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ARTICLE

CHILD SEXUAL ABUSE, THE DELAYED DISCOVERY RULE, AND THE PROBLEM OF FINDING JUSTICE FOR ADULT-SURVIVORS OF CHILD ABUSE

Elizabeth A. Wilson[1]

ABSTRACT

This Article considers the statutes and judicial decisions that extend the use of the delayed discovery rule to adult survivors of child sexual abuse. Use of the rule in such cases has been criticized as opening the door to suits founded on the scientifically-controversial notion of repression, but increasingly the rule has been used in cases where the victim always remembered the abuse but did not connect it with her symptoms. Given this extension of the rule's use, this article explores the rationale for restricting it only to cases involving victims of sexual abuse. The article argues that while child sexual abuse is often regarded as "unique" and "different," and thereby warranting "exceptional" legal treatment, using the rule only in sexual abuse cases reinforces a cultural narrative linking child sexual abuse to a wide range of psychopathological symptoms while underestimating, if not totally ignoring, the malign consequences other forms of abuse and neglect have on children's development. This article examines the strengths and weakness of the justifications that have been implicitly and explicitly advanced for the "exceptionalism" surrounding child sexual abuse in use of the discovery rule and traces it to the social movement on behalf of adult survivors of child sexual abuse. Deeper roots lie in the broad cultural

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identification of childhood with sexual innocence and in the close connection that has historically been made between inappropriate sexual activity in childhood and physical and mental deviations in adulthood. Based on evidence indicating that other forms of child maltreatment may have detrimental consequences to children comparable to those arising from child sexual abuse, this Article proposes that the discovery rule would also be suitable for cases involving child physical abuse.[2]

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This article was in the final stages of publication when the Supreme Court ruled in Stogner v. California, No. 01-1757 (Decided June 26, 2003), that a law extending the *criminal* statute of limitations on sexual abuse is an unconstitutional violation of the Ex Post Facto Clause when applied to revive a previously time-barred prosecution. This decision makes it more likely that the pending sexual abuse cases involving Roman Catholic priests will be disposed of by the civil processes discussed in this article.

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INTRODUCTION

This article examines the use of the discovery rule and extended statutes of limitations in civil child sexual abuse cases. In the immediate aftermath of September 11th, child sexual abuse appeared to be one of those instantly-irrelevant issues that made the 1990s seem, overnight, dated and inconsequential. Day-care scandals, satanic ritual abuse, age regression therapy, malpractice charges, sensational clashes of expert witnesses in well-publicized trials, a prolific outpouring of professional literature on the nature of memory, public confessions by celebrities—all these had been caught up in the most controversial legal issue of the last two decades of the twentieth century, as legislators and courts introduced many exceptions to the law's usual practices and safeguards in an effort to make the legal system more accessible to adult survivors of child sexual abuse, especially those with "repressed" or "recovered" memories. Between 1987 and 2000, hundreds of lawsuits were filed by adult survivors of child sexual abuse with such memories seeking to overcome the statute of limitations and win damages for harms inflicted by abuse occurring many years before in childhood. Such suits generated enormous amounts of controversy and publicity, and engaged a vast

number of lawyers, psychologists, advocates, and victims in a life-or-death struggle for vindication. Though the shock of a major terrorist attack seemed to put the life-or-death quality of that struggle into a new perspective, by December 2002 the issue had returned with a vengeance as a new crisis gripped the Roman Catholic Church.

If September 11th did not overshadow the issue of child sexual abuse—indeed, if it refocused attention on the vulnerability of the young and stirred up memories of abuse that might otherwise have laid quietly—it did serve to effect a break in the legal and social discourse on child sexual abuse. Since then, we have not heard a great deal about the issue that plunged the nation into controversy in the 1980s and 1990s: the debate about whether memories of child sexual abuse could be "repressed" from consciousness and then reemerge, years later, relatively intact. The recent priest cases have not (yet) rekindled this controversy, probably because evidence of the institutional evasions of the church has been clear and compelling. Nevertheless, one name has been conspicuous in its absence from recent discussions of the Catholic Church—namely, that of Chicago Cardinal Joseph Bernardin. In early 1994, a Philadelphia man accused the popular and liberal Bernardin of sexually abusing him, and the nation recoiled in shock. However, the man ultimately retracted his accusations, saying that his memories were probably false.[3] In retrospect, it is clear that the Bernardin episode marked a turning-point in the anguished controversy about recovered memories. At the time of the accusation, the papers were as rife with allegations against priests as they are today. But soon, criticism began to mount, and by the end of 1994, the idea that memories could be repressed and then accurately recovered had been dealt a severe blow.

In this second wave of priest abuse cases, recovered memories have been entirely absent as a theme, but many of the claims against priests that recently have come to light depend on the same legal doctrine that brought recovered memory cases into courtrooms—use of the discovery rule in child sexual abuse cases to overcome the statute of limitations and permit bringing suit long after the abuse has occurred. The claim that recovered memories could be repressed from consciousness until adulthood

3. Editorial, *Who Abused Whom?*, PLAIN DEALER (CLEVELAND), Mar. 3, 1994, at 8B.

caused courts and legislatures to authorize use of the discovery rule in sexual abuse cases and, in a minority of states, to extend the statute of limitations in civil sexual abuse cases. Had they not done so, sexual abuse cases by adult survivors would never have been able to be heard in the first place. These legal innovations were seen as an issue of fairness. How could a plaintiff with repressed memories respect the statute of limitations when she did not even know she had been abused? Though sexual abuse discovery statutes were passed in the first instance to accommodate plaintiffs who had repressed memories, they usually also extended to victims who had continuous memories of abuse and who had nevertheless been unable to meet the statute of limitations, typically 1 to 3 years after the age of majority.[4] Such "continuous memory" cases have now become the leading edge in litigation. Given the resurgence of attention to child sexual abuse and the new direction such suits are taking, now is a good time to reconsider the sexual abuse discovery doctrine and its implications for the social and legal understanding of child maltreatment more generally.

This reconsideration partly involves a look back at the recovered memory controversy. The recovered memory controversy polarized all those who became embroiled in it, with both plaintiffs and defendants claiming the mantle of victim. Of all the recovered memory cases generating controversy in the 1990s, one in particular illustrates the competing claims.[5] In 1989, while a student at U.C. Irvine, Holly Ramona entered treatment for depression and bulimia. Her therapist interpreted the fragments of memory that Holly presented as memories of child sexual abuse and explained to her that bulimia is often caused by a history of child sexual abuse. Another therapist later gave her a dose of sodium amytal, a drug popularly but erroneously understood as a "truth serum,"[6] in order to "confirm" that the flashbacks of sexual abuse she was experiencing were true. Holly subsequently filed suit against her father in Napa Country for assault and battery, which she voluntarily dismissed after the court refused to allow her to amend her complaint to allege that

4. *See infra* notes 99-125 and accompanying text.

5. One version of this case is recounted in Katy Butler, *Clashing Memories, Mixed Messages*, L.A. TIMES, June 26, 1994, mag., at 12; another is found in MOIRA JOHNSTON, SPECTRAL EVIDENCE: THE RAMONA CASE: INCEST, MEMORY, AND TRUTH ON TRIAL IN NAPA VALLEY (1997).

6. Butler, *supra* note 5, at 12.

she had remembered some aspects of the abuse before taking the sodium amytal.[7] At the same time, her father lost both his job and his marriage. He subsequently sued Holly's therapists for damages in a precedent-breaking case allowing a third party to sue a therapist and won a relatively small judgment despite the jury's pronouncement that Holly's enhanced memories were probably false. In an indication of the difficulty of the case, the jury foreman later said to the press, somewhat contradictorily,

> We all got rather disturbed when Mr. Ramona captured the headlines by claiming a victory of sorts, when we knew the case did not prove that he did not do it. I want to make it clear that we did not believe, as Gary [Ramona] indicates, that these therapists gave Holly truth serum and implanted these memories. It was an uneasy decision and there were a lot of unanswered questions."[8]

Holly reinstated her suit, but the California Court of Appeal, Second District, later decided to bar Holly's testimony as tainted by the sodium amytal interview and granted her father's petition for summary judgment.[9] Despite the verdicts, Holly's mother and sisters believed her, and once the allegations surfaced, her mother recollected many suspicious incidents from the past that led her to credit her daughter's claims.[10] The *Ramona* case was widely understood as a blow to victims and their therapists.

Much ink has been spilled on the issue of repressed memory, but there has as yet been almost no discussion about the use of the discovery rule in continuous memory cases. For instance, it has not been sufficiently emphasized that delayed discovery statutes were framed solely to accommodate victims of childhood *sexual* abuse and were not framed to address the long-term consequences of any *other* type of child abuse. At this point, adult survivors of child sexual abuse are the only survivors of childhood maltreatment who are able to take advantage of an extended period of limitations. This reinforces an overly simplistic narrative about childhood maltreatment and its consequences, a narrative that emphasizes the role of sexual abuse and underemphasizes the role of other forms of maltreatment. Because these statutes create a remedy only for victims of child sexual abuse, they arguably create an unhelpful legal incentive for all

7. The history of Holly's claim is recounted in *Ramona v. Superior Court*, 66 Cal. Rptr. 2d 766, 770 n.5 (Ct. App. 1997).
8. Butler, *supra* note 5, at 12.
9. *Ramona*, 66 Cal. Rptr. 2d at 768.
10. Butler, *supra* note 5 at 16.

victims of child abuse to understand their experience through the category of sexual abuse.

The perspective taken up in this article is that the use of the discovery rule in adult survivor cases must be looked at in light of the broader cultural belief that child sexual abuse is the "worst" form of child abuse, indeed the worst fate that can befall a child, "worse than murder," and therefore is a "unique" and different form of child maltreatment that merits "exceptional" treatment by the law.[11] Words to that effect are often repeated in discourse on child sexual abuse, so often that it is unnecessary to look for their original source.[12] The hyperbole in the "worst than murder" claim suggests that childhood sexual abuse has a special, "exceptional" status, since a victim of child sexual abuse can hope to recover while no recovery from murder is possible. This inquiry has many aspects, including how the law both reflects and works to shape normative views about childhood, child abuse, and the child abuse victim. Use of the delayed discovery rule in cases involving child sexual abuse effectively created a new tort action enabling adult-children to sue for the long-term psychological damage caused by sexual trauma in childhood.

Because of their role in facilitating recovered memory suits, delayed discovery statutes and case law have generally been discussed within the context of the furor about recovered memories, where the questions framing the inquiry have been the following: Does "repression" exist? And if not, how can the statute of limitations be tolled because of it, given the protections for the defendant that the statute of limitations is designed to afford? But since in fact most delayed discovery statutes permit the use of the discovery rule in cases where the plaintiff *never* forgot the abuse, this doctrine raises legal issues that have nothing to do with the question of recovered memory. Given the trouncing that recovered memory cases have taken in courts and in the press, it is time to revisit the doctrine and consider whether the justifications for it hold up in the wake of the recovered memory controversy. This Article considers two questions. Is the use of the delayed discovery rule a legitimate strategy for victims of child sexual abuse who have always remembered the abuse? And *if*

11. This belief attaches as well to the perpetrator of child sexual abuse, since the "child molester" is frequently viewed, even among prisoners, as the lowest of the low.

12. For a discussion of this rhetorical trope, see JAMES R. KINCAID, CHILD-LOVING: THE EROTIC CHILD AND VICTORIAN CULTURE 183 (1992).

so, why is the remedy it affords not available to victims of other forms of child abuse as well? Though these questions are quite distinct from questions about the truth or falsity of recovered memory, in considering them, we will also end up learning something about how the "exceptionalism" conferred on child sexual abuse produced the recovered memory controversy as its most spectacular symptom.

In examining the legal "exceptionalism" surrounding child sexual abuse, we need not trivialize the harm caused by sexual abuse. Certainly, child sexual abuse can have devastating consequences, especially when perpetrated over a long term by a family member.[13] However, it will be helpful to remember that children may be harmed in many different ways, only some of which are sexual in nature. Sexual abuse seems to lend itself to overreactions and moral panics that arguably do as much harm as good,[14] while other pressing issues related to the welfare of children (such as violence and poverty, to name only two) elicit comparatively little in the way of social response. Psychological research suggests that in many instances other forms of child maltreatment—for example, physical abuse and neglect—may

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13. For a good discussion of the sexual abuse literature and its strengths and limitations, see Penelope K. Trickett & Frank W. Putnam, *Developmental Consequences of Child Sexual Abuse*, *in* VIOLENCE AGAINST CHILDREN IN THE FAMILY AND THE COMMUNITY 39, 39-57 (Penelope K. Trickett & Cynthia J. Schellenbach eds., 1998) (noting that the variables most consistently associated with adverse impact are duration, force, and father figure as perpetrator but that the data are not universal).

14. The term "moral panic" is taken from a book of the same title by historian Philip Jenkins. PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA (1998). He borrows it from British sociologists Stanley Cohen and Stuart Hall, who defined it as a wave of irrational public fear

> when the official reaction to a person, groups of persons or series of events is *out of all proportion* to the actual threat offered, when 'experts' . . . *perceive* the threat in all but identical terms, and appear to talk 'with one voice' of rates, diagnoses, prognoses and solutions, when the media representations universally stress 'sudden and dramatic' increases (in numbers involved or events) and 'novelty', above and beyond that which a sober, realistic appraisal could sustain.

STUART HALL ET AL., POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER 16 (1978). Jenkins notes that, in response to such panics as they erupt around the issue of child abuse, "lawmakers implement policies that may cause harm in areas having nothing to do with the original problem and that divert resources away from measures which might genuinely assist in protecting children." JENKINS, *supra*, at 7. I differentiate my approach from Jenkins's by assuming that sexual abuse is not just a social construct but also an existential experience that causes real suffering.

have consequences that are *as* damaging if not *more* damaging than child sexual abuse.[15] Yet evidence on the long-term harmful effects of violence has not been as readily translated into law and policy as that related to sex. Since in the day-to-day work of child protection the great bulk of the caseload is made up of more mundane cases of neglect and physical abuse,[16] there is reason to believe that the law is doing a disservice to children in not taking violence and neglect as seriously as it takes sex. To the extent that the legal exceptionalism that surrounds child sexual abuse has contributed to this outcome, it needs to be subjected to critical scrutiny. Childhood is a complex, multifaceted experience, and sexual innocence is only one—and perhaps not the most central—of its components.

Part I of this article examines the origins of this doctrine by looking at how legal commentators drew on feminist and psychotherapeutic literature from the incest survivor movement in developing a new theory by means of which adult survivors of sexual abuse could overcome the statute of limitations. Part II traces how this theory was incorporated into case law and statutes. Part III critically examines the three most common justifications for the judicial and legislative choice to extend the discovery rule uniquely to sexual abuse cases and evaluates their strengths and weaknesses. Evidence suggests that other forms of maltreatment may be as damaging or, in some cases, more damaging than sexual abuse. Part IV looks at deeper historical roots and argues that the belief that child sexual abuse is uniquely harmful takes much of its force from deeper cultural roots, the symptoms of which are recurring narrative structures where childhood sexuality is linked with adult mental pathology. Part V considers the future of the doctrine in light of the preceding analyses.

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15. *See, e.g.*, Barbara K. Luntz & Cathy Spatz Widom, *Antisocial Personality Disorder in Abused and Neglected Children Grown Up*, 151 AM. J. PSYCHIATRY 670 (1994); Robin Malinosky-Rummell & David J. Hansen, *Long-Term Consequences of Childhood Physical Abuse*, 114 PSYCHOL. BULL. 68 (1993).

16. In 1996, substantiated reports of child abuse and neglect cases broke down as follows: neglect 58 percent, physical abuse 22 percent, sexual abuse 12 percent, and emotional maltreatment 6 percent. JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT 8 (1998) (citing NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, CHILD MALTREATMENT 1996: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM (1998)).

I. Historical Context: The Incest Survivor Movement and Legal Discourse

To understand how the delayed discovery rule came to be used uniquely in child sexual abuse cases, we have to begin by looking at how victims, feminists, and their legal and psychotherapeutic advocates began to tell a deeply compelling story about child sexual abuse that eventually led to demands for changes in the law. This story of child sexual abuse and its long-term developmental harm began to emerge haltingly, out of genuine experiences painfully recounted in consciousness-raising groups in the late 1960s and early 1970s and then later in rape crisis centers. Over time, however, it became more formalized and even eventually packaged for audiences of Hollywood films. How this story emerged, became a normative cultural narrative, and gradually made its way into legal discourse is the subject of this section.[17]

In laying out the issues, it will help if we start with a film vignette that neatly illustrates the key elements in this story. I choose an example from popular culture in order to suggest the constitutive role of culture in the social and legal understanding of child sexual abuse.

The courtroom drama *Nuts* (1987) stars Barbra Streisand as Claudia Draper, a high-class prostitute, and Richard Dreyfuss as Aaron Levinsky, the public defender assigned to represent her in a competency hearing that will decide if she is fit to stand trial for manslaughter. Draper is a nightmare client. Antisocial, aggressive, paranoid, seductive, hostile, "with a tendency to inappropriate humor," she engages in a stream of provocative commentary in the courtroom that makes everyone doubt whether she can assist in her own defense. For many, her participation in the old-

17. A normative narrative is any cultural narrative that emerges to exemplify important cultural values, such as the narrative that successful adulthood includes true love, marriage, and family, or the "rags to riches" story of the poor boy who becomes a self-made man. As Karen Sánchez-Eppler observes, "[n]arrative formulas index cultural obsessions." Karen Sánchez-Eppler, *Temperance in the Bed of a Child: Incest and Social Order in Nineteenth-Century America*, 47 AM. Q. 1, 1 (1995). Most normative narratives are "positive," utopian narratives, embodying ideals to aspire to, but with the emergence of "trauma" as a governing trope of the second half of the twentieth century, such narratives are increasingly "negative" and dystopian. Normative narratives exert a gravitational pull and provide a means to organize the chaos of the multiple, fragmented, and often conflicting stories that we all tell in the course of daily life; but naturally, in so doing, they also simplify and reduce the deep complexities that lend every life its small touch of unfathomable mystery.

est profession in the world is prima facie evidence that she is "nuts." As the prison psychiatrist says, "She's not a girl from the streets. She's a bright, upper class girl who couldn't cope, broke down." It turns out, of course, that things are not that simple. In the course of cross-examining her stepfather, Levinsky flails around for an angle. Her stepfather has been portraying Claudia as a child who was always troubled after being abandoned by her natural father and who never fully returned her stepfather's love and care. "But you replaced [the loss of her father] with something much more substantial," notes Levinsky, who concludes, "Something doesn't make sense here." A moment later, the secret tumbles out: Claudia's respectable stepfather sexually abused her. Sexual abuse is what "explains" Claudia—her hostility ("I got a lot to be angry about"), her paranoia (turns out she has good reason to think everyone would like her to be "nuts"), even her prostitution (her stepfather's use of money as an inducement appears to have "groomed" her for exchanging sexual favors for cash). When the prosecuting attorney for the state puts Claudia on the stand, he questions why she has no children. As the camera focuses in for a close-up, Claudia looks at him penetratingly and says, "Because I don't believe in childhood."

Nuts brings together three crucial themes that reappear in the cultural and legal discourse on the discovery doctrine: 1) a woman with a mental illness or (more correctly) putative mental illness; 2) a secret from her past that "explains" her otherwise inexplicable behavior; and 3) the characterization of that secret as the absence of the experience of childhood, considered necessary for the formation of adulthood. In the 1980s and 1990s, a sexual abuse diagnosis came to have a powerful explanatory power. In an essay entitled, "Now Everything Makes Sense!," Donna Wyckoff argues that stories of repressed memories of sexual abuse appealed to women who needed something to ameliorate the stigma of failing to live up to society's expectations.[18] But as *Nuts* makes clear, sexual abuse explained not just the social failure to "have it all," but something rather more loaded; mental illness. The issue of childhood sexual abuse had a re-

18. American women, Wyckoff argues, are expected to be everything American men are expected to be ("knowledgeable, capable, talented, successful in both their professional and personal lives" and so on) and *in addition* be "all this *and* good looking, well-groomed, sexy, a competent hostess, and a nurturing care-giver." Donna Wyckoff, *'Now Everything Makes Sense!': Complicating the Contemporary Legend Picture*, *in* CONTEMPORARY LEGEND: A READER 363, 371 (Gillian Bennett & Paul Smith eds., 1996).

markable impact on the mental health profession when packaged with a feminist critique of how the male-dominated profession of psychiatry, under the influence of Freud and psychoanalysis, had systematically dismissed women's and girls' reports of sexual violation in childhood. As a result of that critique, psychotherapists for a time focused enormous attention on sexual abuse, which became seen as the psychological equivalent of the Rosetta Stone, a key able to unlock the mystery of women's pathology and self-destructive behavior. Combined with the idea of repression, the idea that traumatic memories may not be fully accessible to consciousness, this focus on sexual abuse led to what many felt was a problematic therapeutic trend of "reasoning-backward" from manifest symptoms to the cause of causes, sexual abuse.

Background: Child Abuse Reporting Laws

Though novel, the story of sexual abuse told by victims was not entirely unprecedented. We can better understand its explanatory power if we look at its emergence against the background of the modern social movement to bring attention to child abuse and neglect.

After some attention in the nineteenth century, child abuse and neglect disappeared from public awareness. During the post-war years, a number of pediatric radiologists began to gather information about the causes of long bone fractures and other signs of physical trauma in children observed in emergency room X-rays. Although the parents generally had innocent explanations for how the children's injuries occurred, radiologists began to suspect that the parents were lying as X-rays revealed evidence of old injuries.[19] In 1962, Dr. C. Henry Kempe and colleagues published an article in the *Journal of the American Medical Association* entitled "The Battered Child Syndrome" which, along with an editorial on the same subject, "caused a storm in medical circles and in the mass media as well. Indeed, the article and editorial are routinely used to date the rediscovery of abuse."[20] While the article's definition of child abuse as "intentionally" inflicted "acts of physical violence that produce diagnosable injuries" would soon be regarded as much too nar-

19. Stephen J. Pfohl, *The 'Discovery'of 'Child Abuse'*, 24 SOC. PROBS. 310, 315-16 (1977).

20. BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 58 (1984).

row, acceptance of the "syndrome" and the need to do something about it was immediate and startling. Within four years, every state and the District of Columbia had passed some version of a mandatory child battering reporting requirement.[21]

Attention to child abuse formed a small part of the 1960s civil rights movement that was highlighting the denial of rights and other legal protections to blacks, Hispanics, Native Americans, women and other un-represented or voiceless groups. A growing children's rights movement claimed victory in one of the decade's most important Supreme Court cases, *In re Gault* (1967), when the United States Supreme Court was persuaded to grant children due process rights in juvenile courts.[22] In 1974, under the stewardship of Minnesota Senator Walter Mondale, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA). That legislation established a national Center on Child Abuse and Neglect, allocated $86 million in federal funds for research and demonstration projects, and induced the states to significantly broaden the scope of reporting requirements. So swift was compliance with CAPTA that within four years, forty-three states, the District of Columbia, Puerto Rico, Guam, and American Samoa qualified for federal funding.[23]

The new reporting laws did not specifically focus on child sexual abuse. Child abuse reporting laws helped to raise con-

21. Later amended, these laws conventionally required physicians, therapists, teachers, police, and others who came into contact with children to inform the state, usually by notice to the state child protection agency, of children who were thought to be subject to, or at risk of, abuse or neglect. Friends, neighbors, and relatives were encouraged, though not required, to report. Reporters were held immune from liability as long as they reported; failure to report, on the other hand, was a violation of law, and often a crime. *See, e.g.*, CAL. PENAL CODE §§ 11166(a)-(b), 11165.7(a) (West 2003); N.Y. SOC. SERV. LAW § 413(1) (McKinney 2002); TEX. FAM. CODE ANN. §§ 261.101(a)-(c), 261.102 (Vernon 2002).

22. *In re* Gault, 387 U.S. 1 (1967).

23. Douglas J. Besharov, *'Doing Something' About Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 HARV. J.L. & PUB. POL'Y 539, 544 (1985). As a consequence of these changes, reported cases of every type of child abuse increased dramatically. "In 1963, approximately 150,000 children came to the attention of public authorities because of suspected abuse or neglect. By 1972, an estimated 610,000 children were reported annually. And, in 1982, more than 1.3 million children were reported." *Id.* at 545. Since 1976 the number of cases reported to child protective services has been increasing at an "annual compound rate" of 10% per year. MURRAY A. STRAUS & RICHARD J. GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES 8 (1990). From 1976 to 1990, the total reported incidents of child maltreatment quadrupled. NATIONAL RESEARCH COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT 78 (1993).

sciousness about the plight of abused children, but most of those who advocated on behalf of social and legal change thought that physical abuse, not sexual abuse, was the root of the problem. This began to change as the sentiments that gave rise to CAPTA began to converge with feminism. In the years after CAPTA's passage, child sexual abuse reports increased faster than any other category of child abuse reports.[24]

Emergence of the Feminist-Psychotherapeutic Normative Narrative

Though it drew on the energy resulting from CAPTA, the effort to call attention to the difficulties faced by victims in later adulthood, usually called the "incest-survivor" or "adult survivor" movement, emerged from distinctly different locations—namely, feminism and psychotherapy. The key difference between how advocates on behalf of the "battered child" (mostly medical doctors) and those on behalf of the sexually-abused child (mostly feminists and psychotherapists) constructed the types of child abuse in which they were respectively interested would lie in the developmental implications. For the most part, advocates on behalf of the "battered child" did not trace the full impact of battery on the child's later mental health.[25] If anything, it was believed that a "cycle of violence" existed and that battered children would grow up to become batterers rather than victims. But for feminists and psychotherapists, sexual abuse imperiled the development of the child at every level. Child sexual abuse was seen as the cause of psychopathology, behavioral dysfunction, drug addiction, relationship failure, and the general inability to acquire a coherent sense of identity.

The normative narrative that developed to tell the story of child sexual abuse has several key elements that run through

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24. In 1976, official estimate of the rate of child sexual abuse in the general population was 0.86 per 10,000. In 1986, that rate was estimated at 20.89 children per 10,000, an increase of almost 200%. NATIONAL RESEARCH COUNCIL, *supra* note 23, at 79.

25. For example, in her testimony before the Senate Subcommittee on Children and Youth in the hearings prior to CAPTA,

> Jolly K. "told [the committee] that she herself had been beaten as a child, in much the same manner as she had beaten her daughter. She did not disclose, however, a childhood scarred by abandonment, rape, foster homes, juvenile halls, and repeated delinquency, and a young womanhood of drifting, prostitution, bad marriages, and attempted suicide."

NELSON, *supra* note 20, at 105.

both feminist and psychotherapeutic analyses of sexual abuse (even though differences between such analyses also exist): victims of childhood sexual abuse are most likely to be girls abused by their biological fathers in middle-class homes. This narrative had its first origins in the radical feminist movement of the late 1960s, when women formed informal, small-group discussion groups to talk about (and eventually develop a collective political analysis of) the experience of being a woman.[26] As this process became more formalized and was given the name "consciousness-raising," radical feminists began to focus on sexual violence, especially rape, as the key to understanding women's political oppression. "Rape is Sexism taken to its Logical Conclusion" was the subtitle to the first chapter of the publication of the New York Radical Feminist Rape Conference of 1971.[27] As historian Elizabeth Pleck observes in her study of domestic violence in history, reports of wife-battering far exceeded those of rape in the early 1970s, but the radical feminist movement incorporated the issue of rape before that of wife-battering because "rape fitted more closely the radical feminists emphasis on the deliberate channeling of female sexuality into the service of male domination."[28]

The original insights by early radical feminists regarding female oppression and male sexual violence were later applied specifically to the issue of child sexual abuse, though few feminists fully appreciated at the time how important an issue sexual abuse would become. The seminal analysis was put forward by former social worker Florence Rush at the 1971 Rape Conference:

> [The] sexual abuse of children is permitted because it is an unspoken but prominent factor in socializing and preparing the female to accept a subordinate role; to feel guilty, ashamed, and to tolerate, through fear, the power exercised over her by men. . . . [T]he female's early sexual experiences prepare her to submit in later life to the adult forms of sexual abuse heaped on her by her boyfriend, her lover, and her husband. In short, the sexual abuse of female children is a pro-

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26. *See* NEW YORK RADICAL FEMINISTS, RAPE: THE FIRST SOURCEBOOK FOR WOMEN (Noreen Connell & Cassandra Wilson eds., 1974).

27. *Id.* at 1.

28. ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 180 (1987). Because women as a group appeared to be defined on the basis of their sexual characteristics, it seemed logical to assume that sexuality was the means by which they were oppressed, that the mark of the difference was the means of enforcing a hierarchical relation within the difference.

cess of education that prepares them to become the wives and mothers of America.[29]

As feminists set up rape crisis centers, they were surprised to find that many of the callers either were children or were calling about a rape that had occurred in childhood. Because of the response, sexual abuse began to assume a central place in feminist analysis, following the basic paradigm laid out by Rush. Later feminists elaborated Rush's basic points about the relation of child sexual abuse to patriarchy in such works as *Kiss Daddy Goodnight* and *Father-Daughter Incest*.[30] Father-daughter incest emerged as a paradigm of male power, a literal expression of the patriarchal organization of society.

Feminists thus contributed to the "exceptionalism" surrounding child sexual abuse by locating it on a continuum with sexual violence against adult women rather than on a continuum with other forms of child abuse. Other forms of child abuse—boys beaten by fathers, girls neglected by mothers—that did not conform to this story were not illuminated by the feminist analysis and did not show up on the map. Historian Linda Gordon notes that the second wave of feminism, unlike the first, "has not significantly influenced child welfare debates or policies,"[31] in part because looking at other forms of child abuse implicates mothers as well as fathers and presents feminist theorists with more complicated scenarios in which women are simultaneously "victims and victimizers, dependent and depended on, weak and powerful."[32]

The feminist narrative about incest was deeply motivated by an ideological desire, partly supported by data, to reverse class

29. Florence Rush, *The Sexual Abuse of Children: A Feminist Point of View*, *in* New York Radical Feminists, *supra* note 26, at 64, 73-74.

