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De-Categorizing Child Abuse - Equally Devastating Acts Require Equally Solicitous Statutes of Limitations

Rosemary La Puma
Golden Gate University School of Law, rosemary@rosemarysreview.com

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ROSEMARY LA PUMA*

 Adjunct Professor, Golden Gate University Law School. Many thanks to Bill Gallagher for his encouragement and support and insightful comments on early drafts. Thanks also to Neha Sampat and Mark Yates for reading early drafts and Lewis Engel, Ph.D. for answering questions and explaining the technical language and aspects of the ACE study.

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Introduction

News reports of childhood sexual abuse by Catholic priests initially shocked and subsequently angered the public. Emboldened by the public's reaction toward sexual abusers, survivors attempted to confront their abusers in civil court.[1] Jurisdictions adjudicated these claims if they were brought within two years of reaching the age of majority.[2] Yet, survivors often did not recognize the damage done to them until several years after they reached the age of majority. And by the time they did, the two-year statute of limitations had passed. In the late 1980s and early 1990s, survivors lobbied state legislatures to extend the time within which they could sue their abusers.[3] Almost all state legislatures responded by extending the statute of limitations well past the age of majority so that survivors had more time to bring their claims.[4] In contrast, few states allow survivors of physical and emotional abuse and neglect the same right.[5]

I argue that this legislation should apply to survivors of all forms of child abuse. Recent research dispels the mistaken beliefs that underlie the justifications for the disparate treatment. Given this, extension of the statute of limitations and delayed discovery rule to survivors of all forms of child abuse is necessary. Doing so would improve survivors' health and productivity.[6] Dependence on welfare, disability, unemployment would decrease as a result. Finally, it would send the message that all forms of childhood maltreatment are damaging and worthy of recognition.

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[1] Elizabeth A. Wilson, *Suing for Lost Childhood: Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult-Survivors of Child Abuse*, 12 UCLA WOMEN'S L.J. 145, 165 (2003).

[2] *See, e.g.*, Messina v. Bonner, 813 F. Supp. 346, 350-51 (1993).

[3] Wilson, *supra* note 1.

[4] *See infra* Table 1.

[5] *See infra.*

[6] Centers for Disease Control and Prevention, U.S. Department of Health and Human Services, *Adverse Childhood Experiences Reported by Adults – Five State, 2009,* 59 No. 49 Morbidity and Morality Weekly Report, 1609 (2010) [hereinafter *MMW*]; Shanta R. Dube et al., *Assessing the reliability of retrospective reports of adverse childhood experiences among HMO members attending a primary care clinic*, 28 CHILD ABUSE NEGL. 729, 737 (2004) ("Psychological treatment that can mitigate the progression of ACE-related health problems, such as trauma-focused cognitive-behavioral therapy, are effective and should be widely disseminated."); Robert F. Anda et al., *Childhood abuse, household dysfunction, and indicators of impaired adult worker performance*, 8 PERM. J. 30, 38 (2004).

I. The Statute of Limitations for Non-Sexual Child Abuse Claims is Considerably and Unjustifiably Shorter than the Statute of Limitations for Sexual Abuse Claims

As stated above, sex abuse survivors have lobbied state legislatures to extend the time within which they could sue their abusers.[7] Eighty-six percent of states did.[8] Most states extended the limitations period some years past majority or within some years of discovery of the harm.[9] In contrast, few states have done the same for adult survivors of physical and emotional abuse and neglect.[10]

Professor Elizabeth A. Wilson[11] identified at least two common justifications for the disparity.[12] The first is that sexual abuse is more pervasive and damaging than other forms of abuse.[13] The second is that sexual abuse survivors repress the memory of their experiences while survivors of other forms of child abuse do not.[14]

To use the first justification, one must believe that child abuse happens in distinct categories. One must also believe that each category or type of abuse causes different and distinct measurable damage. To use the second justification, one must believe that repressed memory is common in sexual abuse survivors.

A. Eighty-Six Percent of States have an Extended Statute of Limitations for Sex Abuse Claims

Almost all states[15] have enacted legislation extending the statute limitations for sex abuse claims.[16] Almost 70% of these states allow survivors between two and eight years to file claims.[17] Just over twenty-five

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[7] Wilson, *supra* note 1.

[8] *See infra* Table 1.

[9] *Id.*

[10] *See infra* Table 3.

[11] Professor Elizabeth A. Wilson is a visiting scholar at Rutgers University School of Law. She is currently in India completing research on her manuscript, *Be the Change: Gandhi and the Humans Rights Project.*

[12] Wilson, *supra* note 1, at 193-218.

[13] *Id.*

[14] *Id.*

[15] I have included the District of Columbia as a "state" in my discussion.

[16] Alaska, Arkansas, California, Colorado, District of Columbia, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maryland, Minnesota, Montana, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Washington. *See infra* Table 1.

