is not to suggest that role entirely determines perspective; the film depicts varying perspectives among investigators, among victims, and, most powerfully, among members of the defendants' family.
 17. Patricia Ewick and Susan S. Silbey, "Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative," 29 *L. & Soc'y Rev.* 197, 206–208 (1995); Susan Bandes, "Empathy, Narrative and Victim Impact Statements," 63 *U. Chi. L. Rev.* 361, 382–88 (1996) (discussing counter-narratives that violate the rules of storytelling in order to unsettle conventional assumptions).
 18. Susan Bandes, "Patterns of Injustice: Police Brutality in the Courts," 47 *Buff. L. Rev.* 1275, 1328 (1999). See also Susan Bandes, "Not Enough Blame to Go Around: Reflections on Requiring Purposeful Government Misconduct," 68 *Brooklyn L. Rev.* 1195 (2003).

bent on seeking justice, on doing the right thing, though their views of what justice requires diverge markedly. Thus the film raises the disquieting possibility that justice may be derailed though no one is precisely to blame, at least in the simplistic way in which blame is often portrayed.

In this paper I want to explore the tension, so well encapsulated in *Capturing the Friedmans*, between the dynamics of moral panic – the dramatic retrospective narrative of widespread injustice – and the dynamics of the everyday failures of justice that pervade our criminal courts. Moral panic is a phenomenon worth exploring. It occurs in a particular societal moment, and it is fueled by a set of exceedingly salient emotions. Its sociological roots have been well explored.¹⁹ My focus will be on its emotional aspects; the ways in which the legal system becomes a party to the disgust, fear and hysteria on which it is based.²⁰ At the same time, the concept of moral panic may be a dangerous diversion from far more pervasive problems. My broader concern is with what it shares with other instances of injustice, rather than what makes it unique.

I. Moral Panic and the Day Care Sexual Abuse Cases

The problems that *Capturing the Friedmans* reveals are neither *sui generis* nor universal; yet the film does not explicitly place them in broader perspective. It sets out instead to provide a meticulous dissection of the dynamics of the particular situation. However, as I will argue shortly, placing the Friedman cases in the context of the larger day care sexual abuse panic helps explain the cases themselves, and also sheds light on both the narrative structure and the rhetorical power of the film. In this part, I will examine the moral panic construct in depth. As I will argue, the construct, up to a point, well captures the dynamics Jarecki seeks to depict.

“Moral panic” is a term with roots in sociology which has more recently become part of common parlance. An early and often-cited definition of the term appears in Stanley Cohen’s classic sociological study of the British Mods and Rockers in the mid-sixties.²¹ Cohen explains the term as follows:

Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is

19. One of the acknowledged classics in this field is Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke and Brian Roberts, *Policing the Crisis: Mugging, the State, and Law and Order* (Teaneck: Holmes & Meier Publishers 1978). Other highly respected sociological works on moral panic in general, and the child sexual abuse panic of the 1980’s in particular, are cited throughout this article.

20. In my article “Patterns of Injustice: Police Brutality in the Courts,” supra note 18, I explore in detail the cultural assumptions that undergird judicial tendencies to discern a pattern among incidents in some situations but not in others, and indeed to disaggregate incidents that are arguably connected in some circumstances.

21. Stanley Cohen, *Folk Devils and Moral Panics* (1972) (Oxford: Routledge, 30th anniversary edn. (2002)).

presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible . . . Sometimes the panic passes over and is forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might produce such changes as those in legal and social policy or even in the way the society conceives itself.²²

The concept of moral panic offers a means of ordering seemingly disconnected incidents and placing them in a coherent framework, in the hope that the framework will generate a useful set of lessons or principles. Sociologists search for societal explanations for the explosions of concern that arise from time to time about some form of perceived deviance. Examples include Cohen's *Folk Devils and Moral Panics*, which explores the reaction to the Mods and Rockers during the early counterculture in Britain; the classic work *Policing the Crisis*: which analyses the hysteria surrounding "muggings" in Britain in the early 1970's,²³ more recent work on the hysteria surrounding "wilding," in New York,²⁴ and numerous works, both in the United States and in the United Kingdom, about the widespread panic over day care sexual abuse in the 1980's.²⁵

Whether the framework is a useful ordering device is a matter of continued debate, significantly complicated by the difficulties in pinning down exactly what constitutes a moral panic. My focus is on determining whether the concept offers anything to legal reformers, and a number of the definitional ambiguities bear on this question.

One contribution of the moral panic construct is its reminder that law is not made or enforced in a cultural, historical and social vacuum. For example *Policing the Crisis* sets out to explore, not so much the social causes of mugging, but "why British society reacts to mugging, in the extreme way it does, at that precise historical juncture – the early 1970's."²⁶ Similarly, as I will discuss shortly, the interlocking child sexual abuse panics of the 1980's might be better understood by viewing them in historical context, as part of an era of conservative ascendance, and more specifically, as part of a backlash against loosening sexual mores, feminism, homosexuality and other perceived threats to the established order. Moral panics, in this theory, are a means of reasserting hegemony in the face of behaviors that seem to

22. Id at 9.

23. *Policing the Crisis*, supra note 19.

24. Michael Welch, Eric A. Price and Nana Yankey, "Moral Panic Over Youth Violence: Wilding and the Manufacture of Menace in the Media," 34 *Youth & Society* 3–30 (September 2002).

25. See e.g. Beatrix Campbell, *Unofficial Secrets: Child Sexual Abuse—The Cleveland Case* (London: Virago Press 1988); Nathan, supra note 1; Rabinowitz, supra note 2.

26. *Policing the Crisis*, supra note 19 at Introduction vii.

threaten “disintegration of the social order.”²⁷ Order is restored through the mechanism of defining certain threatening behaviors as deviant, demonizing the behaviors and their practitioners, and cordoning these practitioners off from civil society.²⁸ Thus the theory is useful both in focusing attention on why particular behaviors seem so threatening at particular times, and in reminding us that the sense of imminent threat may later dissipate.

Unfortunately, that knowledge seems most usable in retrospect.²⁹ The retrospective view might permit policymakers, with some distance, to rethink laws and policies adopted in haste, though examples of such rethinking do not come readily to mind.³⁰ An even more utopian hope is that policymakers might learn from history, and in future resist the temptation to adopt a quick fix, or even build in structures to ensure due deliberation. But in the midst of a moral panic, we may not find that historical or sociological insights offer much help. One aspect of a moral panic is that its concerns seem, in the moment, immediate and real. In short, how can we know we are in the midst of a moral panic in time to correct for it?³¹

A second problem is that the concept of moral panic denotes a time-limited, volatile and unexpected phenomenon, and, as I will discuss later, this may simply be descriptively inaccurate. Indeed, the term is sometimes used

27. *Id.* at Introduction viii.

28. There are varying views on how the panics are generated, and for what purposes. Cohen saw them as the product of societal or cultural forces; Goode and Ben-Yehuda viewed them as engineered by the deliberate acts of ruling elites; whereas Hall et al tended to agree that they are generated by elites, but did not impute cynical motives to those elites. See Cohen, *supra* note 21 (introduction at xxiii); Goode and Ben-Yehuda, *supra* note 4 at 127; *Policing the Crisis*, *supra* note 19 at 220. Historian Arnold Hunt also discusses proponents of a grassroots theory, who believe that moral panics are in fact accurate reflections of the conditions in which people live, and thus ought not to be labeled panics at all. Arnold Hunt, “‘Moral Panic’ and Moral Language in the Media,” 48 *British Journal of Sociology* 629, 636–637 (1997) (discussing grassroots theory).

29. Not that hindsight guarantees clarity. The causes of the Salem Witch Trials, for example, are still being debated. See e.g. Frances Hill, *A Delusion of Satan: The Full Story of the Salem Witch Trials* (New York: Doubleday 1995) (arguing that the causes included economic woes and a brutally cold winter); Mary Beth Norton, *In the Devil’s Snare: The Salem Witchcraft Crisis of 1692* (New York: Knopf, 2002) (arguing that the trials must be placed in a religious, political and military context, and particularly in the context of the Indian Wars and the religious interpretation of those wars).