30. Louise Armstrong, Kiss Daddy Goodnight (1978); Judith Lewis Herman, Father-Daughter Incest (1981), *see also* Sandra Butler, Conspiracy of Silence: The Trauma of Incest (1978); Florence Rush, The Best-Kept Secret: Sexual Abuse of Children (1980). *The Best-Kept Secret* and *Conspiracy of Silence* have a *subtextual* emphasis on father-daughter incest. Father-daughter incest is the only specific form of sexual abuse that merits an individual chapter devoted to its discussion in The Best-Kept Secret. While Butler does not devote a separate chapter of Conspiracy of Silence to father-daughter incest, the great majority of the examples she gives in *every* chapter concern biological fathers.

31. Linda Gordon, *Family Violence, Feminism, and Social Control*, *in* Rethinking the Family: Some Thinking the Family: Some Feminist Questions 262, 269 (Barrie Thorne & Marilyn Yalom eds., 1992).

32. *Id.* at 267. "Defending women against male violence is so urgent that we fear women's loss of status as deserving, political 'victims' if we acknowledge women's own aggressions." *Id.*

stereotypes about child sexual abuse, particularly incest. The general stereotype about incest that prevailed before feminism took up the issue was that incest was a behavior concentrated in poor and minority families.[33] Though recognizing that incest affected all races and all classes, feminists drew particular attention to child sexual abuse in white, middle-class families and argued that it had been particularly denied there in order to preserve middle-class respectability and class privilege.[34] Feminists found a particularly egregious example of this in Freud's work. They angrily rejected Freudian psychoanalysis and instead called attention to an earlier theory—the "seduction theory"—in which Freud had traced back neurotic symptoms in his patients to instances of sexual assault (supposedly) carried out by their fathers.[35] Pointing out that the reasons Freud gave for subsequently abandoning the theory in favor of the idea that these sexual scenes were really "fantasies" suggested denial about his patients' "respectable" fathers, feminists dubbed the whole episode "the Freudian cover-up."[36]

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33. *See, e.g.*, S. KIRSON WEINBERG, INCEST BEHAVIOR (1955).

34. The desire of feminists to lay incest at the bedroom door of middle-class men was backed up by research in the area of child sexual abuse, most of which did not confirm the notion that incest is generally more prevalent in the lower classes and "other" racial or ethnic groups. In the first contemporary new study (based on a clinical sample), Karin Meiselman found only that "black patients are slightly *under*represented in the incest group, while patients of Latin American background are somewhat overrepresented." KAREN C. MEISELMAN, INCEST: A PSYCHOLOGICAL STUDY OF CAUSES AND EFFECTS WITH TREATMENT RECOMMENDATIONS 82 (1978). The most important recent study resoundingly disconfirmed previous class prejudices about incest. The conclusions were that, depending on how class is calculated, incest is either *evenly* distributed over the class spectrum (classless) or it is relatively *more frequent* in the middle- and upper-classes. DIANA E. H. RUSSELL, THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN 105-10 (1986). Russell even went so far as to list "high-income background" as a "risk factor" in incest. *Id.* at 114.

35. *See* SIGMUND FREUD & JOSEF BREUER, STUDIES ON HYSTERIA (James Strachey trans. & ed., 1957) (1895). Freud later theorized the research in an essay, *The Aetiology of Hysteria*, where he said that in tracing neurotic symptoms back to "premature sexual experience," he had found the "caput Nili [source of the Nile] in neuropathology." Sigmund Freud, *The Aetiology of Hysteria* 272 (James Strachey trans., 1896), *reprinted in* JEFFREY MOUSSAIEFF MASSON, THE ASSAULT ON TRUTH (1981). Though feminists hated the Freud of psychoanalysis, they loved the Freud of the seduction theory. Judith Herman praised *The Aetiology of Hysteria* as "a brilliant, compassionate, eloquently argued, closely reasoned document." JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 13 (1992).

36. This phrase was coined by Florence Rush, the first feminist to denounce Freud for rejecting the seduction theory. RUSH, *supra* note 30, at 80-104; *see also* JEFFREY MOUSSAIEFF MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY (1984).

The powerful feminist story of incest might have remained cordoned off in the relative confines of the feminist movement had it not been "mainstreamed" by being coupled with a therapeutic discourse and popularized by handbooks on "recovery." The bridge between feminism and psychotherapy was laid down in the 1980s when the feminist criticism of Freud coincided with significant developments in the field of psychiatry. The post-Vietnam War period and the re-entry of veterans into American society had sparked the interest of psychotherapists in the study of psychological "trauma."[37] This interest was soon boosted by a new theoretical departure taken by the field of psychiatry. When the American Psychiatric Association revised its official nosology, the *Diagnostic and Statistical Manual of Mental Disorders*, in a third edition (DSM-III), the field shifted away from the "biopsychosocial" model, which had dominated American psychiatry from the end of World War II, towards a bio-medical model oriented toward pharmacological interventions.[38] The new DSM-III was intended to be "descriptive" and "a-theoretical"—i.e., providing practitioners with detailed differential descriptions of symptom "clusters," but saying little about etiology, the process by means of which symptoms came into being. At the same time, a new category was introduced—post-traumatic stress disorder—which caught the imagination of a generation of researchers and

37. The first DSM, published in 1952, contained a category called "Gross Stress Reaction," described as a temporary condition resulting from conditions of extreme external stress. The description of Gross Stress Reaction (GSR) stipulated that "[t]his diagnosis is justified only in situations in which the individual has been exposed to severe physical demands or extreme emotional stress, such as in combat or in civilian catastrophe." John P. Wilson, *The Historical Evolution of PTSD Diagnostic Criteria: From Freud to DSM-IV*, 7 J. TRAUMATIC STRESS 681, 688 (1994). In the Second Edition of the DSM, Gross Stress Reaction was subsumed into the vaguer "Adjustment Reactions of Adult Life" and the listing of specific examples that made the potential traumatic nature of this diagnosis clear were relegated to an appendix. *Id.* at 690. When therapists working with veterans learned that the APA planned "no change" in the revised edition of DSM scheduled for 1980 with respect to stress disorders, veterans and therapists began to lobby the APA to recognize a "post-Vietnam Syndrome," characterized by "guilt, rage, the feeling of being scapegoated, psychic numbing, and alienation." *See* WILBUR J. SCOTT, THE POLITICS OF READJUSTMENT: VIETNAM VETERANS SINCE THE WAR (1993); Wilbur J. Scott, *PTSD in DSM-III: A Case in the Politics of Diagnosis and Disease*, 37 SOC. PROBS. 294, 301-04 (1990).

38. The goal was to standardize diagnostic criteria to make it easier for psychiatry to compete more successfully against other medical fields for reduced government funding. For a more detailed account of this shift, see Mitchell Wilson, *DSM-III and the Transformation of American Psychiatry: A History*, 150 AM. J. PSYCHIATRY 399 (1993). DSM-III eliminated most references to "neurosis." *Id.* at 407.

therapists. In the mainly "descriptive" DSM-III, PTSD stood out among other disorders as being one of the few where symptoms were linked with external causes. The new diagnosis of PTSD thus attracted many therapists and researchers who were frustrated with the "medicalization" of the field.

Working in the area of trauma studies enabled feminist psychiatrists like Judith Herman to link the feminist critique of Freud with the work of Pierre Janet. Janet had been an illustrious contemporary of Freud, but his work with trauma victims had fallen into obscurity, only to be rediscovered in the early 1970s when trauma therapists were looking to develop a theoretical model.[39] The revival of Janet led to the emergence of a new theory—dissociation—to explain the mind's reaction to trauma. In dissociation (often the term repression was used interchangeably, but the theory is somewhat different),[40] the mind is so overloaded by the trauma that it fails to integrate the experience with normal consciousness and in effect stores it elsewhere in the brain in an alternative stratum of consciousness.[41] The contribution of feminists was to theorize that sexual abuse was the childhood trauma most likely to give rise to this reaction.[42]

As a result of being fused with trauma theory, the feminist story of child sexual abuse was modified, so as to include the psychological "repression" or "blocking out" of the abuse. This emphasis on repression turned out to contribute a critical element, dovetailing nicely with the feminist emphasis on white middle-class families; it came to seem that the very "respectability" of the middle-class family might lead the family to completely deny that abuse was taking place, thus making it harder for the victim to incorporate the abuse into her memories. The new normative narrative—which we might call the feminist-psy-

39. As Henri F. Ellenberger recounts in HENRI F. ELLENBERGER, THE DISCOVERY OF THE UNCONSCIOUS: THE HISTORY AND EVOLUTION OF DYNAMIC PSYCHIATRY 331-417 (1970), Janet actually preceded Freud in founding a system of dynamic psychology and looking at psychological trauma as a source of emotional disturbance.

40. Because the terms are conflated in common usage and because the theoretical difference is immaterial to my analysis, I will use "repression" for convenience.

41. For a discussion of dissociation, see Etzel Cardana, *The Domain of Dissociation*, *in* DISSOCIATION: CLINICAL AND THEORETICAL PERSPECTIVES 15 (Steven Jay Lynn & Judith W. Rhue eds., 1994).

42. *See, e.g.*, JUDITH L. ALPERT ET AL., AMERICAN PSYCHOLOGICAL ASSOCIATION, WORKING GROUP ON INVESTIGATION OF MEMORIES OF CHILDHOOD ABUSE, FINAL REPORT 54 (1996). "[S]evere forms of child sexual abuse seem *especially conducive* to negative disturbances of memory." *Id.* (emphasis added).

chotherapeutic narrative—went like this: father abuses daughter in white middle-class home; daughter represses abuse because of the terror of the abuse itself and because everyone around her is denying that it is happening; because of the abuse, daughter develops a wide array of symptoms; she enters therapy with a sympathetic therapist and begins to heal. The link between child sexual abuse and psychopathology (and the entire narrative just described) was popularized in "checklists" for victims (or potential victims) found in recovery handbooks inviting readers to self-diagnose: "Do you find that you have many of the symptoms on this list?" asks E. Sue Blume in *Secret Survivors*. "You may be a victim of incest."[43] Since the list included everything from panic attacks to gagging on a toothbrush, sexual abuse seemed a key to unlocking the mystery of female emotional suffering.[44] Combined with the idea of repression, checklists introduced a "reversed" logic into incest-survivor discourse that encouraged victims (or anyone suffering from a broad array of symptoms) to reason backward from effects to causes. If you have the symptoms, you could be a victim, even if you have no memories.

The Discovery Rule and Child Sexual Abuse

As these developments were going on in the early 1980s, several obstacles stood in the way of successful prosecutions of childhood sexual abuse crimes. Although child molestation and incest had been classified as criminal offenses for some time, the statutes had never been easy to enforce. Prosecuting attorneys

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43. E. SUE BLUME, SECRET SURVIVORS n.p. (1990); *see also* ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE 39-41 (3d ed. 1994). A chapter entitled "Effects: Recognizing the Damage" asks readers:

> * Do you have a sense of your own interests, talents, or goals?
> * Do you use work or accomplishments to compensate for inadequate feelings in other parts of your life?
> * Do you ever use alcohol, drugs, or food in a way that concerns you?
> * Do you find that your relationships just don't work out?
> * Do you expect people to leave you?

Id. at 38.

In the most recent edition, Bass and Davis have added a side-bar cautioning that these lists "are not a diagnostic tool and are not intended to serve as a way to determine whether or not you've been sexually abused." *Id.* Nevertheless, readers recognizing themselves in the lists are advised not to "feel you need to label yourself as a survivor *before you're ready*." *Id.* (emphasis added).

44. Probably no line from any self-help book has been more quoted than this from *The Courage to Heal*: "If you think you were abused and your life shows the symptoms, then you were." *Id.* at 22.

were often reluctant to bring criminal cases in this area, and victims did not necessarily want to see the offenders, often family members, imprisoned. Advocates for victims turned increasingly to the civil courts, with their less stringent burden of proof, as providing another avenue of recourse and the possibility of financial compensation. Recovered memory cases were generally civil suits, with the claims involving the traditional torts of assault, battery, and intentional and negligent infliction of emotional distress.[45]

Civil suits by adult children brought against sexual abuse perpetrators entailed additional, serious legal hurdles. In the early 1980s, the statute of limitations for the torts under which child sexual abuse claims were usually brought was one to three years on average,[46] although it was sometimes "tolled" until the victim reached the age of majority. Consequently, as victims began exploring the potential for redress that the legal system might offer, they soon confronted the problem that in many cases the statute of limitations (even if tolled until majority) had run out.

In trying to think of ways that victims could get around these legal hurdles, plaintiffs' lawyers turned to the discovery rule, the legal exception that allows the statute of limitations to begin to accrue not from the date of legal injury (or even the date of majority) but from the date the plaintiff "discovers or reasonably could have discovered her cause of action"—in other words, from the date the plaintiff became *aware* of her injuries and their source. Classic examples of the types of cases the discovery rule was devised to address are a malpractice suit where a sponge was not removed from a patient's abdomen after surgery or a worker's compensation suit where an employee developed lung cancer long after being exposed to asbestos. If one accepted the premises of the recovered memory argument, it epitomized neatly the problem that the discovery rule was designed to address.[47]

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45. Margaret J. Allen, Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U.L. REV. 609 (1983).

46. Gregory G. Gordon, Comment, *Adult Survivors of Childhood Sexual Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule*, 20 PEPP. L. REV. 1359, 1371, n.79 (1993).

47. In some states, plaintiff's attorneys invoked laws that toll the statute of limitations for reasons of "insanity" or "disability" or because of a theory of "estoppel" related to the defendant's actions in preventing the plaintiff from bringing a claim. Though these alternative theories were on the whole less persuasive with judges,

To understand how the law in this area evolved and how the feminist-psychotherapeutic narrative about child sexual abuse was incorporated into legal reasoning, it is first necessary to briefly review the policy justifications for both statutes of limitations and the discovery rule.

The statute of limitations is a procedural safeguard designed to ensure the accuracy and fairness of the judicial process. According to the Supreme Court, it represents "a pervasive legal judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time, and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."[48] Statutes of limitations are statutes of repose, generally intended to protect defendants and the judicial process "from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise."[49] Though statutes of limitations are "found and [approved] in all systems of enlightened jurisprudence,"[50] they are not constitutionally guaranteed and amount to a considered decision on the part of a legislature taking into account such things as the quality of the evidence, the nature and severity of the crime, and need to deter inefficient anticipatory lawsuits.

Given that the strict operation of the statute of limitations may sometimes be harsh if the plaintiff, through no fault of his own, is unable to discover his injury, states have evolved statutory, or in some cases common law, discovery rules that toll the statutes of limitations until the plaintiff becomes aware of all the elements of the tort committed against him. In *Urie v. Thompson*, the Supreme Court recognized the discovery rule in the case of a railroad employee who developed asbestosis after years of exposure to asbestos on the job. In response to arguments by the railroad that the statute of limitations should bar the suit, either because Urie should have known he was ill before he became incapacitated or because each breath of asbestos created a new cause of action, the Court concluded, "We do not think the humane legislative plan intended such consequences to attach to

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they were based on a similar rationale and had similar results—i.e., overcoming the statute of limitations.

48. R.R. Tel. v. Ry. Express Agency, 321 U.S. 342, 349 (1944).

49. United States v. Kubrick, 444 U.S. 111, 117 (1979).

50. *Id.* (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)).

blameless ignorance."[51] Because the statute of limitations is designed to protect defendants against "stale" claims and thus aid the courts in producing fair and accurate trials, the discovery rule is usually invoked only where the risk of injustice resulting from barring the claim is greater than the risk of allowing it—less reliable evidence, unavailability of witnesses, distortions in memory.[52]

In view of these competing policy considerations, most states use a balancing test in determining when to use the discovery rule. Illinois, for example, "balanc[es] the increase[d] difficulty of proof which accompanies the passage of time against the hardship to the plaintiff who neither knows or [sic] should have known of the existence of this right to sue."[53] Wisconsin does much the same:

> On the one hand, we are concerned with allowing tort victims a fair opportunity to enforce legitimate claims against wrongdoers. On the other hand, we are concerned with protecting defendants from having to defend against stale claims, where so much time has passed between the allegedly tortious act and the filing of the claim that witnesses and relevant evidence may be unavailable.[54]

The argument that the discovery rule should be applied in child sexual abuse cases began to evolve as legal commentators absorbed the prolific feminist literature on incest written in the 1970s and considered its legal implications . The use of the discovery rule in child sexual abuse cases required a conceptual leap from the traditional exceptions to which the discovery rule had been applied. Important law review comments published in the mid-1980s made the argument that the delayed discovery rule should be applied in these cases by analogizing from situations where the discovery rule had traditionally been applied. A comment in the Harvard Women's Law Journal, for example, took the phrase "blameless ignorance" from *Urie v. Thompson* and linked it with the idea of the "conspiracy of silence" surrounding child sexual abuse, enumerating the various reasons (threats, coercion, guilt) why the victim of incest was likely to keep the se-

51. Urie v. Thompson, 337 U.S. 163, 170 (1949).

52. Tyson v. Tyson, 727 P.2d 226, 228 (Wash. 1986) (citing U.S. Oil & Ref. Co. v. Dep't of Ecology, 633 P.2d 1329 (Wash. 1981)).

53. Johnson v. Johnson, 701 F. Supp. 1363, 1369 (N.D. Ill. 1988); *see also* Rozny v. Marnul, 250 N.E.2d. 656 (Ill. 1969).

54. Doe v. Archdiocese of Milwaukee, 565 N.W.2d 94, 102 (Wis. 1997).

cret, blame herself, and misrecognize her injuries.[55] Noting that the rule that the date of accrual of a tort action is the date of the legal injury "developed against 'the relatively unsophisticated backdrop of barroom brawls, intersection collisions and slips and fall,'"[56] Salten, the author, explored several legal theories that might provide incest plaintiffs with greater flexibility—breach of trust and fraud, disability and insanity,[57] and delayed discovery as applied in medical malpractice suits and latent disease cases. Given the controversy that would surround recovered memory cases, it is significant that her argument assumed the incest survivor always remembered the abuse but had not been able to timely act on it.

Applying the theories to sexual abuse required Salten to draw analogies, the most powerful of which involved trust. Since causes of action based on fraud, breach of confidence, or mistake had their historical roots in equity, they were originally governed by the flexible concept of laches; at law, courts frequently held on equitable grounds that the plaintiff's cause did not begin to accrue until the moment of discovery of injury.[58] Incest is like breach of fiduciary duty, Salten argued, because "the typical child victim of incest . . . is unequipped to distinguish between a legitimate exercise of parental control and a breach of parental duty . . . . She should not be required to infer tortious injury from her own dissatisfaction with parental behavior."[59] Where "substantial" trust exists, courts will often "imply a duty to disclose essential information," thus creating the legal concept of "constructive" trust.[60] In forcing obedience to his criminal demands, Salten pointed out, the incestuous father "necessarily fails to communicate essential information regarding both [his

55. Melissa G. Salten, Comment, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 196-199 (1984). The linkage is effected in the heading "Silence and Blameless Ignorance" of a section laying out the reasons why incest victims may be unable to recognize their injuries. *Id.*

56. *Id.* at 207 (citing Martinez-Ferrer v. Richardson-Merrell, Inc., 164 Cal. Rptr. 591 (Ct. App. 1980)).

57. The author suggested that the insanity theory should be used with caution because of its stigmatizing effect on the plaintiff. *Id.* at 212.

58. *Id.* at 208.

59. *Id.* at 209. That the paradigmatic incest case, from this author's perspective, involves father-daughter incest is evident from the epigraph of Shakespeare's *Hamlet*: "I have a daughter: have, while she is mine." WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2.

60. Salten, *supra* note 55, at 210.

daughter's] legally protected interests and the limitations placed upon his own rights."[61]

Finally, she noted that modern courts have moved in the direction of expanded use of the discovery rule in cases where the plaintiff was "blamelessly ignorant" of her right to sue.[62] In this analysis, latent injury cases, such as asbestos cases like *Wilson v. Johns-Manville Sales Corp.*,[63] established the most promising precedent for child sexual abuse cases, since the court held that "neither the existence nor the prior detection of the earlier injury, on which no legal action had been taken, triggered the limitation period applicable to suit on the second injury."[64] The analogy with latent injury merged persuasively with Salten's arguments about fraud and breach of trust and made a powerful case for the discovery rule, because the rule is often used in both contexts. Other articles appearing around the same time incorporated feminist discourse to similar effect, amplifying the basic argument.[65]

II. Incorporating the Feminist-Psychotherapeutic Narrative: Case Law and Statutes

Tyson v. Tyson

The first case to reach the courts that raised the issue of the statute of limitations in child sexual abuse cases involving adult survivors was *Tyson v. Tyson*, decided in the Washington Supreme Court in 1986.[66] Tyson was dismissed by the court because the statute of limitations had expired and because the allegation did not rest, according to the majority, on "objective,

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61. *Id.*

62. Citing a federal court in California, Salten noted four instances when the discovery rule may be invoked: 1) where there is an extended period of exposure that results in a continuing injury; 2) when pathological effects occur without "perceptible trauma;" 3) when the plaintiff's ignorance results from the defendant's fraudulent concealment; and 4) when a person, though aware of the injury, has not yet discovered that the injury was caused by defendant's conduct or defective product. *Id.* at 216.

63. 684 F.2d 111 (D.C. Cir. 1982).

64. *Id.* at 118-20.

65. *See* Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191, 205 (1985) (noting that "[c]ourts require a lesser standard of diligence where informal confidential relationships exist than is required in legally established fiduciary relationships"); Allen, *supra* note 45.

66. 727 P.2d 226 (Wash. 1986).

verifiable evidence."[67] Faced with a novel suit, the court worried about the evidentiary concerns underlying the statute of limitations and the potential effects of such a suit "on our system of justice."[68] Reviewing previous Washington cases utilizing the delayed discovery rule, the court held that "objective, verifiable evidence" was required—for both the wrongful act and the "resulting physical injury"[69]—before the discovery rule could be employed. In contrast to a malpractice suit, the court concluded, the plaintiff's claim of sexual abuse and resultant injury rested on merely "a subjective assertion" that wrongful acts took place.[70] Although the court theoretically required "objective proof" of injury as well, it based its decision solely on doubts about the plaintiff's "subjective" discovery of the wrongful acts. "Psychology and psychiatry are imprecise disciplines," the court declared. "Unlike the biological sciences, their methods of investigation are primarily subjective and most of their findings are not based on physically observable evidence."[71] Relying on a single authority arguing that the psychoanalytic process itself might influence the narrative of the patient's past created in therapy, the court decided that the plaintiff could not possibly meet her burden and therefore granted summary judgment to the defendant.[72]

While the majority in *Tyson* found the conceptual leap between traditional uses of the delayed discovery exception and child sexual abuse cases a leap too difficult, the dissent proved

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67. *Id.* at 228. The dissent argued persuasively that "objective, verifiable evidence" had never been held to be a requirement in previous cases.

> Indeed, the nature of available evidence is simply one factor to be considered in balancing the harm to a defendant of being forced to defend a stale claim with the harm to a plaintiff of being deprived of a remedy. Fundamental fairness, not availability of objective evidence, has always been the linchpin of the discovery rule.

Id. at 231.

Tyson was overruled by a statute that does not have an "objective" provision, so this aspect of the decision is no longer in force. Ronald G. Donaldson, *Running of Limitations Against Action for Civil Damages for Sexual Abuse of Child*, 9 A.L.R.5th 321, 324 n.7 (1993).

68. *Tyson*, 727 P.2d at 227.

69. *Id.* at 228.

70. *Id.* at 229.

71. *Id.*

72. The one authority cited is Marianne Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331 (1985) (arguing that the psychoanalytic process can lead to a distortion of truth in the patient's life). The dissent points out that the majority's gloss misrepresents Wesson's argument. *Tyson*, 727 P.2d at 229.

more agile. Disturbed by the "summary manner" in which the majority dismissed "the enormous problem of child sexual abuse,"[73] Judge Pearson relied on the law review comments and the feminist-psychotherapeutic narrative discussed above in making what turned out to be an influential argument as to why the delayed discovery rule should apply in child sexual abuse cases. Following their lead, Judge Pearson invoked "trust" among several reasons to tip the balance in favor of allowing the plaintiff the benefit of the discovery rule. Referring to a prior case, he asked,

> If this court . . . found that breach of an adult client's trust by a professional was a deciding factor in applying the discovery rule in those cases, how can we now ignore breach of a child's trust by a father or other authority figure who exploits the child for sexual gratification?[74]

He prominently invoked the feminist-psychotherapeutic narrative in justifying his decision that "fundamental fairness compels us to extend the discovery rule to adults who suffered sexual abuse as children and then repressed that abuse,"[75] touching on all the main points of that narrative: as much as a third of the population has experienced some form of child sexual abuse; most cases involve family members, especially fathers; abuse usually begins when the victim is 8 or 9; the abuse occurs under the veil of secrecy; the victim will begin to "accommodate to the abuse," turning her distress against herself; because it is intolerable to acknowledge the abuse, the victim will "block[ ] out her experience for many years; [ ] as . . . an adult, she will . . . exhibit signs of incest trauma," including "sexual dysfunction, low self-esteem, poor capacity for self-protection, feelings of isolation, and an inability to form or maintain supportive relationships."[76] The narrative was crucial to his reasoning because it explained how the mechanism of repression works, and "[i]t is the repression which gives rise to the need for application of the discovery rule."[77]

Type I and Type II Cases

The earliest cases involving adult-survivors of child sexual abuse were matters of common law, in which courts had to de-

73. *Tyson*, 727 P.2d at 233.
74. *Id.* at 236.
75. *Id.* at 234.
76. *Id.*
77. *Id.*

cide whether or not the statute of limitations for personal injury torts barred the plaintiff's claim or whether the discovery rule applied. Before long, courts found that they were confronted with two distinctly different types of fact-patterns upon which the delayed discovery rule could conceivably be brought to bear—the first, where a victim *never* forgot that she had been abused but experienced a delay in either manifesting her injuries or understanding their causal connection to the abuse; the second, where a victim completely *repressed* her memories until some triggering event such as therapy brought them back. The former came to be called Type I cases and the latter Type II.[78] In Type I cases, "discovery" is a complicated, subtle process whereby the victim gradually makes the intellectual connection between her injuries and the events of her childhood. In Type II cases, "discovery" is the dramatic moment when flashbacks set in and memory returns, even if fragmentarily.

While some courts interpreted "discovery" to apply only to Type II cases, occasionally the Type I plaintiff prevailed. *Hammer v. Hammer*[79] is a Wisconsin case where the defendant never actually forgot a protracted period of abuse but claimed not to recognize the nature of her injuries or their cause until entering therapy.[80] In holding that the Wisconsin discovery rule for all

78. *Johnson v. Johnson*, 701 F. Supp. 1363 (N.D. Ill. 1988), introduced the Type I/Type II language and other courts soon adopted this terminology. The *Johnson* court's use of Type I/Type II ("type 1" and "type 2" in the decision) appears to refer to an internal distinction in the preceding paragraph.

> The cases which have been brought to date have fallen into two categories: (1) those where the Plaintiff claimed she knew about the sexual assaults at or before majority, but that she was unaware that other physical and psychological problems were caused by the prior sexual abuse; and (2) cases such as this one, where the Plaintiff claims due to the trauma of the experience she had no recollection or knowledge of the sexual abuse until shortly before she filed suit.

Id. at 1367. The case does not directly cite the work of psychologist Lenore Terr but she was responsible for introducing analogous language into trauma studies. In her typology, the Type I trauma is a single, catastrophic event and the traumatic memory thereof is typically indelible, characterized by intrusive, detailed recollections that occur involuntarily, whereas the Type II trauma is ongoing and repetitive, its memory structure characterized by "massive denial, repression, dissociation." Lenore Terr, *Childhood Traumas: An Outline and Overview*, 148 AM. J. PSYCHIATRY 10, 16 (1991). Though not precisely identical, her use of the Type I/Type II distinction maps onto legal use of the same language.

79. 418 N.W.2d 23 (Wis. Ct. App. 1987).

80. Laura S. Hammer alleged that her father, Warren J. Hammer, had sexually abused her on average three times weekly between the ages of five and fifteen and also had engaged in other behavior (such as blaming her and telling her the acts were not harmful) that caused her not to recognize her injury. *Id.* at 24-25. In 1985,

tort actions applied to incestuous abuse, the court relied on testimony by the plaintiff's therapist that touched on all the major points laid out in the law review comments cited in *Tyson*.[81] In *Hammer*, the court seems to have been most influenced by expert testimony by the plaintiff's therapist that the plaintiff manifested the "usually recognized symptoms of post-traumatic stress disorder in victims of intrafamilial sexual abuse,"[82] but it also quoted directly from the feminist law review comments discussed above in holding that protecting the parent at the expense of the child in sexual abuse cases "works an 'intolerable perversion of justice.'"[83] In *Osland v. Osland*, the North Dakota supreme court agreed with Judge Pearson's dissent in *Tyson* and the *Hammer* court's majority that "concern about the availability of objective evidence should not preclude application of the discovery rule."[84]

More typical, however, than the decisions in *Hammer* and *Osland* were decisions in California and Montana. In *DeRose v. Carswell*, a California court of appeals affirmed a lower court ruling that a step-grandchild was prohibited from filing suit 13 to 20 years after allegedly being abused by her step-grandfather.[85] DeRose had not forgotten the abuse. Indeed, she affirmed that the assaults "were all committed against [her] will and without her consent" and that at the times of said sexual molestation, she "felt great fear and acceded to [defendant's] acts due to her perceptions of his greater size and strength and his ability and intent to carry out his threats of harm."[86] Because of these stipulations, the court concluded that "the immediate harm caused by the alleged assaults gave DeRose a right to sue" at the time of the original injury but not later.[87] Whether or not all of the plain-

when she was 23, she became extremely distressed when her father sought custody of her minor sister and entered therapy, in the course of which she began to make the connection between her psychological problems and her father's abuse. *Id.* at 25.

