SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 48 | Issue 3

1998

Tales of Sexual Panic in the Legal Academy: The Assault on Reverse Incest Suits

Edward Greer

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

 Part of the Law Commons

Recommended Citation

Edward Greer, *Tales of Sexual Panic in the Legal Academy: The Assault on Reverse Incest Suits*, 48 Case W. Res. L. Rev. 513 (1998)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol48/iss3/4

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

TALES OF SEXUAL PANIC IN THE LEGAL ACADEMY: THE ASSAULT ON REVERSE INCEST SUITS

Edward Greer[†]

Alongside the collective fear of [being randomly murdered] . . . is another anxiety, often bordering on a kind of mass panic: people wonder just how many children are the victims of parental sexual or aggressive abuse. That such abuse is not uncommon only fuels the alarm, and because it is impossible to determine just how common it is, the doors seem to be opening to a new kind of horror.[1]

I. THE DOCTRINAL AGENDA OF LEGAL DOMINANCE FEMINISM

Professors Bowman and Mertz vigorously contend that accused fathers ought not to have any legal remedy against therapists who encourage recollections of, and lawsuits based upon, repressed memories of childhood incest.[2] They rely primarily on the most famous such "reverse incest" lawsuit, *Ramona v. Isabella*,[3] which

---

[†] B.A. Columbia; J.D. Yale; M.P.H. Harvard. Associate Professor of Law, Southern New England School of Law. I would like to thank Professors Ellen Rooney and Elizabeth Weed at the Pembroke Center for Teaching and Research on Women, Brown University for my appointment as Visiting Scholar in 1994-95, and Professor Bonnie Honig for inviting me to participate in, and learn from, her intellectually challenging 1993 seminar in the Harvard University Political Science Department on post-modernist feminist political theory. I am appreciative of the comments on an earlier draft by Professor Elizabeth Bartholet and the detailed critique by Professor Carlin Meyer.

[1] CHRISTOPHER BOLLAS, CRACKING UP: THE WORK OF UNCONSCIOUS EXPERIENCE 199-200 (1995).

[2] *See* Cynthia Grant Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Survivor Therapy*, 109 HARV. L. REV. 549 (1996).

[3] No. C61898 (Cal. Super. Ct. May 13, 1994). The case was the subject of national

they condemn based upon a series of arguments advanced by "dominance feminists."[4] Professors Bowman and Mertz focus on and celebrate the small[5] and highly atypical group of female litigants[6] who bring retrieved memory civil incest suits against their fathers.

It should, however, be noted that the *Ramona* story is atypical of those of girls subjected to incest.[7] To begin with, a large pro-

---

media attention, and considerable feminist commentary. *See, e.g.*, Helen Daniels, *Truth, Community and the Politics of Memory: Narratives of Child Sexual Abuse, in* "BAD GIRLS/GOOD GIRLS": WOMEN, SEX AND POWER IN THE NINETIES 150-51 (Nan Bauer Maglin & Donna Perry eds., 1996); *see also* Dr. Judith Herman, M.D., Speech on *Ramona* at the 1994 Annual Meeting of the American Psychiatric Association [hereinafter Herman Speech], *quoted in* MOIRA JOHNSTON, SPECTRAL EVIDENCE—THE RAMONA CASE: INCEST, MEMORY AND TRUTH ON TRIAL IN NAPA VALLEY (1997).

[4] At the core of dominance feminism is a view of male sexuality as inherently predatory. To religious orthodoxy, this predation is biologically and teleologically immanent, such that men tend—absent the strict social and moral control provided by patriarchy—to sexual aggression. *See, e.g.*, ROBERT H. BORK, SLOUCHING TOWARD GOMORRAH 139 (1996) ("The idea that men are naturally rational, moral creatures without the need for strong external restraints has been exploded by experience."). In its secular feminist version, men are *socially constructed* as sexual predators *through* patriarchy. This view is advanced by "feminists [academics such as Catherine MacKinnon] who have worked theoretically, and often through political practice, to raise consciousness about male sexualization of and aggression against women." Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism on Campus*, 103 YALE L.J. 1535, 1549 (1994) (reviewing KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR AND FEMINISM ON CAMPUS (1993).

The nomenclature for categorizing this perspective has varied: Now it is commonly denominated as "dominance feminism," although some years ago it was generally referred to as "cultural feminism." *See, e.g.*, Alice Echols, *The Taming of the Id: Feminist Sexual Politics, 1968-83, in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 50, 59 (Carole S. Vance ed., 1984) ("Cultural feminists are so convinced that male sexuality is, at its core, lethal that they reduce it to its most alienated and violent expressions.").

[5] One 1995 estimate puts the number of such cases filed in the prior decade at roughly 800. Mark MacNamara, *The Rise and Fall of the Repressed Memory Theory in the Courtroom*, 15 CAL. LAW. 36, 38 (1995); *see also* Thom Weidlich, *Repressed Memories: Unreliable?*, NAT'L L.J., June 12, 1995, at A7.

[6] *See infra* note 12 (detailing studies indicating how subset of litigants differs from the general pool of victims of incest).

[7] It should be noted that only about one-twentieth of those with retrieved memories of incest through therapy bring suit. *See* Debra A. Poole et al., *Psychotherapy and the Recovery of Memories of Childhood Sexual Abuse: U.S. and British Practitioners' Opinions, Practices and Experiences*, 63 J. CONSULTING & CLIN. PSYCH. 426 (1995) (stating that of all the victims who retrieve memories of incest, 94% do not bring suit). Therefore, this "silenced" group is a minuscule fraction of those who were subject to incest. If we quite conservatively assume that half of those who were subject to incest never enter the mental health system, and of those who do, three-fourths never repressed their memories of it, *see* Judith Lewis Herman & Emily Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, 4 PSYCHOANALYTIC PSYCHOL. 1, 4 (1987) ("Just over one quarter of the women (28%) reported severe memory deficits [with respect to childhood experiences of incest]."), then the group about whom Professors Bowman and

portion of former victims appear to suffer no particular adverse psychological sequelae, and as best as can be ascertained, neither need nor seek therapy.[8] Second, of those who do enter the mental health process, it seems that the large majority have always remembered what occurred.[9] And among the residuum who recollect childhood experiences of incest only in the course of psychotherapy, the overwhelming majority[10] decide never to bring any legal claim. Therefore we cannot fairly ascribe a motive to seek a "voice" through the legal system to more than a minuscule fraction of those adult women who suffered incest as children.[11]

We have, moreover, no reason to think that the very small subset of women who bring retrieved memory incest suits against their fathers are representative of the entire class of women who had such experiences.[12] The authors eschew any demonstration

---

Mertz are writing is about 1% of putative incest victims; *see also infra* notes 9, 151, 152.

[8] *See* Mavis Tsai et al., *Childhood Molestation: Variables Related to Differential Impacts on Psychosexual Functioning in Adult Women*, 88 J. ABNORMAL PSYCHOLOGY 407, 414 (1979) (comparing controls with two groups of victims, those in therapy, and those who never sought it and considered themselves normal: "[W]omen [victims] in the nonclinical group showed no ill effects of the molestation, at least when a matched control group of nonmolested, non-therapy seeking women was used as a standard of comparison."); *see also infra* note 120.

[9] *See* Linda Meyers Williams, *What Does it Mean to Forget Child Sexual Abuse? A Reply to Loftus, Garry, and Feldman (1994)*, 62 J. CONSULTING & CLIN. PSYCH. 1182, 1183 (1994) (stating that "[i]ndeed, most of the women in my sample recalled their abuse" (referring to her own study which is the main empirical support for the notion of repression of childhood sexual trauma)). It should also be noted in this regard that the DSM-IV of the American Psychiatric Association does not even have a category for full amnesia from psychic trauma, and the American Psychological Association's official position is that "[m]ost people who were sexually abused as children remember all or part of what happened to them." AMERICAN PSYCHOLOGICAL ASS'N, WORKING GROUP ON INVESTIGATION OF MEMORIES OF CHILD ABUSE: FINAL REPORT 1 (1996) [hereinafter WORKING GROUP]; *see also infra* notes 151, 146.

[10] *See* Poole et al., *supra* note 7, at 426 (placing this figure at 94%).

[11] Even among this group, it is hardly self-evident that motives of financial gain and/or revenge do not predominate for many. The socially benign purpose which Professors Bowman and Mertz ascribe to those who bring suit may or may not correspond with reality in any given case.

that the narratives which they recount are representative, but insofar as they are advanced by the authors "as the basis for recommending policy changes, [they] should be typical of the experiences of those affected by the policy."[13]

In response to retrieved memory claims, several dozen fathers have filed (or in the near future may be expected to file) third-party suits against their daughters' therapists. Professors Bowman and Mertz aver that it constitutes a dangerous direction in public policy to countenance these "reverse incest" suits. They counsel that the fathers be restricted to direct suits against their own daughters.[14] They insist on this as the sole litigation option: "[A] suit for defamation or malicious prosecution is the appropriate corollary to the victim's potential causes of action for abuse. Suits between the alleged victim and the alleged abuser can appropriately resolve the real conflict. Third-party suits cannot."[15]

Evidently this is not a serious perspective, because if a father is innocent and believes his daughter's lawsuit arose from a good faith mistaken or delusional belief, one presumes he would not initiate civil litigation against his own psychologically troubled adult child. Second, if the daughter believes she was subject to incest (and Bowman and Mertz exclude from their discussion wilfully false and malicious claims), then the daughter lacks the requisite malice for these torts to even lie. Third, it is doubtful that many of these daughters are sufficiently affluent to make lawsuits against them by their fathers economically justifiable, and, unlike therapists, they surely do not have insurance to indemnify possible judgments.[16] So the proposed resolution advanced by professors Bowman and Mertz would probably leave the fathers pursuing it in an economically inferior position—hardly a meaningful remedy against the harm of being publicly accused of incest. Given the

---

[13] Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 838 (1993). The methodological/epistemological counterclaim that feminist narratives are privileged such that objections regarding "typicality" are off point, *see* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991), is outside the scope of this article. An introduction to these issues is included in FEMINIST EPISTEMOLOGIES (Alcoff et al. eds., 1993).

[14] *See* Bowman & Mertz, *supra* note 2, at 585.

[15] *See id.* at 586.

[16] *See infra* note 156 (providing support through case law for this proposition).

inadequacy of their purported mechanism of redress, the ubiquity of low-quality psychotherapy, and the general propensity of the American legal system to allow civil suits for most personal injuries both physical and psychic, it might seem anomalous that professors Bowman and Mertz are so exercised by the extraordinarily rare and arcane "reverse incest" lawsuit which can provide at least a modicum of relief to innocent fathers.

The existence of "reverse incest" cases—symbolized by *Ramona*—has become a focal point of a much larger legal and political struggle. The unspoken undergirding of *A Dangerous Direction* is a fury that the bulk of instances of private crimes committed by men against women, in the first instance sexualized crimes (of which incest is a paradigmatic example), cannot be redressed by the legal system because, even if reported, they cannot be proven in a court of law.[17] Most of us who acknowledge that real limitation on the efficacy of the legal system seek other kinds of social reforms to ameliorate this difficulty.[18] But the dominance feminists are profoundly committed to being rescued from individual acts of oppression through expanding the power of the patriarchal state.[19] They appear unconcerned with the larger political implications of this approach.[20]

---

[17] *See infra* note 157 and accompanying text.

[18] *See generally* Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention, in* FEMINISTS THEORIZE THE POLITICAL 385, 388 (Elizabeth Butler & Joan Scott eds., 1992) (criticizing the emphasis of some feminists on achieving more effective punishment of rape because "an almost exclusive insistence on equitable reparation and vindication in the courts has limited effectiveness for a politics of rape prevention").

See also the brilliant piece by Elizabeth M. Iglesias, *Rape, Race and Representation: The Power of Discourses, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 885 (1996):

> [B]y means of an appropriately variegated analysis of rape, feminists will be better equipped to redefine their target and rechannel their reform efforts from the criminal justice apparatus to the public policies that construct women's sexual vulnerability and the culturally dominant images of women and men upon which these policies are based.

[19] While they repeatedly employ the term "patriarchal", Professors Bowman and Mertz nowhere define it. Mari J. Matsuda provides a simple definition: "By 'patriarchy' I mean the social system that assigns cultural characteristics to the male and female sexes and uses that characterization, along with other instruments of power (including state power), to perpetuate the subordination of female to male." MARI J. MATSUDA, WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER AND THE LAW 30 (1996).

[20] The approach of the authors "occlude[s] the question of whether to subject gender issues to the logic of the . . . administrative state is to promote the liberation of women." NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE

Their approach is based on three interlinked legal strategies. First, they endorse draconian punishments. If only a few malefactors can be brought to justice, the penalties should be made so steep that these individuals will serve to provide general deterrence.[21] Second, they favor a radical expansion in the categories of wrongdoing.[22] Finally, they attempt to develop procedural mechanisms which will make it easier to prevail in legal claims against the male defendant.[23]

Legal dominance feminism wishes it could shift the burden of proof to the defendant:[24] The father would have to develop by a preponderance of the evidence that the woman's claim regarding

---

POSTSOCIALIST CONDITION 70 (1997).

[21] *See* Cynthia Grant Bowman, *The Arrest Experiments: A Feminist Critique*, 83 J. CRIM. L. & CRIMINOLOGY 201 (1992) (privileging "more severe sentencing practices" as the most promising method to diminish spousal abuse); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1850 (1996) (discussing the impact of, and advocating, mandated participation in criminal trials for domestic abuse).

[22] *See* Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 574 (1993) (advocating legal remedies for "street harassment" which will "hurt enough to provide general deterrence"); *see also* Caroline Forell, *What's Wrong with Faculty-Student Sex? The Law School Context*, 47 J. LEGAL EDUC. 47 (1997) (stating that any sexual activity should be a *per se* offense with sanction including discharge). *But see* JANE GALLOP, FEMINIST ACCUSED OF SEXUAL HARASSMENT 8 (1997) ("The classic scenario—easy to recognize and deplore as sexual harassment—expands its application in every direction."); Edward Greer, *What's Wrong with Faculty-Student Sex: Response I*, 47 J. LEGAL EDUC. 437, 438 (1997) ("Once the 'differential power' approach to sexual intercourse is embraced, it is hard to draw any principled distinctions which would legitimate any instances of it."); Linda Fitts Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 GEO. J. LEG. AFF. 209 (1996) (describing the ramifications of sexual relations in the attorney-client relationship).

[23] *See, e.g.*, Forell, *supra* note 22 (expressing regret that despite her efforts on the presidentially-appointed university committee on which she served, the burden of proof was not placed on the law professor to demonstrate that he had *not* had sex with a female student or retaliated against her for declinations of intercourse); Susan Deller Ross, *Proving Sexual Harassment: The Hurdles*, 65 S. CAL. L. REV. 1451, 1457 (1992) (advocating legislation to create "a rebuttable presumption for anyone suffering adverse employment consequences after . . . being subjected to sexual harassment. The presumption would be that the adverse action was a direct result of . . . the harassment."). Professor Ross does not specify whether this presumption arises with the making of the underlying harassment claim or only subsequent to a judicial determination of its validity. *See id.*

[24] They believe this would be equitable because they are convinced that the overwhelming majority of claims—perhaps 95%—are valid. Thus, the leading psychiatric supporters of the validity of repressed memories assert that "unsubstantiated complaints seem to hover at 5%." *Letter by Judith Herman, J. Christopher Perry, and Bessel A. Van der Kolk*, 196 AM. J. PSYCHIATRY 1358, 1358-59 (1989).

the alleged wrongful private act was not true.[25] But as this is impractical in the American legal system, the closest approximation is to create by social convention a presumption that the woman's claim against the man is true.

When an adult woman avers that she was the victim of incest committed by her father a decade or two previously, our legal system as constituted cannot presume the validity of that claim. And intuitively, if the woman adds that she did not complain earlier because she repressed the traumatic event (and only recently retrieved the memory in the course of psychotherapy), that would seem on the face of it to further *reduce* the appropriateness of presuming her claim is true. After all, we generally do have, and believe in, continuous memories of catastrophes which befell us as children.[26]

Professors Bowman and Mertz apparently want to somehow get the legal system to presume it is the woman who is truthful, and thus reverse this common sense line of inference.[27] Their position is to argue that if retrieved memories of childhood sexual abuse are generally true,[28] then in cases in which adult daughters claim that their father committed incest and *also* claim recovered memories as the reason for belatedly bringing suit, it would be appropriate to presume the validity of the claims. The only way, however, one can legitimize a presumption of the validity of retrieved memories is if somehow the *therapists*, as expert witnesses, validate it. And for that to happen, it is vital that the therapists be provided with absolute immunity from suit. Absent such immunity, the danger to legal dominance feminism is that it may be readily demonstrable that—as most people intuitively think—the "retrieved memory" component *reduces* the credibility of the incest claim.