30. See e.g. The Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C.A. 14071 (2003) (popularly known as Megan’s Law; passed in reaction to a high profile child abduction); and Public Law 109–3 (2005) (creating a new source of federal jurisdiction to enable Terry Schiavo’s parents to challenge the decision to remove her from life support). See also the USA Patriot Act, PL 107–56 (2001). As an editorial in the *New York Times* noted, “The Patriot Act was passed in haste, in the angst-filled days after the September 11th attacks, with some lawmakers candidly admitting they never read the details.” The editorial notes that rather than allow its more controversial provisions to expire, lawmakers “seem bent on making it worse.” “Patriot Act Redux, and in the Dark,” *New York Times* at A22, June 1, 2005.

31. But see Angela McRobbie and Sarah L. Thornton, “Rethinking ‘Moral Panic’ for Multi-Mediated Social Worlds,” 46 *British Journal of Sociology* 559, 566 (1995). The authors argue that by the 1990’s, interest groups and lobbies had mobilized to intervene in moral panics as they were unfolding, seeking to “respond instantly to the media demonization of the group they represent, and to provide information and analysis designed to counter this representation.”

to describe more diffuse and longstanding phenomena. For example, the authors of *Policing the Crisis* describe a period beginning in the early 1960's with a discrete moral panic over the Mods and the Rockers, developing into a whole series of moral panics occurring in quick succession in the late 1960's (drugs, hippies, pornography and others), and culminating in the 1970's in "a *general panic* about social order."³² Once the term is used to describe such longstanding, broad-based phenomena, it arguably begins to shade into a more general view of moral panics as cyclical phenomena that are "part and parcel of the human condition."³³ As some scholars have commented in reference to *Policing the Crisis*, such analyses are not so much about the sociology of deviance as they are works of general cultural studies.³⁴

Of course, these two views need not be mutually exclusive. It is sensible to assume that moral panics are part of the human condition, and yet each individual instance has its own historical and social triggers. Nevertheless, if the concept of moral panic simply describes an endemic historical cycle of change and backlash, it is not clear what it adds to the conversation.

The final ambiguity goes to the core of the concept's definition. The phrase "moral panic" appears to contain an evaluative judgment, but it is not clear whether the term is necessarily pejorative. It might connote a reaction to a non-existent problem, an inappropriately strong reaction to a problem that does exist, or simply any reaction to an emotionally fraught problem. In short, it is ambiguous whether the term conveys a judgment about the truth and proportionality of the concerns that engender the panic.³⁵

Consider that the pedophilia scandal in the Catholic Church has been dubbed, by some, a moral panic, despite the recognition that many of the accusations are grounded in fact.³⁶ There is a fear that innocent priests may be wrongly accused³⁷ and that the good works of the Church will be overshadowed by the scandal. Do these valid concerns render the scandal a moral panic, or is the more pressing moral issue in that situation the history of institutional denial and absence of moral outrage? The longstanding denial of a pattern of police abuse and torture in Chicago tells a similar story of a stubborn refusal to make or act upon connections, despite story after story of horrific wrongdoing.³⁸ As these stories suggest, if moral panic

32. *Policing the Crisis*, supra note 19 at 222 (emphasis in the original).

33. Hunt, supra note 28, quoting the preface to Goode and Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (Oxford: Blackwell, 1994).

34. McRobbie and Thornton, supra note 31 at 563; expressing this opinion and noting the trend to locate *Policing the Crisis* within a cultural studies or neo-Marxist perspective.

35. As Arnold Hunt notes, Stanley Cohen remains neutral on the policy implications of the phenomenon he identifies, whereas the authors of *Policing the Crisis* "incorporate in their definition of a moral panic the notion of an irrational or unjustified response." Hunt, supra note 28 at 634.

36. See Religioustolerance.org/clergy (last visited September 15, 2004); Benjamin Shepard, "In Search of a Winning Script: Panic vs. Institutional Denial," in *Sexualities* (Sage Publications, 2003).

37. See e.g. Alexander Cockburn, "Back to Salem," *The Nation* at 12, March 7, 2005 (likening child sexual abuse prosecution of defrocked priest Father Paul Shanley, which was based largely on recovered memory testimony, to a witch hunt).

38. Bandes, "Patterns of Injustice," supra note 18.

is an evil, so too is the failure to connect the dots, to call abuse by its rightful name, and to act decisively to end abuse. What, then, separates a moral panic from a legitimate response to an alarming pattern of wrongdoing? For legal policymakers concerned both about whether justice was served in individual cases and about how to respond to systemic problems, this question is of considerable importance.

Ultimately I will argue for a more forward-looking approach that permits us to identify threats to the administration of justice before they occur. Nevertheless, despite the questions I've raised about the utility of the concept of moral panic, the concept does offer some insight into how justice might fail. Each of the crises identified by sociologists shares certain characteristics that tend to be incompatible with deliberative justice. Certain behaviors are not merely identified as criminal, or as on the rise, but as threatening to the fabric of society. Those thought to engage in such behaviors are seen as not merely criminal, but evil, dehumanized; the embodiment of all we fear.³⁹ The media and other institutions take an active role in disseminating this story of good and evil; civilization and chaos. Punishing the wrongdoer becomes a symbolic act of fealty to civilized norms; the failure to punish is a betrayal of those norms. These characteristics define the day care sexual abuse scandal of the 1980's, and we can observe, in microcosm, the means by which they define the Friedman cases, at least as Jarecki's film depicts them.

II. The Day Care Sexual Abuse Panic

The day care sexual abuse panic was, more accurately, a set of overlapping panics over abuse of children by day care workers, by rings of pedophiles and child pornographers, and by satanic cults. Thus it contained a strand of fantastical accusations: the Satanic ritual abuse strand. It also contained a wholly conjectural strand positing an organized nationwide ring of child pornographers. These strands have been discredited.⁴⁰ Child sexual abuse, pedophilia, and child pornography, on the other hand, are real and serious crimes. Here the problem was one of disproportion. The day care panic was comprised of a series of high-profile cases, including the case of the Amiraaults of the Fells Acres School in Malden, Massachusetts, the Bakersfield, California cases and the McMartin Preschool case in Manhattan Beach, California, the Little Rascals Day Care Center case in Edenton, North Carolina, and numerous others. These cases implicated many hundreds of suspects. For example, in the Bakersfield cases eight sex rings were "uncovered" in the early 1980's, just one of which (the "Satanic Church" case) implicated sixty adults.⁴¹

39. *Policing the Crisis*, supra note 19 at 133.

40. Nathan and Snedeker, supra note 1 at 1 (citing Gail S. Goodman et al., *Characteristics and Sources of Allegations of Ritualistic Child Abuse* (Washington D.C.: National Center on Child Abuse and Neglect, 1994) reporting federal governmental study determining that reports of satanic conspiracies and organized incursions into day care were unfounded).

41. Mary deYoung, "The Devil Goes to Day Care: McMartin and the Making of a Moral Panic," 20 *Journal of American Culture* 19 (1997).

The day care abuse scandals, in the harsh light of hindsight, were based largely on non-existent crimes. As mentioned above, some of these crimes defied belief from the beginning. In other cases, a plausible initial complaint against a single individual was lodged,⁴² and the situation spiraled out of control from there – with accusations and suspects multiplying. In the aftermath of these initial complaints, scores of day care workers with no prior records were vilified, convicted, and sent to serve decades in prison. Thus the illusion of a full-scale crime wave was essentially fabricated from a series of exaggerated or nonexistent events.