81. Laura had not perceived the harmfulness of the incest because its long duration made it seem natural to her, her father imposed secrecy on her, the abuse made her think of herself as an object without rights, her father claimed the incest as his right, and abuse by an authority figure made her unwilling to trust other authority figures. *Id.*

82. *Id.*

83. *Id.* at 27.

84. 442 N.W.2d 907, 909 (N.D. 1989).

85. 242 Cal. Rptr. 368 (Ct. App. 1987).

86. *Id.* at 371.

87. *Id.*

tiff's injuries had manifested themselves, "[a]n assault . . . which by definition is perceived as unconsented to and offensive, causes harm as a matter of law."[88] The Montana supreme court held that neither the delayed discovery rule nor the doctrine of fraudulent concealment would toll the statute of limitations for a plaintiff who had corroboration that the alleged abuse had in fact occurred.[89] Not surprisingly, even in permitting Type I cases, courts frequently worried about violating the policies underlying the statute of limitations. A Pennsylvania court reasoned:

> In a case like this, where over two decades have passed since the alleged misconduct began, it is easy to imagine how witnesses could be deceased or become unavailable, memories could fade to black, or tangible evidence simply disappear. Stated more positively, precisely because cases like this present such serious issues, the fact finder should have the freshest and most reliable evidence from the maximum number of possible witnesses.[90]

Though hesitant to apply delayed discovery in Type I cases, courts proved to be more receptive to Type II cases, such cases more easily fitting the policy concerns delayed discovery was designed to address. Though the *Tyson* court had decided against a "Type II" plaintiff, the next important case raising the issue of repressed memories—*Johnson v. Johnson*, decided by an Illinois U.S. District Court in 1988—was decided in the plaintiff's

88. *Id.* In *Evans v. Eckelman*, 265 Cal. Rptr. 605 (Ct. App. 1990), the California Court of Appeal revisited the question and took a different approach to the Type I case, allowing that "blocking mechanisms" like "internalized shame, guilt, and self-blame" could prevent the plaintiff from understanding he or she had been wronged when the abuse occurred. *Id.* at 611. Thus, the moment of accrual could theoretically be defined as the moment the victim understood the *wrongfulness* of the act, not the moment when the victim understood the harm or connected the harm with the act:

> Even where memory of the events themselves is not suppressed, it may be some time before the victim can face the full impact of the acts . . . . Because of the youth and ignorance of the victims, as well as the unique duties and authority held by the parent, child sexual abuse by a parent or parental figure may in some cases be as effectively concealed from the victim as an underground trespass, a foreign object left in the body after surgery, or the abstruse errors made by a hired professional.

Id. at 609. *Evans* distinguished rather than overruled DeRose. *Id.* at 610-11.

89. E.W. v. D.C.H., 754 P.2d 817, 818 (Mont. 1988).

90. Messina v. Bonner, 813 F. Supp. 346, 349 (1993). In deciding the case, however, the court ultimately accepted the logic of the Type I argument but concluded that, notwithstanding, the record indicated that the plaintiffs had made the connection between the abuse and injury more than two years (the length of the applicable SOL) before filing suit. *Id.* at 350-51.

favor.[91] Adopting the reasoning of the dissent in *Tyson* and the majority in *Hammer*, the court concluded that Illinois law permitted application of the discovery rule to this context. In its view, *Hammer*'s holding encompassed *both* Type I and Type II cases, since the court referred to both "the discovery of injury *and the discovery of cause* component."[92] Importing an entire passage from *Tyson* that quotes directly from a number of legal sources incorporating the feminist-psychotherapeutic narrative, including Salten's comment, the court emphasized the gravity of incest ("a major social problem")[93] as a rationale for its decision. The court's reasoning implied the problem was so grave because sexual abuse so often involved father-daughter incest: "[When incest occurs] among family members, it has been estimated that 75 percent [of the cases] involve incest between father and daughter."[94] Since *Johnson v. Johnson* went on to become the leading case in adjudicating delayed discovery cases, it would be correct to say that Judge Pearson's dissent in *Tyson* eventually defined the majority rule.[95]

All this is not to say that because Type I cases were disfavored, Type II cases were always successful. In the absence of specific legislation, the Michigan Supreme Court decided that even Type II cases were clearly distinguishable from malpractice suits because they did not involve "objective" evidence (like the sponge in the stomach) typifying malpractice claims.[96] New York has an extremely limited discovery rule; as a result, neither Type I nor Type II cases have survived a motion for summary judgment.[97]

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91. 701 F. Supp. 1363 (N.D. Ill. 1988).

92. *Id.* at 1368.

93. *Id.* at 1370.

94. *Id.* (citing Phyllis Coleman, *Incest: A Proper Definition Reveals the Need for a Different Legal Response*, 49 MO. L. REV. 251, 251 n.1 (1984)).

95. *See* Mary D. v. John D., 264 Cal. Rptr. 633 (Ct. App. 1989); Meiers-Post v. Schafer, 427 N.W.2d 606 (Mich. Ct. App. 1988); *see also* Jocelyn B. Lamm, Note, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189 (1991).

96. Reversing a decision that it would be "fundamentally unfair" to bar the claim of a plaintiff who had repressed her memories, the Michigan Supreme Court decided that the discovery rule would not apply because previous cases based the decision "on evaluation of a factual, tangible consequence of action by the defendant, measured against an objective external standard." Lemmerman v. Fealk, 534 N.W.2d 695, 699 (Mich. 1995).

97. *See, e.g.*, Bassile v. Covenant House, 575 N.Y.S.2d 233 (1991) (finding that the discovery rule does not apply to toll a statute of limitations where post-traumatic neurosis caused plaintiff to minimize injuries). "New York has a long tradition of

To sum up, the competing policy considerations related to the use of the delayed discovery rule led courts, at least initially, to prefer Type II cases, favoring cases involving repressed memories over those with continuous memories.[98] Most courts reasoned that if the abuse was *not* forgotten, then it was reasonable to expect that the victim would disclose the offense against her, connect her injuries with their cause, and file a suit within the timeframe of the standard statute of limitations. Where memories were continuous, the victim would be aware, at the time of the abuse, of all of the elements of her cause of action, even if the full extent of the injury was not apparent until later. The balancing test applied by the courts in deciding whether to apply the delayed discovery rule thus produced an ironic result: Type I claims, which were less likely to be the product of therapeutic intervention, were disfavored, while Type II claims, where the risks of fabrication were arguably much greater, were allowed. As a consequence, though all incest suits faced numerous legal obstacles, up to a point it was *easier* for cases involving repressed memory to be heard than cases involving continuous memories.

For reasons having to do with the formal logic of the law, then, the telling of stories of child sexual abuse in courts ended up reinforcing and amplifying the feminist-psychotherapeutic narrative in which the victim of incest repressed her experience of incest until beginning cathartic therapy. The policy considerations underlying the statute of limitations had nothing to do with repressed memories, but the resistance of courts to Type I cases (and receptivity to Type II cases) provided important social validation for the idea of repression at a time when it was still formative.

These developments also reinforced the feminist-psychotherapeutic narrative in other ways. Because the legal claims were made in civil courts and the remedies sought were monetary damages, plaintiffs only brought suit where the defendant had financial resources. Such cases, then, necessarily involved middle- and upper-class families; most accused families were also

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hostility toward holding the period of limitations in abeyance pending actual discovery of the injury." *Id.* at 236; *see also* Lindabury v. Lindabury, 552 So. 2d 1117 (Fla. Dist. Ct. App. 1989), *overruled by* Hearndon v. Graham, 767 So. 2d 1179 (Fla. 2000).

98. *Compare* Doe v. First United Methodist Church, 629 N.E.2d 402 (Ohio 1994) (holding that the discovery rule will not apply in a continuous memory case), *with* Ault v. Jasko, 637 N.E.2d 870 (Ohio 1994) (holding that the discovery rule tolls the statute of limitations in a repressed memory case).

white. Civil law thus provided victim advocates with the opportunity to act on their class critique of middle-class families.

The Type I Plaintiff

In view of these legal outcomes, a second generation of law review publications began to appear, with commentators rejecting the invidious Type I/Type II distinction and arguing that it unfairly discriminated against a class of deserving plaintiffs. "No principled reason exists to draw a distinction between plaintiffs who completely repress the memory of incest and those who do not."[99]

Although earlier commentators had not focused exclusively on repressed cases, later articles began to refine the argument for why the delayed discovery rule should be applied in continuous memory cases. The main thrust of the new argument was to emphasize that incest survivors suffer from a *distinct* syndrome, the "Post-Incest Syndrome," a coinage taken from a self-help book that would become notorious in the recovered memory controversy for its diagnostic checklist of symptoms—Blume's *Secret Survivors.* Alan Rosenfeld, who initiated several suits on behalf of sexual abuse victims in the state of New York, introduced the term "Post-Incest Syndrome" into legal discourse in a plaintiff's brief and in an article published in the Harvard Women's Law Journal.[100] There, he argued that "Post-Incest Syndrome" should trigger the equitable estoppel doctrine (whereby a defendant is barred by the nature of his previous actions from asserting the statute of limitations defense) and enable the adult survivor to overcome the hurdle of the statute of limitations.[101] His argument was later developed specifically in relation to the Type I plaintiff.[102]

99. Lamm, *supra* note 95, at 2191. Jocelyn Lamm's note was based on work done in preparation for an amicus brief and under the supervision of Melissa G. Salten. *Id.* at 2189 n.d.

100. Alan Rosenfeld, *The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy*, 12 HARV. WOMEN'S L.J. 206 (1989).

101. *Id.* at 216-18.

102. Lamm, *supra* note 95, at 2194. Lamm notes that, in addition to the short-term symptoms characteristic of PTSD, victims of incest suffer from severe anxiety and depression, sexual dysfunction and multiple personality disorder, self-destructive behavior, abusive relationships, self-mutilation, prostitution, and drug and alcohol addiction. *Id.* The "co-existence of these psychological and emotional disorders is unique to and characteristic of the incest victim." *Id.*

The New York courts found the equitable estoppel argument wanting. In addition, they did not find that "Post-Incest Syndrome" (or as they termed it "post-traumatic neurosis") amounted to "insanity" for the purposes of tolling the statute of limitations.[103] However, if courts were not persuaded by such arguments, legislatures often were. The Type I plaintiff got a new lease on life when state legislators began to address the problem of child sexual abuse and the adult survivor.

The Effect of Legislation

A key issue in the early cases had been whether it was the role of the court or the legislature to decide the question of the discovery rule. After *Tyson*, some state courts took it upon themselves to decide that the moment of accrual could be delayed in cases involving child sexual abuse, while other courts wrung their hands, expressed sympathy for the plaintiff, and openly invited the legislature to change the law.[104] Legislatures quickly obliged, with the state of Washington again in the forefront.[105]

When the decision in *Tyson* prevented Patti and Kelly Barton, a married couple both sexually abused as children, from filing suits against their perpetrators, the couple decided to become activists around this issue. Reasoning that "[i]t just wasn't fair . . . [w]e were spending $90 a week on therapy, our lives were messed up and [Patti's] father was running around scot-free with everyone thinking he was a great guy," the Bartons joined forces with Jana Mohr, a Seattle attorney, and began to lobby state politicians.[106] Their efforts, which included the telling of their individual stories, eventuated in public hearings on the issue that brought about a change in the Washington law allowing for the application of the "delayed discovery rule" to cases involving

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103. Hoffman v. Hoffman, 556 N.Y.S.2d 608, 609 (App. Div. 1990).

104. *Cf.* Doe v. R.D., 417 S.E.2d 541 (S.C. 1992) (asserting that an exception to the plain and unambiguous language of the statute of limitations must come from the legislature).

105. Other states where legislatures responded to negative judicial decisions were California and Montana.

106. For more on Patti and Kelly Barton and Jana Mohr, as well as other early activists, see Carol Lynn Mithers, *Incest and the Law*, N.Y. TIMES, Oct. 21, 1990, § 6 (Magazine), at 44.

childhood sexual abuse.[107] A model act drafted by Mohr became law in 1988.[108]

This was the pattern in many states, where initial decisions were superceded (or codified) by statutes.[109] Hearings often involved victims telling their personal stories, along with testimony from experts, like therapist Christine Courtois, author of *Healing the Incest Wound: Adult Survivors in Therapy*. Courtois testified before the Virginia Senate in 1991 that "survivors of incestuous relationships experience mental problems later in life. They may develop personality or eating disorders; become addicted to drugs, alcohol or sex; try self-mutilation or suicide; or have difficulty maintaining relationships. Some may become sexual abusers themselves."[110] Nearly 30 states have now adopted statutes allowing for the discovery rule or its equivalent with respect to child sexual abuse.[111]

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107. WASH. REV. CODE, § 4.16.340(1) (1988).

108. Mithers, *supra* note 106.

109. Rose R. Zoltek-Jick, *For Whom Does the Bell Toll?: Repressed Memory and Challenges for the Law—Getting Beyond the Statute of Limitations*, *in* TRAUMA AND MEMORY: CLINICAL AND LEGAL CONTROVERSIES (Paul S. Appelbaum et al. eds., 1997).

110. Donald P. Baker, *Va. Senate Considers the Trauma of Incest: Bill Giving Victims of Childhood Sexual Abuse More Time to Sue Draws Dramatic Testimony*, WASH. POST, Jan. 27, 1991, at B10.

> Lisa Little's story sounded like a textbook case. In 1978, as a college freshman, depressed and suicidal, she told a counselor about her 10 years of abuse. He notified her family physician, who examined her but acceded to her mother's pleas that he not report the stepfather to police. In 1981, Little twice attempted suicide. During the past dozen years, she has been hospitalized several times, taken a series of tranquilizers and antidepressants, had difficulty working full time and been divorced from her husband, who also was a victim of child abuse.

Id.

111. *See* ALASKA STAT. § 9.10.140 (Michie 1999); ARK. CODE ANN. § 16-56-130 (Michie Supp. 1999); CAL. CIV. PROC. CODE § 340.1 (West Supp. 1999); COLO. REV. STAT. ANN. § 13-80-103.7 (West 1999); CONN. GEN. STAT. ANN. § 52-577d (West Supp. 1995); FLA. STAT. ANN. § 95.11(7) (West Supp. 1999); GA. CODE ANN. § 9-3-33.1 (Michie Supp. 1995); ILL. COMP. STAT. ANN. 110/13-202.2 (West Supp. 1999); IOWA CODE ANN. § 614.8A (West 1999); KAN. STAT. ANN. § 60-523 (Supp. 1999); ME. REV. STAT. ANN. tit. 14, § 752-C (West Supp. 1999); MASS.GEN. LAWS ANN. ch. 260, § 4C (West Supp. 1999); MINN. STAT. ANN. § 541.073 (West Supp. 1999); MO. ANN. STAT. § 537.046 (West Supp. 1999); MONT. CODE ANN. § 27-2-216 (1999); NEV. REV. STAT. ANN. § 11.215 (Michie 1998); N.H. REV. STAT. ANN. § 508:4 (Supp. 1992); N.J. STAT. ANN. § 24:61 B-1 (West Supp. 1999); N.M. STAT. ANN. § 37-1-30 (Michie Supp. 1999); OKLA. STAT. ANN. tit. 12, § 95(6) (West Supp. 2000); Or. Rev. Stat. § 12.117 (Supp. 1999); R.I. GEN. LAWS § 9-1-51 (1997); S.D. CODIFIED LAWS § 26-10-25 (Michie 1999); UTAH CODE ANN § 78-12-25.1 (Supp. 1999); VT. STAT. ANN. tit. 12 § 522 (Supp. 1999); VA. CODE ANN § 8.01-249(6) (Michie Supp. 1999); WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1999); WIS. STAT. ANN.

Legislation thus breathed new life to Type I cases. Though courts had disfavored Type I cases, most statutes were drafted so as to encompass (at least potentially) both the Type I and Type II plaintiff. Most relevant statutes say that the statute of limitations begins to run when the victim discovers or reasonably should have discovered her injury, leaving the interpretation of "discovery" and "injury" to the courts. In California, for example, the decisions in *DeRose* and *Evans* were overruled by statute, and a court of appeal held that the statute[112] "was intended to toll the statute of limitations even for plaintiffs who recalled their abuse."[113] The case in Montana was also overruled by statute, and a subsequent Type I case came out the other way.[114] The statutes vary slightly as to the precise forms of sexual abuse they cover. The Wisconsin statute for instance originally only covered incest, but now covers incest, first and second degree sexual assault, and "sexual assault of a student by a school instructional staff person."[115] Some statutes are directly tied to the criminal code,[116] while others focus on the harm flowing to the victim.[117]

Taken together, the case law and statutes articulate four basic approaches to the question of the delayed discovery rule in child sexual abuse cases: 1) apply delayed discovery to both Type I (continuous memories) and Type II (repressed memories)—this is the law in the majority of states that have passed statutes; 2) apply delayed discovery rules to Type II but not Type I;[118] 3) no

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§ 893.587 (West 1997); WYO. STAT. ANN. § 1-3-105 (Michie 1999); *see also* Peterson v. Huso, 522 N.W.2d 83, 86 (N.D. 1996) (interpreting N.D. CENT. CODE § 28-01-18(1) (1991) as "two years from the time of discovery to begin an action for sexual assault and battery").

112. CAL. CODE CIV. PRO. § 340.1 (West 2003).

113. Sellery v. Cressey, 55 Cal. Rptr. 2d 706, 711 (Ct. App. 1996). The analysis by the Senate Judiciary Committee, for example, said the bill's proponents "contend it is well documented that most victims of childhood sexual abuse either repress their memories of the abuse or are unable to appreciate their injuries until well into their adult years." *Id.* The court then ruled that the delayed discovery rule applied in the case of a plaintiff who had never forgotten (relatively minor) instances of abuse, while repressing intercourse, and had first seen the connection between her "current psychological ailments and her abuse" when she began therapy. *Id.*; *see also* Lent v. Doe, 47 Cal. Rptr. 2d 389 (1995) (reaching the same conclusion without the legislative history).

114. Werre v. David, 913 P.2d 625 (Mont. 1996).

115. WIS. STAT. § 948.095 (2002). The sexual abuse discovery statute is WIS. STAT. § 893.587 (2002).

116. COLO. REV. STAT. ANN. §13-80-103.7 (West 1999).

117. *See, e.g.*, CONN. GEN. STAT. § 52-577d (2001).

118. This is the law in Illinois. Clay v. Kuhl, 696 N.E.2d 1245 (Ill. App. Ct. 1998). The Illinois statute reads:

discovery rule per se but claims must be filed within a fixed, extended period after the age of majority[119]; 4) apply delayed discovery to neither Type I nor Type II—states without child sexual abuse statutes such as New York and Michigan.[120] Within those broad categories, further differentiations have evolved. Partly as a result of the controversy surrounding litigated cases involving repressed memories, later statutes and emendations to earlier statutes have often introduced additional hurdles the plaintiff must scale in order to make her claim. For example, California requires "certificates of merit" when the plaintiff is older than 26, to be executed by the plaintiff's attorney and a licensed mental health practitioner, verifying that there is "reasonable and meritorious cause for the filing of the action."[121] Colorado's statute gives the plaintiff the burden of proving that the assault or offense "occurred and that such person was actually psychologically or emotionally unable to acknowledge the assault or offense and the harm resulting therefrom."[122] Oklahoma's statute requires "objective verifiable evidence" both that the victim "had psychologically repressed the memory of the facts upon which that claim was predicated and that there was corroborating evi-

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> "(b) An action for damages for personal injury based on childhood sexual abuse must be commenced within 2 years of the date the person abused discovers or through the use of reasonable diligence should discover that the act of childhood sexual abuse occurred and that the injury was caused by the childhood sexual abuse."

735 ILL. COMP. STAT. 5/13-202.2(b) (2002); *see also* Pedigo v. Pedigo, 686 N.E.2d 1180 (Ill. App. Ct. 1997); D.P. v. M.J.O., 640 N.E.2d 1323 (Ill. App. Ct. 1994); Phillips v. Johnson, 599 N.E.2d 4 (Ill. App. Ct. 1992). The Illinois statute originally contained a 12 year statute of repose, but this was later deleted by the General Assembly. *Pedigo*, 686 N.E.2d at 1184. South Carolina has no specific sexual abuse statute but judicially applies the discovery rule in Type II cases but not Type I cases. *Compare* Doe v. R.D., 417 S.E.2d. 541 (S.C. 1992) (Type I), *with* Moriarty v. Garden Sanctuary Church of God, 534 S.E.2d 672 (S.C. 2000) (Type II).

119. *See, e.g.*, CONN. GEN. STAT. § 52-577d (2001) (plaintiff has 17 years after age of majority to commence action); GA. CODE ANN. § 9-3-33.1(b) (2001) (plaintiff has five years after majority); LA. REV. STAT. ANN. § 9:2800.9 (West 2001) (action must commence within ten years of majority). In addition, a number of statutes state explicitly that parental knowledge may not be imputed to a minor, thus preventing a child from being deprived of tolling during her minority simply because she may have told her parents about the abuse when she was still under legal age. *See, e.g.*, MINN. STAT. ANN. § 541.073(2)(c) (West 2000) (knowledge of parent or guardian not imputed to minor); R.I. GEN. LAWS § 9-1-51(c) (2001); UTAH CODE ANN. § 78-12-25.1(4) (2002).

120. A fifth possibility exists only in theory—allow Type I but not Type II—and does not seem to be the law in any state.

121. CAL. CIV. PROC. CODE § 340.1(f)(1) (West Supp. 1999).

122. COLO. REV. STAT. ANN. § 13-80-103.7(3.5)(a) (1979).

dence that the sexual abuse . . . actually occurred."[123] These additional precautions, like the earlier corroboration requirements in rape law, have been objected to as singling out the child sexual abuse plaintiff as especially suspect and untrustworthy.[124] However, they may also be seen as compromises intended to offset concerns about the quality of evidence that use of the delayed discovery rule in recovered memory cases creates.

In an interesting extension of scope, discovery statutes have sometimes been held to support negligence and respondeat superior claims. In *Werre v. David*, the case that overruled *E.W. v. D.C.H.*, the Montana Supreme Court interpreted the phrase "[a]n action based on intentional conduct" in the state's sexual abuse discovery statute in a non-restrictive sense to include a negligence action against the mother who allegedly asked the step-father to give her daughter sex education. (In this case, the events were 5 years old and the plaintiff had always remembered the abuse.)[125]

Although most statutes encompass both continuous and repressed types of adult survivor cases, the two types continued to receive a different legal reception until the beginning of the mid-1990s, when the advantage began to shift. Type II repressed cases began to encounter fierce resistance in courts as defense attorneys developed their own novel theories to counter plaintiff's claims, while Type I continuous cases quietly began achieving greater success. For both cases, the focus of legal debate shifted away from statute of limitations issues and concerns over the "staleness of evidence" and toward new considerations—for Type II cases, to the reliability of recovered memories and the use of expert testimony in supporting plaintiff claims; for Type I cases, to the question of precisely defining the moment when the adult survivor "discovered" or "realized" or "appreciated" the impact that the abuse had had on his or her life.

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123. OKLA. STAT. tit. 12, § 95(6) (2001).

124. For a critique of these requirements, see Zoltek-Jick, *supra* note 109, at 457-60.

125. Werre v. David, 913 P.2d 625, 632 (Mont. 1996) (interpreting MONT. CODE ANN. § 27-2-216(1) (2001)). *But see* Sandoval v. Archdiocese of Denver, 8 P.3d 598 (Colo. Ct. App. 2000), where the Colorado Court of Appeals declined to follow *Werre* and did not permit negligence and respondeat superior claims against an archdiocese.

Type II Cases and the Recovered Memory Controversy

In the early to mid-1990s, the focus of public attention centered on Type II cases and to the sensational issues surrounding the question of repression these cases raised. Though often horrific, continuous memory cases could not compete for dramatic effect with repressed cases, which often featured sensational clashes of expert witnesses and dramatic accounts of revelations discovered in the course of some exotic therapy.[126] Because repressed cases were seen as inherently less credible and therefore more vulnerable to legal challenge than continuous cases, advocates for accused perpetrators threw their energies into developing legal strategies to defeat these claims. The legal backlash was spearheaded by the False Memory Syndrome Foundation (FMSF), a Philadelphia-based advocacy group that organized vitriolic objections to therapists allegedly engaged in "recovered memory therapy." The FMSF was formed in 1992, in order to lend legal and other support to adults accused (allegedly falsely) of child sexual abuse.[127] The FMSF dedicated itself to debunking the idea of "repression" and scorned as "junk science" the research that purported to prove the existence of repression. The subject of repressed or recovered memory resulted in a huge outpouring of popular and academic literature on the psychological theory of "repression."[128] The adversarial setting of the courtroom made discussion of repressed memory, already a loaded issue, into a veritable Rashomon, with one side arguing that child

126. These cases lent themselves to non-fictional popular treatments. *See* HARRY N. MACLEAN, ONCE UPON A TIME: A TRUE STORY OF MEMORY, MURDER, AND THE LAW (1993) (using the *Franklin-Lipsker* case); JOHNSTON, *supra* note 5.

127. Despite its open advocacy and the possibility that real perpetrators as well as the truly falsely accused could benefit from its efforts, the FMSF gained an enormous amount of public and professional credibility by attracting a distinguished roster of cognitive psychologists and memory researchers, like John Kihlstrom, Elizabeth Loftus, Martin Orne, and Donald Spence, to serve on its Scientific and Professional Advisory Board. In December 1994, the FMSF showed its intellectual clout by co-sponsoring a conference with the Johns Hopkins Medical Institutions on "Memory and Reality: Reconciliation—Scientific, Clinical, and Legal Issues of False Memory Syndrome." As early as 1995, the American Psychological Association approved the FMSF as a provider of continuing education programs for psychologists. *See generally* Kenneth S. Pope, *Memory, Abuse, and Science: Questioning Claims About the False Memory Syndrome Epidemic*, 51 AM. PSYCHOLOGIST 957 (1996).

128. Nineteen ninety-four marked a turning point in public perception of the credibility of repression, as the result of aggressive critiques published by individuals associated with FMSF. *See* RICHARD OFSHE & ETHAN WATTERS, MAKING MONSTERS (1994), ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY (1994), FREDERICK CREWS, MEMORY WARS (1995) (reprinting articles originally published in 1994 in *The New York Review of Books*).

sexual abuse is shockingly prevalent and recovered memories are true and reliable transcripts of actual historical events, and the other side arguing just as strenuously that "false memory syndrome" is shockingly prevalent and recovered memories are *ignes fatuui* spawned by unscrupulous or incompetent therapists, leading those who believe in them to doom.

In the course of contesting Type II cases both in and out of the courtroom, the FMSF elaborated a counter-narrative to challenge the assumptions of the powerful feminist-psychotherapeutic narrative. At the heart of this counter-narrative lay the new concept of "false memory syndrome." As defined by psychiatrist John Kihlstrom, false memory syndrome is "a condition in which a person's identity and interpersonal relationships are centered around a memory of traumatic experience which is objectively false but in which the person strongly believes."[129] The "false memory" counter-narrative opens in the same way as the feminist-psychotherapeutic narrative, with a highly-symptomatic woman in a therapist's office. But then the story proceeds quite differently. The therapist tells her, "You have the symptoms of someone who has been sexually abused." The woman protests that nothing like that ever happened to her. The therapist tells her that repression is very common among victims of child sexual abuse and that remembering will relieve her symptoms. Journal-writing, hypnosis and other special techniques are used. "Memories" are recovered. Made vulnerable and suggestible by her symptoms, she "remembers" she was abused by her father, although nothing like this ever happened. The therapist encourages her to confront her parents, who are crushed by the accusations and vehemently deny them. A family is destroyed, but her symptoms keep worsening.

Defense lawyers responded to the success of new plaintiff-oriented theories by developing their own novel strategies to thwart Type II repressed memory cases. Admissibility of testimony about recovered memories became highly contested.[130] A third-party lawsuit was successfully brought against a therapist by an accused parent, even though such suits have traditionally been

129. FALSE MEMORY SYNDROME FOUNDATION, FREQUENTLY ASKED QUESTIONS, *at* http://www.fmsfonline.org/fmsffaq.html#WhatIsFMS (last visited June 5, 2003).

130. *See, e.g.*, Tomika N. Stevens, *The Admissibility of Expert Testimony on Repressed Memories of Childhood Sexual Abuse in* Logerquist v. McVey*: Reliability Takes a Backseat to Relevancy*, 46 VILL. L. REV. 385 (2001).

disfavored.[131] Claims have been brought against attorneys who file complaints in repressed memory cases.[132] An accused father sued for loss of his daughter's consortium in Illinois—and won.[133] An attempt was even made to sue the author of a self-help book. So successful have efforts been at chilling cases based on recovered memories that a recent case has been described as "a dinosaur—a vanishing breed being driven out of courtrooms around the country because of unreliable evidence."[134]

Type I Cases

For obvious reasons, Type I continuous memory cases attracted much less organized resistance than repressed memory cases. While some lawyers for the accused in Type I cases suggested that such claims contain an inherent paradox—"how can you claim you were the victim of such horrible abuse, and yet claim that you didn't know it harmed you?"[135]—the argument that a victim of childhood sexual abuse might remember the abuse but not realize its full impact on her life until later in adulthood has prima facie plausibility. Mature adult life has burdens and stresses that may reveal psychological damage in the form of maladaptive coping strategies or predisposition to depression in ways not apparent at the age of majority or shortly thereafter. The FMSF's usual critique—"false memory syndrome"—misses its mark with the Type I plaintiff who is a Type I precisely because she never repressed her memories of abuse. Indeed, the FMSF devoted relatively little energy to contesting Type I cases as such.[136] When the FMSF did become involved in continuous memory cases, it was often to recast the suit as Type II, so that doubts could be raised as to whether the memories were the product of therapeutic intervention.[137] Such a strategy made

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131. Cynthia Grant Bowman, *The Manipulation of Legal Remedies to Deter Suits by Survivors of Child Sexual Abuse*, 92 Nw. U.L. Rev. 1481, 1486-89 (1998).