Professors Bowman and Mertz have joined this issue with *A Dangerous Direction*, which purports to demonstrate that our legal

---

[25] *See supra* note 23.

[26] As to major childhood traumas other than incest (such as murder of a parent, being sent to a concentration camp, etc.), there essentially are no clinical reports of complete repression; as to incest, even the strongest psychiatric advocates of the phenomenon agree that complete repression is atypical. *See infra* notes 151, 152.

[27] If the legal system creates a presumption of validity regarding the exotic phenomenon of recovered incest memories, *see infra* note 115, a large step has been taken toward vindicating the more general principle that a similar presumption is also appropriate in an expanding penumbra covering private events of all sorts involving women.

[28] *See infra* Part IV (proposing that empirical data does not provide support for this position).

system *should* provide immunity to therapists who aid and encourage their female patients to sue their fathers for long-ago putative incestuous wrongs. They stand on *Ramona* (and to a lesser degree *Sullivan v. Cheshier*[29]) as their proof.

While they advance a series of reasons as to why fathers should be barred from advancing legal claims against their daughters' therapists,[30] Professors Bowman and Mertz focus their analytical attention on the problem of countersuits brought in bad faith by fathers who *were* guilty of incest.[31] In such circumstances, these countersuits, they contend, may well have the socially perverse objective and/or effect of wrongfully disrupting the daughters' ameliorative therapy.[32]

---

[29] 846 F. Supp. 654 (N.D. Ill. 1994).

[30] The authors exempt instances in which the daughter has herself decided that her retrieved memory was falsely evoked by therapist malpractice and filed suit against her own therapist; in this setting they equivocate over whether the father should be allowed to bring a claim ancillary to his daughter's for his own separate damages. *See* Bowman & Mertz, *supra* note 2, at 639 (such suits "might be appropriate under some circumstances"). In their discussion of *James W. v. Superior Court*, 17 Cal. App. 4th 246 (Cal. Ct. App. 1993), Professors Bowman and Mertz assert that "arguably" such an ancillary claim lies under California law, but then conclude that it probably does not lie because they contend that the *James W.* intermediary court erroneously relied upon *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, 770 P.2d 278 (Cal. 1989) (en banc). Bowman & Mertz, *supra* note 2, at 580-81.

They are, however, themselves mistaken in their rendition of *Marlene F.* because that case expressly held that "the therapist's conduct breached a duty of care owed [to the mother] as well as her child." *See Marlene F.*, 770 P.2d at 279; *see also* Elizabeth Handsley, *Mental Injury Occasioned by Harm to Another: A Feminist Critique*, 14 LAW & INEQ. J. 391, 487 n.78 (1996) (stating the holding of *Marlene F.* as: "allowing mother to assert a claim for emotional distress against family therapist who, while treating both mother and son, molested the child"). Professor Handsley, incidentally, indicates that she prepared her article while at Northwestern School of Law and that she is "indebted to Professor Cynthia Grant Bowman . . . [for her] guidance when this paper was in its early stages." *Id.* at 391.

By misreading *Marlene F.*, Professors Bowman and Mertz are able to—mistakenly—cast doubt on the doctrinal validity of the *James W.* decision. In turn, since the *Ramona* trial court decision was explicitly based upon the authority of *James W.*, Professors Bowman and Mertz are able to—erroneously—conclude that *Ramona* would have been reversed as bad law had it been appealed.

Since, however, at least one of the defense counsel in the *Ramona* lawsuit informed the authors in writing that his view was that the decision *would* have been upheld if appealed, Professors Bowman and Mertz—to attempt to avoid self-contradiction—also wind up advancing a misleading alternative explanation for why the defendants did not appeal the *Ramona* judgment. *See infra* note 86.

[31] They seem unaware of the problem raised methodologically in presuming the complainants are acting in good faith while the defendants are presumptively in bad faith. This method largely validates their argument a priori. And it is also consistent with the axiom of dominance feminism that men, as socially constructed, are sexual predators.

[32] *See* Bowman & Mertz, *supra* note 2, at 586. It is entirely uncertain that Professors

Their primary ostensible reason for barring fathers from bringing suit, therefore, is that permitting such countersuits will enable vengeful sexual abusers to intimidate their former victims and their therapists through a misuse of the judicial process. Specifically, these fathers would try to do so by intruding into, and hence destroying, the confidentiality[33] of the therapeutic process.[34] Professors Bowman and Mertz use strong language to describe this phenomenon:

> Therapy offers adult survivors a badly needed chance to remedy that gap in their personal development [caused by their fathers' inappropriate domination and control]. Attempted disruption of the therapy relationship is a predictable response for a father or other abuser who has always viewed with suspicion a child's efforts to separate. When abusers use the courts to aid in this disruption, the courts become instruments of a process of domination, helping abusers to control and interfere with their victims' lives.[35]

There is, as this article demonstrates, no empirical basis for these assertions. In point of fact, the *Ramona* case does *not* mani-

---

Bowman and Mertz are seriously committed to therapeutic confidentiality as opposed to simply using whatever argument comes to hand. *See generally* Jaffee v. Redmond, 518 U.S. 1 (1996) (upholding federal common law evidentiary privilege for psychiatrist-patient communications). One wonders, for instance, if they would favor abolition of the statutes which require therapists to inform on their patients who are child abusers. *See generally* People v. Bass, 529 N.Y.S.2d 961 (Sup. Ct., 1988) (holding that a confidential statement to a therapist implicating a patient in child abuse is protected by a privilege).

[33] The most thoughtful and important discussion of this issue by psychotherapists, *see* CHRISTOPHER BOLLAS & DAVID SUNDELSON, THE NEW INFORMANTS: THE BETRAYAL OF CONFIDENTIALITY IN PSYCHOANALYSIS AND PSYCHOTHERAPY (1995), argues that therapists should never volunteer to participate in the legal process precisely because that undermines the privacy of therapy (and they further argue that therapists ought not—as is now the case—ever be compelled by the state to inform on their patient, subjecting the patient to governmentally-imposed sanctions); *see also* Edward Greer, *Review of The New Informants*, *in* 334 NEW ENG. J. MED. 1141 (1996) (supporting notion of such absolute privacy akin to that embodied in canon law for priest-penitent communications through radically expanding scope of Constitutional privacy).

[34] The authors choose not to raise the difficult question of confidentiality relative to the therapy of minors, so we do not know whether they believe parents should be barred from access to their minor children's therapeutic communications. If they reached this issue it would implicate *current*, as opposed to long past, incest. *See* Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 890 (1975) ("Unfortunately, legal commentary has not emphasized the issues of when or how the state ought to intervene to protect children from their parents.").

[35] Bowman & Mertz, *supra* note 2, at 636.

fest the evil of disrupting a putative victim's therapy. Professors Bowman and Mertz tacitly concede this empirical reality by supplementing their main narrative with an account of a second lawsuit, *Sullivan v. Cheshier*.[36] But neither does *Sullivan* turn out to be an instance of a vengeful father's disrupting his erstwhile incest victim's therapy. Quite to the contrary, in both cases, the fathers had, of their own volition, voluntarily paid for their daughters' therapists.[37]

Erstwhile incest victims have long since fled their families of origin,[38] and as adults have no particular reason to inform their fathers of their decisions to enter, let alone reveal, the content of their psychotherapy. Any attempted disruption by a father presupposes the adult woman's having chosen to reveal this private matter to him, and further assumes that he will, if so informed, be likely to try to interfere. There is not a single reported lawsuit that has been located in which a father who had previously committed incest against his daughter when she was a minor subsequently filed a lawsuit after she reached her majority against her therapist for the purpose of disrupting her therapy.

Immediately after the *Ramona* decision, therapists such as Judith Herman, M.D., who are closely aligned with recovered memory victims bringing lawsuits against their fathers, began to advance the thesis that "[t]he fact that a third party was given standing to speak on malpractice because he was not happy with the treatment of his daughter really opens the door to permit anyone who is dissatisfied with our treatment of any patient to lay claim against us."[39]

Dr. Herman's speech had the effect of creating an atmosphere in which the woman's accusation is *presumed* valid by attempting to persuade the therapeutic profession that it should intervene politically to bar "reverse incest" suits. The article by Bowman and Mertz further legitimates this perspective, and in effect misrepresents to the feminist therapeutic community[40] that men who com-

---

[36] 846 F. Supp. 659 (N.D. Ill. 1994).

[37] *See* JOHNSTON, *supra* note 3, at 77-79 (Ramona); *see also infra* text at note 98 (Sullivan).

[38] *See* JUDITH HERMAN, FATHER-DAUGHTER INCEST 92, 93 tbl.5.5, 94-95 (1981) (stating that thirteen of forty ran away from home while still adolescents, and that in several families, "the fathers deserted once the daughters had left home," and "all the daughters eventually succeeded in escaping from their families").

[39] Herman Speech, *supra* note 3, *quoted in* JOHNSTON, *supra* note 3, at 414.

[40] Theirs is the sole law review article cited in the elaborate bibliography of the

mitted incest are so fearsome that *all* therapists are at risk of costly litigation.[41] This stance that feminist therapists are constantly at serious risk from male sexual aggressors[42] reiterates and further generalizes the recurring theme in the public policy statements of dominance feminists.

II. THE REALITY OF *RAMONA* VERSUS THE IDEOLOGICAL READING

The Bowman and Mertz law review article advances bitter criticism of the trial court decision in *Ramona*.[43] In that case, a

---

American Psychological Association's "Award Address," by Kenneth Pope. *See* Kenneth S. Pope, *Memory, Abuse, and Science: Questioning Claims About the False Memory Syndrome Epidemic*, 51 AM. PSYCHOL. 957 (1996).

[41] This is not just an abstract possibility. One faction within the American Psychological Association's working group is favorably aligned with the view that recovered incest memory is a genuine phenomenon. That faction has advanced the strange idea that "this scare tactic [of asserting that recovered memory is frivolous] is now fueling a series of lawsuits and legislative initiatives whose net effect would be to forbid psychotherapy with trauma survivors." Judith L. Alpert et al., *A Response to Ornstein, Ceci, and Loftus, in* WORKING GROUP, supra note 9, at 132,147. As far as can be ascertained, no such legislative initiatives exist.

In turn, the *legal* proponents of sexual panic utilize the feedback effect which they themselves stimulate among their *psychologist* colleagues as evidence of how reverse incest suits imperil therapy with incest victims by frightening off the psychologists! The article by Professors Bowman and Mertz has itself now entered this feedback loop, *see supra* note 40, becoming a key source for psychologists who are treating patients with incest histories to refer to in order to understand the legal implications of their therapy.

[42] *Cf.* Susan P. Phillips et al., *Sexual Harassment of Female Doctors by Patients*, 329 N.E. J. MED., 1936 (1993) (reporting the surprising and frightening result that three-fourths of female physicians are subjected to sexual harassment by their male patients). A careful reading of the underlying data, however, shows that the likelihood of a male patient engaging in "grossly inappropriate behavior" such as fondling a breast is in likely in the range of one in 50,000. *See id.*

As to how seriously wrongful even this particular action really is, there are of course differing views. *See, e.g.*, Tamar Lewin, *Just Making a Pass*, N.Y. TIMES, Apr. 20, 1997, ¶7, at 31, *reviewing* HELEN GARNER, THE FIRST STONE: SOME QUESTIONS ABOUT SEX AND POWER (1997) (describing an Australian feminist's reflections on a case to the effect that a professor's professional and family wreckage for fondling his student is radically disproportionate and based upon a "priggishly self-righteous assumption of victimhood").

[43] Professors Bowman and Mertz "rely . . . primarily upon the . . . press coverage," ostensibly "[b]ecause no transcript of the *Ramona* case exists." Bowman & Mertz, *supra* note 2, at 555 n.21. It is a methodologically curious approach, since "[t]apes of most of the testimony could easily have been acquired." *See* JOHNSTON, *supra* note 3, at 424.

As one scholar recently observed: "[N]ewspaper accounts of sensational trials I have studied have proven to be highly selective, at best, usually highlighting the human drama, with scant attention to the actual testimony or exhibits. For this reason, I believe that credible accounts of legal proceedings should be based on transcripts. . . ." Roger Olien, *Communications*, 102 AM. HIST. REV. 1300, 1308 (1997).

father obtained money damages against his daughter's two therapists after she brought a civil tort suit against him alleging childhood incest.[44] Subsequent to Ms. Ramona's suit—as a consequence of which she waived[45] her therapeutic privacy—her father filed a separate third-party countersuit, *Ramona v. Isabella*,[46] against the daughter's therapists. The burden of *Ramona* was that the therapists had induced a *false* memory of incest in the daughter, with consequent catastrophic impact: loss of family, job, and reputation in the community and mental anguish.[47]

In the Bowman and Mertz version of the story, a nineteen year-old college student, Holly Ramona, of her own accord entered treatment for bulimia.[48] In actuality, however, the initial consultation which led to the decision of Ms. Ramona to enter therapy was initiated by the *father* through his workplace,[49] and the therapist was chosen by her mother, Mrs. Stephanie Ramona (without any

---

[44] *See* JOHNSTON, *supra* note 3, at 160-62.

[45] *See* Bowman & Mertz, *supra* note 2, at 589 n.230 (stating that "the privilege is waived if the client herself puts her mental state at issue in a lawsuit . . . ."); JOHNSTON, *supra* note 3, at 154, 174; *see also* Flora v. Hamilton, 81 F.R.D. 576 (M.D.N.C. 1978); Commonwealth v. Bishop, 617 N.E.2d 990 (Mass. 1993); DEAN MCCORMICK, MCCORMICK'S ON EVIDENCE §103, at 222 (Edward W. Cleary ed., 2d ed. 1972):

> [I]t is neither human, natural, nor understandable to claim protection from exposure by asserting a privilege for communications to doctors, at the very same time when the patient is parading before the public the mental or physical condition as to which he consulted the doctor, by bringing an action for damages arising from that same condition.

While it is true that the general rule governing waiver is that within the transactional limits, it is given full effect, *see, e.g.*, United States v. Mitchell, 463 U.S. 206, 218-19 (1983); *In re* Sealed Case, 676 F.2d 793, 817-18 (D.C. Cir. 1982), relevancy limitations may operate such that the waiver is less than global or is even inoperative. There are, moreover, specific maneuvers available to counsel representing clients which may mitigate the ensuing loss of privacy. *See* EDWARD GREER & WARREN FREEDMAN, TOXIC TORT LITIGATION ¶ 4.2(4)(f) (1989 & Supp. 1990) (explaining that demeaning of witness "is part of a longstanding and larger historical process in which more powerful social actors coercively obtain information from their class inferiors") (citing S. Nadel, *The Interview Technique in Social Anthropology*, *in* THE STUDY OF SOCIETY 322 (F.C. Bartlett et al. eds., 1939), *quoted in* ANTHROPOLOGY AND THE COLONIAL ENCOUNTER 161 (T. Assad ed., 1973)).

[46] No. C61898 (Cal. Super. Ct. May 13, 1994).

[47] *See id.*

[48] *See* Bowman & Mertz, *supra* note 2, at 555 (describing Ramona as having "sought help" and as having "consulted" a counselor).

[49] "Mr. Ramona revealed to jurors that when he and his wife first became aware of their daughter's eating disorder, they initially consulted Dr. Barry Grunland, a psychiatrist brought in to 'work with family dynamics' in the transfer of control of the winery from Robert Mondavi to the next generation." Victoria Slind-Flor, *He Says "Recovered" Memories Ruined Him*, NAT'L L.J., Apr. 18, 1994, at A10.

objection by the father, who bore all of the costs of the therapy).[50]

Professors Bowman and Mertz set forth as a hypothesis the notion that abusers will attempt through third-party reverse incest suits like *Ramona* to continue an inappropriate pattern of control over their adult daughters.[51] While there is good reason to believe that Holly Ramona was subjected to neglectful parenting by both her father and mother (for instance, the family literally *never* had dinner together at home[52]), the evidence developed at trial was of an absent rather than a controlling father. Apparently Mr. Ramona regularly deposited his entire salary in his wife's checking account, and she spent her time and the family's money exactly as she wished.[53] The defense counsel in *Ramona* made a strategic decision to depict Mr. Ramona as a controlling father,[54] so the weak-

---

[50] *See* Bowman & Mertz, *supra* note 2, at 559 n.48. Thus, from the outset, what actually happened to Ms. Ramona diverged radically from the authors' own paradigm of "[a]ttempted disruption of the therapy relationship [as] a predictable response for a father who has always viewed with suspicion a child's efforts to separate." *Id.* at 636. Professors Bowman and Mertz neither note nor explain this discrepancy.