Different stories resonate at different cultural junctures. There is a rich sociological literature seeking to identify the confluence of cultural and societal factors that led to this particular series of panics, in all their permutations (for example satanic ritual abuse discovered through recovered memory; international child pornography rings) to which I cannot do justice here. In the 1970's and early 1980's, there was a growing belief (whether or not empirically grounded is controversial)⁴³ that child abuse was more prevalent than previously thought. The locus of much of the suspicion was day care centers and preschools. Some sociologists identify a growing concern about day care – the contracting out of previously familial childcare duties – as the root of the panic.⁴⁴ In this view, the moral panic signaled concern about a breakdown of moral consensus in the face of feminism, homosexuality, and loosening sexual constraints in general.⁴⁵ Others argue that the panic was the product of the child advocate frame, which sought to correct for “decades of ignorance and rejection of children's stories of abuse.”⁴⁶ These factors were coupled with certain assumptions that had a powerful influence on whose stories would be believed. One assumption, which remains controversial, is that recovered memories of child sexual abuse are both widespread and reliable.⁴⁷ Another, which has been shown to be flawed, was that children did not lie; or at least, they did not lie when claiming to have been abused. (The counter-assumption, that children who deny abuse are repressing it, has also proved to be flawed). In part, this belief arose from the paucity of serious study of children's conceptions of truth. In part, it stemmed from a laudable determination to at last take children's victimization seriously.

42. John Johnson, “Kids Don't Lie,” *Los Angeles Times* 16, August 10, 2003.

43. Margaret Talbot, “Against Innocence,” *The New Republic* 38, March 15, 1999 (suggesting that though the data are subject to varying interpretations, it is likely that the incidence of child abuse decreased in the 1980's).

44. See e.g. deYoung, *supra* note 41 at 1–2; Nathan & Snedeker, *supra* note 1 at 4.

45. Hunt, *supra* note 28 at 635.

46. Susan J. Sachsenmaier, “Investigating Child Sexual Abuse Allegations: Do Experts Agree on Anything?” www.aaets.org/arts (The American Academy of Experts in Traumatic Stress homepage; last visited September 15, 2004.)

47. See e.g. John O. Beahrs, John J. Cannel and Thomas G. Gutheil, “Delayed Traumatic Recall in Adults: A Synthesis with Legal, Clinical, and Forensic Recommendations”, 24 *Bull Am Acad Psychiatry Law* 45 (1996) (noting that the topic of delayed recall remains highly polarized both in forensic psychiatry and in society, and suggesting that polarization arises not only from competing values but from definitional confusions).

III. *Capturing the Friedmans*

Capturing the Friedmans refers to little of this historical and social context. Instead, it takes the audience, step by step, through the events leading up to the guilty pleas and incarceration of Arnold and Jesse Friedman for multiple counts of child sexual abuse; an escalating scenario that, viewed in retrospect, shares many of the characteristics of the day care sexual abuse panic that was at that time sweeping the United States and the United Kingdom.

The Friedman cases were entirely initiated by the legal system. There had been no complaints from children or their parents about child sexual abuse. Though Arnold and Jesse Friedman would soon be charged with more than 300 counts of child sexual abuse, the investigation began as a federal sting operation against Arnold for receiving child pornography through the US mail. Arnold, it emerged, was a pedophile. Federal agents found child pornography in a search of his home. They also found a list of the children who had attended Arnold's after-school computer class over the last several years. The federal agents notified Great Neck police of the results of their search, and warned them that the computer students might be victims of abuse.⁴⁸ The police began an abuse investigation. Just as the federal agents had apparently assumed abuse, the police appeared to approach their own investigation with a certainty that abuse had occurred. As one of the detectives stated at a public screening of the film,⁴⁹ "We knew going in certain things had happened. We knew that."⁵⁰

At this point, one of the hallmark characteristics of a moral panic came into play. To set off the collective reaction essential to a moral panic, the story must be told and retold. Its moral dimensions must be hyperbolized through role amplification: with the accused becoming more evil, the children more innocent, the parents and prosecutors more heroic in each retelling. In a child sexual abuse case, merely spreading the news of the accusation is generally enough to trigger this reaction, as one of the principal investigators on the Friedman cases, Detective DeGarasso, noted in the film. Here the police began interviewing scores of children and their parents. The film conveys the impression that these interviews were quite directive in nature. One of the detectives interviewed stated that when questioning the children "you don't give them an option, really."⁵¹ His method was to let the children know that police already knew abuse had occurred. Suspected victims and parents interviewed in the film confirmed that police had taken this approach, and also described police as questioning the children repeatedly until they received the answers they wanted.

48. Silvergate, *supra* note 6.

49. The screening took place in Great Neck, New York. Scenes from the screening appear on Disc Two of the *Capturing the Friedmans* dvd.

50. *Capturing the Friedmans* Disc 2. See also Affidavit of Andrew Jarecki in support of Jesse Friedman's motion to vacate conviction in the case of *The People of New York v. Jesse Friedman*, Indictments Nos. 67104, 67430 and 68783, County Court of the State of New York, Nassau County, January 5, 2004.

51. *Capturing the Friedmans* Disc 1.

Police attended community meetings and talked frequently to the media. Parents, understandably, were in an uproar. In journalist Debbie Nathan's description in the film, Great Neck had now identified itself as a victimized community, and anyone who was not a victim was an outsider. Thus the police, with the help of media, parents, and community, began to multiply their list of alleged victims. Ultimately, their entire case, consisting of hundreds of counts alleging specific acts of child sexual abuse, would rest on the statements they obtained from computer students.

The details of the police interviews cannot be known with certainty, since no written, aural or videotaped record of these interviews was ever produced by police. Particularly since the interviews are the sole evidence in the case apart from the guilty pleas, the film's depiction of the interview techniques and the interviewees is controversial. In the film, several of the interviewees and their parents describe their memory of the questioning,⁵² and their memories are generally quite consistent.⁵³

The Friedmans did not have a jury trial. The story of why they pled guilty is sad and complex. Both Arnold and Jesse were subjected to intense pressure not to go to trial. It seems likely that Arnold pled out of a sense of shame at his own pedophilia and what it had wrought, and in order to save Jesse. But he did so without making a deal to cut Jesse loose, leaving Jesse to face trial as the teaching assistant of a man who had admitted, in a televised hearing, to multiple acts of child abuse.⁵⁴ Both Jesse's mother, Elaine Friedman, and Jesse's attorney, Peter Panero, stated in the film that presiding judge Boklan threatened Jesse through his lawyer that if he went to trial and lost, she would sentence him consecutively on every count in his 300 count indictment. After Jesse pled guilty, she sentenced him to the maximum allowable sentence of six to eighteen years and asked the parole board, in a televised proceeding, to consider Jesse a dangerous criminal and to hold him for the full eighteen years of his sentence. Jesse was paroled in 2001, seven years after his eligibility date, because he refused to reiterate his guilt during

52. See e.g. affidavits filed by several of the interviewees and their parents, including Richard Tilker, Brian Tilker, Ralph Georgalis, in the aftermath of the film, as well as the transcript of an interview surreptitiously recorded by one child's mother during the initial investigation. *Capturing the Friedmans* Disc 2.

53. A similar description emerges when a legal advisor to the film interviews one of the detectives, Detective Jones, during the making of the film. Detective Jones recounted the following: One child was interviewed fifteen times, in sessions lasting as long as four hours. He repeatedly denied being abused. The detective explained why she kept going back: "The boy would let us sit with him in his bedroom for hours, and he'd bring up every topic except sexual abuse. We played games with him, he showed us his computer, he'd do anything to avoid the subject. For a long time he had nothing to say, but we knew. On one occasion the boy jumped up and down, screaming 'I have nothing to tell you! Nothing happened!' But by then we already knew, so we kept coming back after that until he told us. On the fifteenth visit, the detectives told the boy's mother that they were going to stay 'as long as it takes, that we were not going to leave until he told us. We were prepared to stay all night if need be.' The boy finally stated that he had been abused. Asked why it took the child fifteen interviews to make the accusation, the detective explained that he 'had suffered tremendous trauma and had kept it deep inside. I drew it out again,' she said. After that visit, the detectives did not return. Affidavit of David Kuhn, id.