[17] Alaska, Arkansas, California, Colorado, District of Columbia, Florida, Georgia, Hawaii,

percent allow survivors between ten and thirty-five years past majority to file claims.[18] Three states set no statute of limitations for sex abuse claims.[19] Seven states do not have an extended statute of limitations for sexual abuse *claims*.[20]

Table 1. Extended Statute of Limitations for Sex Abuse Claims

Extended Statute of Limitations for Sexual Abuse	With Codified Discovery Rule	With Judicial Discovery Rule
Alaska Stat. § 09.10.065 (2010).	Alaska Stat. § 09.10.140(B)(1) & (2) (2010).	
Ark. Code Ann. § 16-56-130 (2010).	Ark. Code Ann. § 16-56-130(C)(3) (2010).	
Cal. Civ. Proc. Code § 340.1 (2010).	Cal. Civ. Proc. Code § 340.1(A) (2010).	
Colo. Rev. Stat. § 13-80-103.7 (2010).	None.	Sandoval v. Archdiocese of Denver, 8 P.3d 598 (Colo. App. 2009).
Conn. Gen. Stat. § 52-577d (2010).	Conn. Gen. Stat. § 52-595 (2010)	
Del. Code Ann. Tit. 10, § 8145(A)-(B) (2010).	None.	None.
D.C. Code § 12-301(11) (2010).	D.C. Code § 12-301(11) (2010).	
Fla. Stat. Ann. § 95.11(9) (2010).	Fla. Stat. Ann. § 95.11(7) (2010).	
Ga. Code Ann. § 9-3-33.1 (2010).	None.	None.
Haw. Rev. Stat. Ann. § 657-1.8 (2012).	Haw. Rev. Stat. Ann. § 657-1.8(A)(2) (2012).	
Idaho Code Ann. § 6-1704(1) (2010).	Idaho Code Ann. § 6-1704(1) (2010).	
735 Ill. Comp. Stat. 5/13-202.2 (2010).	735 Ill. Comp. Stat. 5/13-202.2(B) (2010).	
Ind. Code Ann. § 34-11-2-4 (B)(1) & (2) (2010).		Doe v. Shultz-Lewis, 718 N.E.2d 738 (Ind. 1999).
Iowa Code § 614.1(12) (2010).	Iowa Code § 614.8a (2010).	
Kan. Stat. Ann. § 60-523 (2009).	Kan. Stat. Ann. § 60-523(A) (2009).	
Ky. Rev. Stat. Ann. § 413.249 (2010).	Ky. Rev. Stat. Ann. § 413.249(2) (2010).	
La. Revised Statutes, Title. 2800.9(A) (2010).	None.	Wimberly v. Gatch, 635 So.2d 206, 211 (La. 1994).
Me. Rev. Stat. Ann. Tit. 14, § 752-C (2010).	None.	McAfee v. Cole, 637 A.2d 463 (Me. 1994).
Neb. Rev. Stat. Ann. § 25-228 (2012).	None.	Teater v. State of Nebraska, 559 N.W.2d 758 (Neb. 1997).

Indiana, Iowa, Kansas, Kentucky, Maryland, Minnesota, Montana, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Washington. *See infra* Table 2.

[18] Illinois, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, Ohio, Pennsylvania, Virginia. *See infra* Table 2.

[19] Delaware, Florida (if sexual abuse experienced under age 16) and Maine. *See infra* Table 2.

[20] Alabama, Arizona, Michigan, Mississippi, North Carolina, Tennessee, West Virginia. *See infra* Table 1.

Nev. Rev. Stat. Ann. § 11.215(1)(A) & (1)(B) (2010).	Nev. Rev. Stat. Ann. § 11.215(1)(B) (2010).	
N.H. Rev. Stat. Ann. § 508:4-G(I) & (II) (2010).	N.H. Rev. Stat. Ann. § 508:4-G(II) (2010).	
N.J. Stat. Ann. § 2a:61b-1(b)(c) (2010).	N.J. Stat. Ann. § 2a:61b-1(B) (2010)	
N.M. Stat. Ann. § 37-1-30(A)(1) & (2) (2010).	N.M. Stat. Ann. § 37-1-30(A)(2) (2010).	
N.Y.C.P.L.R. 213-C (2010).	None.	None.
N.D. Cent. Code § 28-01-25.1 (2010).	N.D. Cent. Code § 28-01-25.1 (2010).	
Ohio Rev. Code Ann. § 2305.111(C) (2010).	None.	Judicial.
Okla. Stat. Ann. Tit. 12 § 95(A)(6)(A) & (B) (2010).	Okla. Stat. Ann. Tit. 12 § 95(A)(6)(B) (2010).	
Or. Rev. Stat. § 12.117 (2010).	Or. Rev. Stat. § 12.117(1)(2010).	
42 Pa. Cons. Stat. Ann. § 5533(B)(2)(I) (2010).	None.	None.
R.I. Gen. Laws § 9-1-51 (2010).	R.I. Gen. Laws § 9-1-51 (2010).	
S.C. Code Ann. § 15-3-555(A) (2010).	S.C. Code Ann. § 15-3-555(A) (2010).	
S.D. Codified Laws § 26-10-25 (2010).	S.D. Codified Laws § 26-10-25 (2010).	
Tex. Civ. Prac. & Rem. § 16.0045 (1), (2) & (3) (2010).	Tex. Civ. Prac. & Rem. § 16.0045(C)(2010).	
Utah Code Ann. § 78b-2-308(2)(A)-(5) (2010).	Utah Code Ann. § 78b-2-308(2) (2010).	
Vt. Stat. Ann. Tit. 12, § 522 (2010).	Vt. Stat. Ann. Tit. 12, § 522(A) (2010).	
Va. Code Ann. § 8.01-243(D) (2010).	Va. Code Ann. § 8.01-249(6) (2013).	
Wash. Rev. Code Ann. § 4.16.340 (2010).	Wash. Rev. Code Ann. § 4.16.340(B) & (C) (2010).	
Wis. Stat. Ann. § 893.587 (2010).	None.	Judicial.
Wyo. Stat. Ann. § 1-3-105(B) (2010).	None.	Judicial.
Md. Code Ann., Cts. & Jud. Proc. § 5-117(B) (2010).	None.	None.
Mass. Ann. Laws Ch. 260, § 4c (2014).	Mass. Ann. Laws Ch. 260, § 4c (2014).	
Minn. Stat. § 541.073(2)(A) (2010).	Minn. Stat. § 541.073(2)(A) (2010).	
Mo. Rev. Stat. § 537.046 (2010).	Mo. Rev. Stat. § 537.046 (2010).	
Mont. Code Ann. § 27-2-216(1)(A) & (1)(B) (2010).	Mont. Code Ann. § 27-2-216(1)(B) (2010).	