[51] *See* Bowman & Mertz, *supra* note 2, at 636.

[52] *See* JOHNSTON, *supra* note 3, at 184. Mrs. Ramona admitted that prior to the incest charge, "I can't remember one time in our entire lives that we [i.e., she and Holly] had what you'd call a real talk." *Id.* at 185. In high school, Holly Ramona initially developed a weight problem, at which time her svelte mother taped a photo of a model on the bathroom mirror. *See id.* at 67.

[53] *See id.* at 301. Holly Ramona could recollect being spanked by her father only once. *See id.* at 26. Dr. Judith Herman's monograph, FATHER-DAUGHTER INCEST, which delineated the intra-family dynamics of incestual families based on a set of psychiatric studies, describes a common pattern of intense paternal control: a sequestered wife, religious fundamentalism, and severe corporal punishment of the children are commonplace. *See generally* HERMAN, *supra* note 38. Transmitted to the therapeutic community, and from thence to lawyers representing incest victims, and ultimately to Professor Bowman and Mertz's article, a kind of reversal of causality occurs: Since Ms. Ramona presumptively had been subject to incest, Mr. Ramona's lawsuit perforce evidenced his "controlling" nature, and he therefore was the sort of man who might well commit incest. If one strips this ideological depiction and simply compares the personality of Mr. Ramona as set forth in JOHNSTON, *supra* note 3, (i.e., an absent, neglectful father) with Dr. Herman's original typology, however, the two are quite discrepant.

More recently, however, Dr. Herman has shifted her emphasis from dysfunctional families with both fathers and mothers implicated in incest to a politicized view close to that of the dominance feminists in which women generally are traumatized sexual victims of patriarchy. *See* JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY (1992). Under this more expanded model of the incestuous father, almost any man is a potential culprit, and hence one presumes Mr. Ramona could be guilty regardless of whether or not he was overcontrolling of his daughter.

[54] *See* JOHNSTON, *supra* note 3, at 80. At the closing argument, the therapist's attorney argued to the jury that the father had brought suit "because he wants to control his daughter . . . to show that he can tell her what to think . . . [and] can cut off the aid

ness of that aspect of proof cannot be attributed to defense counsel's not pursuing this line of argument.

We are told that the therapist, Marche Isabella, was a licensed marriage, family, and child counselor, who, as the authors themselves state, erroneously informed Mrs. Ramona *prior to* the commencement of therapy "that seventy to eighty percent of bulimics had suffered sexual abuse in childhood."[55] This pre-treatment statement of the therapist raises two major issues: first, whether her opinion was professionally accurate or simply a manifestation of her habit of seeing sexual abuse everywhere;[56] and second, whether this position meant that Marche Isabella had already diagnosed Ms. Ramona even before meeting her as having been sexually mistreated as a child.[57]

---

that she can get from other people." *Id.* at 356; *see id.*

[55] Bowman & Mertz, *supra* note 2, at 556.

[56] *See id.* at 556 n.24. Professors Bowman and Mertz go out of their way to avoid acknowledging that there was any significant error on the part of the therapist by asserting that "this estimate was probably an overstatement . . . [but] many small-scale scientific studies do in fact confirm a high degree of correlation between . . . bulimia and [childhood] sexual abuse." They then go on to cite studies which respectively set forth correlations in the range of 50% to 67%. *Id.* Thus, while nominally conceding that therapist Isabella's initial estimate of the incidence of incest among those suffering from bulimia was erroneous, they then try to rehabilitate it as basically correct. If, after all, the therapist estimated 70% or so, and the empirical studies are in the range of 50% - 67%, she would be guilty of, at most, only a minor overstatement.

Available studies, however, generally either conclude that the incidence of incest among bulimics is no greater than in the population generally, *see, e.g.*, H.G. Pope & J.I. Hudson, *Is Childhood Sexual Abuse a Risk Factor for Bulimia Nervosa?*, 149 AM. J. PSYCHIATRY, 455 (1992), or conclude "that we really have *no idea* how many eating-disordered patients have been abused." Susan C. Wooley, *Sexual Abuse and Eating Disorders: The Concealed Debate", in* FEMINIST PERSPECTIVES ON EATING DISORDERS 171, 188 (Patricia Fallon et al. eds., 1994).

[57] Professors Bowman and Mertz neither raise nor address the problem of serious professional incompetence manifested by the therapist's essentially pre-diagnosing Ms. Ramona before the therapy even began. However, according to the American Psychiatric Association:

> Psychiatrics should maintain an empathic, non-judgmental, neutral stance towards reported memories of sexual abuse. . . . [C]are must be taken to avoid prejudging the cause of the patient's difficulties, or the veracity of the patient's reports. A strong prior belief by the psychiatrist that sexual abuse, or other factors, are or are not the cause of the patient's problems is likely to interfere with appropriate assessment and treatment.

AMERICAN PSYCHIATRIC ASS'N, STATEMENT ON MEMORIES OF SEXUAL ABUSE 4 (1993), *reprinted in* American Psychiatric Ass'n Bd. of Trustees, *Statement on Memories of Sexual Abuse*, 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS, 261, 263 (1994); *see also* S.V. v. R.V., 933 S.W.2d 1, 18 (Tex. 1996); Daniel Brown, *Pseudomemories: The Standard of Science and the Standard of Care in Trauma Treatment*, 37 AM. J. CLINICAL HYPNOSIS

Then, after several months in treatment with this therapist, Holly Ramona came to recall incest with her father beginning in early childhood and continuing until age sixteen[58] which she had subsequently forgotten.[59] She also recollected that there had been "bestiality[60] when she was three to eight years old."[61]

Professors Bowman and Mertz also, without explanation, insert in their article the information that after her therapist and mother were informed, the young woman was referred to a gynecologist

---

1, 18 (1995) ("Above all, the therapist must avoid leading/misleading inquiry in pursuit of trauma.").

[58] *See* Bowman & Mertz, *supra* note 2, at 556.

[59] The main empirical study supporting the notion of retrieved incest memories suggests that it is only smaller children who may entirely repress the matter and that adolescents always do remember at least in part. *See* Judith L. Herman & Emily Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, 4 PSYCHOANALYTIC PSYCHOL. 1 (1987). Professors Bowman and Mertz do not address the issue of Ms. Ramona's alleged *post*-pubertal repression.

[60] *See* Bowman & Mertz, *supra* note 2, at 556 n.28. In mentioning this episode, however, Professors Bowman and Mertz omit the relevant details of this testimony, and its significance regarding the daughter's overall credibility. Although they, like Cynthia McAlister, cite the same source on this point, Professors Bowman and Mertz do not mention that, "[a]ccording to trial testimony, Holly also testified that she recovered memories of her father . . . forcing her to orally copulate with the family dog." *See* Cynthia V. McAlister, *The Repressed Memory Phenomenon: Are Recovered Memories Scientifically Valid Evidence Under Daubert?*, 22 N.C. CENT. L.J. 56, 69 n.114 (1996) (citing Katy Butler, *Clashing Memories, Mixed Messages*, L.A. TIMES, June 26, 1994, at 12). *The Wall Street Journal* added the name of the dog, Prince, and that the plaintiff testified that this had occurred "numerous times." *See* Elizabeth F. Loftus et al., *Patient-Psychotherapist Privilege: Access to Clinical Records in the Tangled Web of Repressed Memory Litigation*, 30 U. RICH. L. REV. 109, 115 n.24 (1996) (citing Milo Geyelin, *Lawsuits over False Memories Face Hurdles*, WALL ST. J., May 17, 1994, at B1).

One authority argues that Ms. Ramona's "account of extraordinarily bizarre and sadistic sexual abuse (even if it involves the family dog) should not be used to automatically discount or discredit its occurrence," because the most horrible events sometimes do occur and that in some instances there is solid documentary evidence "that bizarre and fetishized sexual exploitation of children occurs." Alpert et al., *supra* note 41, *in* WORKING GROUP, *supra* note 9, at 198, 215. While they are quite right to caution that this testimony should not constitute disproof of Ms. Ramona, it does go to an assessment of its likelihood. *See generally*, THE DILEMMA OF RITUAL ABUSE: CAUTIONS AND GUIDES FOR THERAPISTS (George A. Fraser ed., 1997) (presenting arguments and counter-arguments as to the veracity of claimed incidents of ritual abuse).

[61] Bowman & Mertz, *supra* note 2, at 556 n.28. *But cf.*, DEBBIE NATHAN & MICHAEL SNEDEKER, SATAN'S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH HUNT 116 (1995) (stating that numerous ritual abuse claims are almost certainly all false); Kenneth V. Lanning, *Satanic, Occult, Ritualistic Crime: A Law Enforcement Perspective*, THE POLICE CHIEF, Oct. 1989, at 62, 83 (stating that, in ritualistic satanic cases, "[n]o one can prove with absolute certainty that such activity has not occurred. However, the burden of proof . . . is on those who claim it *has* occurred.").

who, upon examination, discovered "a torn hymen."[62] This physical finding lacks probative value as evidence regarding incest for two reasons. It presupposes that Ms. Ramona was not otherwise sexually active, an issue as to which not all teenagers are fully candid.[63] And second, the medical reality is that the incidence of false positives and false negatives is so great that the physical status of the hymen is essentially worthless as an indicator of prior sexual penetration.[64]

Apparently Professors Bowman and Mertz do not want to entirely omit reporting this salient development of the ob/gyn consult with Dr. Stephanie McClellan, M.D. (who was called ultimately as a trial witness), since it was a key precipitant to the original accusation. But they apparently also are unwilling to make *any* comment on its significance. In actuality, Dr. McClellan "had found a minor posterior separation" which she testified was nondescript and consistent with many causes from intercourse to bicycle riding.[65] The authors also choose to omit entirely the pretrial

---

[62] Bowman & Mertz, *supra* note 2, at 557.

[63] *See* EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 327 (1994) (stating that 71%-74% of American females have had vaginal intercourse prior to reaching age 19, the age when Ms. Ramona accused her father). The defense experts and evidence adduced at trial are suggestive that Ms. Ramona was very sexually naive, but this does not preclude her having had some autonomous sexual activity. *See* JOHNSTON, *supra* note 3, at 65, 203, 308.

[64] One authority has stated:

> Until we have [a single specific test for sexual abuse], an overemphasis on minute changes in the diameter of the hymenal opening will result in a number of children being inappropriately identified as victims of sexual abuse, whereas the majority of sexual abuse victims with normal hymenal measurements will remain unidentified.;

Astrid Heger & S. Jean Emans, *Intraoital Diameter as the Criterion for Sexual Abuse*, 85 PEDIATRICS 222, 223 (1990); *see also* Richard Krugman, *Foreword* to ASTRID HEGER ET AL., EVALUATION OF THE SEXUALLY ABUSED CHILD: A MEDICAL TEXTBOOK AND PHOTOGRAPHIC ATLAS at viii (1992) ("Later studies showed that the absence of findings did not mean a child *was not* abused, and the presence of some findings (e.g., enlarged hymenal opening) did not mean a child *was* abused."); Rosemary Underhill & John Dewhurst, *The Doctor Cannot Always Tell: Medical Examination of the 'Intact' Hymen*, THE LANCET, Feb. 1978, at 375, 376 (stating that the rule is the same on false positives and false negatives: "Conversely, if a woman or girl alleges assault and vaginal examination demonstrates an incomplete hymenal ring, this fact does not confirm that the hymen has been damaged by attempted intercourse or some other means.").

[65] JOHNSTON, *supra* note 3, at 89-90. The Bowman and Mertz locution, "revealed a torn hymen," is thus somewhat misleading. *See* Bowman & Mertz, *supra* note 2, at 557. Apparently jurors thought that had Ms. Ramona's rendition of a decade of rapes beginning at age six been true, there would have been no hymen left. *See* JOHNSTON, *supra* note 3, at 264.

testimony of Ms. Ramona's treating pediatrician on this same issue. He testified that in the course of treating her as a child, at the time of the purported molestation, for some serious urinary tract infections (which required, *inter alia*, highly invasive and uncomfortable procedures[66]), he had undertaken a dozen examinations which involved "laying back the fleshy lips of the labia and looking at the hymen with his otoscope and flashlight."[67] He testified flatly that the girl was not abused during the period when she was under his care.[68] Indeed, *none* of the family's treating medical personnel (other than the defendants themselves) thought that incest had occurred.[69]

After the "hymen" episode, it was then agreed between Ms. Ramona and her therapist that she would be administered sodium amytal, also a most curious therapeutic intervention.[70] The psychiatrist—himself thereafter joined as a defendant in the *Ramona* countersuit—who administered the drug made no contemporaneous clinical notes of what occurred.[71] He subsequently testified in court that Ms. Ramona was "extremely vague" as to who had abused her.[72] Conversely, Ms. Isabella insisted at trial that it was

---

[66] In addition to having a voiding urethrogram at age seven, her medical records indicate that her mother was subjecting her to "enemas 3 or 4 times a week." *See* JOHNSTON, *supra* note 3, at 29. Mr. Ramona's trial theory was that these childhood physical traumas were the substrate for her ultimate beliefs.

[67] JOHNSTON, *supra* note 3, at 264.

[68] *See id.* at 263-64. An investigative reporter subsequently found and interviewed a close neighbor, Maggie Haswell, who was a pediatric nurse and who had worked with battered children; Maggie remembered Holly as a happy child. *See id.* at 407, 44-45.

[69] The family psychiatrist, Dr. Barry Grunland, M.D., who initially made the bulimia diagnosis and proposed treatment, never even thought of incest as a possibility. *See id.* at 318. Mr. Ramona was subsequently referred to a distinguished senior psychiatrist, Dr. Wolfgang Lederer, M.D., who at trial testified that he had observed no symptoms of sexual deviation. *See id.* at 125-26, 151.

[70] "The American Medical Association has cautioned that 'amytal . . . has no legitimate use in recovered-memory cases.'" McAlister, *supra* note 60, at 67 (quoting AMERICAN MED. ASS'N, REPORT OF THE COUNCIL ON SCIENTIFIC AFFAIRS, CSA REPORT 5-A-94 2 (1994)); *see also* Alpert et al., *Symptomatic Clients and Memories of Childhood Abuse: What the Trauma and Child Sexuals Abuse Literature Tells Us*, *in* WORKING GROUP, *supra* note 9, at 15, 77 (asserting that sodium amytal clearly "heighten[s] suggestibility"); August Piper, Jr., *"Truth Serum" and "Recovered Memories" of Sexual Abuse: A Review of the Evidence*, 21 J. PSYCHIATRY & L. 447 (1993). However, at least one lawsuit has been won on this evidentiary basis. *See* Leonard v. England, 445 S.E.2d 50 (N.C. Ct. App. 1994).

[71] *See* Bowman & Mertz, *supra* note 2, at 558. The jurors apparently were shocked that there was neither taping nor even clinical notes of the sodium amytal interview. *See* JOHNSTON, *supra* note 3, at 257.

[72] *See* Bowman & Mertz, *supra* note 2, at 558 n.38.

"clear" from what the patient said under the influence of the drug that the culprit was Mr. Ramona.[73] There had been several prior malpractice lawsuits against the psychiatrist, who left the practice of medicine entirely and moved to Hawaii within a few months of the filing of *Ramona*.[74]

At trial, Ms. Ramona testified that she had decided to take the drug in order "to see if anything she said while under the drug's influence contradicted her *conscious* memories."[75] The therapist testified at her deposition to the opposite effect: the sodium amytal was administered in order to retrieve *inaccessible* memories.[76] The therapist and the psychiatrist also testified to contradictory stories about what the interchange had been between them over the effect of the drug.[77] The authors make no comment on the likely misuse of a prescription medication, or that minimally one of the three, likely two, and possibly all three were not candid about the central event which precipitated the litigation.[78] Furthermore, it is uncertain whether Ms. Ramona had given her informed consent to this procedure.[79]

---

[73] *See id.*

[74] *See* JOHNSTON, *supra* note 3, at 300-01; Bowman & Mertz, *supra* note 2, at 565-66 n.93.

[75] Bowman & Mertz, *supra* note 2, at 557 (emphasis added).

[76] *See id.* at 557 n.35. Although not mentioned in the Bowman and Mertz rendition, one law review note reports that the therapist "admitted to telling patients that while under the influence of sodium amytal they had to be telling the truth." Rola J. Yamini, Note, *Repressed and Recovered Memories of Child Abuse: The Accused as Direct Victim*, 47 HASTINGS L.J. 551, 562 n.100 (1996) (citing Marc Sauer, *Memory Verdict Sends a Message*, SAN DIEGO UNION-TRIB., May 15, 1994, at A6).