54. See Silvergate, *supra* note 6, critiquing the plea arrangements.

required sex offender classes.⁵⁵ He currently remains under strict parole conditions. Arnold Friedman died in prison, an apparent suicide.

The film adopts a stance of impartiality on the question of guilt or innocence, for which it has been both praised and criticized. Critics argue that Jarecki deliberately kept the film on the fence for reasons of aesthetics or marketability, and that this was either indefensible while Jesse Friedman's unjust conviction stood,⁵⁶ or indefensible in light of the crime the Friedmans had committed and the film's power to cause further pain to the victims.⁵⁷ Defenders argue that the film's artistry lies in its demonstration of subjectivity, of the inability of the legal system to capture the absolute truth.

A documentary that raises questions about the justice of a legal proceeding, even one that purports to take no position on the answer to those questions, creates an infinite regress of sorts.⁵⁸ Jennifer Mnookin, in a splendid article about such films (and in particular about two HBO films about the trial of three Memphis teenagers for the murder of three eight-year-old boys), notes that these films "themselves construct a kind of parallel evidentiary record."⁵⁹ Film viewers are asked to judge the evidence anew.⁶⁰ And film viewers, like jurors, are presented with a spectacle that has been produced; a staged depiction of an event in which some aspects have been highlighted, others minimized, and still others excluded entirely. To accept the film's version of events as superior to the law's version, as she puts it:

requires us to accept [the film] as a substitute, or supplementary, trial, which in turn requires us to accept the validity of its depiction of the proof presented, even though the film invites doubt about whether such depictions ever give us the "whole" story.⁶¹

Like legal proceedings, such films raise questions about the truth value of various forms of evidence, legal and filmic, and how it ought to be evaluated. They provide, not a source of unmediated truth, but a depiction of the forces shaping competing versions of truth. They also provide a vivid reminder that in the legal system, tremendous consequences hinge on the outcome of the competition. As Linda Williams observed in an article on such films:

The recognition that documentary access to [the real] is strategic and contingent does not require a retreat to a Rashomon universe of

55. Silvergate, id.

56. See e.g. Silvergate, id; Susan Davis, "Questions the Documentary Never Asks: Framing the Friedmans," *Counterpunch*, November 29, 2003.

57. Waxman, supra note 6.

58. See *Law on the Screen* (Sarat, Douglas and Umphrey, eds. Palo Alto: Stanford University Press (2005)), introduction at 5 (discussing the "doubling up, or thickening, of narrative space that arises from depiction of courtroom proceedings on film).

59. Jennifer L. Mnookin, "Reproducing a Trial" at 157, in *Law on the Screen* (Sarat, Douglas and Umphrey, eds, 2005).

60. *Law on the Screen*, supra note 58 at 14 (explaining that viewers of films about legal trials are "jurified" on a number of different levels.)

61. Mnookin, supra note 59 at 158.

undecidabilities. This recognition can lead, rather, to a remarkable awareness of the conditions under which it is possible to intervene in the political and cultural construction of truths which, while not guaranteed, nevertheless matter as the narratives by which we live.⁶²

Capturing the Friedmans seeks to confound the desire for certainty and closure. Jarecki unsettles his audience each time it feels it is closing in on the truth, leaving it in a state of anxiety at the lack of resolution. Filmic criminal cases are usually resolved by a climactic trial, whereas the Friedmans both pled guilty. The film reveals the guilty pleas as highly problematic or even suspect, depriving the audience of the comfort that normally comes from hearing the wrongdoer publicly accept responsibility.⁶³ Not only does the film fail to give its audience closure on the question of the Friedmans' guilt or innocence, it has managed to open old wounds, rekindle debate among those affected by the case, and possibly reopen the case itself.⁶⁴ In a series of complex feedback loops, the film itself has become so intertwined in the case that it is not always clear where "the film" leaves off and "the case" begins (or ends, for that matter). Witness interviews and documents uncovered by Jarecki (only some of which are presented in the film) have triggered an effort to reopen the case.⁶⁵ The film itself has triggered reactions and some additional revelations by its principals. Much of this additional material appears on Disc 2,⁶⁶ ironically entitled "Outside the Frame," which, for those introduced to *Capturing the Friedmans* on video, is effectively part of the film.

Thus the film demonstrates that the easy closure promised by the Friedmans' guilty pleas was deceptive; there was much more to the story. The film itself neither promises nor delivers closure. Its aftermath raises the specter of endless rounds of testimony appearing on web sites, in film reviews, in articles, all of it unmediated and unconstrained by legal standards of proof or admissibility. Thus it raises, perhaps unintentionally, the question of whether legal closure is, though imperfect, better than the alternative of endless unmediated disputation.

Or perhaps closure, in the sense of a definitive statement of guilt or innocence, is simply not important to the film's message. The film may want to depict the dynamics of a justice system gone awry in the face of community hysteria. If so, *Capturing the Friedmans* finds itself in a predicament. If it is a film about moral panic, and if moral panic connotes an inappropriate reaction, then it matters whether Jesse and Arnold are pedophiles who

62. Linda Williams, "Mirrors without Memories: Truth, History, and the New Documentary," 46 *Film Quarterly* 9, 14 (1993).

63. Peter Brooks, *Troubling Confessions: Speaking Guilt in Law and Literature* at 9 (Chicago: University of Chicago Press, 2000).

64. Jesse Friedman asserts in his Motion to Vacate Conviction that the film gave him some hope that he might overturn his conviction, and that it also provided access to former child witnesses who would testify on his behalf, as well as to new exculpatory evidence.

65. Motion to Vacate Conviction, *supra* note 47.

66. *Capturing the Friedmans* Disc two.

abused numerous young boys in their home. If the film is truly on the fence about this question, a moral panic storyline is unlikely to gain much traction. Yet this does seem to be the implicit story, and it succeeds largely because the film strongly signals its belief in Jesse Friedman's innocence. To the extent true ambiguity exists, it centers mainly on Arnold Friedman: loving father, beloved teacher, admitted pedophile.⁶⁷

The film signals its belief in Jesse's innocence in several ways. Most prominently, the film's narrator, in keeping with the aesthetic of impartiality, rarely intrudes. The film offers little overall commentary; preferring to allow the principals to speak. Yet when it does offer cultural commentary, that commentary is accorded privileged status. Unlike the calibrated presentation of the case itself, which uses starkly differing perspectives to destabilize the notion of an authoritative voice, the presentation of the theory of moral panic is accorded several indicia of authority. Debbie Nathan, a freelance journalist who has devoted many years to exposing the injustices of the day care sexual abuse panic, is given significant airtime. She is presented as professional, attractive and trustworthy. Her role is to place the Friedman cases in the context of the day care abuse cases. She speaks throughout the film of the hysteria around the issue of child sexual abuse, and its application to the cases. She pronounces the charges against the Friedmans "implausible." She is permitted to comment critically on the interviews with some of the principals, for example reminding the audience that one detective's memory of a foot high stack of child pornography around the house was fantasy. Her commentary on the phenomenon of moral panic and its application to the day care sexual abuse cases is left unchallenged.

The film also signals its position through the all-important interviews with the alleged victims and their parents. As the film establishes, the testimony of these victims constituted the entire case against the Friedmans. There was no physical evidence. With one exception, every victim or parent of a victim interviewed in the film claims that nothing happened, that the charges were ludicrous, or (in two cases), that they themselves had not been truthful when they claimed to have been abused. Following footage of the two witnesses who recant on screen, the director informs the audience that their testimony led to multiple counts in the indictments against Arnold and Jesse. The sole victim who continues to claim abuse is presented quite differently. He is splayed on a sofa in a strangely erotic, even tawdry position, bathed in shadow. The off-screen interviewer asks a question that suggests an important discrepancy in his testimony. His response is convoluted and contradictory. It also comes out, in both his on-screen testimony and Debbie Nathan's, that he had no memory of the abuse until he was hypnotized.