132. *Id.* at 1494-95.

133. *Id.* at 1491-92.

134. Tom Mooney, *Why a Court Accepted "Recovered Memory,"* Providence Journal-Bulletin, April 13, 1998, at 1A.

135. Nancy Ritter, *Recovered Memory; Second Thoughts*, N.J. Law., Dec. 8, 1997, at 1 (quoting Attorney David W. Lentz).

136. A scan of the web versions of their newsletters turns up not a single reference to Type I cases.

137. *See, e.g.*, State v. Plaskett, 27 P.3d 890 (Kan. 2001). The victim in this case used the phrase "pushed it out of my mind" to describe what she did with the memory of abuse but refused to testify that after each episode of abuse, she "forgot about it." *Id.* at 896.

sense for their purposes. The real locus of critique for Type I cases lies in the policy justifications for the statute of limitations, but this is a legally formalistic ground that, even if it defeats the suit, does little to rehabilitate the accused perpetrator in the eyes of the public or to undermine the claim that child sexual abuse is a widespread social problem, even in white middle-class families.

In adjudicating motions for summary judgment in Type I cases, the issues after legislation remained more or less what they had been before, but the complications and the nuances in interpreting the key terms "discovery" and "injury" became more obvious. Type I cases forced courts to confront such questions as: Where does the "harm" in sexual injury lie? And when is the victim, especially if a child or young adult, responsible for understanding that he or she has indeed been harmed? Does the harm inhere in the assault itself and/or in the impact the assault had on the victim's life? Courts found themselves entangled in the question of defining the moment when the plaintiff "made the causal connection," either constructively or in fact, between the injury and the later harm. This often involved painstaking examination of the record and some hairsplitting. One court agreed with the plaintiff that recognition did not occur until he understood the relation between his injuries (as reflected in a diagnostic label) and the sexual abuse,[138] while another said the fact that the plaintiff had exploded in anger at an event that reminded him of the trauma constituted evidence that he had known of the harm within the statutory period, even though he claimed not to have "made the connection" until much later.[139]

In Type I cases, courts have sometimes interpreted the phrase "reasonably should have known" in ways that sometimes allow suits and sometimes bar them, based on grounds that are at

138. Hollman v. Corcoran, 949 P.2d 386 (Wash. Ct. App. 1997).

139. Blackowiak v. Kemp, 546 N.W.2d 1 (Minn. 1996). In *Blackowiak*, the plaintiff was orally and anally raped at age 11 but believed there were other instances of abuse. At age 22, he saw the defendant with a young boy and "freaked out." *Id.* at 2. He did not file suit until age 33 when he had a conversation with a high school friend and realized "his problems with drugs and alcohol, crime and with personal relationships were all the result of Kemp's abuse." *Id.* The dissent argued that the majority's opinion was based on a misreading of the statute, the plain language of which stated, "An action for damages based on personal injury caused by sexual abuse must be commenced within six years of the time the plaintiff knew or had reason to know *that the injury was caused by the sexual abuse*," MINN. STAT. § 541.07(2)(a) (2000) (emphasis added), and reasoned that knowing an act is morally wrong is not the same as knowing that it has caused one's injuries. *Blackowiak*, 546 N.W.2d at 3-4.

least questionable. In *Ross v. Garabedian*, the Massachusetts Supreme Judicial Court vacated an entry of summary judgment for the defendant and held that a victim who, as a 13-year-old child, had a homosexual relationship with a 27-year-old man, could bring a suit more than 30 years later.[140] While the experience at the time caused him shame and guilt because of its sexual nature, over the years, the victim claimed, he had further "experienced numerous failed relationships and suffered from psychological and emotional difficulties."[141] In deciding this case in the plaintiff's favor, one of the questions the court had to resolve was whether what the plaintiff knew and experienced at the original time of the abuse "constituted sufficient 'harm' to trigger the statute of limitations."[142] To utilize the discovery rule in Massachusetts, a plaintiff must have suffered some "appreciable harm," but need not be aware of the full extent of the injury.[143] In applying this to sexual abuse cases, the court followed the lead of *Armstrong v. Lamy*, where summary judgment was denied in a case where the plaintiff felt "uncomfortable," "scared," and "nervous" at the time of the abuse,[144] and held that the plaintiff's "shame" and guilt in the instant case was analogous in severity and not enough to trigger the statute of limitations. The court thus distinguished it from cases where "the alleged injuries [at the time of the abuse] were more extensive and tangible."[145] The irony in the court's reasoning is that, although more serious abuse might arguably be more likely to cause serious emotional harm, the victim of such abuse would have less time (in absolute terms) to file than a victim of less serious abuse.

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140. 742 N.E.2d 1046 (Mass. 2001). The relevant statute, Mass.Gen. Laws ch. 260, § 4C, states that the statute of limitations begins

> within three years of the acts alleged to have caused an injury or condition or within three years of the time the victim discovered or reasonably should have discovered that an emotional or psychological injury was caused by said act, whichever comes first; provided however, that the time limit for the commencement of an action under this section is tolled for a child until the child reaches 18 years of age.

141. *Ross*, 742 N.E. 2d at 1047.

142. *Id.* at 1050.

143. *Id.*

144. Armstrong v. Lamy, 938 F. Supp. 1018 (D. Mass. 1996).

145. Ross v. Garabedian, 742 N.E.2d 1046, 1050 (Mass. 2001) (distinguishing *Phinney v. Morgan*, 654 N.E.2d 77, 81 (Mass. App. Ct. 1995), in which the plaintiff discussed bringing suit and ran away from home, and *Flanagan v. Grant*, 79 F.3d 1(1st Cir. 1996), in which the plaintiff filed criminal charges against father and manifested a strong desire to escape repeated abuse).

Incentives

The trends in the legal developments just surveyed created two perverse incentives. By initially favoring Type II cases over Type I, early case law and the popular understanding of delayed discovery statutes gave victims of child sexual abuse an incentive to understand their experience through a "repression" narrative. At the same time, authorizing the use of the delayed discovery rule only in child sexual abuse cases gave victims of other forms of maltreatment or those suffering from psychological problems or dysfunctional behavior an incentive to understand their experience though a child sexual abuse narrative.

In rejecting Type I cases, courts often indicated that the outcome might be different if the plaintiff could show she *had* repressed her memories. In *DeRose,* for example, the court explicitly allowed that if the plaintiff had repressed her memories, she might be able to invoke the discovery rule.[146] The Montana supreme court implied the same in *E. W. v. D.C.H.*: "There is no indication that EW is incompetent or that she psychologically repressed the attacks. It is therefore not unreasonable to assume that EW, upon reaching majority, was aware that child molestation was a wrongful act; nor does she deny her awareness."[147] Even those sympathetic to the legal claims of child sexual abuse victims with repressed memories warned, "[C]ourts that reject Type I Plaintiff claims may be unintentionally encouraging false claims of repression as a ticket of entry into the courtroom."[148] Since it was extremely important for the plaintiff to choose the right legal narrative, prospective Type I plaintiffs may well have chosen to tweak their narratives so as to make them better conform to Type II.[149] In *Petersen v. Bruen*, the supreme court of Nevada based its decision on "objective evidence" (a criminal conviction) that the sexual abuse had occurred, while

146. DeRose v. Carswell, 242 Cal. Rptr. 368, 371 (Ct. App. 1987).

147. E.W. v. D.C.H., 754 P.2d 817, 821 (Mont. 1988).

148. DANIEL BROWN ET AL., MEMORY, TRAUMA TREATMENT, AND THE LAW 584 (1998).

149. This need not have involved outright fabrication. Linda Williams contrasts "a motivated, volitional forgetting (in a conscious attempt to deal with the abuse by blocking it out)" with "repression of or dissociation from the trauma and confusion of the events experienced." Linda Meyer Williams, *Posttraumatic Stress Associated with Delayed Recall of Sexual Abuse*, 8 J. TRAUMATIC STRESS, 629, 668 (1995). In her study, one of the women who was categorized as not remembering the abuse was quoted as saying, "I used to think about it for the first two years, then I just blocked it out. I may not have completely forgot, I just didn't think about it." *Id.* at 663. It is easy to see how this woman might have shaped her narrative to make it Type II.

apparently Petersen himself tried to make a claim of repression. Though the court did not "suggest that [he] has dissembled in his effort to secure passage through the barrier of the statute," it did take pains to point out the irony in his affidavits, where he swore that he had repressed abuse and sought to "buttress the believability of his period of forgetfulness"[150] by averring that he was not "sufficiently traumatized or impressed with the wrongfulness of the acts to make their repression particularly difficult."[151] The court concluded, with a whiff of distaste: "The spectacle thus produced by the discovery rule is one of transmogrification, with the victim trying to convince the trier of fact that he has not now become an abuser of truth."[152]

Both of these incentives, taken singly or together, may have inadvertently helped to fuel the very thing courts feared—false claims—as we can see if we look at the testimony of so-called retractors gathered in a collection called *True Stories of False Memories*.[153] Retractors are women who made but then retracted allegations of abuse, thus becoming public symbols of the reality of "false memory syndrome." In almost all cases, the person allegedly falsely accused was their father.[154] As evidence of at least great confusion, retractor stories stand as powerful examples of therapy gone awry.[155] Yet, if the parameters of the counter-story propagated by the FMSF are correct and false memories are created "out of thin air," we would expect retractors to tell stories of happy families destroyed by unscrupulous or incompetent therapists. Instead, we find that, if read closely, these retractor narratives show evidence of multiple sexual and other serious traumas in childhood that belie the "out-of-thin-air" counter-story. Of the eight retractors who present their stories, no less than five actually present themselves as victims of sexual abuse.[156] Two of the five clearly suggest that the sexual

150. Petersen v. Bruen, 792 P.2d 18, 23 (Nev. 1990).

151. *Id.* at 23.

152. *Id.* at 23-24.

153. ELEANOR C. GOLDSTEIN & KEVIN FARMER, TRUE STORIES OF FALSE MEMORIES (1993).

154. *Id.* at *passim.*

155. Some advocates for sex abuse survivors have been known to describe these woman as multiple personalities who are easily manipulated. In this analysis, I take their accounts at face value.

156. One was raped by a friend's brother and sexually harassed by several older men as a teenager, *id.* at 224, another was abused by an uncle, *id.* at 368, another by a stranger, *id.* at 363. Another was sexually abused multiple times, including a rape, between 9 and 14." *Id.* at 334. One did not provide details. *Id.* at 387.

abuse took place along with other abuse—for example, "I had always been aware of the neglect, and physical and sexual abuse I had endured as a child."[157] The other three present portraits of dysfunctional families of varying degrees of severity. One describes her childhood as "extremely difficult, involving numerous traumas any one of which individually would have been challenging to cope with."[158] These traumas included witnessing her alcoholic, mentally-ill father physically abuse her mother and experiencing physical abuse from both parents.[159] The second of the three remaining accounts describes the retractor's family as a "mentally unhealthy environment," riven by incessant conflict, in which the mother was a compulsive housecleaner and the father was absent.[160] In none of these cases was the father the actual culprit in a sexual sense, yet through the process of therapy, the feminist-psychotherapeutic narrative came to exert a gravitational pull, shaping the variety of idiosyncratic stories into the outlines of the generic plot—daughter represses memory of father's sexual abuse. Had a greater variety of narratives received recognition, particularly narratives of non-sexual maltreatment, it might not have been so easy for both therapist and patient to find a "narrative truth" in a story so far at variance (apparently) with historical truth. This is not to say that no cases that conform to the "false memory syndrome" narrative can be found, just that both polarizing narratives shaping the recovered memory debate—the feminist-psychotherapeutic narrative and the "false memory" narrative—tend to over-simplify and misconstrue the messiness of childhood maltreatment.

Given the reductiveness of both the feminist-psychotherapeutic and the false memory syndrome narratives about sexual abuse, to address the topic through their familiar matrices seems to serve little purpose at this point. It will be more productive if we shift the terrain and explore the justifications for treating child sexual abuse as a distinct and exceptional form of child abuse warranting distinct and exceptional legal treatment. The next two Parts reexamine the use of the discovery rule in adult survivor cases by turning back to the two questions posed in the

157. *Id.* at 387. The other says simply, "There were other abuses also." *Id.* at 335.

158. *Id.* at 285.

159. *Id.* at 285-86.

160. *Id.* at 235. The last woman describes her family as loving and untroubled, except for the "open marriage" of her parents that led them to "swap" spouses with the neighbors next door. *Id.* at 254.

Introduction: Is the use of the rule a good idea in these cases? And, how well do the justifications for its use hold up in the wake of the recovered memory controversy? The focus of the discussion will largely fall on Type I cases. Since their new success has largely occurred without fanfare, they have not figured centrally in the public debate about legal redress for adult survivors of child sexual abuse. Part III subjects the articulated justifications for use of the rule in adult survivor of sexual abuse cases to scrutiny and suggests that, for reasons other than those advanced in the recovered memory controversy, some justifications are more problematic than has been assumed. Part IV broadens the analysis and examines an alternative cultural explanation for the emergence of this doctrine.

III. A New Tort Action: Justifications and Critique of the Sexual Abuse Doctrine

Applying the delayed discovery rule to cases involving childhood sexual abuse ended up, in effect, creating a new and exceptional tort cause of action in which grown adults could sue their parents or other adults who had allegedly sexually harmed them when they were children. This was a remarkable development. Prior to the 1980s, child abuse cases were usually premised on *immediate* harm to children (most still are) and involved minor children and their biological, foster, or adoptive parents. Before the 1980s, the main legal response to child abuse and neglect was a public law and prosecution system in which cases were either criminally prosecuted by the state or civilly by child protective agencies with the aim of influencing child custody decisions. At least partly because the public system had failed to deal adequately with child sexual abuse, adult survivors successfully lobbied for a private right of action.

Traditionally, children could not sue their parents in tort because of the doctrine of "parent-child immunity" which protects a parent from liability for personal injuries inflicted on minor children.[161] Suggested by a Mississippi court in 1891, "parent-child immunity" was soon accepted by almost all of the states;[162]

161. Allen, *supra* note 45, at 633.

162. Hewellette v. George, 9 So. 885 (Miss. 1891); McKelvey v. McKelvey, 77 S.W. 664 (Tenn. 1903); Roller v. Roller, 79 P.2d 788 (Wash. 1905), *overruled in part by* Borst v. Borst, 251 P.2d 149 (Wash. 1952). *Roller* involved the incestuous rape of a 15-year-old. The Washington Supreme Court later commented: "[In *Roller*], this court held that the incestuous rape of a 15-year-old child could not be the subject of

interestingly, it is an American doctrine without roots in English common law.[163] The main rationale for the doctrine is similar to that underlying the spousal immunity doctrine—family harmony.[164] The parent-child immunity doctrine has been drastically limited in recent years and courts have increasingly granted rights to children, both minor and emancipated, to recover damages for intentional or negligent torts.[165] However, even with these exceptions, it was difficult, if not impossible, under the parent-child immunity doctrine to bring a suit for long-deferred emotional damages. Prior to the use of the delayed discovery rule in sexual abuse cases, most instances of children suing their parents for damages were for specific acts of negligence (like driving drunk), which resulted in specific physical injuries to the child and were usually brought within a relatively short period of time after the injury.[166] Use of the delayed discovery rule there-

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a compensation action because to allow such suit would destroy the family relationship. How unreal." Merrick v. Sutterlin, 610 P.2d 891, 892 (Wash. 1980) (en banc).

163. Carolyn E. Johnson, *A Cry for Help: An Argument for Abrogation of the Parent-Child Immunity Doctrine in Child Abuse and Incest Cases*, 21 FLA. ST. U.L. REV. 617, 621-22 (1993).

164. The Florida Supreme Court said:

> The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand.

Herzfeld v. Herzfeld, 781 So. 2d 1070 (Fla. 2001). In *McKelvey*, the Tennessee Supreme Court reasoned that allowing suit by a minor would interfere with parental discipline and control. *McKelvey*, 77 S.W. at 664-65. The Supreme Court of Washington voiced a concern that no line could be drawn between legitimate claims and those based on the proper disciplinary actions of a parent. *Roller*, 79 P.2d at 789. Courts also feared collusion between family members and the risk of depleting family resources. Richards v. Richards, 599 So. 2d 135, 136 (Fla. Dist. Ct. App. 1992); Wagner v. Smith, 340 N.W.2d 255, 256-57 (Iowa 1983). Five jurisdictions (HA, NV, UT, VT, DC) never adopted the doctrine, while South Dakota has never addressed it and Idaho's adoption is unclear. Fields v. Southern Farm Bureau Cas. Ins., 87 S.W.3d 224, 229 (Ark. 2002).

165. Johnson, *supra* note 163, at 635-39.

166. When the cases involve minor children, some courts have carved out specific exceptions to the parent-child immunity doctrine for cases involving sexual abuse. *See, e.g.*, Wilson v. Wilson, 742 F.2d 1004, 1005 (6th Cir. 1984); Hurst v. Capitell, 539 So. 2d 264, 266 (Ala. 1989); Henderson v. Wolley, 644 A.2d 1303 (Conn. 1994); Doe v. Holt, 418 S.E.2d 511 (N.C. 1992). For negligent suits against the mother in paternal sex abuse cases, courts have reached different conclusions. Arkansas continues to recognize the parent-child immunity doctrine for negligence claims in sexual abuse cases, *see* Robinson v. Robinson, 914 S.W.2d 292 (Ark. 1996), while Michigan does not, *see* Spikes v. Banks, 586 N.W.2d 106, 112 (Mich. Ct. App. 1998).

fore allowed child abuse victims, for the first time in the history of the United States, to sue for emotional damage in adulthood as a result of being maltreated as a child. That we do not find it more surprising that this tort remedy was made available to adult survivors of child sexual abuse (but not to other victims of child abuse) points to the pervasive "exceptionalism" that surrounds child sexual abuse.

Justifications for the Statutes

To look at the language of the courts and legal commentators, creating a new tort action exclusively for child sexual abuse victims was warranted because child sexual abuse is "unique" among injury experiences. One legal commentator remarked, "As victims of actions that are almost universally condemned, victims of childhood incestuous abuse are a group *uniquely deserving* of legal protection and remedies."[167] A state supreme court called sexual abuse "a uniquely sinister form of abuse,"[168] while another recognized the "unique character of child sexual abuse cases."[169] A dissent in a Type II case argued in favor of admitting expert testimony on child sexual abuse, because "[a] victim's reaction to childhood incestuous abuse is also unique, complex, and beyond the ken of ordinary laymen."[170]

But in what way, *exactly*, is child sexual abuse unique? Is child sexual abuse the only form of child maltreatment that can be construed as a tort, either intentional or negligent, having long-term consequences that can be construed as damage? What about children who are beaten? Or neglected? Does sexual abuse harm children more (or differently) from other forms of abuse? Where courts have directly addressed the question of uniqueness, it is clear that what was meant was unique *as compared with more typical tort plaintiffs*, not unique as compared with other people harmed as children. "The legislative history of [the Connecticut child sexual abuse statute] shows that there was extensive testimony outlining the unique position of victims of childhood sexual abuse as compared with plaintiffs in other civil

167. Lamm, *supra* note 95, at 2189 (emphasis added).

168. Hearndon v. Graham, 767 So. 2d 1179, 1186 (Fla. 2000).

169. Ault v. Jasko, 637 N.E.2d 879, 872 (Ohio 1994).

170. Lindabury v. Lindabury, 552 So. 2d 1117, 1119 (Fla. Dist. Ct. App. 1989) (Jorgenson, J., dissenting).

actions."[171] The idea that long-term harms in adulthood might be linked with other types of abuse and neglect seems not to have occurred to the typical court hearing adult survivor cases.

The belief that child sexual abuse is unique often operates at the level of a pre-given assumption that is rarely subjected to critical scrutiny. To try to elucidate the uniqueness of sexual abuse, let us now turn to the explicit justifications typically given for sexual abuse discovery statutes and judicial decisions. A good place to begin is with the legislative purpose set out by the Washington legislature in 1991 justifying the delayed discovery statute. The legislature provided five reasons:

> 1. Childhood sexual abuse is a pervasive problem that affects the safety and well-being of many of our citizens.
> 2. Childhood sexual abuse is a traumatic experience for the victim causing long-lasting damage.
> 3. The victim of childhood sexual abuse may repress the memory of the abuse or be unable to connect the abuse to any injury until after the statute of limitations has run.
> 4. The victim of child sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm or damage until many years after the abuse occurs.
> 5. Even though victims may be aware of injuries related to the childhood sexual abuse, more serious injuries may be discovered many years later.[172]

If we condense these assumptions, we find that they fall into three general categories: sexual abuse may be repressed, sexual abuse is widespread, and sexual abuse is traumatic. For the purposes of organization, we can collapse the last two into the general category of "harm." For the purposes of completion, another justification must be added. This justification, implicit in much discourse about child sexual abuse, is that sexual abuse merits special remedies because it is more reprehensible and morally offensive than other forms of child maltreatment. Taken together, these three justifications produce the belief that *child sexual abuse is unique among forms of child maltreatment, the most horrific to endure, and the most damaging in its consequences.* Since much of the impetus for legal reform in this area of course was a manifestation of the will of the people as ex-

171. Giordano v. Giordano, 664 A.2d 1136, 1143 (Conn. App. 1995); *see also* Peterson v. Bruen, 792 P.2d 18, 24 (Nev. 1990) ("In short, adult survivors of child sexual abuse present unique circumstances and injuries that do not readily conform to the usual constructs upon which periods of limitations are imposed.").

172. WASH. REV. CODE. § 4.16.340 (1997).

pressed in the legislature, what is ultimately at issue, then, are deep-seated attitudes and cultural beliefs that are not easily or quickly changed. But it will help to clarify the issues if we make these attitudes and beliefs visible (and so begin to dispel the self-evidence of their truth).

The First Justification: Repression

The first justification for use of the delayed discovery rule in adult survivor of incest cases was the possibility that child sexual abuse could remain locked away from consciousness for many years after the abuse had occurred. Since so much energy has been devoted to debating the pros and cons of this justification, I do not need to dwell on it, but offer instead a few necessary observations . In the feminist-psychotherapeutic narrative about incest, "repression" may be said to typify the "normative" experience of the sexual abuse survivor. The typical sexual abuse survivor awoke one day to find her world shattered by intrusive flashbacks and haunting nightmares of unspeakable memories. In much incest-survivor literature, we find the claim that sexual abuse is the *most* likely trauma to be repressed.[173] The child represses the memory from consciousness because it is an experience that exceeds the mind's ability to bear it. This portrayal certainly had a compelling effect in testimony before legislatures, and the claim of repression exerted a moral pull. Since the statute of limitations was seen as most unfair in cases involving "repressed" memories, where the plaintiff was truly "blamelessly ignorant," delayed discovery statutes were passed, in the first instance, in an effort to accommodate the Type II victim.[174] Although this first justification applies primarily to Type II cases in

173. The general clinical literature on trauma often uses child sexual abuse as the exemplary case when recovered memories (in general) are being discussed, thus implicitly suggesting that these are the memories most likely to be repressed. *See* I. LISA MCCANN & LAURIE ANN PEARLMAN, PSYCHOLOGICAL TRAUMA AND THE ADULT SURVIVOR: THEORY, THERAPY, AND TRANSFORMATION 206-09, 228-30 (1990) (the only two examples in a section on repressed as opposed to intrusive memories concern incest, particularly father-daughter incest) and JUDITH HERMAN, TRAUMA AND RECOVERY 185 (1997) (in a general book on trauma, the only example of a totally repressed memory is a woman who enters therapy with a "body feeling" that she had been sexually abused by her father and who eventually "recovered memories of her father entering her bed at night").

174. Debbie Reynolds Prof'l Rehearsal Studios v. Superior Court, 30 Cal. Rptr. 2d 514, 520 (Ct. App. 1994); Hearndon v. Graham, 767 So. 2d 1179, 1186 (Fla. 2000) (reasoning that such a statute was justified because "[i]t is widely recognized that the shock and confusion resultant from childhood molestation often coupled with authoritative adult demands and threats for secrecy, may lead a child to deny or sup-

its "strong" form (i.e., "repression"), there is a "weak" form that relates to Type I cases. Even where the victims remembered the abuse, it was suggested, the *secrecy* surrounding the abuse and the *stigma* associated with disclosing it inhibited sexual abuse victims from coming forward with their claims and realizing the full impact on their lives.[175]

The first justification clearly creates fault lines in the doctrine, as it differentiates Type II from Type I cases. One option (reflected in early case law) would have been to restrict the use of the rule to repressed cases. This would have had the advantage of limiting the number of these difficult suits likely to be brought, since most studies do not establish that "repression" is a normative experience for sexual abuse victims. (The great majority of research suggests that total repression occurs only in a small minority of cases; in purely statistical terms, the Type I victim is thus the "typical" sexual abuse victim.[176]) But we have already seen the disadvantages that Type II cases brought in their tow. Repressed memory cases turned the legal spotlight on ther-

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press such abuse from his or her consciousness"). The *Debbie Reynolds* court stated:

> Our Legislature, aware it was limiting the scope of the statute [making the discovery rule applicable to childhood-sexual-abuse claims against non-perpetrators], recognized that it is the perpetrator of the abuse who is responsible for instilling the psychological defense mechanism leading to repression. It is this aspect of the repression phenomenon that our Legislature found deserving of special attention and caused it to enact a delayed discovery statute of limitations directed specifically at the perpetrator of the sexual abuse.

Id.

175. *See, e.g.*, Evans v. Eckelman, 265 Cal. Rptr. 605, 6096 (Ct. App. 1990).

176. Diana Elliott, *Traumatic Events: Prevalence and Delayed Recall in the General Population,* 65.5 J. CONSULTING & CLINICAL PSYCHOL. 811, 814 (1997) (finding 20% of the child sexual abuse victims experienced a "history of complete memory loss," with another 22% reporting a "history of partial memory loss"); Diana M. Elliott & John Briere, *Posttraumatic Stress Associated with Delayed Recall of Sexual Abuse: A General Population Study*, 8 J. TRAUMATIC STRESS 629 (1995) (discussing the same study); Shirley Feldman-Summers & Kenneth S. Pope, *The Experience of "Forgetting" Childhood Abuse: A National Survey of Psychologists*, 62 J. CONSULTING & CLINICAL PSYCHOL. 636 (1994) (citing a survey of psychotherapists which found that 44.4% of victims experienced either partial or total forgetting); Elizabeth F. Loftus et al., *Memories of Childhood Sexual Abuse: Remembering and Repressing,* 18 PSYCHOL. WOMEN Q. 67 (1994) (finding that 19% of the women with child sexual abuse histories in an outpatient clinic for substance abuse reported a period of total amnesia for the abuse). The only study indicating a rate over 50% is based on self-reports, the subjects were all in psychotherapy, and amnesia status was identified only on the basis of a yes-no question, rather than through a series of more nuanced questions. *See* John Briere & John Conte, *Self-Reported Amnesia for Abuse in Adults Molested as Children*, 6 J. TRAUMATIC STRESS 21 (1993).

apists and away from alleged perpetrators. In fact, there is a reasonable argument to be made that repressed cases should not have been included in legal reforms, much less have been the leading edge in terms of legislative impetus on the part of adult survivors and their advocates. Though no one could have precisely predicted the formation of the FMSF and the powerful scientific challenges posed by experts like Elizabeth Loftus, organized resistance was foreseeable. Given the novelty of letting adult survivors sue for emotional damages resulting from events occurring in childhood—and given the legitimate concern about fraudulent claims—it would have made sense to exclude repressed cases altogether, at least from the first phase of legal interventions.

How well does this justification account for the exceptional treatment afforded child sexual abuse? Let us first look at the "strong" version. Though supposedly reflecting child sexual abuse's most exceptional feature of all—its ability to be repressed from consciousness for years or even decades—the idea that the delayed discovery rule is justified in adult survivor cases because of the capacity of child sexual abuse to be repressed draws deeply on the notion that child sexual abuse is unique. "Repression" makes intuitive sense if sexual abuse is conceived as so terrible as to be beyond the capacity of comprehension. However, if one views the evidence in the light most favorable to the idea of repression, it appears that, whether or not the mechanism involved is normal forgetting or "repression," other traumas are also subject to "repression," though perhaps not to the same extent as child sexual abuse.[177] Next to sexual abuse,

177. Relatively little comparative research on forgetting has been done, but what little exists does not support the claim that childhood sexual abuse is the *only* form of abuse subject to forgetting and belated recollection and provides only weak support for the claim that childhood sexual abuse is repressed more frequently than other forms of abuse. Diana Elliott studied reported prevalence rates of forgetting of thirteen different traumas, including motor vehicle accidents, combat, rape, child sexual abuse, witnessed domestic violence among others, and found evidence for both complete and partial forgetting in *all* categories, except for the death of a child under eighteen. Child sexual abuse was the most frequent trauma to be totally repressed (20 percent), but the rates of total forgetting for other types of trauma were significant as well—witnessed or experienced combat injuries (16 percent), child physical assault (19 percent), witnessed domestic violence as a child (13 percent), and adult rape (13 percent). Elliott, *supra* note 176, at 814; *see also* Feldman-Summers & Pope, *supra* note 176 (finding both sexual abuse and physical abuse subject to periods of forgetting at rates that were not statistically different). These studies do not prove that a distinctive memory mechanism called "repression" exists, nor that events reported as forgotten were actually forgotten.

physical abuse appears to be most frequently subjected to repression.[178] Furthermore, there is evidence supporting the view that of various types of sexual abuse, *violent* sexual abuse is the type most likely to be repressed, which suggests that it is the violence, not the sexual abuse, causing the repression.[179] The real difficulty with this justification is that most statutes encompassed plaintiffs who remembered the abuse but did not appreciate its impact on their lives, so although repressed cases represented the leading edge, repression was not the *sine qua non* of these statutes.