[77] *See* Bowman & Mertz, *supra* note 2, at 557 n.35; *see also* JOHNSTON, *supra* note 3, at 118, 189-90, 278, 299 (discussing the varying versions advanced by the defendants at different stages of the controversy).

[78] Ms. Ramona "confronted her father with the sex abuse accusations the following day" after taking the sodium amytal. Richard Cole, *Jury Finds Therapist Implanted False Memories of Incest*, SACRAMENTO BEE, May 14, 1994, at A1, *available in* 1994 WL 5269067.

[79] It is unclear whether Ms. Ramona provided a signed consent; the defendants were unable to produce one at trial. *See* JOHNSTON, *supra* note 3, at 320. More troubling is the fact that the administration of the sodium amytal came almost immediately after her admission to the hospital, where the psychiatrist's admitting note indicated that her mood was one of desperation: "she was weepy, scarcely able to concentrate, and had suicidal thoughts." *Id.* at 96-97. Without any intervening therapy, administration of anti-depressant medication, or other prior stabilization, the psychiatrist determined that administering sodium amytal would be appropriate. *See id.* at 97; *cf.* Dr. Thomas Gutheil, M.D., *True Recollections of a False Memory Case: Ramona Has Ominous Implications for Psychiatrists*, PSYCHIATRIC TIMES (July 1994) (relating the thoughts of Dr. Gutheil, who has testified as an expert on the issue of standard of care).

Within a few weeks after the sodium amytal interview and her confrontation with Ms. Isabella and her father, Ms. Ramona had to be readmitted. As the psychiatrist's new

On the authors' own rendition, the facts of this case are strongly suggestive of substandard therapy by Ms. Isabella and medical malpractice by the psychiatrist as well.[80] Indeed, as the authors themselves point out, sometime within the next few weeks, the young woman had to undergo a psychiatric hospitalization.[81] After her release, she filed suit against her father, who responded by filing a third-party lawsuit against the therapist and psychiatrist for negligent infliction of emotional distress.[82] He ultimately was awarded a half-million dollars in damages for the loss of his job which resulted when the charge of incest was made public.[83] That the jury awarded substantial damages suggests that it reached the practical conclusion that neither Mr. Ramona directly (nor the family dog under his direction), had committed any significant sexual wrong against his daughter.[84]

---

admitting note stated, she had "begun reexperiencing intermittent self-destructive ideation, severe impairment of self-esteem, feelings of guilt, and intense desire to binge and purge again." JOHNSTON, *supra* note 3, at 114.

[80] Even the partisan grouping in the American Psychological Association's Working Group that *supported* the existence of such repressed memories acknowledges that the "therapist and psychiatrist were found to have used problematic techniques in their treatment." Alpert et al., *supra* note 41, *in* WORKING GROUP, *supra* note 9, at 198, 215. But Professors Bowman and Mertz nowhere acknowledge that there was even a *possibility* of malpractice.

[81] It is reported in the popular press that Ms. Ramona subsequently completed a masters degree in clinical psychology in preparation for a career of working with abused children. *See* Kathy Butler, *Clashing Memories, Mixed Messages*, L.A. TIMES MAGAZINE, June 26, 1994, at 12, *available in* 1994 WL 2180086.

The authors, who are confident that such therapists can accurately distinguish between true and false memories of incest, seem unconcerned that this nexus might result in Ms. Ramona's having problems with patients' transference once she herself becomes a therapist. Even a layperson can imagine how this would infect the countertransference. *See generally* DARLENE BREGMAN EHRENBERG, THE INTIMATE EDGE: EXTENDING THE REACH OF PSYCHOANALYTIC INTERACTION (1992) (arguing that psychoanalysts and patients cannot avoid the occurrence of countertransference between analyst and patient).

[82] *See* JOHNSTON, *supra* note 3, at 166. The daughter's suit was not filed until after the bitterly-contested divorce settlement monies were paid over to Mrs. Stephanie Ramona, a factor which she obliquely acknowledged as entering into the timing of her daughter's filing the original incest suit. *See id.* at 145. Upon hearing her daughter's tale, Mrs. Ramona immediately commenced divorce proceedings. *See id.* at 97. Ms. Ramona's suit was the proximate cause of the filing of the reverse incest suit, which together with Holly Ramona's signing of an express medical waiver is what made Mr. Ramona's countersuit viable. *See id.* at 160, 174.

[83] *See* Bowman & Mertz, *supra* note 2, at 561-63.

[84] Although the authors raise a question about the exact *legal* consequences of what the judgment meant for purposes of issue preclusion, *see* Bowman & Mertz, *supra* note 2, at 566, it is unimaginable that any jury would have awarded a half million dollars if it thought that Holly Ramona's testimony of bestiality and incest were true.

Immediately after the trial the jury foreman at a press conference indicated that—as

The authors do not seem at all inclined, either in the face of this trial outcome or by re-examining the underlying evidence adduced at the trial, to themselves draw the inference that Mr. Ramona was more likely than not innocent of the crime of incest, and that his daughter's ongoing insistence to the contrary was mistaken. Nor, for that matter, do they acknowledge that it would be reasonable for other observers to reach the same view as that of the jury.[85] From their ideologized stance, it would appear that the *Ramona* judgment was innately wrong independently of the evidence.[86]

III. THE REALITY OF *SULLIVAN V. CHESHIER* VERSUS THE IDEOLOGICAL READING

In their lengthy article, Professors Bowman and Mertz cite only *one* article in support of the proposition that a lawsuit by a victim's family "in fact destroyed the adult daughter's relationship with her therapist, without any legal action whatsoever having been taken by the daughter against any member of her family."[87] This citation, to a reported decision, *Sullivan v. Cheshier*,[88] is the *sole* example of purported third-party legal intervention into or disruption of an adult incest victim's therapy.

The decision states that Ms. Sullivan was, at the time the original intra-familial dispute arose, twenty-three years of age and a resident in Chicago, while her parents lived in Florida.[89] After commencing therapy with one "Dr."[90] Cheshier, she announced

---

set forth in their answers to the Special Questions—they believed that the preponderance of the evidence was that Mr. Ramona had not sexually abused his daughter and that her therapists had negligently reinforced her false memories to the contrary. *See* JOHNSTON, *supra* note 3, at 360-66.

85. *See* Bowman & Mertz, *supra* note 2, at 561 n.58, 563, 564 n.81.

86. In a "postscript," Professors Bowman and Mertz say that the verdict "was not appealed, apparently for economic reasons." Bowman & Mertz, *supra* note 2, at 565; *see also id.* at 565 n.93. The authors adduce no evidence to support their speculation. Given the size of the verdict, this does not seem facially likely. And in a letter to the authors on the subject of why there was no appeal, one of the defense counsel indicates that the defendants thought such an appeal would not succeed on the merits. His letter does not even mention economic impediments. *See* Letter from Edward R. Leonard, attorney for Western Medical Center, to Cynthia Grant Bowman (August 23, 1994) (copy on file with the *Case Western Reserve Law Review*), *cited in* Bowman & Mertz, *supra* note 2, at 565 n.93.

87. Bowman & Mertz, *supra* note 2, at 565.

88. 846 F. Supp. 654 (N.D. Ill. 1994).

89. *See id.* at 656 n.1, 657.

90. The authors do not state directly that Dr. Cheshier held his degree from an unac-

that she had come to remember that when she was a child her brother had raped her. At an arranged family confrontation with the therapist participating, the parents indicated disbelief, and the father later demanded that Ms. Sullivan submit to an independent psychiatric examination from someone other than Dr. Cheshier.[91] Subsequently, after attempting redress through the Illinois Department of Professional Regulation, the parents brought suit against Cheshier for the classic torts of alienation of affection and nuisance.[92]

This is how Professors Bowman and Mertz set forth their sole example of a father's disrupting his daughter's therapy:

> Ms. Sullivan herself filed an affidavit attesting to "an extremely helpful, therapeutic relationship with Dr. William Cheshier, which my parents forced me to terminate." Thus, the *Sullivan* suit in fact[93] destroyed the adult daughter's relationship with her therapist, without any legal action whatsoever having been taken by the daughter against any member of her family.
>
> *Sullivan* provides a dramatic example of the adverse consequences that can result from third-party therapist liability, as the parents' lawsuit resulted in the termination

---

credited institute. Only in a footnote do they indirectly acknowledge that Dr. Cheshier was practicing without a license: "The federal court, in a far-reaching interpretation of Illinois law, nonetheless upheld the third-party action as a public nuisance claim, asserting a private right of action for persons injured by one who practices clinical psychology without a license. . . ." Bowman & Mertz, *supra* note 2, at 565 n.91. The authors are seemingly unconcerned with this kind of therapy relative to Ms. Sullivan, whose therapist—because his doctoral degree was from an unaccredited institute—was not legally entitled to obtain licensing but who nevertheless initially informed her in a written handout that he had a doctorate and had "'chosen' not to be registered as a clinical psychologist." *Sullivan*, 846 F. Supp. at 659. The non-licensure of Dr. Cheshier also resulted in the federal district court's refusal to shield the content of his communications with Ms. Sullivan. *See* Sullivan v. Cheshier, 895 F. Supp. 204, 205 (N.D. Ill. 1995); *see also* Cunningham v. Southlake Center for Mental Health, 125 F.R.D. 474, 477 (N.D. Ind. 1989) (holding that federal psychotherapist-patient privilege did not extend to crisis intervention specialist who was neither a medical doctor nor a certified psychologist); Hulett v. State, 552 N.E.2d 49 (Ind. Ct. App. 1990) (holding that the statutory psychologist-client privilege did not apply to file prepared by counselor who was not a certified psychologist). As with the professional defendants in *Ramona*, Professors Bowman and Mertz choose to occlude the disruptive issue of therapeutic competency from their own narratives.

[91] *See Sullivan*, 846 F. Supp. at 657.

[92] *See id.* at 657, 658.

[93] With this locution, the authors report to their readers (and implicitly endorse) Ms. Sullivan's pre-trial statement as objectively true! They are compelled to make this internal "move" by the intrinsic logic of their thesis, for absent this "fact," *A Dangerous Direction* would be an article without *any* example of the purported evil against which it inveighs.

> of a good therapeutic relationship. It is virtually impossible to continue a therapeutic relationship when its very substance has become the subject of public litigation and communications previously made in confidence are disclosed. Moreover, since most victims claiming abuse are female,[94] third-party liability lawsuits have the potential to silence female voices disproportionately, robbing women of their personal agency with respect to intimate medical and legal decisions.[95]

On its face, the likely way in which the parents "forced" Ms. Sullivan to break off therapy with Dr. Cheshier was either by refusing to pay for it anymore or by moral suasion. There is no suggestion in the Federal District Court opinion that Ms. Sullivan's affidavit *literally* meant that her parents, who were residing in Florida, while she lived in Chicago, used coercion against her. If they had done so, her recourse would have been the police.[96] Neither did the parents obtain, or even seek, any kind of judicial order barring Ms. Sullivan's therapist from seeing her. And a review of the pleadings reveals that Ms. Sullivan's affidavit, filed on behalf of Dr. Cheshier, is no more than the bare conclusory statement quoted from the district court opinion.[97]

---

[94] This gender perspective trivializes legal analysis. *Cf.* Barquin v. Roman Catholic Archdiocese of Burlington, Vt., Inc., 839 F. Supp. 275 (D. Vt. 1993) (upholding a claim made by a male orphan for sexual abuse forty years previously against a nun and a church in *respondeat superior*). For a discussion of the significance of gender for the tort of emotional distress, see generally *infra* note 160, and accompanying text.

[95] Bowman & Mertz, *supra* note 2, at 565. Similarly, professors Bowman and Mertz simply represent as fact the view of the young woman, as if Ms. Sullivan's subjective lay impression that she can distinguish "good" from "bad" therapeutic relationships is self-evidently true. And the absence of licensure is hardly reassuring on the substance of his qualifications. The authors systematically conflate what the incest claimants *say* with what actually *is*, which is an extraordinary version of legal scholarship.

[96] Unfortunately such instances do occur. *See, e.g.*, State v. Hungerford, Nos. 94-S-45 to 94-S-047, 93-S-1734 to 93-S-1936, 1995 WL 378571 (N.H. Super. Ct. May 23, 1995) (holding that retrieved repressed memories of childhood sexual abuse are inadmissible under *Frye* test), *aff'd*, 697 A.2d 916 (N.H. 1997). In *Hungerford*, the court observed: "Prior to the recovery of this memory [by the daughter of a specific abuse incident], Mr. Hungerford had threatened to shoot himself, [his daughter] Laura and her therapist. All were aware of these threats." *Id.* at *6. This problem of extra-legal resort to force has little if anything to do with the finer points of legal doctrine. *Cf.* Michael deCourcy Hinds, *Once Orderly Sanctuaries of Justice, Courts Now Tremble With Violence*, N.Y. TIMES, Jan. 26, 1993, at A14 (surveying the rising tide of violence in American courtrooms, particularly in civil courts).

[97] The court quoted Ms. Sullivan's affidavit by saying that she had "an extremely helpful, therapeutic relationship with Dr. William Cheshier, which my parents forced me

Ms. Sullivan's mother, plaintiff Susan R. Sullivan, helps elucidate what "forced" meant in this real life setting:

> Dear Dad,
> I am no longer seeing Dr. Cheshier.
> Because of your wishes, I've chosen a new doctor, Dr. Cathy Herman.
> Could you please deposit $707 to cover my bills?
> $360 - Dr. Lassers (I tried but didn't like)
> $ 75 - Dr. Herman
> $272 - Royal Insurance
> ---
> $707
> I'll call you later to discuss this further. In the meantime, I've written these checks without much money in my account.
> God Bless You!
> Kathy[98]

On this record, it is hard to give any credence to Professors Bowman and Mertz's explanation.

As if all of these problems with their reading of the *Sullivan* decision are not enough, Professors Bowman and Mertz's zeal also leaves them unaware of the temporal implausibility of their proffered explanation. It is hard to fathom how a suit filed in *1993* could have been a causal factor in Ms. Sullivan's breaking off therapy with Dr. Cheshier, which had occurred in February, *1991*.

---

to terminate." *Sullivan*, 846 F. Supp. at 657-58. Her affidavit of March 9, 1993 addresses the issue solely in Paragraph 4, which reads in its entirety:

> My parents brought this lawsuit without my consent or approval and against my wishes. I had an extremely helpful, therapeutic relationship with Dr. William Cheshier, which my parents forced me to terminate. If my parents had not forced me to terminate my relationship with Dr. Cheshier, I would have continued that relationship. I know of no reason to make any claim against Dr. Cheshier and do not want to make any claim against him.

Declaration of Kathleen Blake Sullivan Nelson, Sullivan v. Cheshier, 846 F. Supp. 654 (N.D. Ill. 1994) (No. 93 C 0047).

[98] Affidavit of Susan R. Sullivan ¶ 9, Sullivan v. Cheshier, 846 F. Supp. 654 (N.D. Ill. 1994) (No. 93 C 0047) (attaching handwritten note received by her husband in March, 1991 from their daughter).

IV. THE RELEVANT EMPIRICAL KNOWLEDGE UNDERMINES THE MODEL OF RETRIEVED INCEST MEMORY LITIGATION ADVANCED BY PROFESSORS BOWMAN & MERTZ

A. The Myth of Therapeutic Beneficence

Professors Bowman and Mertz take as axiomatic the desirability to the individual claimant of retrieved memory incest suits. They pointedly ignore the economic aspects of these lawsuits,[99] but instead presume that they serve a *therapeutic* function for the daughter.

But generally, participating as a party plaintiff in a "retrieved memory" incest suit is psychologically dysfunctional.[100] As one psychologist who has repeatedly served as an expert witness on behalf of such plaintiffs concluded: "While litigation *can* be empowering to some survivors in some circumstances, and can be the experience that transforms their life in a positive way, for others it is equally likely to be profoundly disorganizing and distressing."[101] Clearly if the memories are false, the female litigant is

---

[99] The main function of tort cases is to transfer money. "[Their] purpose is to compensate the victim. . . ." Richard L. Abel, *Torts*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 185, 185 (David Kairys ed., 1982). By simply deleting this factor from their discussion, Professors Bowman and Mertz do not have to reach the redistributional effect on economic resources of civil incest suits within families of origin, especially the problem that in the absence of insurance, *see infra* note 156, wherever there is more than one child, the functional effect may well be that of the claimant's alone drawing down the "family exchequer." Historically, this concern of intra-family equity between the heirs was one of the main public policy grounds upon which common law courts disallowed suits by children against their parents. *See generally* Rice v. Andrews, 217 N.Y.S. 528 (N.Y. Sup. Ct. 1926) (holding that legal obligation of father to support children during minority does not survive his death); William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1056-81 (1930) (discussing tort liability of parents to children); Sandra L. Haley, Note, *The Parental Tort Immunity: Is It a Defensible Defense?*, 30 U. RICH. L. REV. 575 (1996) (attacking the rationales behind parental tort immunity).