67. On Disc 2, the director declares, in an interview with Charlie Rose, that he believes in Jesse Friedman's innocence. He reveals a more complicated attitude toward Arnold, suggesting (in reference to Arnold's admitted acts of pedophilia) that he had been convicted of the "wrong felonies." However, he made clear his opinion that the case had been poorly handled, noting that if it had been a shoplifting case, it would have been thrown out "because the police work was so bad."

Nathan comments that this is an improper investigative technique, prone to creating false memories.

The film throws viewers off balance by following much of this material with an extended section on Arnold's pedophilia. Elaine Friedman, Peter Panero, Debbie Nathan and Arnold's brother all weigh in on the topic, revealing evidence that Arnold did engage in acts of pedophilia, though not the acts of which he stood accused. The audience is left with a queasy and unsettled feeling about Arnold, exacerbated by Arnold's own behavior in the home movies that make up a large part of the film. Arnold does not act like a man outraged at being falsely accused. He acts ashamed, reticent, almost voiceless. Yet the treatment of Arnold serves mostly to highlight the injustice to Jesse. Jarecki gives the last words of the film to Elaine Friedman. She has doubted Arnold's innocence throughout the film, since the initial shock of learning of his pedophilia. The viewer is left with her last comment, expressing her view that Arnold probably belongs in prison; he just shouldn't have taken Jesse with him.

In short, the film is not truly agnostic on the question of guilt or innocence, and in this way it attempts to subtly finesse the question of whether the Friedmans belong in the category of victims of a moral panic. But the story *Capturing the Friedmans* tells about justice derailed need not hinge on retrospective assessments of guilt or innocence, or on claims that such assessments can be made with certainty. Placing the film in the larger context of the day care sexual abuse panic of the 1980's yields valuable insight into the dynamics of a legal system caught in hysteria. It also models a corrective for those dynamics; a way to ameliorate their effects in future cases.

The first step is to understand and address the common elements underlying such cases. Moral panics depend on role simplification and amplification – on uncomplicatedly evil villains, and uncomplicatedly good heroes. This film complicates and humanizes its characters, and renders the notion of heroes and villains problematic. Moral panics offer a simple view of motivation. This film helps us understand the multiple influences that render motivation so complex and mysterious.

Placing the interviews in historical context reveals that the tactics which many of the former students and their parents described, with some corroboration from detectives, were a hallmark of the child sexual abuse investigations of the 1980's. Children who claimed abuse were assumed to be telling the truth, based on firmly-held beliefs about children's cognitive development.⁶⁸ Experts had a ready explanation for those children who repeatedly denied abuse: the theory of child abuse accommodation syndrome.⁶⁹ "A child's emphatic denial that anything had happened was in fact proof that the child had been victimized. Denials of abuse were proof [that the child was in] the suppression stage."⁷⁰ However, juries confronted

68. Johnson, "Kids Don't Lie," supra note 39.

69. Dr. Roland Summit, "The Child Sexual Abuse Accommodation Syndrome," 7 *Child Abuse and Neglect*, 1983.

70. Rabinowitz, supra note 2 at 14.

with videotapes of the interviews sometimes balked at the obvious manipulation of children. Videotaped child testimony was a large factor in the acquittal of the McMartin defendants. In the Friedman cases, as I mentioned above, there was no such documentation, and this lack of documentation is itself a failure of the investigation.

Why did police fail to take (or turn over) notes of their interviews? Why did they fail to seek physical examinations of the alleged victims?⁷¹ According to Jesse's analysis of the charges, for example, police accepted allegations that one boy had been raped 30 times during the first ten week computer course, that he then re-enrolled for the advanced course and was raped 41 more times. No evidence was presented that his parents noticed any sign, physical or emotional, of this repeated rape. Why were police unfazed by the failure of physical evidence to materialize (for example the photographs of boys the Friedmans were charged with taking)? Interestingly, when interviewed for the film years later, the investigators remained committed to their initial version of events, and had in some respects reimagined the evidence to conform to this scenario.⁷² The film does not depict the investigators as cynical, venal or even ambitious. It depicts them as professionals who began their investigation with a fervent commitment to a particular version of events, and a fervent determination to bring the perpetrators to justice. Perhaps because of their certainty, they cut corners in their investigation. Thoroughness is a frequent casualty of such cases.⁷³ The film's depiction of the investigators, like its depiction of the Friedmans, deprives the audience of an unambiguous villain. In place of a villain, it offers a deeper understanding about investigative excess. Sometimes it is venal and deliberate.⁷⁴ More often, particularly in cases like the child sexual abuse investigations, it is less about bad faith than about good intentions coupled with powerful emotions that can hijack a case.

Scott Turow, who was once a prosecutor, eloquently explains (in the context of death penalty investigations):

[i]t is these extreme and repellent crimes that provoke the highest emotions – anger, especially, even outrage – that in turn make rational

71. Detectives explained their failure to do so as based on a desire to spare the children the trauma of a physical exam, as Detective Garasso explained in *Capturing the Friedmans* (Disc two). See also www.leadershipcouncil.org (last visited May 29, 2005), a website of psychologists specializing in child molestation research, which cites approvingly the decision not to subject the children to physical exams in the Friedman investigation.

72. For example, Detective Garasso commented in the film that “the most overwhelming thing was the child pornography,” and confidently declared that police had found stacks of pornography in full view throughout the house; though in fact they had found only one such stack, hidden behind the living room piano. This memory comported with the original theory of the case; that the Friedmans were working with a child pornography ring.

73. James S. Liebman, “The Overproduction of Death,” 100 *Columbia L Rev* 2030, 2082–97 (2000).

74. *Id.* at 2094 n160; Ken Armstrong & Maurice Possley, “Break Rules, Be Promoted,” *Chicago Tribune*, January 14, 1999.

deliberation problematic for investigators, prosecutors, judges and juries. Under enormous pressure to solve these cases, police often become prisoners of their own initial hunches. {The investigations are} conducted in an atmosphere where primitive fears about unknown, dangerous strangers imperil our sense of an orderly world.⁷⁵

Although Turow's comment might be read to suggest an opposition between emotion and reason, it is better understood to suggest that certain emotions may impede and distort the progress of a criminal prosecution. The phenomenon of "heater cases"⁷⁶ is well known; the appellation captures the immediacy and intensity of the cases to which Turow refers. In these high profile cases, tremendous emotion is generated by the public; not just outrage but fear and the sense of an imbalance that must be righted as soon as possible. These are the sorts of emotions that propel a rush to judgment if not properly channeled. As legal scholar Oliver Goodenough observed:

Although some emotional content is probably inevitable and necessary in reviewing criminal allegations, letting the quick, intuitive and emotional impulse to punish dissipate before judgment and action take place may lead to preferable results in a complex society. Lynching is a quick phenomenon, 'shot through' with emotion.⁷⁷

He is certainly correct that emotional content is inevitable;⁷⁸ the question is what sorts of emotion should be encouraged or discouraged in particular circumstances, and how best to accomplish this regulation. Emotion that is "quick and intuitive" plays an important role in our survival and thriving,⁷⁹ but may not be best suited to deliberative judgments. Intuition can be channeled or corrected in light of further information, and one function of the criminal process is to slow down the action and to allow room for contemplation and correction. In heater cases, this often fails to occur. Instead, the intensity of the initial reaction builds and infects the very institutions that ought to ensure a more deliberative process.

Sexual abuse investigations elicit an additional set of powerful emotions: a fierce protectiveness of children, an immense revulsion at the idea that anyone might be capable of harming children in this way. Arnold's pedophilia emerges as one of the most significant facts of the Friedman

75. Scott Turow, *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty* at 34 (New York: Farrar, Straus & Giroux (2003)).

76. Liebman, *supra* note 73 at 2078 n 137; Myron W. Orfield, Jr., "Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts," 63 *U. Colo. L. Rev.* 75 (1992).

77. Oliver Goodenough and Kristin Prehn, "A Neuroscientific Approach to Normative Judgment in Law and Justice," *Phil. Trans. Royal Society London* 1709, 1719 (2004).