Table 2. Legislatively Extended Statute of Limitations for Child Sex Abuse Survivors

States that allow survivors between 2 and 8 years past the age of majority to bring claims	States that allow survivors between 10 and 35 years past the age of majority to bring claims	States that allow sex abuse claims to be brought at any time past the age of majority
Alaska Stat. § 09.10.065 (2010).	735 Ill. Comp. Stat. 5/13-202.2 (B) (2010).	Del. Code Ann. Tit. 10, § 8145(A)-(B) (2010).
Ark. Code Ann. § 16-56-130 (2010).	Mass. Ann. Laws Ch. 260, § 4c (2014).	Fla. Stat. Ann. § 95.11(9) (2010) (for sexual abuse experienced under the age of 16).
Cal. Civ. Proc. Code § 340.1 (2010).	Mo. Rev. Stat. § 537.046 (2010).	Me. Rev. Stat. Ann. Tit. 14, § 752-C (2010).
Colo. Rev. Stat. § 13-80-103.7 (2010).	Neb. Rev. Stat. Ann. § 25-228 (2012).	
D.C. Code § 12-301(11) (2010).	Nev. Rev. Stat. Ann. § 11.215(1)(A) & (1)(B) (2010).	
Fla. Stat. Ann. § 95.11(9) (2010).	N.H. Rev. Stat. Ann. § 508:4-G(I) & (II) (2010).	
Ga. Code Ann. § 9-3-33.1 (2010).	Ohio Rev. Code Ann. § 2305.111(C) (2010).	
Haw. Rev. Stat. Ann. § 657-1.8 (2012).	42 Pa. Cons. Stat. Ann. § 5533(B)(2)(I) (2010).	
Ind. Code Ann. § 34-11-2-4(B)(1) & (2) (2010).	Va. Code Ann. § 8.01-243(D) (2010).	
Iowa Code § 614.1(12) (2010).	Iowa Code § 614.8a (2010).	
Kan. Stat. Ann. § 60-523 (2009).	Kan. Stat. Ann. § 60-523(A) (2009).	
Ky. Rev. Stat. Ann. § 413.249 (2010).	Ky. Rev. Stat. Ann. § 413.249(2) (2010).	
Md. Code Ann., Cts. & Jud. Proc. § 5-117(B) (2010).	Mass. Ann. Laws Ch. 260, § 4c (2014).	
Mass. Ann. Laws Ch. 260, § 4c (2014).	Minn. Stat. § 541.073(2)(A) (2010).	
Minn. Stat. § 541.073(2)(A) (2010).	Mo. Rev. Stat. § 537.046 (2010).	
Mo. Rev. Stat. § 537.046 (2010).	Mont. Code Ann. § 27-2-216(1)(B) (2010).	
Mont. Code Ann. § 27-2-216(1)(A) & (1)(B) (2010).	Nev. Rev. Stat. Ann. § 11.215(1)(B) (2010).	
N.M. Stat. Ann. § 37-1-30(A)(1) & (2) (2010).	N.H. Rev. Stat. Ann. § 508:4-G(II) (2010).	
N.Y.C.P.L.R. 213-C (2010).	N.J. Stat. Ann. § 2a:61b-1(B) (2010).	
N.D. Cent. Code § 28-01-25.1 (2010).	N.M. Stat. Ann. § 37-1-30(A)(2) (2010).	
Okla. Stat. Ann. Tit. 12 § 95(A)(6)(A) & (B) (2010).	N.D. Cent. Code § 28-01-25.1 (2010).	
R.I. Gen. Laws § 9-1-51 (2010).	Okla. Stat. Ann. Tit. 12 § 95(A)(6)(B) (2010).	
S.C. Code Ann. § 15-3-555(A) (2010).	Or .Rev. Stat. § 12.117 (1) (2010).	
S.D. Codified Laws § 26-10-25 (2010).	R.I. Gen. Laws § 9-1-51 (2010).	
Tex. Civ. Prac. & Rem. § 16.0045(1), (2) & (3) (2010).	S.C. Code Ann. § 15-3-555(A) (2010).	
Utah Code Ann. § 78b-2-308(2)(A)-(5) (2010).	S.D. Codified Laws § 26-10-25 (2010).	
Vt. Stat. Ann. Tit. 12, § 522 (2010).	Tex. Civ. Prac. & Rem. § 16.0045(C) (2010).	