[100] As an expert psychologist for claimants in numerous incest civil suits states: "[T]he justice that one can obtain through winning a lawsuit against a sexual abuse perpetrator falls far from genuine and emotionally satisfying amends. . . ." Laura S. Brown, *The Therapy Client as Plaintiff: Clinical and Legal Issues for the Treating Therapist*, *in* SEXUAL ABUSE RECALLED: TREATING TRAUMA IN THE ERA OF THE RECOVERED MEMORY DEBATE 337, 359 (Judith L. Alpert ed., 1995).

[101] *Id.* at 349-50. Another expert asserts that "clinicians well-grounded in both the empirical and theoretical foundations of effective psychotherapy are particularly appalled by this litigation trend; rarely can dysfunctional family relationships be repaired, or alleged victims cured or truly compensated for psychological trauma in the adversarial courtroom forum." Loftus et al., *supra* note 60, at 111 n.13.

Even in typical instances of on-the-job sexual harassment, where (in contradiction to

psychologically injured by filing suit. But even if the memories are true, what happens when suit is brought and thereafter *not* won? Isn't it facially likely that losing a claim will cause psychic distress to the women and impede healing?

Even when one turns to successful cases, it should be apparent that, contrary to the claims of some lawyers,[102] there is a high likelihood of psychological harm to the protagonists. As an illustration of the possible adverse effects on plaintiffs in successful lawsuits, it is useful to note that as many as three-fifths of the torture and other victims who testified before South Africa's Truth and Conciliation Commission—clearly a more supportive setting than an adversarial American courtroom—"have said they suffered [significant psychological] difficulties after testifying. . . ."[103] Therefore it is, at best, only speculative to conclude that successful plaintiffs in incest suits are benefitted psychologically by their litigious experience.

---

childhood incest) there is no reason to assume the victims are especially psychologically vulnerable, some feminist psychological experts are coming to counsel against filing claims "because the impact of what happens to them [by entering the litigation sphere] is as damaging, if not more damaging, than the acts of misconduct themselves." Mary Leonard, *Is Silence More Prudent than Accusation?*, BOSTON GLOBE, Mar. 22, 1998, at E1, E5 (quoting Louise Fitzgerald, professor of psychology and women's studies at the University of Illinois). For the reasons set forth in, *inter alia*, GREER & FREEDMAN, *supra* note 45, ¶4.2(4)(f), Diane Shrier, M.D. a clinical psychiatrist at George Washington University Medical Center, similarly "advises women to avoid reporting" sexual harassment on the job. On the basis of her clinical research, she has concluded that the legal process tends to exacerbate the adverse mental health consequences of the original injury. *See* Mary Leonard, *supra* at E5.

[102] *See, e.g.*, ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL 310 (1988) ("[N]early every client who has undertaken this kind of suit has experienced growth, therapeutic strengthening, and an increased sense of personal power and self-esteem as a result of the litigation.") (quoting attorney Mary Williams). *But see* JOHNSTON, *supra* note 3, at 319 (quoting *Ramona* defense expert Dr. Thomas Gutheil, M.D., that the most likely effect of such litigation is to cause "developmental arrest" to the woman victim).

Attorney Mary Williams served as one of the attorneys for a woman who alleged retrieval of repressed memories of sexual molestation commencing with "her infancy until she was approximately five years old." Mary D. v. John D., 264 Cal. Rptr. 633 (Cal. Ct. App. 1989). One wonders whether this client—whose recall of memories of infancy defy our knowledge of brain development—was among those whose self-esteem rose by advancing this sort of legal claim.

[103] Suzanne Daley, *In Apartheid Inquiry, Agony Is Relived But Not Put to Rest*, N.Y. TIMES, July 17, 1997, at A1.

B. The Myth of Distinguishing True from False Claims

In addition to presuming the beneficence of daughters' suits, the authors argue that the legal system can winnow the true from the false claims. They imply that the legal system, with the aid of expert testimony by psychotherapists, can, even in the absence of any objective corroborating evidence, effectively separate true from false claims.[104] This implication is simply insupportable. It is almost certain that in the absence of external corroboration, there is no way to determine whether any individual claim based on a retrieved memory of childhood incest is objectively true.[105]

With nearly a century of clinical experience, the leading professional organizations all have concluded and hold as official positions that therapists *cannot* reliably distinguish true from false retrieved memories of incest. Thus, the American Medical Association "considers recovered memories of childhood sexual abuse to be of uncertain authenticity which should be subject to external verification. The use of retrieved memories is fraught with problems of potential misapplication."[106] A similar position is held by the American Psychological Association.[107] And the *Statement on*

---

[104] *See* Bowman & Mertz, *supra* note 2, at 603, 604.

[105] This was Freud's ultimate agnostic conclusion with respect to the uncorroborated claims of childhood incest by his female hysteric patients. *See* SIGMUND FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS 323-24 (Joan Riviere trans., 1943) ("[E]ven today we have not succeeded in tracing any variation in the results according as phantasy or reality plays the greater part in these experiences."); *see also* Laurie Betito & Andrea Doyle, *Fantasy and Reality: An Essay on Incest*, 19 J. OF SEX & MARITAL THERAPY 308 (1993) (summarizing conflict between fantasy and reality and concluding that they are often indistinguishable); Elizabeth F. Loftus, *Creating False Memories*, 277 SCI. AM. 70, 75 (1997) ("Without corroboration, there is little that can be done to help even the most experienced evaluator to differentiate true memories from ones that were suggestively planted.").

As a practical matter, it is not feasible to sort out the subset in which incest actually occurs from the set of instances in which "preconscious anxiety that incest is imminent" is evoked in children when parents "barely successful[ly] struggle to control incestuous urges." Sue Grand, *Toward a Reconceptualization of False-Memory Phenomena*, *in* SEXUAL ABUSE RECALLED: TREATING TRAUMA IN THE ERA OF THE RECOVERED MEMORY DEBATE 257, 260 (Judith L. Alpert ed., 1995). The latter group is doubtless considerably larger than the former. *See* HERMAN, *supra* note 38, at 110 ("For every girl who has been involved in an incestuous relationship, there are considerably more who have grown up in a covertly incestuous family. . . . [O]vert incest represents only the furthest point on a continuum—an exaggeration of patriarchal family norms, but not a departure from them.").

[106] AMERICAN MEDICAL ASSOCIATION COUNCIL ON SCIENTIFIC AFFAIRS, REPORT ON MEMORIES OF CHILDHOOD ABUSE, *reprinted in* 43 INT'L. J. CLINICAL & EXPERIMENTAL HYPNOSIS 114, 117 (1995).

[107] While the American Psychological Association does not take a specific position on

Memories of Sexual Abuse of the American Psychiatric Association asserts:

> It is not known what proportion of adults who report memories of sexual abuse were actually abused. Many individuals who recover memories of abuse have been able to find corroborating information about their memories. However, no such information can be found, or is possible to obtain, in some situations. While aspects of the alleged abuse situation, as well as the context in which the memories emerge, can contribute to the assessment, there is no completely accurate way of determining the validity of reports in the absence of corroborating information.[108]

Professors Bowman and Mertz are misleading in how they portray the positions of the American Medical Association, the American Psychiatric Association, and the American Psychological Association.[109] They correctly report that the conclusion "that

---

litigation, the same perspective as that of the AMA seems to be a necessary corollary of its identical analysis of the issue, which concludes that as between accurate and "pseudomemories for events that never occurred," there remain "gaps in our knowledge" of how to distinguish between them. WORKING GROUP, *supra* note 9, at 1. The complete text of the American Psychological Association on this issue reads:

> Controversies regarding adult recollections should not be allowed to obscure the fact that child sexual abuse is a complex and pervasive problem in America that has historically gone unacknowledged.
> 2. Most people who were sexually abused as children remember all or part of what happened to them.
> 3. It is possible for memories of abuse that have been forgotten for a long time to be remembered.
> 4. It is also possible to construct convincing pseudomemories for events that never occurred.
> 5. There are gaps in our knowledge about the processes that lead to accurate and inaccurate recollections of childhood abuse.

Id.

[108] AMERICAN PSYCHIATRIC ASS'N, *supra* note 57, at 3 (1993), *reprinted in* American Psychiatric Ass'n Bd. of Trustees, *Statement on Memories of Sexual Abuse*, 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 261, 263 (1994); *see also* THE DILEMMA OF RITUAL ABUSE, *supra* note 60, at 233 (quoting the same).

[109] The reports of the AMA and American Psychiatric Association were readily available to the authors, and were quoted and cited in several reported cases on retrieved incest memories. *See, e.g.*, Lemmerman v. Fealk, 534 N.W.2d 695, 703-04, 705 (Mich. 1995); State v. Hungerford, No. 94-S-045, 1995 WL 378571 (N.H. Super.) at 9-10.

The Final Conclusions of the American Psychological Association were not published until after *A Dangerous Direction* appeared. An earlier draft statement, however, which embodied the selfsame conclusions, had been publicized by that organization on November 11, 1994, and was also widely referred to and cited. *See* AMERICAN PSYCHOLOGICAL ASS'N, APA PANEL ADDRESSES CONTROVERSY OVER ADULT MEMORIES OF CHILDHOOD

both accurate and faulty memories exist . . . has been endorsed by respected professional organizations and represents the best evaluation of the evidence."[110] But then they simply *omit* the more important and relevant part of these organizations' positions for our legal system: namely, that clinicians cannot distinguish accurate from inaccurate recollections.[111]

Bowman and Mertz' omission is consistent with, and necessary to, their position that the legal process *can* reasonably, accurately, and reliably differentiate true recollections from false ones.[112] They reach this preordained view by means of asserting that "with properly cautious diagnosis and interpretation, repressed memories could indeed be a source of accurate information" about childhood incest.[113] Professors Bowman and Mertz conclude that such evidence—mediated through expert witnesses—*is reliable*:

> [S]trongly suggestive indicia of reliability, when taken together and carefully analyzed in the therapeutic context, appear to generate degrees of certainty that arguably do not

---

SEXUAL ABUSE (1994) (copy on file with the *Case Western Reserve Law Review*). Additionally, an APA pamphlet had been published before *A Dangerous Direction* appeared. *See* AMERICAN PSYCHOLOGICAL ASS'N, QUESTIONS AND ANSWERS ABOUT MEMORIES OF CHILDHOOD ABUSE (1995) (on file with the *Case Western Reserve Law Review*). Professors Bowman and Mertz do not refer to this draft statement either. Instead, citing to a newspaper article on the subject from October, *1993*, they misleadingly assert that the Working Group stated "'that it's possible to create a false belief and that it's possible to retrieve a false memory.'" Bowman & Mertz, *supra* note 2, at 598 n.268 (quoting Kim Ode, *Task Force Investigates Repressed Memory Issues*, STAR TRIB. (Minneapolis-St. Paul), Oct. 11, 1993, at 3E).

[110] Bowman & Mertz, *supra* note 2, at 622.

[111] Even if anchored in a narrative format, feminist law review articles, "[l]ike any form of scholarship, . . . must be presented in good faith and be as honest as the author can make them." Mary I. Coombs, *Outside Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 714 (1992).

[112] Bowman & Mertz, *supra* note 2, at 604, 614 Evidently, if there were no way at all to distinguish between accurate and inaccurate retrieved memories, in our legal system there should not be civil liability predicated upon them. Conversely, because the authors are zealous in advocating retrieved memory incest cases, they find themselves logically *compelled* to demonstrate that we can so distinguish. Since the relevant professional organizations deny that we can do so, Professors Bowman and Mertz are obliged to omit their positions lest their entire argument self-destruct.

[113] Bowman & Mertz, *supra* note 2, at 604. They buttress this position by then summarizing the psychological studies which are consistent with this claim, studiously omitting those which are inconsistent with it (or critique those favorable studies). *See id.* at 604-09. They conclude from this selective sub-sample of the literature that these studies show that retrieved memories are no different from regular ones; therefore, because the legal system admits into evidence uncorroborated testimony about ordinary memories, there is no reason to exclude retrieved memories from evidence. *See id.* at 609, 611 n.339.

> differ discernably from the certainty with which we approach continuous memories. Indeed, the kind of behavioral memory typical of flashbacks may sometimes be more robust or accurate than language-mediated conscious memory. . . .[114]

Professors Bowman & Mertz are entitled to hold any position they choose[115] regarding the ability of experts in the fields of psychology and psychiatry to distinguish between true and false retrieved memories. What they cannot fairly do, however, is to leave the reader with the (erroneous) impression that their position is consistent with, rather than contrary to, the professional consensus within those selfsame fields.

C. The Myths of Ubiquitous Incest and Its Purported Relevance to the Likelihood that Claims Are Valid

As a logical corollary of this reality of intrinsic clinical agnosticism, it is perforce also true that we have no way of knowing whether the preponderance of the retrieved memory lawsuits are based on true events of incest. There are good reasons, however, to operate on the provisional view that at the minimum,[116] a substantial minority of uncorroborated retrieved memory claims do not correspond with actual incestuous events.

The overt position of Bowman and Mertz on the central empirical question of the proportion of retrieved incest claims which are valid is ostensibly one of scholarly agnosticism. After an elaborate discourses on the psychology of memory and on empirical

---

[114] *Id.* at 614.

[115] By suggesting that retrieved memories may even be *more* reliable than others, professors Bowman and Mertz can "square the circle" and reach the conclusion that we ought to *presume* the daughters' claims are true. Here, it may be suggested, we have moved into the realm of superstition, where magical qualities are ascribed to awakened remembrances of incest long ago.

[116] Some experts grouped around the "false memory syndrome" position argue that "retrieved memories" of prior trauma simply cannot occur—a position linked to strong anti-Freudian views regarding the unconscious. For recent illustrations of how bizarre this perspective can become, see, e.g., MIKKEL BORCH-JACOBSEN, REMEMBERING ANNA O.: A CENTURY OF MYSTIFICATION (Kirby Olson trans., 1996) (contending that there is no unconscious and that Freud was a charlatan); MARGARET A. HAGEN, WHORES OF THE COURT (1997) (arguing that essentially all uses of clinical psychology in the legal system amount to fraud by "hired gun psychoexperts"); AUGUST PIPER, JR., HOAX AND REALITY: THE BIZARRE WORLD OF MULTIPLE PERSONALITY DISORDER 61 (1997) (holding therapists responsible for much mental illness by giving patients "license" to manifest disorders "and fail[ing] to discourage them when they act in irresponsible ways").

studies of remembrance they modestly conclude:

> Both accurate and faulty memories exist. . . . We have no scientific basis for assessing the relative proportions of accurate to inaccurate claims except by reference to figures on actual abuse. These data show that sexual abuse is more prevalent than was previously suspected and thus seem to suggest that a substantial proportion of the memories could be accurate.[117]

The history of the variation in the estimates of the prevalence of incest is outside the scope of this article,[118] but whatever Profes-

---

[117] Bowman & Mertz, *supra* note 2, at 622. The locution of this last sentence is somewhat misleading, since it is clear from their text that their article is predicated on the tacit understanding that a substantial preponderance of the lawsuits *are* valid. "Could," would not seem to fairly state the position held by the authors, nor, for that matter, the pro-"repressed memory" experts on whom they largely rely. *See supra* note 24.

[118] It is now commonly, and fallaciously, reported that millions of American women were subjected to incest. *See, e.g.*, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2462-63 (Harold I. Kaplan & Benjamin Saddock eds., 6th ed. 1995) ("About 15 million women in the United States have been the object of incestuous attention."); Jeffrey Masson, *Incest Pornography and the Problem of Fantasy, in* MEN CONFRONT PORNOGRAPHY 142 (Michael S. Kimmel ed., 1991) (asserting that one erroneous text "proclaimed that one girl in a million was likely to be the victim of incest. The truth is closer to one in four."). This view is apparently shared by the authors. *See* Bowman & Mertz, *supra* note 2, at 583 n.210 (favorably citing study that one-eighth of girls under age 14 "reported incestuous abuse").