78. *The Passions of Law*, Introduction (Susan Bandes ed. (New York: New York University Press (2000))

79. Anthony R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain*, Ch. 6 (Biological Regulation and Survival, pp 114–126 (Harper Perennial (1995)).

case. Not his *acts* of pedophilia, but his proclivity. As one critic noted about the film: “There’s enormous tension between accounts of the crimes Arnold seems likely to have committed⁸⁰ (and for which he was not tried) and the stories of impossible-seeming crimes for which he was imprisoned.”⁸¹ The subtext of child pornography and pedophilia drives the actions of all the players in this tragedy, including the legal actors. Arnold was a member of a reviled group. In the sociology of moral panics, he was a “folk-devil,” “a villain . . . in the morality play of evil versus good,” an “enemy of respectable, law-abiding society,” whose behavior was seen as “harmful or threatening to the values, interests, way of life, possibly the very existence, of the society.”⁸² In short, once an accused is demonized in this manner, he ceases to be merely a fallible or flawed person and becomes the repository of our fears and social anxieties. As the authors of *Policing the Crisis* put it “we turn against him the full wrath of our indignation.”⁸³ Arnold was treated as a monster, not just by the lay public but by legal actors all down the line. Even Jesse’s attorney felt he had license to express his disgust, on camera, toward Arnold’s pedophilia.⁸⁴

Disgust, as both William Miller and Martha Nussbaum have argued, is of an entirely different character than anger or indignation. It is an emotion that, as Miller said,

marks out moral matters for which we can have no compromise . . . It . . . [helps] define and locate the boundary separating our group from their group, purity from pollution, the violable from the inviolable.⁸⁵

Nussbaum similarly argues that disgust is an emotion we use to distance people; to treat them as “monsters, in no way like ourselves,”⁸⁶ and therefore not worthy of our understanding or compassion. Nussbaum views disgust as more visceral than cognitive; as an emotion not susceptible to reflection and reason. The disgust elicited by accusations like those leveled at the Friedmans might well short-circuit judgment at an early stage. Once the accused were marked as monsters, the sole imperative was to cordon them off from the human community.

80. In the film, Arnold admits to having inappropriate sexual contact with two young boys unrelated to the computer class during a summer vacation. Neither ever came forward. Debbie Nathan quotes a former computer student who recalled that during class Arnold “used to give boys furtive pats on their clothed legs and butts,” but that the kids shrugged it off as a mere nuisance. Debbie Nathan, “Complex Persecution,” *The Village Voice* at 30, 2003.

81. Davis, *supra* note 56.

82. Good and Ben-Yehuda, *supra* note 4 at 157.

83. *Policing the Crisis*, *supra* note 19 at 133.

84. In the film, Jesse’s attorney Peter Panero recounts a conversation while Arnold was in prison, in which Arnold asked to move away from a father with a small boy on his lap, because their interaction was exciting him sexually. Panero is emphatic about how disgusted he felt at this revelation.

85. William Miller, *The Anatomy of Disgust* at 194–95 (Cambridge: Harvard University Press, 1997).

86. Martha Nussbaum, “Secret Sewers of Vice” at 51 (in *The Passions of Law*, *supra* note 41).

Dan Kahan, in response to Nussbaum, defends the role of disgust, arguing that it signals a deep moral aversion to the conduct at issue.⁸⁷ But it is possible that this signaling function becomes part of the impediment to justice in cases like those involving child sexual abuse, since it may override the importance of ensuring individual justice. In Miller's view, disgust does some valuable work in highlighting proper objects of contempt and loathing, but, as he eloquently puts it:

We also clip disgust's wings by wisely subjecting the entire moral regime to certain political and legal constraints that severely circumscribe the actions that can justifiably be taken in consequence of moral judgment.⁸⁸

It is when the "moral regime" overpowers the "legal constraints" that problems arise. As *Wall Street Journal* reporter Dorothy Rabinowitz explains, this is exactly the situation triggered by a charge of child sexual abuse:

To take up for those falsely accused of sex abuse charges was to undermine the battle against child abuse; it was to betray children and all other victims of sexual predators . . . {In such cases} the facts of a case were simply irrelevant. What mattered was the message – that such crimes were uniquely abhorrent and must be punished accordingly.⁸⁹

Emotions like fear, outrage, anger and disgust, in situations like these, are entirely human. The question is what the legal system can do to correct for the excesses to which they lead. The crux of the moral panic dynamic is that the legal system, in such cases, does not correct for them. It gets swept up in them instead.

This dynamic is not confined to overzealous pretrial investigators. The prosecution role is even more problematic. Prosecutors are officers of the court whose role is to seek justice, rather than seek convictions. They should, in an ideal world, put a brake on police overzealousness. Yet prosecutors are not exempt from the disgust, outrage and anger evoked by child sexual abuse, and, disturbingly, they are not necessarily exempt from the tendency to conflate accusation with guilt. Rabinowitz, confronting the issue whether prosecutors actually believed some of the more incredible charges they brought in the day care cases, concluded that "the prosecutors' propensity to believe in the guilt of anyone accused of the crime of child sex abuse was overwhelming."⁹⁰ Moreover, prosecutors are under tremendous pressure to produce results in heater cases. The community pressure to right a grievous wrong is directed first at the police, and then, for the duration of the investigation and the trial process, full bore on the

87. Dan Kahan, "The Progressive Appropriation of Disgust," in *The Passions of Law*, id.

88. Miller, *supra* note 85 at 202–03.

89. Rabinowitz, *supra* note 2 at 18.

90. *Id.* at 229.

prosecution. High profile child sexual abuse cases, like death penalty cases, have the power to make or break a prosecutor's reputation and perhaps his political career.⁹¹

Finally, there is the role of the trier of fact. Many of the day care abuse cases were tried before juries. Rabinowitz was asked how jurors could believe some of the bizarre testimony they heard in these cases, and she explained:

Let's say you're a juror and you're in the midst of this huge tidal wave of accusations. The media is playing and replaying the sound of the parents saying how their children's lives have been ruined and the accused are portrayed as monsters and the prosecutor . . . reminds the jurors {of} how brave these children are for coming forward to tell their stories. How can you betray these children?⁹²

As scholars of jury behavior have usefully noted, the problem in such cases is not so much the reaction of jurors toward any particular parties in the case, but the strong emotions evoked by the very fact of such a crime, or the very fact that someone could commit it. Neil Vidmar calls this a problem of generic prejudice toward the type of crime or type of party, explaining that for some jurors:

the mere fact that the defendant is charged with sexual assault against a child will cause the juror to consider the defendant probably guilty, or, at the very least, the burden will be placed on that defendant to prove his or her innocence . . . [Generic prejudice] . . . involves the juror's inability to impartially decide whether in fact a crime has occurred or, if it has occurred, whether the defendant is the guilty party.⁹³

Crimes like child sexual abuse evoke intense anger. The problem this anger presents, for purposes of juror deliberation, is that it is often accompanied by a strong impetus toward action. Anger toward those accused of terrible

91. Janet Reno, for example, "rode to prominence in Florida as Miami Dade County state attorney on these cases." *Rocky Mountain News*, June 19, 2003. See also Nathan and Snedeker, *supra* note 1 at 5. The John Stoll prosecution was brought by a District Attorney who won office after his opponent was enveloped in scandal over his lenient treatment of a child molester. Jones, "Who Was Abused?," *supra* note 3. A 1992 article in the *National Law Journal* approvingly discusses the "pot of gold at the end of the rainbow" for Fells Acre prosecutor Laurence Hardoon, who entered private practice to prosecute civil child abuse lawsuits, and "settled cases aggregating more than \$1 million for his clients in his first year." Randall Samborn, "Prosecutors Go to Boot Camp," *National Law Journal* 1-2, September 14, 1992. See also Don J. DeBenedictis, "McMartin Preschool's Lessons," 76 *ABA Journal* 28-29 (April 1990) (discussing the role of prosecutorial ambition in the McMartin case); Jay Mathews, "Ex McMartin Defendant Sues Local Governments, Media," *The Washington Post* A3, January 20, 1990 (same).