Wash. Rev. Code Ann. § 4.16.340 (2010).	Utah Code Ann. § 78b-2-308(2) (2010).	
	Vt. Stat. Ann. Tit. 12, § 522(A) (2010).	
	Va. Code Ann. § 8.01-249(6) (2013).	
	Wash. Rev. Code Ann. § 4.16.340 (B), (C) (2010).	

Approximately 70% of these states added a delayed discovery rule to further extend the limitations period.[21] These states allow survivors to sue some years after they discovered the injury and the causal connection between it and the abuse.[22] Ninety-three percent of these states allow survivors to sue between 2 and 10 years after discovery.[23] One state allows survivors to sue 20 years after discovery.[24] One allows survivors to sue any time after discovery.[25]

Twenty-two percent of states have a judicial delayed discovery rule for sex abuse claims.[26] Four states, Delaware, Georgia, Maryland and New York, have no statutory or judicial delayed discovery rule for sex abuse claims.[27]

B. Ninety-One Percent of States Apply Shorter Tort Limitations Rules to Child Abuse Claims Other than Sex Abuse

Most states apply tort law limitations rules to claims for child abuse claims other than sex abuse.[28] The difference between the two ranges from 1-11 years in 65% of states and 18-32 years in 11% of states.[29] The difference is incalculable in 15% of states.[30] This occurs when the limitations period for both actions is the same, but the delayed discovery rule is only applicable to sex abuse claims.[31] Or there is no limitation for

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[21] *See supra* Table 1.

[22] *See id.*

[23] Alaska, California, Connecticut, District of Columbia, Florida, Hawaii, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Washington, Wyoming. *See supra* Table 1.

[24] Illinois. 735 ILCS 5/13-202.2(b) (2014).

[25] Virginia. VA. CODE ANN. § 8.01-249(6) (2013).

[26] Colorado, Indiana, Maine, Maryland, Nebraska, Ohio, Pennsylvania, Wisconsin, Wyoming. *See supra* Table 1.

[27] *See supra* Table 1.

[28] *See infra* Table 3.

[29] Connecticut, Illinois, Massachusetts, Virginia, and Wisconsin. *See infra* Table 3.

[30] Alaska (for felony sexual assault), Arkansas, Delaware, Maine, Montana, New Jersey and Utah.

[31] For example Arkansas. *See infra* Table 3.

sex abuse claims.[32] In fact, the differences indicated above are actually much larger when the delayed discovery rule is factored in.

There are several states that do not follow the above pattern. Florida allows survivors of physical and sexual abuse to file claims within seven years of majority or within four years of discovery.[33] Idaho allows survivors of physical abuse to file claims within five years of age 18, or within five years of discovery.[34] Louisiana allows survivors of physical and sexual abuse to file claims within 10 years of majority.[35] Finally, Oregon allows survivors of emotional, physical and sexual child abuse to file claims within 40 years of majority or within five years of discovery.[36]

Table 3. Years Disparity Between Extended Sexual Abuse Statute of Limitations and the Statute of Limitations Applicable to Other Child Abuse Claims

Extended Statute of Limitations for Sex Abuse Claims	Statute of Limitations Applicable to Other Child Abuse Claims	Difference
No statute of limitations for felony child sexual abuse. Within three years of majority for misdemeanor sexual assault and incest or three years from discovery. Alaska Stat. § 09.10.065 (2010); Alaska Stat. § 09.10.140(b)(1) & (2) (2010).	Within 2 years. Alaska Stat. § 09.10.070 (2010).	Felony Sexual assault: No limit versus 2 years. Misdemeanor Sexual Assault: Within 3 years of majority or discovery (potentially limitless time period) versus 2 years.
Within 3 years of discovery of childhood sexual abuse. Ark. Code Ann. § 16-56-130 (2010).	Within 3 years from age 21. Ark. Code Ann. § 16-56-116(a) (2010).	Within three years of discovery (potentially limitless period) versus 3 years from age 21.
Within 8 years of 18 years old or within 3 years of discovery. Cal. Civ. Proc. Code § 340.1 (2010).	Within 2 years. Cal. Civ. Proc. Code § 335.1 (2010); Cal. Civ. Proc. Code § 352 (2010).	6 years plus.
Within 6 years of 18 years old. Colo. Rev. Stat. § 13-80-103.7 (2010). *See also* Sandoval v. Archdiocese of Denver, 8 P.3d 598 (Colo. App. 2009).	Within 2 years. Colo. Rev. Stat. § 13-80-103(1)(C) (2010).	4 years plus.
Within 30 years from age of majority. Conn. Gen. Stat. § 52-577d (2010).	Within 3 years of injury. Conn. Gen. Stat. § 52-584 (2010).	27 years.
No statute of limitations. Del. Code Ann. Tit. 10, § 8145(A)-(B) (2010).	Within 2 years. Del. Code Ann. Tit. 10, § 8119 (2010).	No limit versus 2 years.
Age of majority plus 7 years or 3 years from discovery. D.C. Code § 12-301(11) (2010).	Intentional torts: within 1 year of 18 years old. Negligence: Within 3 years of 18 years old. D.C. Code § 12-301(4) (2010); D.C. Code § 12-301(8) (2010); D.C. Code § 12-302(A) (2010).	4-6 years plus.