As for the "weak" form of the justification—secrecy—it is not at all clear that the secrecy surrounding sexual abuse is distinctive from the secrecy surrounding other forms of abuse. Many abusive families are socially isolated—indeed, privacy facilitates abuse—and children are often loyal to even the most abusive parents. While it is true that some evidence of physical abuse or neglect (like physical bruises or poor hygiene) may be more likely to be discovered by third parties, at the same time it may be easier for the child to misrecognize physical abuse or neglect as discipline or even "love" when the parent's abusive behavior is "hidden in plain view." The very warnings that sexual abuse victims typically receive ("don't ever tell") may in themselves suggest to the victim that what is happening is wrong.

The Second Justification: Moral Reprehensibility

The second justification for the use of the delayed discovery rule in adult survivor sexual abuse cases—the idea that child sexual abuse is morally reprehensible and inherently wrongful—has not been much discussed, in explicit terms, in the legal discourse on the issue, but it is implicit in the idea of "uniqueness." It simply holds that, regardless of its effect on children, child sexual abuse offends our sensibilities and poses a threat to ordered society. Individuals should be deterred from directing their sexual desire toward children, because making children a sexual object constitutes a deviation from the sexual norms our society upholds (which are centered around monogamous heterosexual marriage and procreation). The idea that child sexual abuse is unique because it is morally reprehensible often makes reasoned

178. Elliott, *supra* note 176, at 814.

179. Briere & Conte, *supra* note 176. Other studies have not found an association between force and repression.

discussion about this topic impossible, so it will be helpful to make this idea as explicit as possible.

The moral reprehensibility of sexual abuse is particularly evident in the degree to which it has been criminalized. The criminal sanction is often imposed on deviant sexual activity for the purposes of expressing communal disapproval.[180] States are free to punish morally offensive behavior so long as they do not create laws that infringe on fundamental rights or impact negatively on protected classes.[181] Even though conflicts exist over definitions, in general "child abuse," while morally condemned, is not a crime unless it results in grave physical harm to the child.[182] In the average child abuse case, the real risk the parent faces is loss of custody. In most cases, the state attempts to convince the parent to cooperate with treatment, but, in the case of sexual abuse, prosecution is often mandatory. Laws covering child abuse reporting procedures for *criminal* prosecution often stipulate that *all* cases of sexual abuse, while only *serious* cases of physical abuse or injury mandate reporting.[183] This difference reflects the absolute quality of social attitudes towards child sexual abuse—all sexual abuse, no matter what degree of severity, is viewed as a crime—and the relative quality of attitudes towards physical

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180. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 304 (1968).

181. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986).

182. Generally, the majority of cases that are forwarded for criminal prosecution are sexual abuse cases. *See, e.g.*, MASSACHUSETTS DEPARTMENT OF SOCIAL SERVICES, CHILD MALTREATMENT STATISTICS, 1996, at iv (1997).

183. The Massachusetts law is typical. A copy of a child abuse report must be filed with the District Attorney's office when any of these conditions are met:

> (a) a child has died (b) a child has been sexually assaulted. . . (c) a child has suffered brain damage, loss or substantial impairment of a bodily function or organ, or substantial disfigurement; (d) a child has been sexually exploited, which shall mean encouraging a child to engage in prostitution . . . or in the obscene or pornographic photographing, filming, or depicting of a child . . . (e) a child has suffered serious physical abuse or injury that includes, but is not limited to: (i) a fracture of any bone, severe burn, impairment of any organ, or any other serious injury; (ii) an injury requiring the child to be placed on life-support systems; (iii) any other disclosure of physical abuse involving physical evidence which may be destroyed; (iv) any current disclosure by the child of sexual assault; or (v) the presence of physical evidence of sexual assault.

MASS. GEN. LAWS ch. 119, § 51B(4) (2002). Several things can be pointed out about the law. First, there are a redundancy of mentions of abuse that is sexual in nature (both assault and exploitation); and, second, sexual abuse reports can be forwarded on the basis of the child's verbal disclosures alone, but physical abuse reports require physical evidence.

abuse—only abuse that causes the child serious (physical) injury can be prosecuted as a crime.

Criminal prosecution of sexual abuse has been facilitated by other extraordinary developments in the criminal law. For example, the prosecutor in child abuse cases can now take advantage of many legal exceptions that apply to child sexual abuse in criminal law. In a development parallel to the use of the delayed discovery rule in civil cases, many states have extended or eliminated the statute of limitations for sexual abuse. In evidence law, there are new rules for sexual offenders instituting official exceptions to the propensity rule, the lynchpin of the presumption of innocence.[184] Prior offenses can now be introduced at trial without having to fall under one of the traditional categories by means of which evidence suggesting propensity might be admitted for "other purposes" (such as showing proof of motive, opportunity, intent, and so on).[185] In the eighties and nineties, state after state passed new legislation governing sexual offenders that increased prison sentences, added civil commitment terms after the prison sentences had run out, and set up elaborate community registration systems to track the whereabouts as well as to notify communities of the residence of sexual offenders.[186] Often labeled "sexual predator" statutes, these new laws had a decidedly punitive cast, with no serious attention being given to rehabilitating the offender.[187]

The relevance of criminal law to my argument might not be immediately obvious, since delayed discovery legislation was designed to facilitate the bringing of civil suits. However, though not usually articulated, the criminal nature of childhood sexual abuse provided an added incentive for courts to open the doors

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184. *See* FED. R. EVID. 414 ("Evidence of Similar Crimes in Child Molestation Cases"); FED. R. EVID. 415 ("Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation").

185. FED. R. EVID. 404(b).

186. For a summary of these statutes, see the web site of the U.S. Dept. of Health and Human Service's National Clearinghouse on Child Abuse and Neglect Information. NATIONAL CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFORMATION, STATE STATUTES, at http://www.calib.com/nccanch/statutes/index.cfm#lawscivil (last updated May 20, 2003).

187. Some statutes include nominal mentions of treatment. For a discussion, see Elizabeth A. Weeks, *The Newly Found "Compassion" for Sexually Violent Predators: Civil Commitment and the Right to Treatment in the Wake* of Kansas v. Hendricks, 32 GA. L. REV. 1261 (1998).

to adult survivors of childhood sexual abuse.[188] If the criminal justice system had failed to bring perpetrators to justice, it made sense to allow victims to get at least some financial compensation for their harms. Like criminal sanctions, civil suits by adult survivors are intended to deter child sexual abuse. As the Connecticut Supreme Court put it, in upholding the constitutionality of the state's child sexual abuse delayed discovery statute, "The state has a legitimate interest both in deterring the sexual abuse of children and in providing a means for the victims of childhood sexual abuse to recall the traumatic events and understand the harm done to them before seeking redress."[189]

Moral reprehensibility appears to be a decisive factor in favor of using the rule *only* in sexual abuse cases. No other type of abuse sets off the strong sense of social disapproval that sexual abuse does. No other type of abuse triggers the reactions of disgust and aversion (and their converses, fascination and attraction) triggered by child sexual abuse. No other type of abuse is, as a category, so criminalized as sexual abuse. Since in general there is a rough proportion between the statute of limitations and the perceived seriousness of the crime or tort—the more serious, the longer the statute of limitations—extending the discovery rule only in child sexual abuse cases arguably reflects the greater seriousness with which this type of child abuse is regarded.

The force of the moral reprehensibility justification is strong, but let me complicate it in a few ways. Though molestation and sexual assault against children have been crimes for some time, the exceptional criminalization that now surrounds sexual abuse is a relatively recent phenomenon, instituted partly to correct under-prosecution from the past. The measures surveyed above are all extraordinary measures, but they cannot truly serve to justify the exceptionalism reflected in the delayed discovery doctrine because they are contemporaneous with it. It is more correct to say that *both* are responses to the social movement calling attention to the child sexual abuse and of the incorporation of the feminist-psychotherapeutic narrative into the law.

This justification runs into problems in other ways. Though sexual abuse is the form of abuse most criminalized as a category, it is not the only form of abuse and neglect to be criminalized. Serious forms of abuse and neglect are criminalized as well, at

188. *See* Johnson v. Johnson, 701 F. Supp. 1363, 1370 (N.D. Ill. 1988) ("Incest is a crime in Illinois.").

189. Giordano v. Giordano, 664 A.2d 1136, 1142 (Conn. App. 1995).

least in theory, even if they do not lead to the death of the child. Furthermore, although there is some overlap between the criminal law and the civil law, a civil claim may be brought even when no crime has been committed, so criminalization is not *per se* dispositive. Finally, we have to ask a larger question, which I can only pose here—namely, whether this pattern of criminalization makes sense.

I have made moral reprehensibility of child sexual abuse a separate justification in order to emphasize that it is logically distinct from the justification of harm, with which it is often linked. Separated from harm, the essence of this justification would have to be that the goal of deterrence is the inappropriate direction of sexual desire. To illustrate what it means to distinguish this from harm, this goal may be usefully compared with that of a similar moral justification dating from an earlier historical period. Under canon law, sexual activity with a child was forbidden, not because it was harmful to the child but because it was non-procreative and thus a species of sodomy.[190] Translated into modern terms, this would be like saying that sexual abuse of children is forbidden because it provides a sexual release outside of marriage and frustrates the formation of new family units. Put in these terms, it is clear that no one today is really making this kind of argument, even though we might concur that sexuality should

190. The emphasis on procreation sometimes led canonists to moral priorities that today we would find surprising. Some canonists believed that the sin of extravaginal ejaculation was worse than fornication, seduction, rape or incest. JOHN T. NOONAN, CONTRACEPTION: A HISTORY OF ITS TREATMENT BY CATHOLIC THEOLOGIANS AND CANONISTS 261 (1965). According to the fifteenth-century theologian/preacher, Bernadine of Siena, "It is better for a wife to permit herself to copulate with her own father in a natural way than with her husband against nature." *Id.* Elsewhere, he declared, "It is bad for a man to have intercourse with his own mother, but it is much worse for him to have intercourse with his wife against nature." *Id.* To take a more proximate example, when a daughter of a magistrate in the seventeenth-century Massachusetts Bay Colony accused several men of sexual abuse, the incident catapulted the colony into a realm of moral and legal ambiguity. It took elders of several colonies several *months* to decide whether the incident should be categorized as sodomy or rape, at the end of which they could not agree, though apparently the views of the Massachusetts Bay ultimately prevailed. "Most of our own agreed in one, viz. that it was a rape, though she consented, in regard she was unripe and not of understanding fit to give consent." 2 JOHN WINTHROP, HISTORY OF NEW ENGLAND FROM 1630 TO 1649, at 45-47 (James Savage ed., Arno Press 1972) (1825). Though ultimately categorizing it as rape, the elders of the colony viewed the child as culpable as well. Far from worrying about the harm she might have suffered, they believed she had "grown capable of man's fellowship, and took pleasure in it" and so ordered that she "bee privately severely corrected by this Cort, Mr Bellingham & Increase Nowell to see it done." *Id.* at 46.

not be directed toward children. This helps to clarify the extent to which the moral reprehensibility justification is bound up with an assumption about the harm to children resulting from sexual abuse. In practice the two are often conflated—the moral reprehensibility of sexual abuse is thought to lie in its ability to cause a harm different in kind or greater in degree than other harms to children. That is the reason for creating a civil remedy. But if the real justification of these suits is that sexual abuse causes harm, then we have to look more carefully at the evidence for that claim, particularly evidence as to the uniqueness of that harm.

The Third Justification: Harm

With the third justification, we come to the heart of the matter. Reasons four and five set out by the Washington legislature suggests that giving the incest survivor an extended opportunity to file suit, even after the normal statute of limitations has been tolled to majority, reflects the ways in which child sexual abuse is thought to be a complex and serious harm—widespread as well as devastatingly destructive. The justification of harm implicitly suggests that child sexual abuse is more defining of adult identity, more likely to have destructive effects on a victim's life, more likely to cause the kind of suffering for which damages could be claimed, than other forms of abuse. In *Peterson v. Bruen*, the Nevada Supreme Court noted, "Unlike almost all other complainants subjected to statutes of limitation, child victims of sexual abuse suffer from a form of personal intrusion on their mental and emotional makeup that interferes with normal emotional and personality development."[191] Since to date the use of delayed discovery in civil tort cases involving adult survivors of child abuse has been applied *uniquely* to cases involving child *sexual* abuse, the inference to be drawn is that child sexual abuse causes *more* long-term emotional and psychological damage than other forms of abuse. It is no accident that the only other type of case where recovered memories have been successfully introduced are murder cases,[192] the most serious crime our society acknowledges.

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191. Petersen v. Bruen, 792 P.2d 18, 24 (Nev. 1990).

192. *See, e.g.*, Jon Schmitz, *Court Upholds Murder Conviction on Son's Old Memory*, PITTSBURGH POST-GAZETTE, Oct. 8, 1993, at B1 (discussing murder case).

The issue of "causation" has figured much less prominently in child sexual abuse cases than might be expected. Although commentators argued that delayed discovery suits by adult survivors are less like traditional torts, where the wrongful act and its consequences are immediately known (except for the intangibles of pain and suffering), and more like latent injury cases like those involving asbestos and DES, that analogy did not seem to bring along in its tow the thorny questions about causality that latent injury cases typically raise. While plaintiffs in toxic tort cases are generally required to prove both general and specific causation,[193] causation has not been a significant matter of dispute in Type I cases, rarely if ever being challenged on appeal.[194] The plaintiff's burden has been to prove when they made "the causal link" or "recognized the connection" between the abuse and her subsequent emotional injuries. If the wrongful act or acts is proved, it has usually been assumed that causation is proved as well. Indeed, courts sometimes excluded evidence that the plaintiff's injuries might have had other causes.[195]

Despite the intuitive plausibility of the justification of harm, research in support of the claim that child sexual abuse causes severe and lasting harm has been criticized by some as having design flaws.[196] Even researchers sympathetic to child abuse victims admit that early studies on childhood sexual abuse suffer from what is known to social scientists as "confounding"—that is, the confusion created when an association between two variables

193. Wright v. Willamette Industries, Inc., 91 F.3d 1105, 1106 (8th Cir. 1996) ("[A] plaintiff in a toxic tort case must prove the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover").

194. Most appellate cases in the area of recovered memory are appeals by the plaintiff against a grant of summary judgment, on statute of limitations grounds, to the defendant.

195. *But see* Giordano v. Giordano, 664 A.2d 1136, 1150 (Conn. App. 1995) (reducing amount of damages because the plaintiffs "had suffered other traumatic events as children, including abandonment by their mother and physical abuse by their stepmother, not all of the plaintiffs' difficulties as adults were necessarily a result of the alleged sexual abuse, and accordingly awarded an amount lower than that requested.")

196. An influential early study of the short-term harmful effects of child sexual abuse reviewed 15 studies, but of those studies, 9 had no comparison group (a grave defect in social scientific research). "In some case when a comparison group was included, the social class of the comparison group was considerably higher than that of the maltreated group but this problem is neither acknowledged nor addressed statistically." Patricia Trickett & Catherine McBride-Chang, *The Developmental Impact of Different Forms of Child Abuse and Neglect*, 15 DEVELOPMENTAL REV. 311, 313-14 (1995).

is discerned and it is believed that one of the variables causes the other but the true causality comes from a third, hidden variable that is often closely associated with one or another of the initial variables.[197] Researchers have tended to study child sexual abuse "in a relative vacuum;"[198] many studies do not discriminate between childhood sexual abuse and physical abuse or between violent and non-violent forms of sexual abuse (thus leaving in question whether it was sexual abuse or violence that is causative in the relation).[199] Still other studies have shown that when other types of abuse, including general family dysfunction, are controlled for, the specific relationship between sexual abuse and psychopathology recedes to insignificance.[200] This means that in all likelihood it is the dysfunctional environment that is pathological, rather than the sexual abuse per se. As researchers have become more sophisticated and have begun to try to take account of multiple forms of abuse, several studies have suggested that victims of mixed physical and sexual abuse do worse in the long run than victims of sexual abuse alone, and that some victims of physical abuse fare worse than some victims of non-violent sexual abuse.[201] Similarly, eating disorders commonly appear in the self-help literature, yet empirical evidence for the association is mixed. Two studies prompted the Editors of the *American Journal of Psychiatry*, as long ago as 1994, to warn against seeing sexual abuse as a "unitary concept of pathogenesis;"[202] other forms of abuse, including emotional abuse and family dysfunction, were found to be strongly correlated with

197. John Briere, *Methodological Issues in the Study of Sexual Abuse Effects*, 60 J. CONSULTING & CLINICAL PSYCHOL. 196, 199 (1992) ("groups defined as 'sexual abuse' may have experienced varying amounts of physical abuse or neglect, but this was not measured or reported.")

198. *Id.*

199. Joseph H. Beitchman et al., *A Review of the Long-Term Effects of Child Sexual Abuse*, 16 CHILD ABUSE & NEGLECT 101, 101-18 (1992).

200. M. E. Fromuth, *The Relationship of Childhood Sexual Abuse with Later Psychological and Sexual Adjustment in a Sample of College Women*, 10 CHILD ABUSE & NEGLECT 5 (1986); M. R. Nash et al., *Long-Term Sequelae of Childhood Sexual Abuse: Perceived Family Environment, Psychopathology, and Dissociation*, 61 J. CONSULTING & CLINICAL PSYCHOL. 276 (1993).

201. Kristen K. Schaaf & Thomas R. McCanne, *Relation of Childhood Sexual, Physical, and Combined Sexual and Physical Abuse to Adult Victimization and Posttraumatic Stress Disorder*, 22 CHILD ABUSE & NEGLECT 1119 (1998); *see also* T.W. Wind & L. Silvern, *Type and Extent of Child Abuse as Predictors of Adult Functioning*, 7 J. FAM. VIOLENCE 261 (1992).

202. Editorial, *"Sexual Abuse," Pathogenesis, and Enlightened Skepticism*, 151 AM. J. PSYCHIATRY 1101 (1994).

eating disorders. Sexual abuse was implicated only in combination with other forms of abuse or a dysfunctional family background.[203]

By and large, in child sexual abuse cases, courts have accepted evidence of a broad range of psychopathological and behavioral problems without insisting on the "distinct syndrome" promoted by legal commentators. This was fortunate for plaintiffs, since generally speaking, latent injury cases have had the most chance of success when there is a signature disease that indicates toxic exposure—e.g., asbestosis and exposure to asbestos; uterine cancer and DES; and lung cancer, emphysema and smoking. However, unlike some latent injury cases, child sexual abuse cases do not generally involve a signature disease. Though proclaimed by self-help books,[204] the notion that incest survivors suffer from a distinct syndrome has been rejected by mainstream therapists.[205] Rather, victims of child sexual abuse are believed to manifest a "wide range of coping strategies,"[206] and clinicians caution against the idea of inferring child sexual abuse from a particular symptom portrait.[207] PTSD for acute, adult-onset trauma often has specific markers that indicate its cause (a com-

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203. Johann F. Kinzl et al., *Family Background and Sexual Abuse Associated with Eating Disorders*, 151 AM. J. PSYCHIATRY 1127 (1994); Marcia Rorty et al., *Childhood Sexual, Physical, and Psychological Abuse in Bulimia Nervosa*, 151 AM. J. PSYCHIATRY 1122 (1994).

204. "Post-Incest Syndrome" in particular is a meaningless label. E. Sue Blume's *Secret Survivors*, from which the phrase "Post-Incest Syndrome" is taken, gives a checklist of "Aftereffects" of incest that includes so many symptoms (and so many mutually contradictory symptoms) that it belies the name "syndrome." Included are such items as the following: "Eating disorders, drug or alcohol abuse (or total abstinence); other addictions; compulsive behaviors;" "Need to be invisible, perfect, or perfectly bad;" "Rigid control of one's thought process; humorlessness or extreme solemnity;" "High risk taking ('daring the fates'); inability to take risks." BLUME, *supra* note 43, at ii-iii.

205. ALPERT ET AL., *supra* note 42, at 73 ("no one set of symptoms or syndrome accurately characterizes the adult sequelae of childhood sexual abuse"). The APA Final Report also refers to the "wide range of coping strategies," to the "documented heterogeneity of response to childhood sexual abuse." *Id.* at 74–75.

206. *Id.* at 74. *But see* John Briere & Marsha Runtz, *Differential Adult Symptomatology Associated with Three Types of Child Abuse Histories*, 14 CHILD ABUSE & NEGLECT 357 (1990) (identifying a few traits differentially associated with types of abuse). Sexual dysfunction seems the only long-term effect that is truly distinctive to sexual abuse, but this is a much narrower category than attachment behavior, which may be affected by a wide range of experiences of maltreatment and loss.

207. Alpert et al., supra note 42 at 75 ("No assumptions should be made by a clinician that sexual abuse must have occurred based largely upon the presence of a symptom picture, since a number of the sequelae of sexual abuse may also emerge from other general and/or traumatic experiences.").

bat veteran with recurring nightmares about gun fire, a rape victim having intrusive images about her rapists masked face), but the kind of PTSD that results from complex childhood trauma occurring over a long period of time is less likely to have such specific markers. In addition, child sexual abuse plaintiffs often claimed diffuse, non-specific symptoms like depression, anxiety, eating disorders, or drug abuse that may in fact have many causes. Failed relationships were also among the harms typically included as an effect of child sexual abuse. Like the Barton's (the couple that testified before the Washington legislature), plaintiffs in child sexual abuse delayed discovery cases were often claiming, in essence, "Our lives were messed up."[208]

Like the data about harm, the statistics about prevalence were at times misleading as well. The normative narrative suggested that the damage from child sexual abuse was as wide as it was deep. In weighing the competing claims of plaintiffs and defendants, courts and legislatures clearly were influenced by the pervasiveness of child sexual abuse; the sheer numbers indicated that child sexual abuse was apparently a widespread social problem, much more so than had previously been believed. Numerous studies found that as many as one in three women and one in ten men experience some form of sexual abuse as children.[209] Studies revealing this astonishing prevalence were then frequently invoked in the same breath with other studies suggesting that the harm caused by sexual abuse is devastating for victims. This juxtaposition created the impression that one in two or three women suffer grave and debilitating long-term consequences.[210] A similar effect was created when commentators juxtaposed prevalence data with data suggesting that father-daughter incest

208. The argument I am making here should be distinguished from the argument that has been made about the tort notion of "proximate cause" in Leslie Bender & Perette Lawrence, *Is Tort Law Male? Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313 (1993). I am not trying to "cut off" chains of causality but to highlight the fact that certain causal chains have been given greater legal recognition than others.

209. *See, e.g.*, RUSSELL, *supra* note 34, at 67.

210. *See* Rosenfeld, *supra* note 100, at 208. Alan Rosenfield states:

> [T]he frequency of sexual abuse actually might be higher than reported in any survey because many survivors repress their memories of abuse or are otherwise prevented from reporting it even in an anonymous survey. Thus, it is possible that as many as half of the adult women in the United States have been victims of childhood sexual abuse. In addition, there is now a growing body of literature that examines the severity of long-term damages suffered by survivors.

Id.

is the most common form of child sexual abuse. Though father-daughter incest is a gravely serious form of abuse, it is far from the most common type of incest. Step-fathers are five times as likely as biological fathers to sexually abuse their step-daughters,[211] and brothers are also common offenders.[212] Perhaps the single most common perpetrator *among family members* is the uncle.[213] But abuse is still more likely to be committed by strangers and friends and acquaintances.[214] Of course, such abuse may be gravely harmful too, but only a small subset of all children who experienced unwanted sexual contact (if that is defined broadly to include touching, kissing, fondling, exhibitionism) are repeatedly and intrusively abused. For that subset of victims who suffer repeated intrusive or violent forms of sexual violation (oral sex, anal sex, intercourse), the evidence that they suffer devastating, long-term psychological harm is quite compelling,[215] even if the "uniqueness" of this harm turns out to be an article of faith. But for the majority of victims, those who experience less frequent, less intrusive violations or even ambiguously pleasurable experiences, child sexual abuse does not necessarily have to be debilitating in the long-run, unless combined with other developmental traumas. Since the justification of harm had an intuitive plausibility, in rulings favoring the plaintiff courts often cited data without subjecting it to critical scrutiny. In *Peterson v. Bruen*, one of the few cases actually citing social scientific data (rather than legal digestion of it), the only studies directly cited examined the effects of sexual abuse on children[216] and thus did

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211. RUSSELL, *supra* note 34, at 232.

212. *Id.* at tbl. 15-1.

213. *Id.* at 215.

214. *Id.* at 219. Diane Russell states:

> The old myth used to be that most perpetrators of child sexual abuse are strangers. It is now common for people to say instead that most child sexual abuse is perpetrated by members of the child's own family. Our survey reveals, however, that when all cases of incestuous and extrafamilial child sexual abuse are combined, *the majority of the perpetrators were not relatives.* Specifically, 11 percent were total strangers, 29 percent were relatives, and 60 percent were known but unrelated to the victims. We must be careful that we do not simply replace the old myth that perpetrators are usually strangers with a new one that they are usually relatives.

Id. (emphasis added.)

215. Jeffrey J. Haugaard & Robert E. Emery, *Methodological Issues in Child Sexual Abuse Research*, 13 CHILD ABUSE & NEGLECT 89 (1989).

216. Petersen v. Bruen, 792 P.2d 18, 23 (Nev. 1990) (citing Susan V. McLeer et al., *Post-Traumatic Stress Disorder in Sexually Abused Children*, 27 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 650 (1988)).

not truly support the proposition that *adult* survivors suffer long-term harms. Data about adult survivors was second-hand,[217] and the court's reasoning took some speculations as facts.[218] To put this research into further perspective, let me now briefly review research on the long-term consequences of violence and neglect. Though these forms of abuse have been relatively under-researched and under-theorized because of a research bias in favor of child sexual abuse,[219] there is nonetheless enough evidence available now to suggest that in our concern for children and for the long-term developmental consequences resulting

217. *Id.* (citing DAVID FINKELHOR ET AL., A SOURCEBOOK ON CHILD SEXUAL ABUSE 162-63 (1988) ("Empirical studies with adults confirm many of the long-term effects of sexual abuse mentioned in the clinical literature.")).

218. The court quoted this passage from McLeer: "'Several investigators have noted that some of these symptom clusters fit DSM-III-R [The Diagnostic and Statistical Manual] criteria for PTSD, and these data [from other studies] suggest that women may have unremitting PTSD symptoms for years after the experience of child sexual abuse.'" *Id.* at 278 (quoting McLeer et al., *supra* note 216, at 650). Taking that speculation as conclusive, the court then cited DSM criteria for PTSD as support for its assertion that "in many cases, the lives of CSA survivors progressively deteriorate to the point where individual coping is no longer possible or tolerable." *Id.* at 279.

219. The roots of this research bias lie in the history of the study of post-traumatic stress disorder within the field of psychiatry. Evidence of this research bias can be demonstrated in a number of ways. Articles published in the premier journal *Child Abuse and Neglect* reflect the shift from physical abuse to sexual abuse as the leading issue in child protection advocacy. From 1979 to 1982, there were 30 percent more articles on physical abuse as compared with sexual abuse; from 1983 to 1986, the balance shifted in favor of sexual abuse, which outnumbered physical abuse by 15 percent; from 1987 to 1990, the preponderance of articles on sexual abuse became pronounced—almost 5 to 1. Keith L. Kaufman & Leslie Rudy, *Future Directions in the Treatment of Child Physical Abuse*, 18 CRIM. JUST. & BEHAV. 82, 84 (1991). In the PILOTS database, which compiles research related to traumatic-stress, the ratio of articles with "sexual abuse" and "child" in the title compared with "physical abuse" and "child" in the title is over 10 to 1. National Center for Post Traumatic Stress Disorder, The Pilots Database: An Electronic Index to the Traumatic Stress Literature, *at* http://www.ncptsd.org/publications/pilots (last visited June 24, 2003). The ratio of articles with "neglect" and "child" in the title is 13 to 1. *Id.* A similar disproportion is revealed if we consider books written about child abuse and neglect. Using the Harvard library computer catalog, the number of book titles that come up under the "keyword" heading of "child sexual abuse" is 786. Another 505 appear if we use the keyword "incest." For "child physical abuse" and "battered child," the result is 46 and 52, respectively. "Child neglect" yields 270. If we use "Subject Headings," the classification system used by the Library of Congress, the results are similar. Using the subject heading of "child abuse," the number of book titles retrieved is 1141; for "child sexual abuse," the number is 645, over one half of all the books on child abuse. Of course, these numbers give only a rough idea of the distribution; the categories are imprecise and there is overlap (e.g., some books that come up under "child physical abuse" are really about sexual abuse). Nevertheless, they strikingly suggest that the majority of research and writing about child abuse and neglect is really about child sexual abuse.

from abuse, we need to look not only at sexual abuse but at other forms of maltreatment as well.

Violence

American families are violent institutions, though this is often unrecognized.[220] Murray Straus and Richard Gelles have conducted the most extensive research on violence in American families and found astonishing levels.[221] In a single year, they found that one in ten children overall was subjected to "severe violence" by their parents.[222] Since these data only concern a single year, lifetime prevalence rates are likely much higher.

Like child sexual abuse, physical violence against children has been linked with long-term harm. Even recipients of "normal" corporal punishment have higher rates of depression as adults than children not corporally disciplined.[223] Chronic high levels of normal corporal punishment in adolescence have been linked to suicidality.[224] Like victims of child sexual abuse, victims of physical abuse frequently have behavioral and relationship problems as adults or adolescents, though physical abuse victims more frequently engage in anti-social behavior, rather than the self-destructive behavior of sexual abuse victims. Like victims of child sexual abuse, victims of physical abuse are more likely to engage in criminal behavior than non-abused individuals—prostitution in the case of sexual abuse, violence and property crimes in the case of physical abuse.[225] Child victims of

220. "There are powerful social and psychological forces that interfere with even perceiving the fact that there is a great deal of violence in families." MURRAY A. STRAUS & RICHARD GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES 9 (1990).