92. Dorothy Rabinowitz, quoted in Vincent Caroll, "The Tragedy of a Modern-Day Witch Hunt," *Rocky Mountain News* 40A, June 19, 2003.

93. Neil Vidmar, "Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials," 21 *Law and Human Behavior* 5, 6 (1997).

crimes may quickly translate into a desire to attack and to punish. Jurors want to right the wrong; to restore order, and to help the victim.⁹⁴ Joseph Nadler and Mary Rose theorize that the “exposure to intense emotional suffering heightens decision makers’ negative affect and consequently activates ‘blame-validation processing,’” a state in which jurors “look for ways to hold an offender responsible.”⁹⁵ The need to find a target for blame may override the desire to ensure that the correct target has been chosen.

Moreover, any natural inclination to convict and punish in the day care abuse cases was exacerbated by the jury’s limited access to evidence. Depending on the case, it was limited by partial investigations by police and prosecutors, by prosecutorial failure to share exculpatory information with the defense,⁹⁶ by a lack of information about the investigative techniques leading up to the testimony they heard,⁹⁷ and by judicial rulings permitting certain expert witnesses and excluding others.⁹⁸ It is not surprising that jurors should not get “the whole story,” this is, after all, the nature of the trial process.⁹⁹ The salient point is that the forces discussed above, all of which tended to tilt away from presuming innocence and toward a rush for judgment, would coalesce once again at the trial. It is also noteworthy that some of this rush to judgment would come in the form of rulings from the bench.

In this story of judgment clouded by passion, the role of the judge may be the most difficult to accept. Even those who readily believe in the partiality of police and prosecutors may have difficulty letting go of the image of judicial dispassion. The film makes it apparent, however, that Judge Abbey Boklan bears tremendous responsibility for the hysteria as well. In the film, Judge Boklan, a former sex crimes prosecutor, assures the audience “there was never a doubt in my mind as to their guilt.” Yet her actions helped ensure that the trial at which this guilt might be determined did not take place. Her decision to permit cameras in the courtroom for the first

94. Joseph Nadler and Mary R. Rose, “Victim Impact Testimony and the Psychology of Punishment,” 88 *Cornell L. Rev.* 419, 443 (2003).

95. *Id.*

96. Nathan and Snedeker assert that prosecutors habitually hid exculpatory evidence from defense lawyers and sealed records from the press “in the name of protecting the child victims.” Nathan and Snedeker, *supra* note 1 at 6.

97. Nathan and Snedeker assert that once it became obvious that videotaped interviews showing children denying abuse led to not-guilty verdicts, “prosecutors began advising investigators not to keep tapes or detailed notes of their work.” Nathan and Snedeker, *id.* at 6.

98. See for example the discussion by Rabinowitz of the Snowden trial in Florida, in which a woman “with no credentials as a child psychologist but a reputation as a child advocate and a doctorate in speech, had been permitted to present herself to the jury as an expert in child development,” whereas a specialist in research on the diagnosis of sexually transmitted diseases was not permitted to testify because he was “not an expert in the diagnosis of sexually transmitted diseases in children,” despite the fact that “this medical specialty does not exist.” Rabinowitz, *supra* note 2 at 58.

99. Although as Nathan and Snedeker point out, the day care abuse prosecutions introduced several non-traditional types of evidence, including “videotaped interviews, closed circuit television testimony, hearsay accounts of abuse by adults speaking for children in court, and expert testimony about children’s play with dolls, their drawings, and sexual abuse behavioral syndromes.” Nathan and Snedeker *supra* note 1 at 6.

time in the history of Nassau County contributed greatly to what she described as “a media frenzy.” Jesse cited Arnold’s televised guilty plea to numerous counts of child sexual abuse as a large factor in his own decision to plead, convinced that he could not get a fair trial.¹⁰⁰ Boklan told Andrew Jarecki that she decided to allow cameras in the courtroom because:

It was something the community was very interested in, the media was very interested in, and I believe in open courtrooms and as long as the names of the children and the children could be protected I saw no harm in it. I wasn’t that concerned about protecting the defendants. Their pictures, their names were all over the newspapers, so their reputation at that point was not too good.¹⁰¹

IV. Moral Panic and its Legal Handmaidens: The Lessons of *Capturing the Friedmans*

Is moral panic a useful heuristic? Does it help us to understand and address what happened here? Or is it useful only in hindsight? The concept is a useful reminder that the attitudes which shape the law occur within a social, cultural, and institutional framework. Unfortunately, as I have argued, this knowledge is most usable in retrospect. Once the day care abuse prosecutions had begun to unravel it was possible, with hindsight, to replace the narratives of nationwide child pornography rings and satanic abuse cults with a narrative of moral panic leading to injustice. It was possible to theorize about why day care sexual abuse became such an *idée fixe*, to examine the role of institutions, and to ask what might be done to prevent this particular type of panic from occurring again. For example, in their aftermath it became clear that the investigations were fueled in part by misapprehensions of children’s cognitive development.¹⁰² Largely because of these cases, the fields of psychology and law have become more knowledgeable about children’s conceptions of truth and about the importance of training investigators in appropriate interview techniques.¹⁰³

100. One shocking claim that came out in the film concerned the use of Arnold’s “closeout statement,” a statement he made as part of his guilty plea in which he confessed to molesting numerous students so that the police would not rearrest him and charge him with additional acts of abuse. The closeout statement was a confidential document which, according to Jesse’s affidavit, police nevertheless read to the potential witnesses for Jesse in his pending trial in order to discourage them from testifying for him. Indeed, Jesse soon found himself with no witnesses to present. See affidavit of Jesse Friedman, motion to vacate, *supra* note 47, and *Capturing the Friedmans* Disc 2.

101. Affidavit of Andrew Jarecki, motion to vacate, *id.*

102. But see the leadership council website, *supra* note 71, taking issue with what it terms the myths propounded by the film, including the myth that children will exaggerate stories of abuse, and the myth that children will necessarily report abuse to their parents.

103. See Sasha Abramsky, “Memory and Manipulation,” *LA Weekly* 32, August 20, 2004 (discussing the work of Elizabeth Loftus).

In short, the concept of moral panic may offer some lessons about how justice is derailed. But to the extent the term is meant to describe a time-limited, volatile phenomenon, one which “erupts fairly suddenly and, nearly as suddenly, subsides,”¹⁰⁴ it does not capture the essence of the problem depicted in *Capturing the Friedmans*, which is a problem that infects the legal system on a much broader and deeper level.

Recently, sociologists have argued that early formulations of the notion of moral panic need revision because they misconceive the dynamic as a series of isolated phenomena emanating from “one or two centralized agencies of social control” when in fact it is “a permanent struggle,” the product of policies and practices that are “endemic in media and society.”¹⁰⁵ This critique is well founded, as the child sexual abuse cases illustrate. This series of prosecutions can be framed as a time-limited phenomenon, but many of its root causes persist. It can be framed as a failure of social workers, the media, or the law, but in fact it illustrates the close symbiosis among all the relevant institutions.¹⁰⁶

Justice was derailed in these cases for reasons that are deeply entrenched, entirely predictable, and very difficult to address. Such cases share a number of common characteristics that can be identified and addressed in advance. These are cases that evoke fear, revulsion, and other intense emotions of the sort that cloud judgment; cases based on deep-seated stereotypes and prejudices. Viewed from that perspective, they can be seen to have much in common with other types of cases that elicit intense fear and revulsion, and that rest on deep-seated prejudices. For example, they share marked similarities with death penalty cases and with police torture cases. Considering the failures of justice in these varied contexts yields insight into what goes wrong, and how it might be fixed. This seems a more useful exercise than debating, in retrospect, whether a spectacular failure of justice should be classified as a moral panic.