[32] For example Delaware. *See* Table 3.

[33] FLA. STAT. ANN. § 95.11(7) (2010).

[34] IDAHO CODE ANN. § 6-1704(1) (2010).

[35] LA. CIV. CODE ANN., Art. 3496.1 (2014).

[36] OR. REV. STAT. § 12.117 (2013).

Within 5 years of age of majority. Ga. Code Ann. § 9-3-33.1 (2010).	Within 2 years. Ga. Code Ann. § 9-3-33 (2010); Ga. Code Ann. § 9-3-90 (2010).	3 years.
Within 8 years of age 18 or 3 years from discovery. Haw. Rev. Stat. Ann. § 657-1.8 (2012).	Within 2 years. Haw. Rev. Stat. Ann. § 657-7 (2010); Haw. Rev. Stat. Ann. § 657-13 (2010).	6 years plus.
Within 20 years from age of majority or 20 years from discovery. 735 Ill. Comp. Stat. 5/13-202.2 (2010).	Within 2 years. 735 Ill. Comp. Stat. 5/13-202 (2010).	18 years plus.
Within 7 years of age 18. Ind. Code Ann. § 34-11-2-4 (B)(1) & (2) (2010). Judicial Delayed Discovery. Doe v. Shultz-Lewis, 718 N.E.2d 738 (Ind. 1999).	Within 2 years. Ind. Code Ann. § 34-11-2-4 (A) (2010).	5 years plus.
Within 4 years from discovery. Iowa Code § 614.8A (2010).	Within 1 year of age 18. Iowa Code § 614.1(2) (2010); Iowa Code § 614.8 (2010).	3 years plus.
Within 3 years of majority or 3 years from discovery. Kan. Stat. Ann. § 60-523 (2009).	Within 1 year. Kan. Stat. Ann. § 60-514(b) (2009).	2 years plus.
Within 5 years from date of majority or discovery. Ky. Rev. Stat. Ann. § 413.249 (2010).	Within 1 year. Ky. Rev. Stat. Ann. § 413.140(1)(A) (2010).	4 years plus.
No statute of limitations. Me. Rev. Stat. Ann. Tit. 14, § 752-C (2010).	Intentional torts: Within 2 years. Negligence: within 6 years. Me. Rev. Stat. Ann. Tit. 14, § 752 (2010); Me. Rev. Stat. Ann. Tit. 14, § 753 (2010); Me. Rev. Stat. Ann. Tit. 14, § 853 (2010).	No limit versus 2 and 6 years.
Within 7 years from age of majority. Md. Code Ann., Cts. & Jud. Proc. § 5-117(B) (2010).	Within 3 years. Md. Code Ann., Cts. & Jud. Proc. § 5-101(A) (2010).	4 years.
Within 35 years or within 3 years of discovery. Mass. Ann. Laws Ch. 260, § 4c (2014).	Within 3 years. Mass. Ann. Laws Ch. 260, § 2a (2010); Mich. Comp. Laws § 600.5805 (2010).	32 years plus.
Within 6 years of age 18 or within 6 years of discovery. Minn. Stat. § 541.073(2)(A) (2010).	Within 1 year of age 18. Minn. Stat. § 541.07 (1)(2009); Minn. Stat. § 541.15 (2009); Minn. Stat. § 541.15(A)(1) (2009).	5 years plus.
Within 10 years from age 21 or within 3 years of discovery. Mo. Rev. Stat. § 537.046 (2010).	Intentional torts: within 2 years. Negligence: 5 years. Mo. Rev. Stat. § 516.140 (2010); Mo. Rev. Stat. § 516.120(4) (2010); Mo. Rev. Stat. § 516.170 (2010).	5-8 years plus.
Within 3 years of majority or within 3 years from discovery. Mont. Code Ann. § 27-2-216(1)(a) & (1)(b) (2010).	Within 3 years; tolled during minority but only max 5 years. Mont. Code Ann. § 27-2-204 (2010); Mont. Code Ann. § 27-2-401(1) (2010).	No difference except delayed discovery applicable to sex abuse claims but not to other tort claims.
Within 12 years of age 21. Neb. Rev. Stat. Ann. § 25-228 (2012).	Within 4 years of age 21. Neb. Rev. Stat. Ann. § 25-207 (2010); Neb. Rev. Stat. Ann. § 25-212 (2010); Neb. Rev. Stat. Ann. § 25-213 (2010).	8 years.
Within 10 years of age 18 or within 10 years of discovery. Nev. Rev. Stat. Ann. § 11.215 (1)(A) & (1)(B) (2010).	Within 4 years of age 18. Nev. Rev. Stat. Ann. § 11.220 (2010); Nev. Rev. Stat. Ann. § 11.250 (2010).	6 years plus.