Actually, examination of the primary data in the major studies reveals no significant variability over the past half century. From Kinsey to the present, the data fairly uniformly indicate the prevalence of father-daughter incest among women to be roughly one in two hundred, and so the estimates which purport to show that incest is ubiquitous are probably wrong by almost two orders of magnitude as evidenced by the best available empirical data. *See* EDWARD O. LAUMAN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 331 tbl.9.4 (1994) (demonstrating that the prevalence of father-daughter incest is three-tenths of one percent (0.3%) of American women); Fox Butterfield, *'95 Data Show Sharp Drop in Reported Rapes*, N.Y. TIMES, Feb. 3, 1997 (summarizing data of U.S. Dept. of Justice, Bureau of Justice Statistics which indicate that the proportion of girls under the age of 12 subjected to incest by any family members is 0.4%).

It is outside the scope of legal scholarship and really within the realm of the sociology of knowledge to explicate why the secondary and popular literature has radically shifted, from the tendency a generation ago to understate these rates by two orders of magnitude, to overstating them by almost two orders of magnitude today. *Cf.* D. Stephen Lindsay & J. Don Read, *"Memory Work" and Recovered Memories of Childhood Sexual Abuse: Scientific Evidence and Public, Professional and Personal Issues*, 1 PSYCHOL. PUB. POL'Y & L. 846, 854 (1995) (reviewing numerous studies and concluding that "people with such histories would still make up a small minority of clients in most general practices"). In part it is because the wildly inflated estimates bandied about by legal dominance feminists are derived from highly idiosyncratic and expansive definitions of "incest." *See generally* SUSAN BAUR, THE INTIMATE HOUR: LOVE AND SEX IN PSYCHOTHERAPY 85 (1997) ("The definition of sexual abuse and harassment expanded like a deep breath, and

sors Bowman and Mertz think of either the actual prevalence, or how estimates have changed over time, is irrelevant to a determination of what fraction of lawsuits is valid.

Let us for the moment assume, *arguendo,* that it turns out that an extremely large proportion of American women, say one-eighth,[119] actually experienced incest. This prevalence rate essentially tells us nothing useful in determining whether a substantial proportion of the legal claims are true, or, *a fortiori,* what the legal system seeks to ascertain, namely, whether the particular claim before the court is valid.

For instance, it may well be that virtually all of the women who experienced incest in childhood are so traumatized that they *never* bring suit (or that those who do not file suit may not have been traumatized by what occurred and thus have no current cognizable injury or motive to sue).[120] Conversely, virtually all of the

---

women who had long been silent charged that 'depending on how we process the abuse, how our psyche copes, a few kisses can be as traumatic and damaging as outright rape and are just as abusive.'"); JANE GALLOP, FEMINIST ACCUSED OF SEXUAL HARASSMENT 8 (1997), ("The classic scenario—easy to recognize and deplore as sexual harassment—expands its application in every direction."); Ian Hacking, *The Making and Molding of Child Abuse,* 17 CRITICAL INQUIRY, 253, 261 (1991) ("Views on the causes and prevention of child abuse [such as "patriarchal cruelty"] have determined, to a great extent, the class of events that are labeled abuse."); *id.* at 270-72 (illustrating how definitions have radically expanded).

[119] *See* Bowman & Mertz, *supra* note 2, at 583 n.210 (favorably citing study that one-eighth of girls under age 14 "reported incestuous abuse").

[120] While incest is a risk factor for serious psychological sequelae, as best as can be ascertained, a substantial proportion of the victims experience no injury in their adult life. *See* HANDBOOK ON SEXUAL ABUSE OF CHILDREN: ASSESSMENT AND TREATMENT ISSUES (Lenore E.A. Walker ed., 1988) (demonstrating a collection of several pertinent works); HERMAN, *supra* note 35, at 29 ("Thus, it would be an exaggeration to state that victims of sexual abuse inevitably sustain permanent damage."); Judith L. Alpert et al., *supra* note 70, *in* WORKING GROUP, *supra* note 9, at 15, 33 ("Incest within the nuclear family, is a unique and complex interpersonal stressor with high potential to traumatize or otherwise damage a developing child."); Joseph H. Beitchman et al., *A Review of the Long-Term Effects of Child Abuse,* 22 CHILD ABUSE AND NEGLECT 101 (1991) (reporting that a majority of abused women never suffered major psychological harm); L.M. DiPalma, *Patterns of Coping and Characteristics of High-Functioning Incest Survivors,* 8 ARCHIVES OF PSYCHIATRIC NURSING, 82-90 (1994); Judith Herman et al., *Long-Term Effects of Incestuous Abuse in Childhood,* 143 AM. J. PSYCHIATRY 1293, 1294-95 (1986) ("However, 22.4% of the women stated that they were not aware of any long-lasting effects of the abuse; 27.2% complained of only slight residual effects. Thus, roughly half of the incest victims in the community sample considered themselves to have recovered well."); Peter A. Ornstein et al., *Reply to the Alpert, Brown, and Courtois Document: The Science of Memory and the Practice of Psychotherapy, in* WORKING GROUP, *supra* note 9, at 106, 124-25 (arguing that the literature discussing child abuse does not provide a strong inferential link between such abuse and negative development); Tsai et al., *supra* note 8, at

women who *do* bring suit could fall into the category of scoundrels with fraudulent claims and/or psychotic persons who cannot distinguish outer and inner reality, but who were not mistreated as children. Or it may be that the overwhelming majority of those who do bring claims are sincere in their subjective positions, but simply mistaken. Since the total number of lawsuits constitutes a minuscule fraction of American women, it is literally impossible to infer *anything* about the statistical likelihood of claims being valid, or whether any given claim is valid.

It is illogical to assert that since many women were victims of incest, those who bring incest claims are likely to be among those women who did experience it.[121] For that assertion to have probative force, it would be necessary to have substantial *additional* empirical data. But that additional supporting data is precisely what is lacking.[122] And hence we cannot infer the relative likelihood of *real* victims of incest versus others bringing suit from the data at hand.

We do, however, have some kinds of information available which are suggestive that a very substantial proportion of claims are not true. This is the independent empirical evidence available regarding allegations of child sexual abuse which arise in the throes of contested divorces. Professors Bowman and Mertz them-

---

414 (comparing controls with two groups of victims, those in therapy, and those who never sought it and considered themselves normal: "[W]omen [victims] in the nonclinical group showed no ill effects of the molestation, at least when a matched control group of nonmolested, non-therapy seeking women was used as a standard of comparison.").

Nor does there appear to be any syndrome specific to incest. *See* Alpert et al., *supra* note 70, *in* WORKING GROUP, *supra* note 9, at 15, 33-39; Herbert N. Weissman, *Forensic Psychological Examination of the Child Witness in Cases of Alleged Sexual Abuse*, 61 AM. J. ORTHOPSYCHIATRY 48, 52 (1991) (examining the issue of credibility and conscious motivation in the suffering of abuse by victims).

[121] This selfsame fallacy of composition is deployed in another law review article as supposed evidence to advance the inverse—and zany—thesis that the underlying phenomenon of retrieved memories of incest *must* exist:

> Even the most conservative estimate of twelve percent is high enough to support an assertion that there is a serious problem of childhood sexual abuse. . . . With such a high rate of sexual abuse, it does not seem improbable that some victims would experience amnesia for the trauma, given the secrecy, shame and guilt that often surround" it.

Jacqueline Hough, *Recovered Memories of Childhood Sexual Abuse: Applying the Daubert Standard in State Courts*, 59 S. CAL. L. REV., 855, 863 (1996).

[122] Setting forth individual stories of valid cases cannot function as a substitute, precisely because all it can do is show that such cases occur (as opposed to what proportion of all claims are valid); *see also supra* text accompanying note 13.

selves advance these cases as analogous, and thus contend that no third-party liability should attach in "[c]hild custody battles involving allegations of sexual abuse" either.[123] They cite an empirical study which indicates that as many as 14% of such accusations are made maliciously, and many others (perhaps as many as an additional 33% of the total) are erroneous.[124] Similar questions have arisen in other settings concerning the accuracy of allegations of child abuse,[125] and there is good reason to believe that agency findings are often thoroughly unreliable.[126]

It is even perfectly plausible that the overwhelming majority of

---

[123] Bowman & Mertz, *supra* note 2, at 578.

[124] *See id.* at 578, n.178. In that footnote, the authors themselves cite other studies which report that about a quarter of the allegations are false. *See id.* Additional studies, not cited by Professors Bowman and Mertz, also indicate that a large fraction of these claims are false. *See, e.g.*, Elissa P. Benedek & Diane H. Schetky, *Allegations of Sexual Abuse in Child Custody and Visitation Disputes, in* EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW 145 (Diane H. Schetky & Elissa P. Benedek eds., 1985); Arthur H. Green, M.D., *True and False Allegations of Sexual Abuse in Child Custody Disputes*, 25 J. AM. ACADEMY CHILD PSYCHIATRY 449 (1986) (noting that a child psychiatrist, as a court-appointed expert, determined that 4 out of 11 children reporting to be sexually abused by the noncustodial parent were not, and citing to other similar studies); John E.B. Myers, *The Child Sexual Abuse Literature: A Call For Greater Objectivity*, 88 MICH. L. REV. 1709, 1726 (1990) ("[T]he most methodologically rigorous studies indicate that in divorce litigation the incidence of fabricated allegations of child sexual abuse may be as high as twenty percent."). *But see* Meredith Sherman Fahn, Note, *Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter*, 14 WOMEN'S RTS. REP. 123, 128 (1992) ("It is rare that a parent maliciously accuses another parent of child sexual abuse."). The note cites studies which assert that only about 5% of these allegations are willfully false. *See id.*

[125] *See* Valmonte v. Bane, 18 F.3d 992 (2d Cir. 1994) (stating that there are as many as two million cumulative child abuse reports in New York State, of which it appears between one-fourth and three-fourths of those listed in the state's Central Register on the basis of "some credible evidence" were so listed erroneously); Michael Robin, *Are False Allegations of Child Sexual Abuse a Major Problem? Yes, in* CONTROVERSIAL ISSUES IN SOCIAL POLICY 160 (Howard I. Karger & James Midgeley eds., 1994) (asserting that as many as half of claims apparently untrue).

[126] See, for instance, a recent scandal in Massachusetts, where the Department of Social Services found "reasonable cause to support" 25,000 out of 96,000 annual reports of child neglect and abuse. Michael Grunwald, *Neglect Policy Revised*, BOSTON GLOBE, Mar. 29, 1997, at B1. In the course of a physician-mother's spending $15,000 on legal and psychological fees to have such a finding against her set aside, *see* David Armstrong, *A Finding of Neglect, A Battle, A Reversal*, BOSTON GLOBE, Mar. 26, 1997, at A1, it was ascertained that the regular practice of that state agency was to make such findings without even contacting the parents, falsely asserting that it had done so, and basing its findings on the "results" of these phantom interviews. The agency admitted that it had no idea "how many times social workers filed abuse charges without interviewing family members and then falsely claimed the interviews were conducted," but nevertheless insisted in its own defense that this occurred in fewer than *half* of the cases! David Armstrong, *Step Falsified in Abuse Citations*, BOSTON GLOBE, Mar. 27, 1997, at A1.

retrieved childhood incest memories are false, for while it is clear to anyone who has undertaken his or her own full-scale psychoanalysis that significant memories are repressed, it is very uncertain that major traumas (such as watching a parent being killed or being put in a concentration camp) are *ever* lost to the conscious mind. Freud, who was both a great clinician and perfectly willing to shock the bourgeois consciousness with his findings regarding infantile sexuality[127] and transference,[128] came to be dubious about the objective veracity of retrieved incest memories.[129]

D. The Myth of Incest as a Taboo Subject in the Legal System

Professors Bowman and Mertz go on to contend that "reverse incest" suits are bad public policy and not beneficial because:

> [They might be] following the pendulum swing of public backlash, [in which] the courts would allow cultural fears surrounding traditionally taboo topics to move the legal system in a dangerous direction. This move might well close off a promising avenue (therapy for sexual abuse survivors) for resolving a key social problem[130] and at the

---

[127] The idea that Freud would be willing to advance the concept of active prepubescent sexuality but not of adult incest out of moral cowardice and careerism is facially silly; *see also* Caryn James, *A Movie America Can't See*, THE N.Y. TIMES, Mar. 15, 1998, at A13 (despite the $50 million investment, and major stars such as Jeremy Irons and Melanie Griffith, distribution unavailable for film *Lolita* because it shows child protagonist as "kiss[ing] passionately . . . [and acting] seductive"). *Compare* JEFFREY MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY (1984) *with* Arnold Davidson, *Assault on Freud*, *in* LONDON REVIEW OF BOOKS, July 19, 1984, at 9-11 (commenting on the Masson book). It is only because Freud's insights continue to be so subversive by granting full sexual agency to all humans, especially children, that Freud can successfully be subjected to this kind of posthumous character assassination.

[128] It was the revolutionary concept of "transference," and not the well-known and accepted fact that father-daughter incest sometimes occurs, which most "arouse[d] enmity against Freud's method." HANNAH DECKER, FREUD IN GERMANY: REVOLUTION AND REACTION IN SCIENCE: 1893-1907, at 164 (1977); *see also* JOHN KERR, A MOST DANGEROUS METHOD: THE STORY OF JUNG, FREUD AND SABRINA SPIELREIN 89, 102 (1994) (describing Freud's theory of hysteria as based upon repressed infantile sexuality manifested through transference phenomena). Furthermore, it is likely that the main contemporaneous impetus to reject Freud was anti-Semitism and not the *content* of any of his theories regarding the expression and/or the repression of sexual impulses. *See* DENNIS B. KLEIN, JEWISH ORIGINS OF THE PSYCHOANALYTIC MOVEMENT (1985) (describing the oppression of the Jewish people in relation to psychotherapy).

[129] *See supra* note 105.

[130] This is a most peculiar formulation. Whatever therapy does in the way of amelioration of the psychic wounds often inflicted by incest, it surely does nothing to resolve the underlying phenomenon of incest. Ordinarily when we think of resolving a social

same time strengthen an abusive (and patriarchal) aspect of our social structure.[131]

Because they cannot, Professors Bowman and Mertz offer no empirical evidence of any tendency within the American legal system toward barring complaints by incest victims.[132] They address only the civil side, which has seen in recent years a rapidly increasing number of retrieved memory incest suits that seems to show no signs of abating.[133]

On the criminal side, in recent years most states have tolled or extended their statutes of limitations.[134] And as one careful study reveals, even though in the majority of instances there was no corroborating evidence, virtually every case of indictment for incest "resulted in conviction and sentencing for felony charges."[135] As one judge recently observed:

---

problem, we think of eliminating its cause, not simply mitigating its harm. Thus, as to the "key social problem" of teenage gang warfare, resolution does not mean improvements in surgery for gunshot wounds; it means providing those youngsters with genuine socially constructive alternatives. *See* PAUL GOODMAN, GROWING UP ABSURD: THE PROBLEMS OF YOUTH IN THE ORGANIZED SOCIETY (1960). Apparently for Professors Bowman and Mertz, if there is sufficient politicization and judicialization of *past* incest, that *is* a social solution. This posture accords with the ideological thrust of "dominance feminism," but has no particular utility for confronting current instances of incest, or reducing it in the future.

[131] Bowman & Mertz, *supra* note 2, at 555. This thesis is also advanced by other dominance feminists. *See, e.g.*, LEORA N. ROSEN & MICHELLE ETLIN, THE HOSTAGE CHILD: SEX ABUSE ALLEGATIONS IN CUSTODY DISPUTES xi (1996) ("[T]he denial of sex abuse allegations in custody disputes is part of a trend to deny the incest problem following its 'rediscovery' in the 1970s and early 1980s.").

[132] *See supra* note 41 and accompanying text (describing as to how this baseless rumor has passed into the therapeutic community).

[133] *See* MacNamara, *supra* note 5; *see also supra* note 5 generally.

[134] *See* Monica L. Hayes, Note, *The Necessity of Memory Experts for the Defense in Prosecutions for Child Sexual Abuse Based Upon Repressed Memories*, 32 AM. CRIM. L. REV. 69 (1994) (finding that all but four states, of states that have statutes of limitations for criminal felonies, have extended or tolled those time limits in cases of child sexual abuse).

[135] Even where the accused was offered and accepted a plea bargain, the "advantage" was remarkably modest: sentences of "4 to 10 years" in lieu of the statutory minimum of "5 to 10 years." Allan R. DeJong & Mimi Rose, *Frequency and Significance of Physical Evidence in Legally Proven Cases of Child Sexual Abuse*, 84 PEDIATRICS 1022, 1025-26 (1989) (noting that Pennsylvania has mandatory minimum sentencing). *But see* 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) (asserting, without citing sources, that "criminal proceedings are rarely initiated against abusers; when they are, defendants are rarely successfully prosecuted").