221. *Id.* at 97 tbl. 6.1. One couple in six reported at least one incidence of violence during the previous year; more than five in ten children experience "serious violence" from a brother or sister. *Id.* Straus and Gelles break down violence into the following categories: "minor violence" which includes throwing something, pushing, grabbing, shoving, spanking and slapping; "severe violence" which includes kicking, biting, punching, hitting or trying to hit with an object, beating up, choking, burning or scalding (for parents), threatening with a gun or knife, using a gun or knife; and (for certain analytical purposes) "very severe violence" which includes most of the items in "severe violence" except for "hitting with an object" (to avoid any overlap with conventional notions of corporal punishment). *Id.* at 6.

222. *Id.* at 97.

223. MURRAY A. STRAUS, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES 70-74 (1994).

224. *Id.* at 73.

225. The more corporal punishment a child experiences, the more likely he is to engage in violent or property crime as a young adult. *Id.* at 106.

severe physical violence are, as adolescents, two to three times more likely than non-abused children to have trouble making friends, throw temper tantrums, get failing grades in school, be disciplinary problems, engage in assaultive behavior, drink and use drugs, and engage in vandalism and theft.[226] Child and adolescent victims of child physical abuse are at risk for a number of psychiatric disorders, including "depressive disorders, anxiety disorders, conduct disorder, oppositional defiant disorder, attention deficit/hyperactivity disorder, and substance abuse."[227] Evidence suggests that these problems continue into adulthood.[228]

Like sexually abused children, physically abused children show neurobiological damage. Physically abused children have been shown to have frontotemporal and anterior brain electrophysicological abnormalities[229] and hormonal changes involving the hypothalamo-pituitary-adrenalcortical axis.[230] Adults abused as children have decreased volume in the hippocampus, the region of the brain important to memory functioning.[231] Neurobiological research, the cutting edge in child maltreatment research, appears to show that children suffer damage, whether the maltreatment is sexual or physical abuse or neglect, though this research is still in its early stages.[232]

Perhaps the most significant point of differentiation between child physical abuse and child sexual abuse is the extent to which physical abuse is a risk factor for later behavior that aggresses against others. Rapists are more likely to have been physically abused as children than the general population.[233] Although the criminal law has some limited mechanisms for taking account of

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226. STRAUS & GELLES, *supra* note 220, at 428; *see also* Sandra J. Kaplan et al., *Child and Adolescent Abuse and Neglect Research: A Review of the Past 10 Years: Part I: Physical and Emotional Abuse and Neglect*, 38 J. AM. ACADEMY CHILD & ADOLESCENT PSYCHIATRY 1214, 1216 (1999).

227. Kaplan et al., *supra* note 226, at 1217.

228. Malinosky-Rummell & Hansen, *supra n.* 15.

229. Y. Ito et al., *Increased Prevalence of Electrophysiological Abnormalities in Children with Psychological, Physical, and Sexual Abuse,* 5 J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCE 401 (1993).

230. Kaplan et al., *supra* note 226, at 1218.

231. Martin H. Teicher, *Scars That Won't Heal: The Neurobiology of Child Abuse*, SCI. AM., Mar. 2002, at 70, 71.

232. *Id.*

233. W.H. Sack & R. Mason, *Child Abuse and Conviction of Sexual Crimes: A Preliminary Finding*, 4 LAW & HUMAN BEHAV. 211 (1980). Of course, the feminist-psychotherapeutic narrative acknowledged that child molesters have often been sexually abused as children, but the victims in the paradigmatic narrative chose the path of healing rather than the path of perpetration.

"mitigating" factors, such as child abuse, for legal purposes comparisons with adult survivors of sexual abuse are most persuasive for those adults whose externalizing behavior falls short of criminal activity. The angry, anti-social victim of physical abuse may be less attractive to judges and juries than the "nice," self-destructive victims of the feminist-psychotherapeutic narrative. But we do not have to like the victim in order to want to deter the act. In fact, precisely because we do not like the victim, because the victim is likely to "pass on" the harm and create social costs, it is in our interest to deter the behavior.[234] Furthermore, it is not true that every victim of physical abuse will grow up to abuse others. Many will suffer depression or abuse drugs, especially if they are women.

Attention to physical abuse (and neglect as well) is important in order to have a gender-balanced approach to child maltreatment. Boys are more likely to experience physical abuse than girls.[235] Some studies of abused adolescents find that boys suffer more from child physical abuse and neglect than from sexual abuse,[236] perhaps because the physical abuse they experience is likely to be more severe than that which girls experience. Boys may also suffer more from witnessing domestic violence than girls[237] and may be more prone as a result to engage in violent offending.[238] Understanding how boys' exposure to violence interacts with gender socialization to produce the adult male propensity for violence may lead to greater insights in understanding.[239]

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234. Psychological abuse or violence ("verbal battering") is almost unrecognized by child protection services as a reason for intervention, even though "mental injury" is specifically mentioned in most reporting statutes. Though it often co-occurs with other forms of child maltreatment, child researchers are becoming increasingly aware that it occurs alone and has independent effects. *See* Angelika H. Claussen & Patricia M. Crittenden, *Physical and Psychological Maltreatment: Relations Among Types of Maltreatment*, 15 CHILD ABUSE & NEGLECT 5 (1991).

235. MELISSA SICKMUND ET AL., JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE: STATISTICS: SUMMARY 1-47 (1997).

236. Lori A. Meyerson et al., *The Influence of Childhood Sexual Abuse, Physical Abuse, Family Environment, and Gender on the Psychological Adjustment of Adolescents*, 26 CHILD ABUSE & NEGLECT 387 (2002).

237. Matthew W. Reynolds et al., *The Relation Between Gender, Depression, and Self-Esteem in Children Who Have Witnessed Domestic Violence*, 25.9 Child Abuse and Neglect 1201 (2001).

238. Veronica M. Herrera & Laura Ann McCloskey, *Gender Differences in the Risk for Delinquency Among Youth Exposed to Family Violence*, 25 CHILD ABUSE & NEGLECT 1037, 1048 (2001).

239. A recent study has suggested that mutations of a certain gene may, *in combination with abuse and maltreatment*, result in violent behavior and antisocial per-

Emotional Abuse

Because of special difficulties with the legal cognition of emotional injuries, I will not discuss this type of maltreatment in depth. However, it is important to note that some research suggests that emotional maltreatment may actually be more destructive of long-term psychological functioning than other forms of maltreatment.[240]

Neglect

It is generally acknowledged that the great bulk of the caseload in the system is made up of reports of neglect, especially physical neglect. The reasons for this are thought to be two. First, neglect is an extremely common form of child abuse.[241] Second, the families that are most exposed to social services, the process through which maltreatment might be discovered, are poor families that are most likely to physically neglect children. Neglect is a highly dangerous form of child maltreatment. Approximately 40 percent of child deaths are attributable to it.[242] Though neglect is generally identified in the public imagination with images of hungry, dirty, ill-clothed children, psychological neglect (lack of attention to the child's needs for warmth, attention, stimulation) is a distinct and equally dangerous form. Psychological neglect probably also generally accompanies physical neglect, but it can also occur alone (and in middle-class families most likely does occur alone).

The neurobiological implications of maltreatment are especially exacerbated when it comes to psychological neglect. Research on brain development has shown that psychological neglect (lack of stimulation, attention) has a direct impact on the "hard-wiring" that takes place in the crucial early years of life. The brain of a neglected child does not develop optimally, leav-

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sonality problems among boys. Avshalom Caspi et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*, 297 SCI. 851, 851 (2002). Interestingly, the study implicates not just outright abuse but also "erratic, coercive, and punitive parenting." *Id.*

240. Kaplan et al., *supra* note 226, at 1218.

241. Neglect was the most common form of abuse in the Second National Incidence Study, compiled in 1986, six years after the First National Incidence Study. Though this data is based on information broader than statistics drawn from the child protection system, it is still based largely on reporting data. NATIONAL RESEARCH COUNCIL, *supra* note 23, at 81.

242. D. WIESE & D. DARO, CURRENT TRENDS IN CHILD ABUSE REPORTING AND FATALITIES: THE RESULTS OF THE 1994 ANNUAL FIFTY STATE SURVEY (1995).

ing that child plagued in later years by a variety of developmental delays and chronic difficulties, such as poor academic performance and low I.Q., weak interpersonal skills, attachment problems, behavioral problems such as acting-out or extreme passivity, problems with affect, risk of substance abuse, and propensity for anti-social and criminal behavior.[243] The reason for this impact is that infants are born with an excess of neurons in their brain. As Janet Weinstein and Ricardo Weinstein explain, synapses between neurons are created only after birth, thus creating neural pathways for the exchange of information:

> Genes contain the information for general organization of the brain's structure, but experience determines which genes become expressed, how, and when. . . . Experience—the activation of specific neural pathways—therefore directly shapes gene expression and leads to the maintenance, creation, and strengthening of the connections that form the neural substrate of the mind.[244]

Children who are surrounded by environments rich in stimulation are believed to develop a greater density of synaptic connections, as well as increased neurons and a physically larger hippocampus, the region of the brain important for learning and memory.[245] The brain's development during these early years will affect its ability to process information throughout life.[246] This aspect of brain research thus provides a theory for what has been observed for some time—namely, that neglected children fare worse than others in the cognitive/academic dimensions of development.[247] Ironically, despite the attention given to childhood trauma, particularly sexual trauma, in the current social discourse on child abuse, the developmental effects of psychological deprivation may even be greater than those associated with

243. My argument here relies heavily on Janet Weinstein & Ricardo Weinstein, *Before It's Too Late: Neuropsychological Consequences of Child Neglect and Their Implications for Law and Social Policy*, 33 U. MICH. J.L. REFORM 561, 591-92 (2000).

244. *Id.* at 592 (summarizing DANIEL J. SIEGEL, THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE 13-14 (1999)).

245. *Id.*

246. *Id.*

247. Patricia Trickett and Catherine McBride-Chang state:

> The results seem clearest in the cognitive/academic domain. Consistently, from the earliest ages, physically abused and neglected children show poorer cognitive development and poorer school performance than comparison group children, with neglected children showing the worst delays and lowest performance. This is so even when SES is carefully controlled.

Trickett & McBride-Chang, *supra* note 196, at 325.

trauma.[248] "It is that pervasive insensitivity to the child's needs rather than the incidence of abuse per se which is the primary factor accounting for long term psychological consequences."[249]

Even more startling than research showing an association between neglect and cognitive impairment is the association between neglect and violence.[250] The "intergenerational transmission" theory of child abuse suggests that adults pass on abuse learned as children. While this may be true in some general sense, the research on neglect makes clear that maltreatment is not necessarily passed on in a direct one-to-one relationship. The association between neglect and violence is not as strange as it might appear. The "affect-inhibition" often resulting from neglect "makes it far less likely such children will empathize with others' pain, so they may prove peculiarly capable of cold-blooded torture or business-like brutality."[251] However, the neglect/violence narrative is not one that has a comparable purchase on the public imagination as does the sex/pathology narrative.

This research on neglect also reveals a problem with legal standards of neglect. Because the prevailing legal standard in most jurisdictions requires a showing of immediate physical harm or threat of physical harm to the child in order to justify intervention,[252] the legal definition of neglect fails to protect children from many of the most damaging effects of neglect. The law on neglect has been framed this way to ensure that children are only taken away from their parents when faced with "serious harm," but the assumption behind the policy on child neglect is that

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248. Bruce D. Perry et al., *Childhood Trauma, Neurobiology of Adaptation, and "Use-Dependent" Development of the Brain: How "States" Become "Traits,"* 16 INFANT MENTAL HEALTH J. 271, 271-89 (1995).

249. JILL DUERR BERRICK ET AL., THE TENDER YEARS: TOWARD DEVELOPMENTALLY SENSITIVE CHILD WELFARE FOR VERY YOUNG CHILDREN 19 (1998) (quoting M.F. Erickson & B Egeland, *Psychologically Unavailable Caregiving, in* Psychological Maltreatment of Children and Youth 164 (M. Brassard, B. Germain, & S. Hart, eds. 1987)).

250. Cathy Spatz Widom, *The Cycle of Violence*, 244 SCI. 160 (1989). In her study, Cathy Widom segregated out pure types of abuse and neglect (as far as was possible) and found that neglected children had a rate of arrest for "any violent offense" of 12.5%. *Id.* This is comparable (though slightly less) than the rate for physically abused children (15.8%) and higher than the rate for non-abused/neglected controls (7.9%). *Id.* at 164, tbl. 2; *see also* Cathy Spatz Widom, *Child Abuse, Neglect, and Adult Behavior: Research Design and Findings on Criminality, Violence, and Child Abuse*, 53 AM. J. ORTHOPSYCHIATRY 355 (1989).

251. NORMAN A. POLANSKY, DAMAGED PARENTS: AN ANATOMY OF CHILD NEGLECT 46 (1981).

252. Weinstein & Weinstein, *supra* note 243, at 576-90.

physical harm is more serious than psychological harm. In fact, it appears that much physical harm is less serious than the psychological harm suffered by neglected children, since the "long-lasting consequences" of the latter may penetrate "every domain of a child's life."[253]

To sum up, each of the three main justifications for use of the discovery rule only in sexual abuse cases (secrecy, moral reprehensibility, and harm) must be qualified by the awareness that much of what is thought to be "unique" to child sexual abuse seems often to be characteristic of child abuse *in general*. Child abuse often remains a *family* secret, even when it does not happen in complete privacy, and children are often reluctant to betray their parents, whether the abuse is physical, emotional, or sexual. Evidence exists associating harm, including irreversible neurobiological damage, with a wide variety of child maltreatments. Indeed, when researchers carefully control for different forms of abuse, sexual abuse appears to be most harmful when it co-occurs with other forms of abuse. Some studies have shown that victims of "pure" sexual abuse exhibit fewer symptoms than victims of physical abuse. Psychological abuse, physical abuse, as well as sexual abuse, has been correlated with a number of risk factors for leading causes of death, including smoking, obesity, physical inactivity, depression, suicide attempts, alcoholism, substance abuse, sexual promiscuity, and sexually transmitted diseases.[254] Similarly, correlations between all forms of abuse with a number of diseases have been found.[255] The most distinctive feature of child sexual abuse—its perceived moral reprehensibility—is less a characteristic of sexual abuse than the social fact that needs to be explained. To adduce moral reprehensibility as the explanation for the exceptionalism surrounding child sexual abuse is, in essence, tautological. What we really need to explain is why child sexual abuse is seen as more morally reprehensible than other forms of abuse.

In critiquing these three justifications for the use of the delayed discovery rule only in child sexual abuse cases, I realize that it is risky to challenge the assumption that child sexual abuse is the "worst" form of child abuse. Those who do so are often

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253. *Id.* at 600-01.

254. Vincent J. Felitti, *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 AM. J. PREV. MED. 245, 250 (1998).

255. *Id.*

suspected of being apologists for paedophilia, but the choice need not be either/or. We can acknowledge that sexual abuse is harmful, without uncritically accepting the premise that it is uniquely harmful, without defining it as a category of experience so "unique," so unlike everything else, as to warrant the panoply of legal exceptions that now surrounds it. What I have tried to do here is suggest that if we look at child sexual abuse in the context of other forms of child abuse and neglect, its uniqueness becomes less self-evident. Since the announced justifications do not fully account for the perceived "uniqueness" of child sexual abuse, it is likely that the reasons lie elsewhere. In the next Part, I suggest an alternative explanation, drawing on cultural studies, for why child sexual abuse is seen as exceptional and unique.

IV. Suing for Lost Childhood: The Cultural Context

My analysis thus far has implied that the exceptional response of the law to sexual abuse as compared with other forms of child abuse and neglect is largely owing to the different levels of activism that have surrounded the issue of child sexual abuse, rather than reflecting in a wholly accurate way the available evidence about child maltreatment and its long-term effects. In this Part, I broaden the historical context of analysis and argue that the social construction of child sexual abuse reflected in law, feminism, and psychotherapy draws on a deeper history relating to the idea of childhood. The greater legibility of a connection between sexual abuse and psychopathology and dysfunction is indebted to this deeper history, as is the intuitive sense that sexual abuse is "exceptional" and "unique."

Sexual Abuse and the Idea of Childhood

Evidence for the operation of the ideology of childhood can be seen in the speed with which a concern with sexual abuse was disseminated through American society. Just six years after the initial development of feminist activism around the issue (but well before the feminist position on abuse had fused with the psychotherapeutic concern with mental health), a frenzy of concern about child pornography gripped the nation in the mid-1970s resulting in the passage of the Protection of Children Against Sexual Exploitation Act of 1977. In the Senate hearings preceding the passage of this act, the long-term damage to children from this form of sexual abuse was taken for granted, even though few (if any) systematic studies had been carried out at

that time. The Committee on Human Resources of the Senate drafted a resolution condemning child pornography in which it declared that "such base and sordid activities . . . may permanently traumatize and warp the minds of the children involved."[256] On the floor, Senator Charles Percy (Ill.) declared, "Child pornography is clearly a form of child abuse. The scars left on those young children could remain and will remain for an entire lifetime."[257] Such remarks, at such an early stage in consciousness-raising about child sexual abuse, suggest that there was a cultural readiness to credit stories linking child sexual abuse to trauma and adult psychopathology, quite apart from the efforts of specific feminists and therapists. It is arguable that the incest-survivor movement became as influential as it did, even outside the confines of the feminist and psychotherapy communities, because it resonated with a deeper cultural investment in the idea of childhood as a state of sexual innocence.

That victims of child sexual abuse were the first adult-children to seek (and prevail) in bringing emotional damages claims against their parents is thus no accident. By suing for such broad and diffuse injuries, plaintiffs in delayed discovery cases were, in effect, suing for being robbed of their childhood. Identified with the loss of sexual innocence, "lost childhood" has been a recurring image in incest-survivor discourse. As one victim addressed his alleged molester: "I was sentenced many years ago to struggle with the damaging effects of this for the rest of my life," he said. "Today is not the end for me. Today is still the beginning. I will never have my childhood back."[258] Blume's *Secret Survivors* quotes another survivor: "The money can hardly replace my fractured sense of myself; nothing can give me back my childhood. The money is a symbol. He should pay for what he did to that child."[259] "[The victim] knows she has been robbed of her childhood and believes that nothing can ever compensate for that theft."[260] One of the most powerful expressions of this meto-

256. Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary, 95th Cong., 1st Sess. 121-58 (1977). For a history of the Act, see Gregory Loken, *The Federal Battle Against Child Sexual Exploitation: Proposals for Reform*, 9 HARV. WOMEN'S L.J. 105, 110-13 (1986).

257. *Id.*

258. Greg Moran, *Molestation Victim's Justice Belated; Seven-year-old Case Based on Allegations from 1974*, S.D. UNION-TRIBUNE, Nov. 9, 2001, at B1.

259. BLUME, *supra* note 43, at 284.

260. SUSAN FORWARD & CRAIG BUCK, THE BETRAYAL OF INNOCENCE: INCEST AND ITS DEVIATIONS 23 (1978); *see also* ROSE MARY EVANS, CHILDHOOD'S THIEF:

nymic linking of sexual abuse and loss of childhood is found in Richard Hoffman's memoir, *Half the House*. Describing the sexual knowledge learned as a result of being sexually abused by a high school coach, he says that he "knew lots of things the other kids didn't—like that Minnie Mouse liked to have Mickey lick her pussy, loudly: Slurp, slurp!," that the man who raped him had an uncircumcised penis, "although I didn't know how to name that difference then." "I knew that sex was sinister, clandestine, hot, and universal. I may have even known that my childhood was over."[261] No other form of childhood abuse performs this ideological work of signifying the loss of childhood itself.

Historians and cultural critics have noted that the idea of childhood emerges historically with the rise of the middle-class and reflects the normative model of the family associated with it.[262] In this model, the family is a sentimental—as opposed to an economic unit—dominated by a full-time mother who creates a space of domesticity, while the absentee, breadwinning father is away at work.[263] The modern idea of childhood seems to include the following set of ideas: that children have a privileged relationship to truth; that children should be protected, both physically and psychologically, from certain realities of adult life (sex primarily, but also death and work); that the purpose of the family is to nurture children and provide them with these protec-

ONE WOMAN'S JOURNEY OF HEALING FROM SEXUAL ABUSE (1994) (about therapy with an incest survivor); BETSY PETERSEN, DANCING WITH DADDY: A CHILDHOOD LOST AND A LIFE REGAINED 174 (1991) ("My father comes in the night and crawls into my bed and steals my childhood.").

261. RICHARD HOFFMAN, HALF THE HOUSE 53-54 (1995).

262. In the book that launched the academic study of childhood, Philippe Aries notes that the modern notion of childhood is a function of the rise of the modern domestic nuclear family and the decline of the open, horizontally-extended, work-centered feudal and pre-modern family. PHILIPPE ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (Robert Baldick trans., 1962). For other accounts of the relation between childhood and the middle class, see HUGH CUNNINGHAM, Children and Childhood in Western Society Since 1500, at 41 (1995) (paying special attention to Chapter 3, "The Development of a Middle-Class Ideology of Childhood, 1500-1900"); MARY RYAN, THE CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865 (1981); and J.H. Plumb, *The New World of Children in Eighteenth-Century England*, 67 PAST & PRESENT 64, 93 (1975) (stating that the new world was extended to children "so long as they were middle-class").

263. The middle-class idea of childhood was imposed downward on working-class families through child labor and compulsory education laws. *See, generally,* HUGH CUNNINGHAM, THE CHILDREN OF THE POOR (1991). Historians usually date the emergence of the modern, nuclear family to the 1830s. *See* NANCY COTT, THE BONDS OF WOMANHOOD: 'WOMEN'S SPHERE' IN NEW ENGLAND, 1780-1835 (1977).

tions; and that children are capable of redeeming adult life from its cynicism, selfishness, and sordidness. While historians of childhood have pointed out that certain features of the modern idea of childhood can in fact be found in other periods, this constellation seems uniquely middle-class, as does the idea that childhood is not just a phase on the way to adulthood but, in the words of Hugh Cunningham, "a spring which should nourish the whole life."[264]

The idea of childhood gave rise to a growing concern for children's sexual innocence. Sexuality is central to the seminal argument made by French historian Philippe Aries in *Centuries of Childhood*.[265] Aries features a now-classic reading of the diary of the French court physician Heroard, who records how court attendants in the early seventeenth century played openly with the young Dauphin's penis and made ribald jokes at his expense. "No other document," Aries declares, "can give us a better idea of the non-existence of the modern idea of childhood at the beginning of the seventeenth century."[266] According to Aries, pre-modern attitudes toward children and sexuality were crucially different from modern ones:

> In the first place the child under the age of puberty was believed to be unaware of or indifferent to sex. Thus gestures and allusions had no meaning for him; they became purely gratuitous and lost their sexual significance. Secondly, the idea did not yet exist that references to sexual matters, even when virtually devoid of dubious meanings, could soil childish innocence, either in fact or in the opinion people had of it: nobody thought that this innocence really existed.[267]

Though this striking observation remains somewhat embryonic in his larger argument,[268] nevertheless, Aries points us to an

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264. CUNNINGHAM, *supra* note 262, at 73.
265. ARIES, *supra* note 262.
266. *Id.* at 100.
267. *Id.* at 106.
268. When Aries comes to a general statement of his thesis in the next chapter called "Two Concepts of Childhood," he does not revisit the theme of sexual innocence. Instead, he writes of the rise in the practice of "coddling" children (indulging in affectionate displays towards them) as well as a moralist tradition (first arising outside the family) interested in educating children and inculcating rationality in them. *Id.* at 130-31. Perhaps because they were left buried within his larger argument, Aries's remarks on sexuality have been subjected to remarkably little investigation by the various commentators who have subjected his work to critical scrutiny. Some do not understand him as having articulated a specific thesis about sexuality, so they ignore questions of sexuality altogether. *See, e.g.*, LINDA A. POLLACK, FORGOTTEN CHILDREN: PARENT-CHILD RELATIONS FROM 1500 TO 1900 (1983). Others take his comments at face value and treat "innocence" as a construct imposed upon

important, though as yet not-fully-explored, historical shift, as a number of legal developments suggest that concern with children's sexuality does coincide with the rise of the idea of childhood.

The centrality of "childhood" to a middle-class self-conscious meant that the feminist critique of white middle-class families cut to the core of its conception of self-identity and class privilege. According to the ideology of childhood, a child who is caused to be prematurely sexual has been denied the experience that is deemed essential for successful middle-class adulthood. Thus, if a person wants to make it understood that they feel *robbed* of childhood—in the terms the middle-class itself has established—a sexual abuse charge is one that is likely to be understood.

Historical Development of Statutory Rape Law

Though Christianity in the middle ages and Renaissance may have idolized the child and provided some antecedents for the contemporary ideology of childhood, it is not at all clear that anything like the contemporary concern with protecting chil-

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children by adults, with the implication being that this represents a misrecognition, not to say repression, of children's "true" sexual nature. Usually thanks are given to Freud for rescuing us from this misrecognition. For Peter Coveney, Freud is at once the premier spokesman for social and ideological revolt against the innocent child and the promulgator of an "objective assessment of the nature of the child." PETER COVENEY, THE IMAGE OF CHILDHOOD: THE INDIVIDUAL AND SOCIETY: A STUDY OF THE THEME IN ENGLISH LITERATURE 291-92 (1967). For Jacqueline Rose, "Freud is known to have undermined the concept of childhood innocence." While the innocence of the child is a "concept," "The child is sexual but its sexuality (bisexual, polymorphous, perverse) threatens our own at its very roots." JACQUELINE ROSE, THE CASE OF PETER PAN: OR, THE IMPOSSIBILITY OF CHILDREN'S FICTION 4 (1984). Historian Shulamith Shahar presents evidence that the Middle Ages did have a view of the child as sexually pure and in need of protection. According to Shahar, the use of the image of the child as a symbol of sexual purity in medieval literature (e.g., *Le Roman de la Rose*) suggests that children's sexual innocence was taken for granted. Shulamith Shahar, CHILDHOOD IN THE MIDDLE AGES 18-19 (1990). But she does not address the question of how *dominant* this view of the child was in the middle ages nor does she look at how this view was reconciled (if at all) with the doctrine of original sin. Thus it is significant that when Shahar examines the evidence from social history about *practices* related to children's sexuality, she delineates substantial differences between modern and medieval practices. "It was customary," Shahar writes, "for several members of a family to sleep in the same bed: brothers and sisters, parents and their child or an uncle and his nephew." *Id.* at 102. Neither adult nudity nor sexual relations were kept a secret from children; "In short, adult sensuality was overt, and infantile sexuality was considered innocent and perhaps even amusing." *Id.* These practices imply a view of children's lack of sexuality that is close to what Aries characterizes as the pre-modern view.

dren's sexual innocence can be found earlier than the eighteenth or nineteenth century. Predecessors to modern statutory rape laws exist, but either historians have not focused on them when examining earlier legal systems or those laws do not seem to have been particularly prominent in earlier legal systems. Ancient laws prohibiting sex between children and adults are difficult to find,[269] though there is some evidence that early Roman law prohibited sex with minor males.[270] In some cases in Talmudic law, the legal principle of "statutory virginity" was upheld, meaning that sexual violation of a female infant under three was considered invalid as intercourse and did not affect the "virgin" status of the child.[271] With paternal permission, a girl-child of no more than "three years and a day" could be betrothed in marriage.[272] Ecclesiastical canons around 300 A. D. prohibited sex with young boys, yet it appears that while the youth of the partner exacerbated the offense, the real object of the laws was homosexuality.[273] Pederasty was one of the "sins against nature" opposed by reformists in the twelfth century, but since it was usually grouped together with bestiality, fellatio, masturbation, and sodomy (a word with both narrow and broad senses, sometimes being an umbrella term denoting all deviant sexual practices), it appears that the church's aim was to repress non-procreative behavior rather than to protect children.[274] The followers of Gratian's *Decretum* in the twelfth century recognized an early version of statutory rape.[275] Although the legal age for the marriage of female children was twelve under canon law, many exceptions to this principle were accepted, as intercourse became more important than age in determining the binding validity of marriages.[276]

Statutory rape became part of English Common Law in 1275,[277] with the age-of-consent originally set at twelve but lowered to ten in 1576. But it was not until the rise of the idea of childhood in the nineteenth century that statutory rape became

269. Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 6 (1997).

270. JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 47 (1987).

271. RUSH, *supra* note 30, at 27.

272. *Id.* at 18.

273. BRUNDAGE, *supra* note 270, at 74.

274. *Id.* at 212-23.

275. *Id.* at 311.

276. RUSH, *supra* note 30, at 32.

277. Rita Eidson, Comment, *The Constitutionality of Statutory Rape Laws*, 27 UCLA L. REV. 757, 762 (1980).

an issue of central legal and political importance. Through the efforts of an alliance of feminists, clergy, and social reformers known as the social purity movement, the age of consent was raised to as high as eighteen or twenty-one in some states before being lowered again in the mid-twentieth century.[278]

During this time, concern for restricting children's exposure to sexuality could be seen in many spheres—from the campaigns of feminists and moral reformers against prostitution (which was largely *child* prostitution), to the social phobias about children masturbating,[279] to changes in family sleeping arrangements, to the decline of the Christian idea of Original Sin, to the emergence of a (censored) literature for children, to the rise of sex-education. Prior to the nineteenth century, it was not unusual for children to sleep in the same beds with adults, even unrelated adults.[280] Divorce records from the seventeenth century reveal that children were often present when infidelities took place.[281] With the emergence of the idea of childhood, more care was taken to segregate children from adults, even from their parents, in the bedroom. The sexual history of childhood has yet to be written, but material from different historical domains is suggestive.[282]

The distinctiveness of the modern idea of childhood fully emerges when these developments are placed in the context of contemporaneous shifts in attitudes toward child labor, compul-

278. Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15 (1994). The social purity reformers focussed on strengthening rape laws and defeating a movement to legalize prostitution. LINDA R. HIRSHMAN AND JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 124-25 (1998).

279. *See infra* notes 284-303 and accompanying text.