Within 12 years from age of majority or within 3 years of discovery. N.H. Rev. Stat. Ann. § 508:4-G (I) & (II) (2010).	Within 2 years of age of majority. N.H. Rev. Stat. Ann. § 508:4 (2010); N.H. Rev. Stat. Ann. § 508:8 (2010). Disability Statute: N.H. Rev. Stat. Ann. § 508:8 (2010).	10 years plus.
Within 2 years from reasonable discovery (provision b) plus equitable extension available "because of the plaintiff's mental state, duress by the defendant, or any other equitable grounds." (provision c). N.J. Stat. Ann. § 2A:61B-1(b) (2010); N.J. Stat. Ann. § 2A:61B-1(c) (2010).	Within 2 years of age 21. N.J. Stat. Ann. § 2A:14-2 (2010); N.J. Stat. Ann. § 2A:14-21 (2010).	No difference except delayed discovery applicable to sex abuse claims but not to other tort claims.
Within 6 years of age 18 or within 3 years of discovery. N.M. Stat. Ann. § 37-1-30(A)(1) & (2) (2010).	Within 1 year. N.M. Stat. Ann. § 37-1-8 (2010); N.M. Stat. Ann. § 37-1-10 (2010); N.M. Stat. Ann. § 28-6-1.	5 years plus.
Within 5 years of age of majority. N.Y.C.P.L.R. 213-C (2010).	Within 3 years of age of majority. N.Y.C.P.L.R. 215 (2010); N.Y.C.P.L.R. 214 (2010); N.Y.C.P.L.R. 208 (2010).	2 years.
Within 7 years from discovery. N.D. Cent. Code § 28-01-25.1 (2010).	Within 1 year of age 18. N.D. Cent. Code § 28-01-18 (2010); N.D. Cent. Code § 28-01-16(5) (2010); N.D. Cent. Code § 28-01-25 (2010).	6 years plus.
Within 12 years from age of majority. Ohio Rev. Code Ann. § 2305.111(C) (2010).	Within 1 year. Ohio Rev. Code Ann. § 2305.111(B) (2010); Ohio Rev. Code Ann. § 2305.16 (2010).	11 years.
Within 2 years from majority or within 2 years of discovery. Okla. Stat. Ann. Tit. 12 § 95(A)(6)(A) & (B) (2010).	Within 1 year. Okla. Stat. Ann. Tit. 12 § 95(A)(4) & (12) (2010); Okla. Stat. Ann. Tit. 12 § 96 (2010); Okla. Stat. Ann. Tit. 12 § 96(A) (6) (2010);	1 year plus.
Within 12 years of age 18. 42 Pa. Cons. Stat. Ann. § 5533(B)(2)(I) (2010).	Within 2 years. 42 Pa. Cons. Stat. Ann. § 5524(1) & (2) (2010); 42 Pa. Cons. Stat. Ann. § 5533(B)(1)(i) & (ii) (2010).	10 years.
Within 7 years of the act or within 7 years of discovery. R.I. Gen. Laws § 9-1-51 (2010).	Within 3 years. R.I. Gen. Laws § 9-1-14 (2010); R.I. Gen. Laws § 9-1-19 (2010).	4 years plus.
Within 6 years of age 21 (Within 9 years of age 18) or within 3 years of discovery. S.C. Code Ann. § 15-3-555(A) (2010).	Within 1 year of age 18. S.C. Code Ann. § 15-3-530(5) (2009); S.C. Code Ann. § 15-3-535 (2009); S.C. Code Ann. § 15-3-40(B) (2009).	8 years plus.
Within 3 years of the act or within 3 years from discovery. S.D. Codified Laws § 26-10-25 (2010).	Within 1 year of age 18. S.D. Codified Laws § 15-2-14(3) (2010); S.D. Codified Laws § 15-2-15 (2010); S.D. Codified Laws § 15-2-22 (2010).	2 years plus.
Within 5 years of age 18. Tex. Civ. Prac. & Rem. § 16.0045 (1), (2) & (3) (2010).	Within 2 years. Tex. Civ. Prac. & Rem. § 16.003(A) (2010); Tex. Civ. Prac. & Rem. § 16.001(A)(1) (2010); Tex. Civ. Prac. & Rem. § 16.001(B) (2010).	3 years.
Within 4 years from age 18 or within 4 years of discovery. Utah Code Ann. § 78B-2-308(2)(a)-(5) (2010).	Within 4 years of age 18. Utah Code Ann. § 78B-2-307(3)(2010).	No difference except delayed discovery applicable to sex abuse claims but not to other tort claims.

Within 6 years or 6 years from discovery. Vt. Stat. Ann. Tit. 12, § 522 (2010).	Within 3 years. Vt. Stat. Ann. Tit. 12, § 512 (2010).	3 year plus.
Within 20 years after cause accrues. Va. Code Ann. § 8.01-243(D) (2010).	Within 2 years. Va. Code Ann. § 8.01-243(A) (2010).	18 years.
Within 3 years from act or within 3 years of discovery. Wash. Rev. Code Ann. § 4.16.340 (2010).	Within 2 years. Wash. Rev. Code Ann. § 4.16.100 (2010); Wash. Rev. Code Ann. § 4.16.130 (2010).	1 year plus.
Can bring claims until age 35. Wis. Stat. Ann. § 893.587 (2010).	Within 3 years. Wis. Stat. Ann. § 893.54(1) (2010); Wis. Stat. Ann. § 893.57 (2010).	32 years.
Within 8 years of age 18 or within 3 years of discovery. Wyo. Stat. Ann. § 1-3-105(B) (2010).	Intentional Torts: within 1 year. Negligence: within 4 years. Wyo. Stat. Ann. § 1-3-105(A)(IV)(C) (2010); Wyo. Stat. Ann. § 1-3-105(A)(V)(B) (2010).	4-7 years plus.