The day care sexual abuse cases were fueled by revulsion toward the accused, or the category of those accused of child sexual abuse. In this sense, child sexual abuse cases have much in common with capital cases. Both rest on accusations of horrific crimes; crimes that are often difficult to contemplate. The notion that people are capable of such crimes makes the world seem less safe. These crimes evoke a need to ward off chaos by holding someone accountable. They evoke a sense of responsibility to the victims that seems to demand meting out a punishment to fit the crime. The perpetrator

104. Goode and Ben-Yehuda, *supra* note 4 at 158. Some sociologists use the label rather flexibly. Goode and Ben-Yehuda, for example, seem willing to call the fear of nuclear contamination a moral panic, though it does not meet the criteria of volatility or the presence of folk devils, solely because it meets the criterion of disjunction between likelihood of harm and public concern with the threat. *Id.* at 162. At such points the concept of moral panic begins to seem elastic to the point of amorphousness.

105. McRobbie and Thornton, *supra* note 31 at 564 (critiquing the concept of moral panic as a “poor vehicle for addressing policies and practices that are endemic, rather than sudden, unpleasant and unanticipated.”)

106. *Id.* at 572.

of such a crime becomes dehumanized, a monstrous offender,¹⁰⁷ not someone like us who took a few wrong turns in life. To regard such a person as anything less than purely evil comes to be seen as relativistic and weak.¹⁰⁸ To fail to convict such a person, or to fail to punish him adequately, is a symbolic act: a sign of disrespect to the victims and a failure to protect society. In such cases, the drive to convict and punish colors every aspect of the legal process, often in ways that are difficult to detect.

The cases were fueled in part by the virtually unreviewable discretion of elected prosecutors, by media excesses that have been decried for years,¹⁰⁹ and by elected judges who could not afford to seem soft on child molesters or heinous murderers.¹¹⁰ These are all longstanding problems that, for a variety of reasons, are unlikely to be addressed any time soon.

Conversely, the police brutality cases I mentioned above provide a mirror image of the day care panic. Like the scandal of pedophilia in the clergy, the South Side Chicago police torture scandal of the 1970's was a case of institutional denial rather than institutional hysteria; a refusal to connect the dots rather than the fabrication of a pattern where none existed.¹¹¹ Yet many of the elements discussed above derailed justice here as well. The generic prejudice ran against those who claimed to have been tortured: poor, black, marginal men, most of them accused of crimes, some with police records. It was their word against that of police officers – mostly white, middle class men in uniform, many of them decorated war veterans. The fear of chaos arose, not from the specter of letting crime go unpunished, but from admitting the possibility that the police, the thin blue line between the law abiding and the criminal, could engage in such unspeakable acts. It was far more comforting to reject this possibility – not just for the lay public, but for the legal system.¹¹² Whereas careers are made and elections won by prosecuting and convicting child molesters, and by sending murderers to the chair, prosecuting and convicting cops is usually a futile and self-destructive gesture. In the police torture cases, in short, fear, disgust and generic prejudice led to minimizing rather than exaggerating the harm; to disaggregating a series of connected events, rather than to yoking together a series of disconnected events.

The moral panic framework helps us understand that certain acts may evoke especially strong passions at particular cultural junctures. For example

107. Joseph E. Kennedy, "Monstrous Offenders and the Search for Solidarity Through Modern Punishment," 51 *Hastings L.J.* 829 (2004).

108. Susan Bandes, "Fear Factor: The Role of Media in Covering and Shaping the Death Penalty," 1 *Ohio State Journal of Criminal Law* 585 (2004). Kennedy, *id.*, at 904.

109. Bandes, "Fear Factor," *id.* at 594. As Alexander Cockburn observed about the McMartin case, "the essential function of most of the press had been to act as a conduit for the prosecution." Alexander Cockburn, "Out of the Mouths of Babes: Child Abuse and the Abuse of Adults," *The Nation* at 6, February 12, 1990.

110. Stephen B. Bright and Patrick J. Keenan, "Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases," 75 *B.U. L. Rev.* 759 (1995).

111. See generally Bandes, "Patterns of Injustice," *supra* note 18.

112. *Id.* at 1317–1340.

societal attitudes toward children (as small adults, as unspoiled creatures of nature, as preternaturally honest, as super-predators, as out of control gang members) and toward young girls (as innocent maidens, as vixens, as mean girls, as juvenile delinquents) shift over time and our attitudes toward crime by and against children shifts with it – often rather emphatically. Knowledge of these shifts, ideally, can serve as a reminder of the importance of proceeding with caution.

Neither capital murder nor police torture seems to fit neatly into the moral panic framework. Murder violates widely-held norms that remain stable across time, and murders that are capitally charged tend to be especially shocking. Nevertheless, cultural assumptions contribute to many of our perceptions about murder (for example what separates murder from manslaughter;¹¹³ what sorts of murders are most prevalent and pose the greatest danger;¹¹⁴ what constitutes a crime wave) and to many aspects of capital punishment (for example, changing levels of support for the death penalty,¹¹⁵ or the factors that render a particular category of crime death-eligible¹¹⁶). Similarly, police torture is too often insulated from judicial oversight because of deeply-rooted cultural assumptions about what sorts of people threaten the social order and what must be tolerated in order to keep them in line. Shifts in such assumptions may not be sudden or volatile, and thus may not fit the moral panic criteria, but some core insights of the moral panic literature apply. Context helps shape not only our criminal justice priorities but our perceptions about what constitutes deviance and what remedies deviance requires. At the same time, across the spectrum of cases in which justice fails, certain factors remain constant.

All these cases – child sexual abuse, capital murder, police torture – are rife with stereotyping, prejudice, fear and disgust. They are at high risk for failures of due process and for unjust or disproportionate outcomes. These outcomes cannot usually be blamed on single, malevolent individuals; the failures are systemic. This is something we know, and that we can therefore try to address, not by denying human nature, but by building in procedures to slow the rush to judgment, enhance the possibility of reflection and deliberation, channel emotion to minimize its distorting effects, and correct for human nature's inevitable lapses and fallibilities.¹¹⁷ There is ample literature on practices that reduce the likelihood of miscarriages of justice,

113. See e.g. Victoria Nourse, "Passion's Progress: Modern Law Reform and the Provocation Defense," 106 *Yale L.J.* 1331 (1997); Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (NYU Press, 2003).

114. See e.g. "Fear Factor," *supra* note 109 at 587 (discussing widely held but incorrect perception that the most prevalent murders are those committed by black men against random white victims).

115. Samuel R. Gross & Phoebe Ellsworth, "Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century," in *Beyond Repair? American's Death Penalty* (Steven P. Garvey, Ed., 2003).

116. See Scott Turow, "To Kill or Not to Kill: Coming to Terms with Capital Punishment," *The New Yorker*, Jan. 6, 2003, at 40, 47 (discussing emotional momentum to expand the categories for death penalty eligibility).

117. Bandes, "Empathy, Narrative, and Victim Impact Statements," *supra* note 17.

including mandated deliberation periods before charges can be brought,¹¹⁸ better training and education of investigators, social workers, and other personnel who gather evidence and make recommendations to the court,¹¹⁹ corroboration requirements to decrease the possibility of relying on unreliable testimony, videotaping of interrogations of witnesses and suspects,¹²⁰ layers of review at every stage – including review of police and prosecutorial charging decisions, merit selection of judges, provision of adequate defense counsel and support,¹²¹ and many others.¹²² There are formidable institutional hurdles to many of these reforms, and indeed much of the problem stems from the failure to follow existing rules, but some progress has been made nevertheless. We might look back at the nine year moral panic over day care sexual abuse, with its outlandish stories about satanic cults, marvel at how gullible we once were, and congratulate ourselves for what we've learned. But that would be the wrong lesson. Most of our work still lies ahead.

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118. Liebman, *supra* note 73 at 2144.

119. Sachsenmaier, *supra* note 46.

120. Liebman, *supra* note 73 at 2147.

121. *Id.*

122. Turow, *supra* note 75 at 119–25; Mandatory Justice: Eighteen Reforms to the Death Penalty (The Constitution Project 2001) www.constitutionproject.org