> It has been aptly observed that the sexual abuse of children, "[o]nce an undiscussed subject", has—with justification—become "something of a national obsession". . . . The concern is heightened when a family member is the suspected abuser: "In recent years preventing the sexual abuse of children in family settings has become a major social and judicial concern. . . ."[136]

Additionally, since 1980, "the number of prisoners sentenced for violent sexual assault (other than rape) increased by an annual average of nearly 15%," as opposed to 7.6% for all crimes—the highest rates of increase save for drug offenses.[137] It is clear that this trend toward more punitive treatment of sexual wrongdoing has been dominant for the better part of a generation.

While there is no overwhelming trend either way,[138] both the majority of legislatures[139] and numerous courts have been hospitable to retrieved memory incest claims by setting aside timeliness considerations that would otherwise bar suit.[140] More generally,

---

[136] Caryl S. v. Child & Adolescent Treatment Services, Inc., 614 N.Y.S.2d 661, 665 (N.Y. Sup. Ct. 1994) (quoting *In re* Nicole V., 518 N.E.2d 914 (1987)).

[137] The average time served in prison for sexual offenses other than rape has similarly increased since 1980 by about 15%. BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 18 (1997).

[138] *See* S.V. v. R.V., 1996 WL 112206, at *21 (Tex. Mar. 14, 1996) (stating that there is considerable "difficulty of ascertaining any convincing trend in the caselaw"); Lamm, *supra* note 135, at 2199 (describing "a split of authority . . . has developed over . . . where the discovery rule is appropriate."); Julie M. Kosmond Murray, Comment, *Repression, Memory, and Suggestibility: A Call For Limitations on the Admissibility of Repressed Memory Testimony in Sexual Abuse Trials*, 66 U. COLO. L. REV. 477, 483 (1995) ("[F]or a variety of reasons, the results [in the courts over tolling] are still mixed."). For annotations on the caselaw, see Gregory G. Sarno, Annotation, *Emotional or Psychological "Blocking" or Repression as Tolling Running of Statute of Limitations*, 11 A.L.R. 5th 588 (1993); Russell G. Donaldson, Annotation, *Running of Limitations Against Action for Civil Damages for Sexual Abuse of Child*, 9 A.L.R. 5th 321 (1993).

[139] A typical example is the California statute which provides that "the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered the psychological injury or illness occurring after the age of majority was caused by the sexual abuse. . . ." CAL. CIV. PROC. CODE § 340.1(a) (West Supp. 1996). The states with such statutes—at last counting a majority—are surveyed in *S.V. v. R.V.*, 933 S.W.2d 1, 21-22 (Tex. 1996) and David J. Schaibley, *Legal and Scientific Discord: Supporting a Cause of Action Based Upon Repressed Memories*, 17 HAMLINE J. PUB. L. & POL'Y, 151, 166-68 (1995).

[140] *See, e.g.*, Simmons v. United States, 805 F.2d 1363, 1368 (9th Cir. 1986) (applying federal law); Barquin v. Roman Catholic Archdiocese of Burlington, Vt., Inc., 839 F. Supp. 275 (D. Vt. 1993) (diversity suit, applying Vermont law); Hoult v. Hoult, 792 F.

based on major federal and state legislation and funding, whole institutions devoted to ferreting out "child abuse" (of which incest is one component) have developed over the past few years.[141] Despite their high error rates,[142] virtually no one seems to be proposing that they be abolished.[143]

Additionally, regardless of whether incest was "traditionally [a]

Supp. 143 (D. Mass. 1992), *aff'd. on other grounds*, 57 F.3d 1 (1st Cir. 1995); Johnson v. Johnson, 701 F. Supp. 1363, 1370 (N.D. Ill. 1988) (applying Illinois law); Doe v. Roe, 931 P.2d 1115 (Ariz. Ct. App. 1996) (dictum); Ulibarri v. Gerstenberger, 871 P.2d 698, 705 (Ariz. Ct. App. 1993); Mary D. v. John D., 264 Cal. Rptr. 633, 639 (Cal. Ct. App. 1989); Farris v. Compton, 652 A.2d 49, 63-64 (D.C. Ct. App. 1994); Phillips v. Johnson, 599 N.E.2d 4, 7 (Ill. App. Ct. 1992); Franke v. Geyer, 568 N.E.2d 931, 933 (Ill. App. Ct. 1991); Callahan v. State, 464 N.W.2d 268, 273 (Iowa 1990); McCollum v. D'Arcy, 638 A.2d 797, 799-800 (N.H. 1994); Osland v. Osland, 442 N.W.2d 907, 909 (N.D. 1989); Ault v. Jasko, 637 N.E.2d 870, 873 (Ohio 1994); Olsen v. Hooley, 865 P.2d 1345, 1349-50 (Utah 1993); Hammer v. Hammer, 418 N.W.2d 23, 25-56 (Wisc. Ct. App. 1987). At least two states have tolled the statute of limitations on some kind of "insanity" ground. *See* Meiers-Post v. Schafer, 427 N.W.2d 606, 608 (Mich. 1988); Jones v. Jones, 576 A.2d 316 (N.J. Super. 1990), *cert. denied*, 585 A.2d 412 (1990).

But see, e.g., Nuccio v. Nuccio, 86 F.3d 270 (1st Cir. 1996) (per curiam) (reporting certified answer of Supreme Judicial Court of Maine of April 8, 1996, that statute of limitation not tolled during the period that the plaintiff's memories remain repressed); Ernestes v. Warner, 860 F. Supp. 1338 (S.D. Ind. 1994) (Indiana and federal law); Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991); Baily v. Lewis, 763 F. Supp. 802, 810 (E.D. Pa. 1991) (applying Pennsylvania law), *aff'd*, 950 F.2d 721 (3d Cir. 1991); Lindabury v. Lindabury, 552 So. 2d 1117, 1118 (Fla. Dist. Ct. App. 1989) (per curiam); Harrison v. Gore, 660 So. 2d 563 (La. Ct. App. 1995); Doe v. Maskell, 679 A.2d 1087 (Md. Ct. App. 1996); Lemmerman v. Fealk, 534 N.W.2d 695, 703 (Mich. 1995); State v. Hungerford, Nos. 94-S-45 to 94-S-047, 93-S-1734 to 93-S-1936, 1995 WL 378571 (N.H. Super. Ct. May 23, 1995); Lovelace v. Keohane, 831 P.2d 624 (Okla. 1992); Seto v. Willits, 638 A.2d 258 (Pa. Super. Ct. 1994); Doe v. R.D., 417 S.E.2d 541 (S.C. 1992); Shippen v. Parrott, 506 N.W.2d 82, 85-86 (S.D. 1993) (citing legislation prohibiting discovery rule); Hunter v. Brown, No. 03A01-9504-CV-00127, 1996 WL 57944 (Tenn. Ct. App. Feb. 13, 1996); S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996).

[141] *See* 42 U.S.C. §§ 5101-5107 (1994) (establishing the National Center on Child Abuse and Neglect, as well as related entities, programs and grants); LELA B. COSTIN, ET AL., THE POLITICS OF CHILD ABUSE IN AMERICA 107-34 (1996) (relating the development of systems to address child abuse from 1960 to present). Basically, ever-expanding groups are mandated to report any suspicion of wrongdoing in almost every state, upon pain of criminal punishment for any noncompliance. With such rules it is hardly surprising that every year literally hundreds of thousands of false reports of child abuse are made in America. *See, e.g.*, Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 204-05 (1992).

[142] *See supra* notes 124-26.

[143] Arguably there has been no greater increase in state intervention than that allowed by the remarkably expansive child abuse legislation, ordinances, and agencies during the past thirty years. However, some have argued that the functional effect of this legislation and agencies "is not the protection of children but the increase in state power." Hacking, *supra* note 118, at 262.

taboo subject" in society, that is certainly no longer the situation among those whose professional responsibilities encompass this issue.[144] As one close student observed: "On the contrary, such disclosures now tend to receive almost universal acceptance by mental health professionals and the general public."[145] Neither is there any realistic chance that it will become taboo as a matter of public discourse in the foreseeable future,[146] unless full-scale political and cultural control passes into the hands of the political allies of the religiously orthodox.[147] Rather, the difficulty is that incest has become a staple focus of mass media attention.[148]

As a recent text on clinical treatment of adults who had been subjected to sexual abuse as minors puts it, "within less than a decade, incest went from the most taboo and shameful of personal and family secrets to one that permeated the media, was highly sensationalized, and was ultimately overexposed and trivialized."[149] The incessant public discussion about the ubiquity

---

[144] In one random study of therapists, the majority of the blame was assigned to the father-perpetrators with none of the blame being ascribed to the daughters. Thomas J. Reidy and Neil J. Hochstadt, *Attribution of Blame in Incest Cases: A Comparison of Mental Health Professionals*, 17 CHILD ABUSE & NEGLECT, 371 (1993). Furthermore, a substantial proportion of therapists believe that repressed memories of childhood sexual abuse are common. *See* Poole et al., *supra* note 7, at 434. When individuals seek professional help around this question, therefore, they are apt to encounter a sympathetic professional. This is especially so because almost a quarter of psychologists believe that they themselves were sexually abused as minors. *See* Shirley Feldman-Summers & Kenneth S. Pope, *The Experience of 'Forgetting' Child Abuse: A National Survey of Psychologists*, 62 J. CONSULTING & CLINICAL PSYCHOLOGY 636 (1994). The meaning of "sexual abuse" was self-defined by the respondent. *See id.* at 636 n.4.

[145] Alan J. Klein, *Forensic Issues in Sexual Abuse Allegations in Custody/Visitation Litigation*, 18 LAW & PSYCHOL. REV. 247, 247 (1994).

[146] *See, e.g.*, Kimberly A. Crnich, *Redressing the Undressing: A Primer on the Representation of Adult Survivors of Childhood Sexual Abuse*, 14 WOMEN'S RTS. L. REP. 65, 65 (1992) ("Societal awareness of child sexual abuse, including incest, has reached an unprecedented level in the recent past.").

[147] Conservative politics have been known to chill sexual research. LAUMANN ET AL.'s *supra* note 63 proposed study on teenage sexual behavior was considered "political suicide" by the National Institute of Child Health and Human Development. It was not funded, thus restricting the scope of Laumann's study to adults. *See* Anne Simon Moffat, *Another Sex Survey Bites the Dust*, 253 SCIENCE 1483 (1991); *see generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

[148] For example, a recent episode of the television program *The X-Files* contained a plot line "in which incestuous sons impregnated their quadriplegic mother" Frederic M. Biddle, *Stay Tuned: Decoding TV Ratings*, BOSTON GLOBE, Jan. 19, 1997, at N1. Consider also "Miramax's purchase of Mark Waters's 'The House of Yes,' a black comedy about incest." Bernard Weinraub, *At Sundance, Disappointment Over the Latest Independent Films*, N.Y. TIMES, Jan. 27, 1997, at D10.

[149] Christine A. Courtois, *Foreword* to SEXUAL ABUSE RECALLED: TREATING TRAUMA

of this wrong (of which the article by Professors Bowman and Mertz is an academic analogue) may well even begin to have the perverse effect of undermining the taboo.[150] In any event, the suggestion of Professors Bowman and Mertz that discourse on incest is either taboo, or might well become taboo, is specious.

V. SOME DOCTRINAL CONCLUSIONS FROM THE "REVERSE INCEST" IMBROGLIO

The actuality of the experiences among the minority[151] subset among women claiming prior incest victimization who also insist that they have retrieved previously fully repressed memories[152] is itself extraordinarily diverse:

IN THE ERA OF THE RECOVERED MEMORY DEBATE at viii (Judith L. Alpert ed., 1995); *see also* LELA B. COSTIN ET AL., THE POLITICS OF CHILD ABUSE IN AMERICA 17 (1996) ("In true media form, sexual abuse went from a shameful, carefully hidden secret to a spectacle.").

[150] In this regard, one might pay attention to the warning of Annette Michelson:

> [It is necessary to develop] an analysis of the intensifying discourse on seduction and on child pornography in a society in which the incest taboo is quite obviously becoming increasingly difficult to maintain. For Western culture is now characterized by the sexualization of the totality of the social formation. . . . It is increasingly clear that the phobic discourse on the child's body is the anxious response to the difficulty of maintaining within that general sexualization . . . the incest taboo as it bears upon children in their relations with adults and among themselves.

Annette Michelson, *Lolita's Progeny*, OCTOBER, Spring 1996, at 13-14.

[151] *See* Judith L. Alpert, *Professional Practice, Psychological Science, and the Delayed Memory Debate*, *in* SEXUAL ABUSE RECALLED: TREATING TRAUMA IN THE ERA OF THE RECOVERED MEMORY DEBATE 3, 15 (Judith L. Alpert ed., 1995):

> However, this situation, that of total amnesia for a lengthy time and the ensuing recalled and detailed recollection, represents the minority of sexual abuse stories. Data indicate that most of those who have been traumatized retain total, partial, or oscillating memory, whether they fully understood it or disclosed it . . . I am not suggesting that the story of those who have total memory loss and delayed recall should not be told. I am simply pointing out that there are other stories and that the media have focused mainly on one minority account.

[152] It is clear that "most people who were sexually abused remember." WORKING GROUP, *supra* note 9, at 1. Herman and Schatzow provide the main empirical study supporting the retrieval thesis. *See* Herman & Schatzow, *supra* note 7, at 4 (discussing how only one-fourth of the patients in a fifty-three woman therapy group for incest survivors had severe memory deficits).

But there are very serious methodological problems with the Herman study which undermine relying on its accuracy, and in particular suggest that it significantly overstates the incidence of major repression. *See, e.g.*, Harrison G. Pope, Jr. & James I. Hudson, *Can Memories of Childhood Sexual Abuse Be Repressed?*, 25 PSYCH. MED. 121, 123 (1995).

> In families characterized by verbal, emotional and/or physical maltreatment, sexual politics are rarely healthy. Destructive familial themes of poor boundaries, sadism, dominance, cloying seduction and possessiveness, narcissistic exploitation of children, invasiveness, and so on, inform and permeate the interpersonal dialectics of family sexuality even when incestuous contact does not actually occur. At times, children sense their parents' barely successful struggle to control incestuous urges; such children suffer preconscious anxiety that incest is imminent. In such contexts, the patient's real history offers fertile ground for confabulated memories of actual sexual contact. The profoundly painful sexualized affects evoked by the patient's actual childhood can be readily attached to sex abuse imagery, as such imagery parallels and mirrors the emotional truth of destructive childhood events. An erroneous accusation of sexual abuse functions to release and organize primitive and authentic affects, while allowing an outlet for the patient's preconscious sadism toward parental authority in a reversal of powerlessness and emotional abuse.[153]

Most of this sort of mistreatment of children simply does not admit of legal redress.[154] "Poor boundaries . . . cloying seduction and possessiveness"[155] and so on cannot be the subject of legal causes of action. Contending otherwise requires that one develop—as do Professors Bowman and Mertz—a kind of "master narrative" of incest, and omit all instances and facts which do not fit into it. Quite aside from the flagrant violation of truth entailed in

---

[153] Sue Grand, *Towards a Reconceptualization of False-Memory Phenomena*, *in* SEXUAL ABUSE RECALLED: TREATING TRAUMA IN THE ERA OF THE RECOVERED MEMORY DEBATE 257, 260 (Judith L. Alpert ed., 1995) [hereinafter SEXUAL ABUSE RECALLED].

[154] As Kathryn Abrams states: "Not all coercive or sexualizing acts create legal violations." Abrams, *supra* note 4, at 1558. To the extent that the dominance feminists were fully successful, many instances in which girls "suffer[ed] preconscious anxiety that incest is imminent," Grand, *supra* note 153, *in* SEXUAL ABUSE RECALLED, *supra* note 153, at 260, would also become successful "retrieved incest memory" lawsuits. We would, in this *reductio ad absurdum* legal world, have turned "sexual predation" very broadly construed into a sanctionable offense. What would be left as legitimate—marital intercourse—would be the ideal of Christian fundamentalism. Thus at the asymptote, there is a striking convergence between the secular dominance feminists and their purported sworn foes, patriarchal culture.