C. The Justifications for a Longer Limitations Period for Sex Abuse Claims than for Other Child Abuse Claims are not Supported by Scientific Research

There are three common justifications for extending the limitations period for sex abuse survivors.[37] The first is that sex abuse is more reprehensible and pervasive than other forms of child abuse.[38] The second is that sex abuse causes more harm than other forms of abuse.[39] The third is that sex abuse survivors repress the memory of the abuse while survivors of other forms of abuse do not.[40]

The first two justifications show the belief that child abuse happens in distinct categories. They further perpetuate the belief that different forms cause different damage. Finally, they demonstrate the belief that sex abuse is more prevalent and damaging than other forms of abuse. The third justification shows the belief that survivors of other forms of child abuse never repress the memory of it.

As discussed below in Section II, scientific evidence demonstrates the inaccuracy of these beliefs. Thus, the justifications for allowing special treatment for sexual abuse claims lack merit.

II. The Adverse Childhood Experiences (ACE) Study Reveals the Truth About Child Abuse Harm

In 1990, Kaiser Permanente and the Center for Disease Control began a study of the effect of adverse childhood experiences on adult

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[37] Wilson, *supra* note 1, at 193, 198-200.

[38] *Id.*

[39] *Id.* at 203.

[40] *Id.*

health.[41] The study, which is still ongoing, is the Adverse Childhood Experiences Study (ACE).[42] Approximately 18,000 participants[43] received a physical exam and answered an extensive questionnaire on their health and social well-being from 1995 to 1997.[44] The questionnaire also asked about abuse, neglect and household dysfunction.[45]

The questionnaire asked about three sub categories of abuse (verbal, physical and sexual), two categories of neglect (emotional and physical), and five categories of household dysfunction (mother treated violently, household substance abuse, parental separation, divorce, and an incarcerated household member).[46]

Each participant was awarded 1 point for every "yes" answer to a question about exposure to an adverse childhood experience.[47] The points were added to determine the adverse childhood experiences (ACE) score.[48] Below I discuss the ACE study findings, accuracy, and its replication. Finally, I discuss how the ACE study findings rendered previous child abuse research, and law and policy based on it, inaccurate and flawed.

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[41] Heather Larkin, Joseph J. Shields & Robert F. Anda, *The Health and Social Consequences of Adverse Childhood Experiences (ACE) Across the Lifespan: An Introduction to Prevention and Intervention in the Community*, 40 J. PREV. INTERV. COMMUNITY 263, 270 (2012); Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death*, 14 AM. J. PREV. MED. 245, 258 (1998).

[42] Participants in the study are continuing to be studied. Larkin, Shields & Anda, *supra* note 41.

[43] Participants were predominately well-educated and middle-class members of Kaiser Permanente; 54% of the participants were women and 46% were men. Their mean age was 56 years. Robert F. Anda et al., *The enduring effects of abuse and related adverse experiences in childhood: A convergence of evidence from neurobiology and epidemiology*, 256 EUR. ARCH. PSYCHIATRY CLIN. NEUROSCI. 174–86 (2006); Maxia Dong et al., *The interrelatedness of multiple forms of childhood abuse, neglect, and household dysfunction*, 28 CHILD ABUSE NEGL. 771–84 (2004).

[44] Larkin, Shields & Anda, *supra* note 41; David W. Brown et al., *Adverse Childhood Experiences and the Risk of Premature Mortality*, 37 AM. J. PREV. MED. 389–96 (2009); Felitti et al., *supra* note 41.

[45] *Id.*

[46] Dong et al., *supra* note 43; *see also* Daniel P. Chapman et al., *Adverse childhood experiences and the risk of depressive disorders in adulthood*, 82 J. AFFECT. DISORD. 217–225 (2004) (noting these categories were identified through a review of the research literature and discussions with experienced researchers in the field).

[47] Brown et al., *supra* note 44.

[48] *Id.*

A. Findings–ACEs are Common, Commonly Co-occur and are Highly Interrelated

The most important findings are those that shattered historical beliefs about child abuse. The first was that it is common to have had an adverse childhood experience.[49] The second was that these experiences commonly co-occur.[50] The third was that they are highly interrelated.[51]

1. Adverse Childhood Experiences are Common

Two-thirds (66%) of the study's participants had experienced at least one ACE.[52] One in ten (10%) had experienced 5 or more ACEs.[53] These results have been duplicated in other population-based surveys.[54]

The study also quantified the prevalence of adverse childhood experiences the results of which are in the Table 4 below.[55]

Table 4. ACE Study - Prevalence of ACE

Physical abuse	28%
Substance abuse in household	27%
Parental separation or divorce	23%
Sexual abuse	21%
Mental illness in the household	17%
Emotional neglect	15%
Domestic violence	13%
Psychological abuse	11%
Physical Neglect	10%
Incarcerated household member	6%

Thus, the ACE study found the most prevalent form of child abuse

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[49] Felitti, *supra* note 41.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] Harriet L. MacMillan, *Prevalence of Child Physical and Sexual Abuse in the Community: Results From the Ontario Health Supplement*, 278 JAMA 131 (1997); L. Bynum et al., *Adverse Childhood Experiences Reported by Adults—Five States, 2009*, 59 CENTER FOR DISEASE CONTROL MORBIDITY AND MORTALITY WEEKLY REPORT 1609, 1609-1613 (2010), http://www.cdc.gov/mmwr/pdf/wk/mm5949.pdf.