280. *See* KARIN CALVERT, CHILDREN IN THE HOUSE: THE MATERIAL CULTURE OF EARLY CHILDHOOD, 1600-1900, at 37 (1992); STEPHANIE COONTZ, THE SOCIAL ORIGINS OF PRIVATE LIFE: A HISTORY OF AMERICAN FAMILIES, 1600-1900, at 89 (1988).

281. *See* Nancy F. Cott, *Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records, in* A HERITAGE OF HER OWN: TOWARDS A NEW SOCIAL HISTORY OF AMERICAN WOMEN 119, 119 (Nancy F. Cott & Elizabeth H. Pleck eds., 1979) ("These parents' heedlessness of protecting their children's sexual 'innocence' recalls Aries' claim that in premodern families children were assumed not to sense sexual significance nor, on the other hand, to have any 'innocence' to preserve.")

282. There is some reason to believe that the sexual history of childhood falls through the cracks between two areas of inquiry - the history of childhood and the history of sexuality. As noted above, the former does not usually address itself to questions of sexuality, while the latter does not usually utilize the framework of childhood in developing its analyses.

sory education, and the care of children generally. Changes in all of these domains contributed to the formation of the modern idea of childhood, but at least at the present, these domains do not all carry the same weight in signifying childhood as sexual innocence.

Childhood Sexuality and Psychopathology

The ideology of childhood provides another reason why child sexual abuse lent itself to a certain kind of storytelling more than other forms of abuse. As the idea of childhood began to take root and children's sexual innocence came to be legally protected, social anxiety began to appear about the developmental consequences of sexuality during childhood. Accompanying the rise of a concern for childhood sexuality was an imperative to link childhood sexual experience with later physical or mental pathology. The powerful plot reflected in today's "checklists" for incest survivors—the widespread belief that child sexual abuse can cause a dizzying array of symptoms, from eating disorders to phobias to drug abuse to indecisiveness—was not entirely novel. Indeed, implicating childhood sexuality in the mysteries of adult psychological and physical health has been one of the great themes in middle-class culture going back at least two centuries. The "causal" link drawn between childhood sexual experience and adult pathology in incest-survivor literature, which prompted a generation of women across the United States to wonder anxiously whether they had repressed memories of being sexually abused, has what literary critics might call a "deep structure," an underlying, more abstract articulation of general elements that may be expressed and recombined in more specific fashion. The deep structure I am referring to involves three general elements—childhood sexuality, development into adulthood, and physical or mental pathology. If we look back over the history of the rise of the ideology of childhood, we see that this "deep structure" underlying today's adult survivor discourse had at least two important earlier articulations—nineteenth-century anti-masturbation literature and twentieth-century Freudian thought (both in its seduction theory and psychoanalytical moments).[283] The inclusion of Freudian psychoanalysis here may

283. This "deep structure" is a narrative about *middle-class* children. As we have seen, the feminist-psychotherapeutic narrative is also a narrative mainly about middle-class children, so it shares class location with these earlier narratives in addition to drawing a connection between sex and pathology. For reasons that are too com-

seem surprising, given the hostility of feminists to Freudian psychoanalysis recounted earlier, but the reasons for this will become clear. In the remainder of this section, I will outline briefly the main contours of these earlier articulations and trace their relevance. It lies beyond the scope of this Article to review the prior historical expressions of this deep structure with true depth. However, by at least naming these broader themes, we can begin to intimate the deeper reasons why the long-term consequences of child sexual abuse may appear more legible than those of other forms of maltreatment. The historical pattern suggests that the power of the feminist-psychotherapeutic narrative owes something to a broader cultural tendency to link childhood sexuality with mental illness that goes far deeper than the adult survivor movement.

Anti-Masturbation Literature

The eighteenth century saw the emergence of a vast and curious literature detailing the perils of masturbation.[284] Though long considered a sin by the Catholic Church, which condoned only vaginal sex between men and women for the purposes of reproduction,[285] masturbation was not an especial preoccupation of the Church, nor was it seen as a grave threat to children.[286] Attitudes changed in the early eighteenth century when an anon-

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plicated to go into here, physical abuse and neglect are more frequently associated with lower classes and ethnic groups, and indeed these are the communities primarily served by contemporary child protective services. It would take too much of an additional digression to explore the class ramifications of various child maltreatment narratives, so I merely note that the topic is a rich one and defer its treatment for a later time.

284. Treatments of anti-masturbation literature, which I discuss at some length below, are good examples of how the history of children's sexuality has not been integrated into dominant scholarship on childhood and sexuality. My perspective has been influenced by R. P. Neuman, whose work best integrates these two larger areas of inquiry. *See* R.P. Neuman, *Masturbation, Madness, and the Modern Concepts of Childhood and Adolescence*, 8 J. Soc. Hist. 1 (1974-75).

285. Officially termed a "sin against nature," masturbation was one of several grave sins—*coitus interruptus*, contraception, sodomy—that were all deemed sinful because of their non-procreative nature. Paula Bennett & Vernon A. Rosario II, *Introduction: The Politics of Solitary Pleasures*, *in* Solitary Pleasures: The Historical, Literary, and Artistic Discourses of Autoeroticism 3 (Paula Bennett & Vernon A. Rosario II, eds. 1995).

286. Michel Foucault locates in the Christian confessional early roots of the imperative to *speak* about sex that he sees as characteristic of bourgeois attitudes toward sex. 1 Michel Foucault, History of Sexuality (Robert Hurley trans., Vintage Books 1990). It is significant, however, that masturbation was usually not prosecuted in ecclesiastical courts. Brundage, *supra* note 270, at 47.

ymous tract called *Onania* appeared in London, proclaiming the dangers of masturbation, warning of dire consequences that awaited those who engaged in "the heinous sin of self-pollution," and hawking remedies for sale.[287] The book struck an anxious nerve and sold like wild-fire in England, going through 15 editions by 1730 and possibly reaching as many as 80 editions.[288]

Anti-masturbation literature gained scientific credibility when the reputable Swiss physician Samuel August Tissot divested anti-onanist discourse of its excesses and ranting moralistic quality and gave it the seal of scientific approval.[289] Though medical advisor to the pope, Tissot described masturbation more as pathogen than sin. His work paved the way for a plethora of tracts by physicians, on both sides of the Atlantic, warning about the health dangers resulting from masturbation. Although the earliest tracts are often thought to have ignored them, children occupied an important place in anti-masturbation discourse from the beginning, where they appeared as the population most vulnerable to the medical consequences of the practice. Though Tissot deemed masturbation a health risk for all ages, he believed that masturbation was "particularly dangerous to children before they attain to the age of puberty."[290] In the eighteenth century, masturbation became seen as the cause of diverse illnesses and conditions such as stunted growth, fainting spells, impotence, barrenness, consumption, epilepsy, hysteria, priapism, weakness, lassitude, and even death.[291] By the nineteenth century, the ill-

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287. ONANIA: OR, THE HEINOUS SIN OF SELF-POLLUTION (Garland Publ., Inc. 1986) (1723).

288. E.H. Hare, *Masturbatory Insanity: The History of an Idea*, 108 J. MENTAL SCI. 1, 2 (1962). The ONANIA was reprinted only once in America before 1820; but certain other English books in its vein, like SAMUEL SOLOMON, A GUIDE TO HEALTH; OR, ADVICE TO BOTH SEXES, IN NERVOUS AND CONSUMPTIVE COMPLAINTS (1800), were widely circulated in the United States.

289. S. A. D. TISSOT, ONANISM (Garland Publishing 1985) (1728).

290. *Id.* at 74. A century later E.C. Spitzka reiterated the point, declaring masturbation "is most rapid and serious in younger children, less so in adolescents, and least so in adults." E.C. Spitzka, *Cases of Masturbation (Masturbatic Insanity)*, 33 J. MENTAL SCI. 57, 61 (1887).

291. To say that masturbation was considered a health risk is to indulge in understatement. Tissot describes a young masturbater as follows:

> I found a being that less resembled a living creature, than a corpse, lying upon straw, meagre, pale, and filthy, casting forth an infectious stench; almost incapable of motion, a watry palish blood issued from his nose; slaver constantly flowed from his mouth: having a diarrhea, he voided his excrement in the bed without knowing it: he had a continual flux of semen; his sore watry eyes were deadened to that degree, that he could not move them: his pulse was very small, quick, and fre-

effects of masturbation began to be conceived of more in psychological terms, as insanity was linked with masturbation or "self-abuse" as it was often called.[292] Masturbators were seen as reluctant or unable to marry. It was particularly feared that masturbation would interfere with genital development, adult sexual life, and healthy offspring.[293] Extreme "cures" were sometimes undertaken, with girls in particular being subjected to surgical procedures, most extreme of which was cliterodectomy.[294]

To understand fully the parallels with modern discourse, it is necessary to see that "masturbation" in earlier centuries had a much wider meaning than the term has today and encompassed much of what we would now call "child abuse." Today, "masturbation" mainly refers to an auto-erotic activity carried out alone; anything else requires a modifier ("mutual masturbation") or a transitive verb ("to masturbate someone"). But in the eighteenth and nineteenth centuries, the term "masturbation" covered all of these senses and more. In some texts, we find evidence that behaviors we would now understand through the category of "sexual abuse" were understood at the time as "masturbation." Samuel Woodward's *Hints for the Young* reprints a letter from a young man who wrote, "I was induced by a young man with whom I slept, to follow the practice of masturbation, though not

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> quent: it was with great difficulty he breathed, reduced almost to a skeleton, in every part except his feet, which became oedematous. The disorder of his mind was equal to that of his body, devoid of ideas and memory, incapable of connecting two sentences, without reflection, without being afflicted at his fate, without any other sensation than pain, which returned with every fit, at least, every third day. Far below the brute creation, he was a spectacle, the horrible sight of which cannot be conceived, and it was difficult to discover, that he had formerly made part of the human species.

TISSOT, *supra* note 289, at 25.

292. Roy Porter, *Love, Sex, and Madness in Eighteenth-Century England,* 53 SOC. RES. 211, 228-30 (1986).

293. *See* JAMES COPLAND, *Pollution, in* 3 A DICTIONARY OF PRACTICAL MEDICINE 488 (1855); JOSEPH HOWE, EXCESSIVE VENERY 92-93 (Harper & Brothers 1859) (1834) (the masturbator's sperm was "thinner, more watery, of a pale yellowish color, and contains fewer spermatozoa" than that of non-masturbator's); Lesley A. Hall, *Forbidden by God, Despised by Man: Masturbation, Medical Warning, Moral Panic, and Manhood in Great Britain, 1850-1950*, 2 J. HIST. SEXUALITY 365 (1992). In examining the voluminous letters written to Marie Stopes, author of the runaway bestseller MARIE STOPES, MARRIED LOVE (1918), Hall shows that the greatest number deal with concerns about the effects of masturbation on sex after marriage and the health of offspring. Hall, *supra*, at 384.

294. Rene A. Spitz, *Authority and Masturbation: Some Remarks on a Bibliographical Investigation*, 9 Y.B PSYCHOANALYSIS 113, 123-25 (1953). Boys were often circumcised for similar reasons. *Id.* at 124.

without some threats on his part, and indeed was forced to by him."[295] Boarding schools were feared because they gave boys the unsupervised opportunities to demonstrate the practice to one another. One of the letters in the original *Onania* speaks of a "Miscreant, my School-fellow, who did not shame to perpetrate before me that detestable and pernicious, unnatural and abominable Crime of SELF-POLLUTION;"[296] another recounts going on a holiday trip as a teenager along with some friends when a twenty-year-old companion asked, "Whether ever we saw the Seed of Man?" and when they replied in the negative, "told us, if we would reach him a Leaf of a Cabbage, he would shew us, which he did, by SELF-POLLUTION."[297]

Anti-masturbation literature contains language that anticipates the anxieties manifested in modern day-care scandals. Running like a leitmotiv through anti-masturbation literature is the accusation that domestic servants, often explicitly "othered" in class or race terms, were teaching "masturbation" to the middle-class children left in their charge. References to nurses rubbing the genitals of children to quiet them occur so often, it is impossible to believe that they do not refer to an actual practice. Tissot had noted that "the English collection [i.e., the *Onania*] is replete with such examples" and worried that parents might be "deceived" by servants "who are frequently hired without its being known if they have any morals at all."[298] While one writer of an anti-masturbation tract suggested that nurses stimulated children to quiet them and not for their own sexual gratification, he simultaneously indicted the "lewdness" of "depraved nurses" and approvingly mentioned calls for a law punishing nurses who were found to have corrupted their charges.[299] James Copland

295. SAMUAL B. WOODWARD, HINTS FOR THE YOUNG IN RELATION TO THE HEALTH OF BODY AND MIND 22 (G. W. Light 1856) (1838).

296. ONANIA, supra note 287, at 65.

297. *Id.* at 64.

298. TISSOT, *supra* note 289, at 44. Alfred Jacobi (considered the father of American pediatrics) refers to infants becoming excited when "being gently tickled" on the genital organs" and "when unruly, their greater manageableness resulting therefore." Alfred Jacobi, *On Masturbation and Hysteria*, 8 AM. J. OBSTETICS & DISEASES WOMEN & CHILDREN 595, 598-99 (1876). Joseph Howe notes that "children at the breast are often excited by their nurses, in order to keep them quiet; the titillation of the child's genitals produces sensations of pleasure which allay its cries. JOSEPH W. HOWE, EXCESSIVE VENERY, MASTURBATION AND CONTINENCE: THE ETIOLOGY, PATHOLOGY AND TREATMENT OF THE DISEASES RESULTING FROM VENEREAL EXCESSES, MASTURBATION AND CONTINENCE 63 (1883).

299. *Id.* at 64-65.

mentions a "native Indian nurse" as the cause of masturbation in the child of a physician living in India.[300] In Acton, the practice appears as something of a rumor about "foreign nurses."[301] With distaste, he expresses the hope that "it is confined to the continent."[302]

Though the parallels with modern sexual abuse discourse are my main focus here, it would be unhistorical not to recognize the differences as well. For the most part, Victorians did not assume that children disliked sexual contacts with adults. Rather, the problem was that they liked them all too much. They became *instantly* sexual. But common to both modern and Victorian discourses on children and sexuality is a palpable fascination on the part of the adult consumers of the narratives with the details of the accounts.[303]

Though a fascinating curiosity, anti-masturbation literature is primarily important because it forged a historically new developmental narrative that linked childhood sexuality and pathology in a deferred, causal relationship. The basic narrative—sex causing pathology—would be susceptible to numerous mutations and transformations over the next two centuries. Elements would be substituted, exchanged, deleted, and amended, and the precise relations of cause and effect would mutate, shift, and evolve according to evolving notions of sexual health; but the basic template would have an underlying stability and persistence in middle-class culture. With the work of Freud, this childhood-sex-pathology narrative began to take on psychological dimensions as childhood sexual experience came to be seen as the crucible of the psyche.

Seduction Theory

Freudian thought has, for our purposes, two basic moments—the seduction theory and everything after. Contemporary trauma discourse reflected in the feminist-psychotherapeutic

300. COPLAND, *supra* note 293, at 485.

301. WILLIAM ACTON, THE FUNCTIONS AND DISORDERS OF THE REPRODUCTIVE ORGANS 7 (John Churchill & Sons 1865).

302. *Id.*; *see also* LUTHER VOSE BELL, AN HOUR'S CONFERENCE WITH FATHERS AND SONS, IN RELATION TO A COMMON AND FATAL INDULGENCE OF YOUTH 27-29 (Whipple and Damrell 1840).

303. This point has been made by James Kincaid of modern child abuse literature in JAMES KINCAID, EROTIC INNOCENCE: THE CULTURE OF CHILD-MOLESTING (1998). He argues that tales of child molestation serve to confirm the belief that children are sexually irresistible. *Id.* at 13.

narrative owes much to the early Freud's seduction theory, as many important therapists and researchers rediscovered his work and argued for both its truth and relevance. Freud began to develop the seduction theory in work with his colleague Josef Breuer, and first published it in *Studies in Hysteria* in 1895.[304] "The Psychic Mechanism of Hysterical Phenomena," a prelude to that work, outlines a theory in which the roots of hysteria are traced to "psychic trauma" generally and contains the famous line, "The hysteric suffers mostly reminiscences."[305]

Independent of Breuer, who recoiled in the face of the introduction of the sexual into the theory, Freud later refined the psychic trauma theory to refer exclusively to *sexual* trauma, and the major statement of this theory is "The Aetiology of Hysteria," first delivered in 1896.[306] In the seduction theory, the childhood sexuality implicated in the formation of neurosis is an external trauma that actively aggresses upon the passive child. Freud's argument in "The Aetiology of Hysteria" began with Breuer's "momentous discovery" that "*the symptoms of hysteria . . . are determined by certain experiences of the patient's which have operated in a traumatic fashion and which are being reproduced in his psychical life in the form of mnemic symbols.*"[307] Resolving the hysteria involves tracing symptoms to earlier traumatic scenes in childhood that were related to "the field of sexual experience." Since the sexual origins of hysterical symptoms arising after puberty were often widely different in their force, Freud went back even further to "the period of earliest childhood," which, like many of his peers, he regarded as "a period before the development of sexual life." Because the pre-sexual quality of childhood presented a problem for his theory, Freud went on to suggest that this period is "not wanting in slight sexual excitations" that may eventually influence development.[308]

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304. FREUD & BREUER, *supra* note 35.

305. The *Psychic Mechanism of Hysterical Phenomena* was originally published as *Preliminary Communication* in the Weiner Medizinische Blaetter. Pierre Janet, whose work has recently resurfaced in traumatic-stress studies, noticed the paper and discussed it in a laudatory fashion in the last chapter of his book, "L'Etat Mental des Hysteriques". JAMES STRACHEY, *Introduction* to Studies on Hysteria, at xiv (James Strachey ed., Basic Books 1957) (1895).

306. It was presented to the Society for Psychiatry and Neurology, in Vienna, April 1896.

307. Freud, *Aetiology*, *supra* note 35, at 261.

308. *Id.* at 270.

Themes that overlap with those found in anti-masturbation literature figure prominently in the seduction theory. In discussing the suggestion that childhood is not free from sexuality, Freud says, "Injuries sustained by an organ which is as yet immature, or by a function which is in process of developing, often cause more severe and lasting effects than they could do in maturer years."[309] Although Freud appears to be making a general physiological point, the idea that sexuality would literally damage children's sexual organs was rife in the nineteenth-century anti-masturbation literature. In support of the claim that sexual assaults on children must be widespread, Freud referred to writings that can only be anti-masturbation texts: "When I first made enquiries about what was known on the subject [of sexual assaults against children], I learnt from colleagues that there are several publications by paediatricians which stigmatize the frequency of sexual practices by nurses and nursery maids carried out even on infants in arms."[310]

Psychoanalysis

The abandonment of the seduction theory and embrace of the Oedipus complex is generally considered to be the founding moment of psychoanalysis. Whatever the reasons for the shift, Freud moved from a model where sexuality acts as an external force acting traumatically on the psyche to one where sexuality expresses internal drives that are present from birth and merely organize themselves in different ways. Though Freud's thoughts passed through numerous stages, in not all of which was sexuality his exclusive concern,[311] he certainly regarded sexuality as one of the most powerful of the "drives" he conceived as contributing much of the raw material for the unconscious. Popular receptions of his work in the United States focus on almost nothing else. His most complete statement of a sexual theory is found in *Three Essays on Sexuality*, a text that outlines a model of normative sexual development.[312] In this model, children are polymorphously perverse at birth and experience erotic pleasure through stimulation of the mucuous membranes of the mouth,

309. *Id.*

310. *Id.* at 276.

311. *Compare Three Essays on the Theory of Sexuality in* 7 STANDARD EDITION (James Strachey ed., 1953) (1905) *with Instincts and Their Vicissitudes*, 14 STANDARD EDITION (James Strachey ed., 1957) *and Beyond the Pleasure Principle*, 18 STANDARD EDITION (James Strachey, ed.) (1955).

312. *Three Essays on the Theory of Sexuality*, *supra* note 311.

anus, and genitals. As the child develops, these elements are selectively repressed and organized under genital sexuality, which becomes dominant. In the first eighteen months of life, the oral zone is dominant; from eighteen months to three years, the anal zone dominates; in the third to fifth years, the child becomes aware of sexual differences and the penis and confronts the problem of object choice.[313] Successfully negotiating this stage will result in normal genitally focussed sexuality. *Failing* to negotiate the transition to genital sexuality will result in the development of pathological symptoms. Though in *Three Essays* Freud focuses mainly on the perversions, rather than the neuroses, he makes clear that both develop as a result of improper sexual development. The perversions represent fragments of childhood sexuality that remain unintegrated and unsubordinated to genital sexuality. As for symptoms, Freud explains that they are, in effect, repressed perversions, residues of childhood sexuality that must be pushed out of consciousness as unacceptable.[314]

Freud's seduction theory has been at the center of controversy in recent years because of how he abandoned it and eventually embraced its opposite—the Oedipus complex. The controversy surrounding the abandonment of the seduction theory has generated much historical research, so it is only necessary to rehearse the main outlines of the controversy here. In *The Assault on Truth,* Jeffrey Masson tells the story of the abandonment of the seduction theory in this way: Freud originally came up with the seduction theory because he listened to his female patients and learned that "something dreadful and violent lay in their past."[315] His insights, presented orally in "The Aetiology of Hysteria," received "an icy reception." Two weeks after the presentation, Freud wrote his friend William Flies, "I am as isolated as you could wish me to be: the word has been given out to

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313. *Id.* at 197-224.

314. Freud states:

> It is by no means only at the cost of the so-called *normal* sexual instinct that these symptoms originate—at any rate such is not exclusively or mainly the case; they also give expression (by conversion) to instincts which would be described as *perverse* in the widest sense of the word if they could be expressed directly in phantasy and action without being diverted from consciousness. Thus symptoms are formed in part at the cost of *abnormal* sexuality; *neuroses are, so to say, the negative of perversions.*

Id. at 165.

315. MASSON, *supra* note 307, at xxx.

abandon me, and a void is forming around me."[316] Not long after that, according to his account in 1925, Freud decided these scenes "were only fantasies which [his] patients had made up."[317] Other scholars have questioned this account and pointed out that Freud's 1925 remarks are not consistent with an earlier description of the theory, in which he declared that the scenes of seduction had resulted from hypnosis.[318] Whether his patients had actually reported the traumas or Freud had induced the memories through hypnosis and suggestion, whether in all cases the father was the seducer or Freud invented that detail because it suited his interpretive model—all these are important questions, but they do not bear directly on the point I am making here.

Although Freud's rejection of the seduction theory has continued to generate controversy, from the perspective of my argument what is significant is that this reversal leaves in place the crucial link between childhood, sexuality and pathology. This is not to say that there is no difference between fantasy and reality but rather that while the relations are reconfigured, the links between childhood, sexuality, and pathology remain intact. While at one level, it makes an enormous difference if we believe that patients become ill because of their fantasies or because they have been raped by a parent, the broad terms in which the opposition between the seduction theory and psychoanalysis has been cast obscure the fact that both identify sexuality as a potent source of later psychological disturbance and thus contribute equally to obscuring other potential causes of pathology and dysfunction—violence and neglect, preeminently, but also psychological abuse, witnessed violence, abandonment, loss, and poverty. Therefore, though the battle lines between the seduction theory and psychoanalysis were drawn starkly by Masson and the feminists, the two theories have more in common than has generally been appreciated.[319] The idea of sexual abuse as trauma could never have taken hold as quickly and as powerfully

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316. *Id.* at 10 (quoting Letter from Sigmund Freud to William Fliess (May 4, 1896).

317. *Id.* at 11 (quoting Sigmund Freud, *Autobiographical Study*, 20 STANDARD EDITION 34 (1925)).

318. Hans Israels & Morton Schatzman, *The Seduction Theory*, 4 HIST. PSYCHIATRY 23 (1993); Jean G. Schimek, *Fact and Fantasy in the Seduction Theory: A Historical Review*, 35 J. AM. PSYCHOANALYTICAL ASS'N 937 (1987).

319. Though making a different point, Frederick Crews suggests the continuity between the seduction theory Freud and the psychoanalytical Freud in his essays on the theory of repression. *See* FREDERICK CREWS, THE MEMORY WARS: FREUD'S LEGACY IN DISPUTE (1995).

as it did without the deep absorption of Freudian thought into American culture. The developmental narrative that feminists and trauma therapists elaborated resonated with a culture primed by Freud's *Three Essays on Sexuality* to see sexuality and child development as crucially related themes. Viewed from a more abstract perspective, the feminist-psychotherapeutic narrative, Freudian psychoanalysis, the seduction theory, and anti-masturbation literature all tell a version of one story: If children fail to develop in the correct sexual fashion—if they indulge in masturbation, fail to overcome desire for their parents, or are subject to unwanted sexual assaults—they will not attain successful "normal" adulthood. Their lives will be stunted by bothersome symptoms, they will fail to marry and produce a family.

Sexuality and Middle-Class Self-Identity

This historical foray concludes with a discussion of Michel Foucault's *History of Sexuality, Volume One*, where Foucault elaborates a thesis that bears closely on the historical parallels outlined in the previous section. At the beginning of *The History of Sexuality*, Foucault announces what he calls "the repressive hypothesis"—namely, the self-congratulatory story that we "moderns" tell ourselves in which we liberated sex from the inhibitions placed on it by Victorian prudery.[320] Foucault's justly famous thesis of course is that this "repression" only served as a pretext for a more obsessive talking about sex, a proliferation of incitements to discourse about sex that invested sex with portentious significance. The middle class, he writes, medicalized sexuality to a degree that was historically unprecedented and became preoccupied with identifying (thus creating) "perverts," "deviants," "abnormals," "degenerates," thereby enforcing through a medical regime its hetero-conjugal norms of sexual behavior. Foucault situates Freud squarely in this larger project. For Foucault, Freud was not a radical innovator, giving us new "truths" of sexuality; rather, he merely gave "new impetus" to a process

320. 1 FOUCAULT, *supra* note 286, at 3-13. Interestingly, the chronology Foucault identifies maps neatly onto that of Aries in *Centuries of Childhood*. Aries narrates a history in which modern "innocence" falls upon children like a long bourgeois shadow. His general thesis sounds the loss of communality and conviviality of social life in the transition to the modern family form, of which the loss of freedom to speak openly around children was presumably a key part.

begun in the eighteenth century that transformed sex into discourse.[321]

One of the prime exemplars of Foucault's thesis, to which he devotes much of the first chapter, is anti-masturbation discourse. Though he does not incorporate "childhood" into his analysis as a theoretical dimension, Foucault recognized that children, and middle-class children above all, were rhetorically central to the project of medicalizing sex: "the onanistic child who was of such concern to doctors and educators . . . was not the child of the people, the future worker who had to be taught the disciplines of the body, but rather the schoolboy, the child surrounded by domestic servants, tutors, and governesses." However, because Foucault does not incorporate the idea of "childhood" into his overall thesis, he fails to see that children are unlike the other "perverts" that the middle-class began to classify, which is why no sustained efforts have ever been undertaken to "liberate" children's sexuality.[322]

As a result of this proliferation of discourse, sexuality became seen, for the middle-class, as the site of the deepest sense of identity, the domain of social experience where the self is experienced in its most authentic, "true" form. Sex was transformed into a "secret" holding the key to identity itself. It lies "outside of discourse" and "only the removing of an obstacle, the breaking of a secret, can clear the way leading to it."[323] So, Foucault

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321. *Id.* at 159.

322. We also have reason to be suspicious of his suggestions that the medicalization of sex amounted to a loss of freedom for children and adults alike. Consider this illustrative detail. Amidst a discussion of how children's sexuality (mostly masturbation) became the focus of adult policing in the nineteenth century, Foucault includes an example from a village called Lapcourt in 1867 of a "simple-minded" farm hand who "obtained a few caresses from a little girl, just as he had done before and seen done by the village urchins round him . . .[when] they would play the familiar game called 'curdled milk.'" *Id.* at 31. Only this time, in 1867, the girl's parents reported the farm hand to the mayor, who referred him to the gendarmes, who took him to the judge, who indicted him and sent him, not to prison but to the care of doctors, who decided he was suffering from an ailment . In Foucault's account, behavior was being policed that was an "everyday occurrence in the life of village sexuality, these inconsequential bucolic pleasures." *Id.* at 31. He concludes: "So it was that our society—and it was doubtless the first in history to take such measures—assembled around these timeless gestures, these barely furtive pleasures between simple-minded adults and adult children a whole machinery for specifying, analyzing and investigating." *Id.* at 32. But Foucault also tells us that "this village halfwit . . .would give a few pennies to the little girls for favors the older ones refused him," *id.* at 32, which makes us wonder why, if these "bucolic pleasures" were so "inconsequential" the older girls bothered to refuse them.

323. *Id.* at 34.

argues, sex is made to mirror, "at the outer limit of every actual discourse, something akin to a secret whose discovery is imperative, *a thing abusively reduced to silence*, and at the same time difficult and necessary, dangerous and precious to divulge" (italics added).[324] Whatever one ultimately makes of Foucault's general thesis, his work cannot be ignored in examining the recent controversies about child sexual abuse, for where else, in the pervasive speaking of sex that is characteristic of Western societies, has the rhetoric of "secrets" and "silences" (indeed, "abusive" silences) been more central than in the discourse on childhood sexual abuse?

I suggest that Foucault's general argument about the medicalization of sex and the identification of sex with selfhood in middle-class culture helps to explain the various iterations of the "deep structure" childhood-sex-pathology narrative discussed in the last section. To turn back to the present, this sort of broader cultural information is relevant for understanding why sexual abuse has been the form of child maltreatment that has most often been studied in terms of its adult consequences, that is, in terms of a developmental narrative in which the adult *self* is shaped by childhood trauma.[325] Today, most research on child

324. *Id.* at 35.