[155] Grand, *supra* note 153, *in* SEXUAL ABUSE RECALLED, *supra* note 153, at 260.

such an enterprise, it turns out to be a failure as an approach to utilizing civil litigation to advance the interests of women as a class.[156]

Professors Bowman and Mertz oppose permitting third-party "reverse" incest suits because they think recovered memories of incest tend to be objectively true and that, therefore, the legal system hurts women by entertaining such countersuits. But without the empirical justification advanced in their examples and arguments, there is every reason to conclude that barring third-party "reverse" incest suits would be poor public policy. Indeed, without some objective corroboration,[157] courts probably ought not to allow delayed recall incest litigation,[158] and thus avoid the

---

[156] Insurance coverage is not available for incest and intentional sexual misconduct, so adequate redress might not be attainable. *See, e.g.*, All Am. Ins. Co. v. Burns, 971 F.2d 438 (10th Cir. 1992) (holding that an exclusion in a church's comprehensive liability policy for a willful violation of a penal statute by any insured was applicable in suit against the church and members of the board arising from a driver's molestation of two girls); St. Paul's Ins. Co. v. Cromeans, 771 F. Supp. 349 (N.D. Ala. 1991) (holding that physician's liability for sexual misconduct toward patients did not come within coverage of policy); Horace Mann Ins. Co. v. Barbara B., 846 P.2d 792, 801 (Cal. 1993) (Baxter, J., concurring) (discussing how insurer may be required to defend teacher under educator's liability policy in suit arising from teacher's sexual and other misconduct); J.C. Penny Cas. Co. v. M.K., 804 P.2d 689, 698 (Cal. 1991) (stating that "child molestation is always intentional" and hence excluded from policy coverage); Western Nat'l. Assurance Co. v. Hecker, 719 P.2d 954 (Wash. App. 1986) (holding that an alleged "negligent" act of anal intercourse not a covered occurrence).

Because such insurance is not available, practical litigation requirements drive daughters to bring suit against their own mothers. *See, e.g.*, Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988) (denying motion to dismiss by parents whose daughter brought suit against them alleging sexual abuse while she was a child); Phinney v. Morgan, 6 N.E.2d 77 (Mass. App. Ct. 1995) (describing adult daughters who brought action against their mother based on her alleged negligence (as opposed to intentional wrongdoing of father who was excluded from insurance coverage) in failing to protect them from childhood sexual abuse by father); Lemmerman v. Fealk, 534 N.W.2d 695 (Mich. 1995) (discussing a woman's suit against her father's estate, her mother, and her aunt, alleging sexual abuse by her father and aunt when she was a child, and stating that the memories from that abuse had been repressed until recently); Raymond v. Ingrid, 737 P.2d 314 (Wash. App. 1987) (discussing a suit brought against a grandmother for negligently allowing grandfather's sexual wrongdoing).

[157] There is disquiet in some circles about such a requirement because "corroboration is notoriously hard to find in cases of privatized harms to women." Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 160 (1996); *see also* SUSAN ESTRICH, REAL RAPE 21 (1987) (discussing how corroboration is important, but that corroborative evidence of rape is more difficult to secure than for many other crimes). Nevertheless, the burden of this article is that in the arena of retrieved repressed memories, requiring corroboration is essential if the courts are to do justice.

[158] A number of courts have taken this position. *See, e.g.*, Nicolette v. Carey, 751 F.

Sisyphean task of attempting to sort out "retrieved" recollections of actual events from similarly retrieved fantasies.

Second, whether or not particular common law causes of action—or for that matter private civil claims arising from the organic development of statutes[159]—ought to exist can *not* be determined on the basis of gender. Rather, because of their inherent plasticity, they ordinarily can be deployed with equal facility across gender lines. It is highly dubious that women would be aided by eliminating or narrowing the scope of the claim of negligent infliction of emotional distress.[160]

Supp. 695, 699-700 (W.D. Mich. 1990) (holding written admission by defendant sufficient corroboration); Meisers-Post v. Schafer, 427 N.W.2d 606 (Mich. Ct. App. 1988) (holding that the three-year statute of limitations applicable to student's claim against teacher for sexual relationship would be tolled if the student could corroborate repressed memory of the facts); Peterson v. Bruen, 792 P.2d 18, 25 (Nev. 1990) ("We recognize that injustice may result from our ruling in instances where [childhood sexual abuse] has occurred but cannot be demonstrated by corroborative evidence that is clear and convincing. We are persuaded, however, that the potential for fraudulent claims is sufficiently great to warrant such a ruling."); State v. Hungerford, No. 94-S-045, 1995 WL 378571 (N.H. Super. Ct., May 23, 1995) (holding that the repressed memory of assaults shall not be admitted at trial because the process of therapy used in these cases to recover the memories is not scientifically reliable); S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996) (holding that expert opinions regarding recovered memories of childhood sexual abuse could not meet objective verifiability element for extending discovery rule in childhood sexual abuse case); Olsen v. Hooley, 865 P.2d 1345 (Utah, 1993) (holding that plaintiff had to produce corroborating evidence in support of her allegations of abuse in order to toll limitations period). Oklahoma by state statute requires objective corroboration. *See* OKLA. STATE. ANN. tit. 12, § 95 (West Supp. 1996) (stating actions based on childhood sexual abuse must be based on objective verifications of evidence).

[159] *See* GUIDO CALLABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (discussing the fundamental change in American law from a legal system dominated by common law to one of statutes enacted by legislatures). For example, RICO has been used to combat sexual harassment. An example from my own practice was *Hunt v. Weatherbee*, 626 F. Supp. 1097 (D. Mass. 1986) (upholding civil RICO employment claim for sexual harassment on construction sites against motion to dismiss); *see also* William H. Kaiser, *Extortion in the Workplace: Using Civil RICO to Combat Sexual Harassment in Employment*, 61 BROOK. L. REV. 965 (1995) (discussing how in certain circumstances, sexual harassment in the workplace constitutes a pattern of extortion amounting to racketeering activity as defined by RICO). The RICO statute, 18 U.S.C. §1961-68, was thereafter similarly deployed to protect the constitutional right to abortion. National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) (holding abortion clinics have standing to use RICO); Geri J. Yonover, *Fighting Fire with Fire: Civil RICO and Anti-Abortion Activists*, 12 WOMEN'S RTS. L. REP. 153 (1990).

[160] In Texas, when its Supreme Court (despite the vigorous intervention of many *amicus* groups) refused to recognize the tort of negligent infliction of emotional distress in a related pair of sharply contested opinions, *see* Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993); Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993), its refusal came over the bitter opposition of, *inter alia*, The Women's Advocacy Project, "a statewide agency providing social and legal services to victims of sexual, physical, and emotional abuse." *Boyles*, 855

Third, what Professors Bowman and Mertz advocate would have the sociological effect of privileging a narrow stratum of women (white, professional, adult,[161] but too young to themselves have adult daughters)[162] at the expense of women generally, especially those of a younger[163] or older generation,[164] those suffer-

---

S.W.2d at 602 n.9.

Members of that Supreme Court actually found themselves arguing over how to classify along gender lines the thirty-four prior emotional distress claims which had come before it. The plurality opinion declaims "thirteen were brought by women, twelve were brought by men, seven by husbands and wives jointly, one by an executrix on behalf of an estate, and one by a corporation." *Twyman*, 855 S.W.2d at 622-23. Justice Spector responded by asserting:

> [W]omen's claims outnumbered men's by a ratio of five to four; and only four of the thirty-four involved female defendants. Of those cases involving relations between two individuals— . . . five involved a woman's claim against a man; none involved a men's claim against a woman. . . . [S]ince the overwhelming majority of emotional distress claims have arisen from harmful conduct by men, rather than women, I do argue that men have had a disproportionate interest in downplaying such claims.

Id. at 642.

[161] It appears from some data, which are not necessarily representative, that the typical repressed memory claimant is a "woman from an affluent family whose siblings have not reported similar abuse. . . . thirty-one percent [of whom] have pursued education beyond college." Rock, *supra* note 12 (citing FALSE MEMORY SYNDROME FOUND., FREQUENTLY ASKED QUESTIONS 3 (1994)).

The impression from the caselaw is that a goodly number of claimants do comport with this profile. *See, e.g.*, Nuccio v. Nuccio, 673 A.2d 1331, 1333 (Minn. 1996) (discussing how plaintiff held a master's degree in social work and a doctorate, had "written and published scholarly articles" and held a "tenured position as an associate professor" at a major university, yet the court held that there was no basis for applying equitable estoppel so as to toll statute of limitations during the period that plaintiff's memory was repressed), *aff'd*, 86 F.3d 270 (1st Cir. 1996).

It can be argued, moreover, that the very existence of such advocacy groups on behalf of accused parents demonstrates that the locus of litigated abuse claims has shifted from the poor to the affluent, since the poor lack the resources to forge such organizational instrumentalities.

[162] Studies of hospital reporting to governmental authorities of physically abused children indicate that the relative under-reporting is greatest when the injuries are inflicted by upper-middle class white women. Eli H. Newberger, *The Helping Hand Strikes Again: Unintended Consequences of Child Abuse Reporting*, *in* UNHAPPY FAMILIES: CLINICAL AND RESEARCH PERSPECTIVES ON FAMILY VIOLENCE 171, 175 (Eli H. Newberger & Richard Bourne eds., 1985).

[163] Another difficulty of the Bowman and Mertz approach is the obvious one that their proposals, even if entirely followed, would have no deterrent effect in reducing current and future incest inflicted on children. This is because if those who commit incest are not stopped by the threat of current criminal liability, it is hard to imagine that the additional possibility of a civil suit many years in the future would yield any additional deterrent effect.

[164] Not a word is ever mentioned by Professors Bowman & Mertz regarding Ms. Cheshier's mother, Mrs. Cheshier, or why the daughter is to be believed in preference to

ing from major psychological disabilities and those who, because they are poor or racially disadvantaged in society, are most apt to be abused by the legal system.[165]

Fourth, the approach of Professors Bowman and Mertz, as is true of dominance feminism generally, is to expand state power both by enlarging the categories of behavior subject to sanctions and by increasing their levels of severity. This is a truly dangerous political direction, and one which fundamentally misconstrues how to ameliorate the conditions of women in our present-day culture.[166]

Fifth, as a direct consequence of its actual bias, the mood or politics of sexual panic resonates profoundly with dominant cultural models of Western society which embrace a "process of control and thoroughgoing repression of sexual life."[167] It is the cultural

---

her mother. *See supra* note 156 (citing suits of daughters against mothers). Privileging younger as against older women is not unique to these authors. *See, e.g., Is Multiculturalism Bad for Women?*, BOSTON REVIEW, October/November 1997, at 25, 28.

[165] *See, e.g.*, Drucilla Cornell, *What is Ethical Feminism?*, *in* FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE 75, 85 (1995) ("The call to responsibility . . . demands of us that we deconstruct the claim that there is an identity that we share as women and that the differences between us are secondary. . . . The ethical danger in this obscuration is that it disguises privilege."); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990) ("[I]n the attempt to extract an essential female self and voice from the diversity of women's experience, the experiences of women perceived as 'different' are ignored or treated as variations on the (white) norm.").

[166] *See* JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING VALUES IN THE POSTMODERN AGE 76 (1996) ("Portraying nuclear families primarily as sites of patriarchal violence [including incest], as some [academic dominance] feminists have done, is inaccurate and impolitic."); *see also* Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn Suppression*, 72 TEX. L. REV. 1097, 1101 (1994) ("[The] suppressionist movement generate[s] a conservative ideology, [and] it also strengthens the political power of the Right to censor sexual and progressive political discourse and to pass measures aimed at controlling women's bodies and sexuality.").

[167] CARLO GINZBURG, CLUES, MYTHS AND THE HISTORICAL METHOD 92 (John Tedeschi & Anne C. Tedeschi trans., The Johns Hopkins University Press 1986); *see also* UTA RANKE HEINEMANN, EUNUCHS FOR THE KINGDOM OF HEAVEN: WOMEN, SEXUALITY AND THE CATHOLIC CHURCH (Peter Heinegg trans., Doubleday, 1988) (discussing how hostility to pleasure and the body are a legacy preserved by Christianity). *Cf.* Elisheva Carlebach, *Attribution of Secrecy and Perceptions of Jewry*, 2 JEWISH SOC. STUD. 115-36 (1996).

The Enlightenment fundamentally challenged this tradition: "With the emergence of democratic discourses, the claims made in them for the equality and liberty of all clashed with the existing discourses insisting on women's subordination." Katrina Irving, *(Still) Hesitating on the Threshold: Feminist Theory and the Question of the Subject*, 1 NWSA J. 630,641 (1989); *see also* ERNESTO LACLAU CHANTAL MOUFFE, HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS 154 (Winston Moore & Paul Cammack trans., 1985) (arguing that "the birth of feminism occurred in Mary Wollstonecraft's *A Vindication of the Rights of Women* (1792) through the use made in it

heritage within which most Americans, in particular the dominance feminists, are raised, which is why it seems intuitively plausible as description,[168] why it has successfully disguised itself as integral to feminism, and why it can be utilized so effectively by cultural conservatism on the larger national political stage.

Professors Bowman and Mertz believe that the interests of the victim are well served by allowing her to bring suit against her family of origin for incest decades after the fact,[169] and that uncorroborated recollections of such incest, based on therapeutically retrieved memories, are reliable enough to support civil verdicts. As has been indicated, these are extremely dubious propositions, although they are integral to the politics of sexual panic and are congruent with radically expanding the punitive uses of the state apparatus.

By encouraging and validating an overtly partisan and punitive approach to social and cultural conflicts which involve masses of citizens, Professors Bowman and Mertz play the role of sorcerers' apprentices. In addition to missing the larger political damage which they are causing by providing a "feminist" cover for outright reaction, Professors Bowman and Mertz seem obtuse to the immediate harm which must flow from reducing the complex and various experiences and situations of real women in our society into a set of radically oversimplified stereotypes.[170]

---

of the democratic discourse, which was thus displaced from the field of political equality between citizens to the field of equality between the sexes").

[168] "We especially attach ourselves to such categories as male/female because of our own psychological development in a culture that has made gender matter, and our own early constructions of personal identity forged in relationship to parents who made gender matter." Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 52 (1988).

[169] *See, e.g.*, Overall v. Estate of L.H.P. Klotz, 52 F.3d 398 (2d Cir. 1995) (discussing a suit brought by daughter against her father for abusive conduct which allegedly occurred more than 40 years previously); Shahzade v. Gregory, 923 F. Supp. 286, 287 (D. Mass. 1996) (upholding against dismissal motion a suit predicated on retrieved memories of "repeated episodes of non-consensual sexual touching of her [between the ages of 12 and 17 by her cousin who was five years older than she] . . . more than forty-seven years prior to her filing a complaint"); Barquin v. Roman Catholic Archdiocese of Burlington, Vt., Inc., 839 F. Supp. 275 (D. Vt. 1993) (40 years); Farris v. Compton, 652 A.2d 49, 63-64 (D.C. Ct. App. 1994) (35 years); Cosgriffe v. Cosgriffe, 864 P.2d 776 (Mont. 1993) (24 years). Similar filings are now ubiquitously reported in the daily press. *See, e.g.*, Diego Ribadeneira, *Maine Man Sues Priest, Says He Was Abused As Boy*, BOSTON GLOBE, Apr. 8, 1997, at B8 (discussing how a man, then 45, filed suit against a priest for sexual molestation 31 years previously when he was a boy).

[170] Ironically, while Professors Bowman and Mertz devote themselves to agitating against third-party lawsuits under the implausible ideological thesis that fear of such suits

The authors do not seem to fathom the negative implications of ever further extensions and legitimations of state power into the area of regulating sexuality. It is as if they themselves are mesmerized by the politics of sexual panic, and are so obsessed with the dangers of male sexual aggression,[171] that all considerations of good sense, public policy, and academic discourse are drowned out by its piercing sound.

---

by the male predators might make therapists' shy from treating women who suffered childhood sexual trauma and ancillary repression, *see* Bowman & Mertz, *supra* note 2, at 587, in real life it is first-party lawsuits brought for negligent implantation of false memories by erstwhile women patients which may actually bring about this result.

Recently, a number of such lawsuits against therapists by women who have recanted their charges against male family members have resulted in extremely large verdicts and settlements. As a consequence of these suits, insurance companies may well exclude "recovered memory therapy" from the scope of their policies, a development which in turn would probably be the death knell for these confrontational treatment modalities. *See* Pam Belluck, *"Memory" Therapy Leads to a Lawsuit and Big Settlement*, N.Y. TIMES, Nov. 6, 1997, at A1, A14.

[171] Jessica Benjamin writes:

> A sharper perspective on this matter is particularly important to feminist thought today, because a major tendency in feminism has constructed the problem of domination as a drama of female vulnerability victimized by male aggression. . . . To reduce domination to a simple relation of doer and done-to is to substitute moral outrage for analysis. Such a simplification, moreover, reproduces the structure of gender polarity under the guise of attacking it.

JESSICA BENJAMIN, THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, AND THE PROBLEM OF DOMINATION 9-10 (1988).