325. An illustration of the rhetorical difference in the way impact on adulthood has been articulated in trauma literature with respect to different forms of abuse can be seen in the articles dealing with childhood trauma in an important early volume in the Brunner/Mazel professional series on traumatic stress. *See* 1 TRAUMA AND ITS WAKE: THE STUDY AND TREATMENT OF POST-TRAUMATIC STRESS DISORDER (Charles Figley ed., 1985). While most of the essays focus on the effects of trauma on adults, there are two essays dealing with children. One essay, more prominently placed, reviews literature on children who have suffered a "variety of single traumatic events" and traces the effects of such trauma through various stages of development, ending with adolescence. Spencer Eth & Robert S. Pynoos, *Developmental Perspective on Psychic Trauma in Childhood*, in TRAUMA AND ITS WAKE, *supra*, at 39. The other essay is the only one dealing with the impact of childhood trauma on *adult* development, and it deals *only* with child sexual abuse. Mary Ann Donaldson & Russell Gardner, Jr., *Diagnosis and Treatment of Traumatic Stress Among Women After Childhood Incest*, in TRAUMA AND ITS WAKE, *supra*, at 356. It is interesting to note that in the non-sexual essay, the authors specifically excluded from consideration studies where the children were exposed to multiple stressors and rejected use of the concept "cumulative trauma," thus in effect excluding from their study most of the experiences typically defined as child maltreatment, which do tend to involve multiple stressors and do tend to be cumulative. Eth & Pynoos, *supra*, at 39. The latter was said to be problematic because "it primarily addresses cases of attenuated insult or emotional deprivation in parent-child interactions." *Id.* It is fair to try to distinguish true "traumas" from complex, relationally-embedded dynamics of deprivation and abuse, but a difficulty arises because the essay on sexual abuse in the same volume does not restrict itself to "single-event" traumas. In that study, many

abuse and neglect more generally does not follow children into adulthood but focuses on short- and medium-term impacts (most often *not* theorized in terms of a trauma model), except for child sexual abuse, which is generally theorized in terms of a trauma model and looked at in terms of its impact on adulthood. That means that there is a relative paucity of research on the adult status of victims of physical abuse and neglect.[326] A review conducted in 1995 of all studies on the developmental impact of different forms of child abuse and neglect that met certain criteria found that, of eighteen studies meeting the criteria, fully two-thirds were concerned *exclusively* with child sexual abuse (see Table 4), while almost all the rest examined sexual abuse together with other forms of abuse.[327] The authors noted that sexual and marital adjustment have not been studied at all for physically abused and neglected children: "In fact. . .there is virtually no information about the adult status of neglected children."[328] The authors did not even include psychological abuse in their study "because so few studies explicitly designed to examine the impact of psychological abuse have been conducted."[329]

The absence of comparable amounts of significant research on the long-term consequences of other forms of abuse creates the impression that sexual abuse does more to define adult identity than other forms of abuse and therefore should be more actionable. It seems intuitively correct that sexuality is central to our ability to form attachments and create domestic units and

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of the subjects had been abused for years and had suffered multiple forms of abuse. "Attemped fondling" and "intercourse" were treated as equivalent for the purposes of the analysis. *See* Donaldson & Gardner, *supra*, at 370 tbls. 6, 7.

326. Trickett & McBride-Chang, *supra* note 196, at 311, 323.

327. Only two focused exclusively on forms of abuse other than sexual abuse.

328. *Id.* at 316, 324. The authors note that the work of Cathy Widom is an exception; however, the "n's" in her studies tend to be rather small.

329. As late as 1990, only one study had been completed studying the effects of childhood psychological abuse in adulthood. A recent study sums up the problem:

> Several methodological limitations exist in empirical efforts directed at evaluating the impact of child abuse. The majority of studies target the correlates of childhood sexual abuse, with only moderate research interest in the outcome of physical abuse and psychological abuse. . . . Additionally, the failure to assess for the co-occurrence of various types of abuse of the impact of experiencing several types of abuse concurrently is even more problematic.

Joanne L. Davis et al., *Intimacy Dysfunction and Trauma Symptomatology: Long-Term Correlates of Different Types of Child Abuse*, 14 J. TRAUMATIC STRESS 63, 65 (2001).

families. Since sexuality, for the middle-class, is supposed to be confined to these units, it seems to define their formation, even though it is arguable either that attachment (or bonding) behavior and sexuality are merely overlapping, not co-extensive categories, or that attachment is a broader category than sexuality.[330] The belief that sexual abuse is more defining of adult identity than other forms of child maltreatment is in keeping with Foucault's observation that for the middle-class, sexuality came to seem to hold the secret of the self: " . . . we [modern middle-class subjects] demand that [sex] tell us our truth, or rather, the deeply buried truth of that truth about ourselves which we think we possess in our immediate consciousness."[331]

However, it is a pity that Foucault did not take one step further and incorporate into his analysis that realm where sexuality and identity are most completely fused—romantic love. What is romantic love but the hope that through intense physical union with another, our most intimate and authentic selves will be "known" and valued? The interference with the developing sexual self that occurs in sexual abuse thus seems, self-evidently, to prevent the authentic self from emerging. For the sexual abuse victim, who has often been stimulated to physically respond to the abuser, this is often thought to result in a process of internal self-alienation. Who am I if I do not know what I desire? What is my desire if I cannot freely choose its object? What is sex if it does not lead me to discover who I am?[332] Foucault's great insight was to realize that the fascination in middle-class culture is with desire, not sex as such. More powerfully than "choice," which always has an element of the arbitrary about it ("I choose this, rather than that"), desire seems to point to the truth of the self by revealing that which cannot be transformed through force of will ("I cannot do otherwise"). In all desire there is a loss of autonomy—in the literature of the Renaissance, desire was often figured through the metaphor of a small boat or dinghy, tossed on angry waves—and it is precisely through this lack of control as to object that knowledge of the self is thought to emerge. Where we love, we desire not only another but the repaired self

330. For a good discussion of the issues, see *id. passim*.

331. 1 FOUCAULT, *supra* note 286, at 70.

332. "You may never have had a chance to feel your own desire. When children are forced to be sexual at an early age, their natural sexual feelings don't have a chance to emerge. This pattern often continues into adulthood." BASS & DAVIS, *supra* note 43, at 263.

we want to become through them. It is ironic that Foucault, deconstructor par excellence of the autonomous self, does not explore more explicitly the centrality of romantic love in middle-class attitudes toward sexuality. The great middle-class project has been the domestication of romantic love. Having its origins in the adulterous conventions of medieval courtly love, it remains ambiguously situated at the boundary of socially-authorized domestic relationships, sometimes seen as central to marriage, sometimes removed from all social convention. The centrality of romantic love to middle-class ideology helps to explain why sexuality is conceived as closely linked with self-identity.

This historical material may help us understand the roots of the deep-seated intuitive sense that child sexual abuse is uniquely harmful and that all of "childhood" is lost when a child is sexually abused. I would suggest that this long tradition of associating childhood sexual experience with pathology makes the pathogenic quality of sexual abuse seem intuitively obvious. Narratives about the malign effects of other forms of abuse do not fall into the same deep grooves and so they are harder to formulate and to hear if they are formulated. Because sexuality is often misunderstood as identical with attachment behavior and self-identity, narratives in which sexual abuse causes a wide variety of psychopathological symptoms, physical problems, and self-destructive behaviors resonate with a middle-class system of beliefs about sexuality and serve to enforce its norms. Whatever the ultimate merits of this belief system, it is clear that its focus on sexuality ends up obscuring the other potent sources of harm that children confront, and thus distorts the social response to the enormous problem of child maltreatment.

V. The Future of the Doctrine

Where does all this leave us with respect to the child sexual abuse discovery doctrine? In attempting to find justice for adult survivors of child sexual abuse through use of the discovery rule, the law became caught up in a furious debate. The two sides in this battle offered opposing analyses. To the advocates for victims, the fury with which these efforts were contested revealed exactly what is at stake: the power of reputation (and the ability of money to back it up) as against the vulnerability of children and the silence that often meets their pain. Advocates for the accused countered that this was not a search for justice but a witchhunt, in which zealous believers in a false theory ruined the

lives of innocent people. Throughout this Article, I have tried to keep a critical distance from both views, focusing instead on how the sexual abuse discovery doctrine may have inadvertently helped create the conditions for the recovered memory controversy, while at the same time it gave a day in court to many deserving plaintiffs. It is now time to sum up the implication of the analysis I have undertaken here for the future of the sexual abuse discovery doctrine.

Using the discovery rule to provide a remedy for adult survivors of child sexual abuse, without extending that remedy to survivors of other forms of child abuse and neglect, initially created two perverse incentives. First, it encouraged plaintiffs to emphasize the deficits in their memories, at a time when legal and scientific issues related to the question of repression were unresolved. Second, it encouraged victims of multiple and complex forms of child maltreatment to tell their story through the uni-causal lens of father-daughter sexual abuse. It may be that, with the subsidence of Type II cases and greater awareness in the psychotherapeutic community about the possibility of iatrogenically creating false memories, the worst effects of the perverse incentives described here have already been mitigated. If the trend continues, the more representative continuous memory cases will make up the bulk of survivor cases. These cases, though raising challenges to the policy concerns represented in the statute of limitations, do not present the same dangers as repressed cases. In a regime where repressed cases face tougher legal hurdles than those that are continuous, there is no extra value in a repressed claim. By neutralizing the first of the incentives, Type I claims do not cast the long shadow over the law as Type II claims did; they do not encourage (as repressed claims arguably do) potential plaintiffs to actively try to "recover" memories in order to have their day in court. If so, the law is coming out where it arguably should have in the first place, and the analysis I have conducted here will have a mainly historical value in explaining a particularly controversial episode in legal history.

The recent eruption of cases involving Roman Catholic priests may lend new impetus to the sexual abuse discovery doctrine in its Type I form, as we appear to be entering into a new stage in adult survivor cases. Because of the corroborating evidence revealed in church documents, the priest cases appear to be exceptionally strong Type I cases and may strengthen the trend in that direction. So far, these cases have not generated the

controversy about false allegations that flared up in the 1990s. Since most were originally settled, it may be that attention shifts to ancillary legal issues, like *respondeat superior* and the confidentiality agreements that accompanied many of these settlements. Courts have differed on the question of whether sexual abuse discovery statutes apply to suits against third parties in a position of *respondeat superior* to the perpetrator. Because some statutes reflect a "harm-based" approach,[333] while others are tied to the criminal code,[334] courts have split on this question. As for the confidentiality agreements, undoubtedly there will be some debate about whether they violate the ethical codes of the legal profession, especially if the lawyer in question had reason to know that the particular priest involved would be likely to abuse again or had not received treatment, even though bound to by an earlier agreement.[335]

However, even if legal attention shifts to these ancillary issues, it remains true that the sexual abuse discovery doctrine gives a legal sanction to a developmental narrative relating to child abuse that is somewhat skewed, in that it recognizes only one out of a potentially much broader number of narratives. The risk still remains that a potential plaintiff who has continuous memories of sexual abuse may over-attribute her symptoms to a sexual abuse history, but this is a risk that, at the moment, seems easier for courts to live with. It seems to be a less disturbing result if a defendant who really did sexually abuse a plaintiff is held liable for all of that plaintiff's injuries, instead of only some, than if a defendant who really did not sexually abuse a plaintiff is similarly held liable. Of course, even in Type I cases, the evidence must be proved, and these cases may indeed be weeded

333. *See e.g.*, CONN. GEN. STAT. § 52-577d (2001), *as interpreted in* Almonte v. N.Y. Med. Coll., 851 F. Supp. 34 (D. Conn. 1994) (holding that the "statutory focus is on *actions* flowing from a particular type of harm, and not *parties*").

334. *See e.g.*, COLO. REV. STAT. ANN. §13-80-103.7 (West 1999), *as interpreted in* Sandoval v. Archdiocese of Denver, 8 P.3d 598 (Colo. Ct. App. 2000); *see also* Debbie Reynolds Prof'l Rehearsal Studios v. Superior Court, 30 Cal. Rptr. 2d 514, 520 (Ct. App. 1994) (stating that plaintiff may seek recovery for any act committed by a defendant that would have been proscribed by specified penal code sections; thus, recovery excluded for defendants who are alleged to have contributed to plaintiff's damages by negligence). After *Debbie Reynolds*, California amended its statute so that it expressly applies to "an action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was the legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff." CAL. CIV. PROC. CODE § 340.1(a)(2) (West Supp. 1999).

335. *See* Alan B. Morrison, *The Secrecy Scandal*, BOSTON GLOBE, Apr. 14, 2002, at E7.

out by the adversary system. But the incentive structures that the sexual abuse discovery rule sets up may still not be correctly calibrated. For instance, the doctrine gives no recourse to a potential plaintiff who, though not a victim of sexual abuse, might persuasively argue that she is a victim of *some other kind* of child abuse and that she has sustained injuries that are comparable to those claimed in sexual abuse cases. While benefiting victims of sexual abuse, this selective application of the rule ignores evidence that damage from childhood maltreatment is not restricted to sexual abuse, creates a disparity in the remedies available for child maltreatment victims, and reveals an asymmetry in the law's treatment of sex as compared with violence and neglect when it comes to deleterious impacts on children. Combined with the broad policy of criminalizing sexual abuse to a much greater extent than other forms of child abuse, it communicates that these other forms of maltreatment are not as serious, not as worthy of redress, as child sexual abuse. Because of the law's norm-setting functions, the legal recognition of sexual abuse likely affects how judgments are made and resources are allocated in other areas, like child protective services, police departments, and probate courts. It may even affect what happens in psychotherapist's offices, since the law reflects a particularly weighty social judgment as to the seriousness of sexual abuse. If we are concerned with the problem of finding justice for adult survivors in the wake of the recovered controversy, we need to find legal doctrines that reflect the complexities of child maltreatment and that do not reinforce appealing but overly simplistic narratives that portray child sexual abuse as so uniquely terrible that it stands alone in its capacity to cause harm meriting legal redress.

Alternative Narratives

If the law took more account of the etiological complexity of child abuse, it might have to look at some child abuse cases rather differently. Here are some hypothetical scenarios. Plaintiff P lived with his natural father and his step-mother, two deeply dysfunctional people who abuse alcohol and subject each other to verbal and physical battering on a regular basis. When he was two years old, his natural mother died and for two years, P lived with his father's mother who was very depressed and considered the boy a burden. When his father remarried three years later, P rejoined him. Frequently, over the next nine years, P

witnessed domestic violence, usually initiated by his step-mother. Even at fourteen, P meets the criteria for clinical depression and has already started to abuse alcohol. Yearning for the attention of a caring adult figure, he is singled out by the junior high school coach who starts taking him on special trips to watch professional sports teams. Eventually, the coach, whom P much admires, sexualizes the relationship. P's parents are so neglectful and absorbed in their own marital dispute that they do not even notice his more frequent absences from home. Confused and vaguely uncomfortable with the sexual contact, P nonetheless feels flattered by the coach's attentions. His grades worsen, but they were never good to begin with. When the police take his parents to the station because a neighbor, hearing screams, has called them, the coach comes over and waits with P for them to come back. While they are waiting, P and the coach have sex. P then grows up into a relatively low functioning adult, develops a serious alcohol problem, and fails to develop meaningful relationships. He can sue the coach, but he cannot sue his parents, even though it is likely that many of P's problems would have developed even if the coach had never come into his life. Should the coach compensate P for all of his injuries, none of his injuries, or some proportion of his injuries? Calculated on what basis?

Here is another scenario. P is the daughter of two wealthy parents who inherited a considerable fortune. Her father was an Olympic athlete before coming into his money and he has been lastingly bitter about not winning a gold medal. From the time she was a small child, he started training her for the Olympics and when she failed to perform to his expectations, he beat her. Her mother was vain and self-involved and ignored what was going on. She often called P "stupid" and "ugly" and lengthily berated her for petty infractions. This went on for most of the years between eight and eighteen. At age fourteen, P was taken to a party by a distant family relative where she was raped by that relative's friend. As an adult, she is moody, self-destructive, angry, has twice tried to commit suicide, and has run a small business that has racked up thousands of dollars in debt. Her parents have disinherited her for her general rebelliousness. She claims that her self-destructiveness manifests itself in her bad business decisions. Used to being abused by a powerful white male with money, she always finds means of destroying potentially good deals. She knows the name of the man who raped her and knows that she could find witnesses, but he is judgment-proof. The law

is not required to make sure that all tortfeasors have money, but does it make sense that she is not able to sue her parents?

Apart from the rape, was she "abused?" Or did she just have an "unhappy" childhood and *damnum absque injuria*? If you ask P, she would say that while the rape was traumatic, she finally came to realize that the beatings by her father are the reason for her dysfunctional life. Is self-destructiveness in business like the failed relationships claimed by child sexual abuse survivors, or is it different? In what way? What about damages? A critic of the "psychotherapeutic-industrial complex," P has never been in therapy. Should she be reimbursed for her debts? Or can we calculate something like "lost potential?" If she can run her own business, is she even "messed up" enough to sue? How "messed up" do you have to be?

Suppose for the purposes of illustration that neither of these cases involved sexual abuse, yet in both cases the outcomes were substantially the same. As the law stands right now, both cases would be dismissed because neither statutes nor common law extends the discovery rule to non-sexual abuse cases, but should they be? I am not raising these questions to argue that lack of causation should be more intensively employed to defeat Type I claims. Perhaps, in the context of child sexual abuse litigation, the complex scenarios I have just outlined would have been weeded out through the adversary process as plaintiff's lawyers chose only the strongest cases to put forward. But the questions raised by these scenarios challenge us to articulate the reasons (other than the "uniqueness" of sexual abuse) why other forms of child abuse and neglect should not also be actionable if a plausible case can be made that they caused the potential plaintiff's psychological and behavioral problems.

In the Introduction to this Article, I posed two questions: Should the discovery rule have been used in cases involving adult survivors of child sexual abuse? And, if so, should it not also be available to victims of other forms of maltreatment? Taking all the evidence into consideration, the answer to the first is a qualified yes. Certainly, there is a good argument in favor of the status quo. The status quo represents an expression of political will that should not be cast aside lightly. The legitimate rationale for the sexual abuse discovery statutes was that five years is frequently not long enough for a victim of childhood maltreatment to realize that she has been damaged by maltreatment and to assess its full impact on her adult life. The doctrine gives chil-

dren additional rights against their parents in a legal regime where *parens patriae* remains a relatively weak doctrine and parental rights are accorded much greater recognition than children's rights, which remain difficult to formulate. For this reason, the doctrine has an appeal in that it utilizes private law to make up for deficiencies in public law. As long as the child protection system functions inadequately, it is arguable that a private right of action, though flawed and imperfect, gives some redress to at least a small percentage of children who are failed by the system. It is unfortunate that a private law remedy will only really be available to middle-class children, but with the class and race biases built into the child protection system as it stands now, those are the children who are least likely to come to the attention of the system.[336] It has also been said that this doctrine has deterrent effects, which are important given that it has historically been difficult to prosecute child sexual abuse cases. However, this argument is at least partially offset by the exceptions recently introduced in criminal law to facilitate child sexual abuse prosecutions.

On the other hand, the evidence supporting the causality prong of the tort action is more complicated than has generally been acknowledged in the public discourse on the subject, though evidence does support the claim that repeated intrusive forms of sexual violation are damaging to the long-term psychological health of victims. Though scores of therapists have testified on behalf of plaintiffs, the body of research on which their testimony ultimately rests is just now beginning to disentangle the different potential causal factors and, in response, to design studies controlling for the effects of multiple forms of abuse. In effect, there has been a presumption in operation that if the act is proved, it will be assumed that causality is also proved. This implicit presumption is tied to the criminal status of sexual abuse, but this becomes a tautology, in that sexual abuse is criminalized at least partly because it is assumed to be especially harmful. In making this point, I should stress that I am not suggesting that many of these cases would be reversed if causality were scruti-

336. *See* Brett Drake & Susan Zuravin, *Bias in Child Maltreatment Reporting: Revisiting the Myth of Classlessness*, 68 AM. J. ORTHOPSYCHIATRY 295 (1998); Robert L. Hampton, *Violence Against Black Children: Current Knowledge and Future Research Needs*, in VIOLENCE IN THE BLACK FAMILY: CORRELATES AND CONSEQUENCES 6 (1987) (citing J.P. Turbett & R. O'Toole, Physician Recognition of Child Abuse, Paper Presented at the Annual Meeting of the American Sociological Association (1980)).

nized more carefully. Because of the adversarial process, most of the cases discussed here are of the repeated, intrusive, intrafamilial variety, and so *would* withstand stricter scrutiny on the issue of causation. But I have raised the issue to make the point that much of the current research on child abuse has been affected by a research bias in favor of sexual abuse, so at this point we have not empirically established the relative harmfulness of different types of child maltreatment.

Now to the question of whether survivors of other forms of child maltreatment should be afforded the benefit of the discovery doctrine. Some commentators and courts have argued against Type I cases on the grounds that they, theoretically, "open the floodgates" to litigation.[337] For instance, the Indiana supreme court expressed anxiety that if an adult survivor of child sexual abuse could invoke the delayed discovery rule, then it would follow that "a middle-aged claimant, suddenly learning that he had been involved as an infant in an automobile accident, could attempt to invoke the discovery rule to assert an action seeking damages for a permanent medical condition allegedly resulting."[338] The more relevant worry, for the purposes of this Article, is with regard to claims based on other forms of child abuse and neglect. Floodgates arguments are, of course, often practically correct—more litigation will follow; but save in unusual circumstances, too much justice hardly seems a weighty argument. In the case of adult survivors and the discovery rule, however, the flood never materialized.[339] Few if any non-sexual Type I cases have been attempted, suggesting that use of the discovery rule in adult survivor of incest cases has indeed been prompted by the sense of exceptionalism that, somewhat irrationally, attaches to child sexual abuse. As we have seen, the claim of uniqueness on the question of harm may express a deep-seated, nearly intuitive belief about the pathologizing potential

337. Carro and Hatala have argued that if Type I cases are permitted, "statutes of limitations would be completely obviated in cases of ordinary injuries to children whose developmental limitations impaired or precluded their capacity to discover that an injury resulted from another person's tortious act." Jorge L. Carro & Joseph V. Hatala, *Recovered Memories, Extending Statutes of Limitations and Discovery Exceptions in Childhood Sexual Abuse Cases: Have We Gone Too Far?*, 23 PEPP. L. REV. 1239, 1263 (1996).

338. Fager v. Hundt, 610 N.E.2d 246, 251 (Ind. 1993). Though voicing this concern, the court came up with a solution: "impute" discovery to the child, if the parent knew of the injury and exercised their rights and duties to protect the child and provide for her maintenance and care. *Id.* at 251.

339. A very few cases involved allegations of *both* sexual and physical abuse.

of childhood sexuality more than the results of scientific research. At the least, the issue needs further scrutiny. Victims of other forms of child abuse may be able to make a convincing showing on the issue of causality, and as a society we would benefit from a greater understanding of how child maltreatment, even less sensational forms like psychological neglect, contributes to the social problems of mental illness, drug abuse, violence, and crime.

Yet it is true that broadening the applicability of the delayed discovery rule to child maltreatment in general would introduce difficult administrative problems. Child sexual abuse is the most concretely defined ("operationalized") form of childhood maltreatment and consequently the rule is easiest to administer in such cases. Though childhood sexual activity has some gray areas (lascivious looking, invasions of privacy, wet kisses), on the whole there is a good deal of cultural consensus as to what constitutes sexual abuse of children. Although researchers have made progress in "operationalizing" non-sexual (and particularly non-physical) forms of child maltreatment, there is still great controversy as to what constitutes appropriate "good enough mothering" and what constitutes abuse. Though it might not be impossible to develop clearer ways of operationalizing abuse, it might be that this would tend too much in the direction of standardizing a single norm of good parenting behavior. On the other hand, it might be said that abuse and neglect standards would only establish a floor above which a myriad of parenting styles could flourish.

However, there are some good reasons to consider use of the rule in at least some other cases. The law sends a strong social signal about the relative seriousness of different forms of child maltreatment. By not recognizing other adult survivor claims, current legal doctrine contributes to the social misrecognition of violence and neglect as social problems. While an ideal response might be to strengthen the child protection system, civil suits by other victims of child abuse and neglect (setting a high threshold of abuse) would validate the research on the long-term developmental harm from other types of abuse and ensure that the law is not inadvertently setting up perverse incentives.

It has been argued that suits by adult survivors of childhood physical abuse "have merit and can be justified on virtually the

same basis as 'delayed' sexual child abuse suits for damages."[340] I believe this is correct. As things now stand, among other forms of child abuse and neglect, physical abuse is probably the best candidate for the discovery rule. Given the evidence that physical abuse exacerbates the effects of sexual abuse and that some victims of physical abuse are more symptomatic and face greater risk of adult victimization than victims of sexual abuse, there is an issue of fairness. Next to sexual abuse, physical abuse is the easiest form of abuse for which to elaborate standards. Furthermore, serious forms of physical abuse are often criminalized (though they are not very often prosecuted), so here too a parallel with sexual abuse is clear.

Physical abuse also most closely resembles child sexual abuse in terms of its potential for repression and for being misrecognized by the child as an appropriate form of behavior (i.e., discipline). A Type I argument supporting use of delayed discovery in a tort claim based on physical abuse would begin by saying that the social acceptance of corporal punishment and the uncertain line between "discipline" and "abuse" means that the injury would often be "hidden in plain view." Physically abused children (especially those exposed to chronic severe corporal punishment) are often told that they are being physically struck "for their own good." Like victims of sexual abuse, but for different reasons, victims of physical abuse thus often need time to realize that what was called "discipline" could just as accurately be called "abuse" and that their problems with anger, failed relationships, and episodes of depression may be rooted in childhood experience. This argument would have to make a threshold showing that the abuse exceeded "normal" corporal punishment, but it would have the positive benefit of opening a debate on what amount of punishment is "normal" and whether the evidence that even "normal" punishment is harmful should alter our sense of what is appropriate treatment of children. A physical abuse discovery doctrine could also frame itself as a natural extension of the growing awareness of the dangers for children of "witnessing" domestic violence. Providing a remedy for victims of physical abuse would lead to a more informed debate about the effects of corporal punishment and to the clarification of standards in this area.

340. Jill K. Harker, *The Case for Allowing Civil Tort Suits for Adult Victims of Physical Abuse*, 30 FAM. L.Q. 217, 219 (1996).

CONCLUSION

This Article has tried to do three things: first, trace how a powerful narrative about sexual abuse was constructed and then incorporated into legal discourse through the sexual abuse discovery doctrine; second, to examine the strengths and weaknesses in the justifications of the doctrine; third, to suggest that the sense of uniqueness attached to child sexual abuse that exists apart from the merits of these justifications owes something to the ideology of childhood and to a deeper cultural sense that childhood, sexuality, and pathology are inextricably linked. The legal response to the adult sexual abuse survivor movement was rational enough, yet it helped to produce an irrational outcome—a social obsession with child sexual abuse, a collective search for repressed memories that did not adequately reflect the nuances and complexities of child maltreatment as a social problem. Though it is easy to blame the excesses of the recovered memory controversy on the over-zealousness of therapists and the politics of feminism, some blame must be given as well to social attitudes, as reflected in law, that ignore or diminish other forms of child maltreatment. I have argued that sexual abuse is not the "bright line" suggested by the sexual abuse discovery doctrine. Although the same sense of moral reprehensibility may not attach to other forms of child abuse and neglect, the claim that sexual abuse causes a unique and distinctive type of harm seems problematic and arguably reflects the cultural significance attached to sexual innocence as signifier of "childhood" more than the available evidence about harm. The problem to be resolved is that, as things stand now, the law lacks a means of redress for those individuals whose lives have been devastated by maltreatment in childhood if that maltreatment happens not to have been sexual in nature. Extending use of the discovery rule to victims of physical abuse would be a step in the right direction.

It follows from the argument I have made that "victimization" in general has now come to be identified with sexual abuse. It would not be far-fetched to see in the resurgence of concern about pedophile priests a collective working-through of the traumatic events of September 11th. Though the church scandal has roots that are independent of the terrorist attacks, it is likely that many victims were retraumatized by the events and so have been newly mobilized to actively pursue the church. It is equally likely, however, that many of those who suffered (and still suffer) psychological distress in the months after September 11th were

made to relive a wide variety of events, not just sexual abuse. Certainly, the pain of New York schoolchildren who are suffering directly from the attacks reminds us that violence itself is a potent cause of psychological suffering. But because sexual abuse has become such a powerful cultural symbol of victimization, it affords a way to publically express suffering that would otherwise remain mute.

The problem is that while facilitating expression, this identification of sexual abuse with victimization oversimplifies and distorts.[341] We will not begin remotely to understand the domestic and global implications of violence, poverty, and neglect if we do not adopt a more complex and nuanced view of what victimization is and what its consequences may be. Until we are able to see children who have suffered from neglect and physical or psychological abuse, from poverty or violence, as suffering just as much, though perhaps differently, as children who suffer from sexual abuse, we will not understand the challenge that child maltreatment poses. Grasping the causative role of violence or poverty or psychological humiliation in the creation of violent behavior will present a challenge to our moral sensibilities, since admitting that role seems to deny the moral responsibility of those who go on to commit violence themselves; but nevertheless, it must be done.

Finally, though controversy about repression seems to have receded for the time being, there is reason to fear a return of the repressed. History suggests that moral panics about child sexual abuse tend to recur. All the evidence suggests that current attitudes about child sexual abuse, as reflected in legal doctrines, are deeply ambivalent, with doubts about the veracity of accusers coexisting alongside of persecutory feelings towards those accused. Unless we get at the underlying structure of feeling that gives rise to these strong if incoherent reactions and ensure that the legal system does not just blindly reproduce them, the conditions remain ripe for the eruption of controversy around this issue in the future.

341. For a more elaborate discussion related to this point, see Elizabeth Wilson, *"Something Happened": The Repressed Memory Controversy and the Social Recognition of Victims*, *in* FRAGMENT BY FRAGMENT: FEMINIST PERSPECTIVES ON MEMORY AND CHILD SEXUAL ABUSE 309 (Margo Rivera ed., 1999).