[55] Anda et al., *supra* note 43; Dong et al., *supra* note 43.

was physical abuse followed by exposure to substance abuse in the household. Notably, sexual abuse is only the fourth most prevalent form of child abuse.

2. ACEs Commonly Co-Occur and are Highly Interrelated

Another important finding is that ACEs commonly co-occur and are highly interrelated. Thus, an abused child will often experience multiple forms of abuse.[56] For example, 81% of participants exposed to household substance abuse also reported experiencing one other type of adverse childhood experience.[57] A majority had experienced two or more.[58] This is also true for participants exposed to other ACEs. For example, 95% of participants who watched their mothers abused experienced at least one other adverse childhood experience.[59] Eighty-two percent experienced two.[60]

Ninety-eight percent of participants that experienced emotional abuse experienced one other adverse childhood experience.[61] Ninety percent experienced two additional adverse childhood experiences.[62] Eighty-three percent of participants who experienced physical abuse experienced one other adverse childhood experience.[63] And seventy-eight percent of participants who reported sex abuse did as well.[64]

This data dispels the belief that child abuse happens in distinct categories and thus causes distinct types of harm. Since ACEs co-occur and are highly interrelated it is impossible to determine what act caused what harm. It is also impossible to say that a certain type of abuse causes more damage than another.

B. The ACE Study, Although a Retrospective Study, is Reliable and Accurate

Retrospective studies ask questions about past experiences to study their current effects.[65] The ACE study is a retrospective study. ACE study

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[56] Dong et al., *supra* note 43.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *See id.*

participants were asked to answer questions about past ACE experiences.[66] This is because the majority of abuse survivors are not identified in childhood.[67] If they were, there would be documentation of the abuse and, in turn, the study results of the effect of abuse on adult health would be quite credible. Reliance on answers to questions about past experiences can make retrospective studies inaccurate.[68] Many factors can influence a participant's questionnaire answers. The sensitive nature of the questions, the lapse in time between the abuse and the study, and abuse-induced memory impairment are just a few.[69] Thus, a participant's answers to the same questionnaire given at different times might be different. And if so, would the results of the study be reliable?[70]

The ACE researchers had the opportunity to address this question. By accident, 658 applicants answered the questionnaire twice.[71] The researchers evaluated the agreement between the first and second questionnaire responses.[72] They also compared the agreement between ACEs reported on the first and second questionnaire.[73] They found "the test-retest reliability in the responses to questions about adverse childhood experiences as well as the resulting ACE score to be good (Fleiss, 1981) and moderate to substantial (Landis & Koch, 1977)."[74]

The results suggest that "retrospective responses to childhood abuse and related forms of serious household dysfunction are generally stable over time."[75] And these results are "consistent with prior studies that have analyzed the reliability of reports of childhood maltreatment."[76]

C. Replication of the Study in Five States Demonstrated Similar Results as the ACE Study Including that Sex Abuse is Less Prevalent than Commonly Believed

The ACE study participants were members of Kaiser Permanente in San Diego. Would the results be the same if the participants were randomly

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66 *Id.* at 774.
67 Dube, *supra* note 6, at 732.
68 *Id.* at 731.
69 *Id* at 729–37.
70 *Id.* at 731.
71 *Id.* at 731.
72 *Id.*
73 *Id.*
74 *Id.* at 731.
75 *Id.* at 735–36.
76 *Id.*

selected individuals? In 2009, the CDC did a study to answer this question.[77] They called 26,229 adults (approximately 5000 more than the ACE study) in five states.[78] They asked them eleven questions about eight categories of ACE.[79] The result was that the findings of the Five-States study and the ACE study were similar.[80]

Fifty-nine percent of the respondents reported one or more ACE and 8.7% reported five or more.[81] (The ACE study reported 66% of the respondents reported one or more ACE and 10% reported 5 or more.[82]) The prevalence of ACE in the Five-State Study is in Table 5 below.[83]

Table 5. Five-State Study – Prevalence of ACE

Substance abuse in household	29.1%
Parental separation or divorce	26.6%
Verbal Abuse	25.9%
Mental Illness in the household	19.4%
Domestic Violence	16.3%
Physical Abuse	14.8%
Sexual Abuse	12.2%
Incarcerated household member	7.2%

The similarities in the results are striking. Sixty-six percent of participants in the ACE study reported experiencing one or more adverse childhood experience.[84] Ten percent of them reported experiencing five or

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[77] *MMW*, *supra* note 6, at 709.

[78] *Id.* at 1609–10. The five states were Arkansas, Louisiana, New Mexico, Tennessee, and Washington.

[79] *Id.* at 1609. The Behavioral Risk Factor Surveillance System is operated by state health departments in collaboration with CDC. Each month, trained interviewers using a standardized questionnaire collect data from nine institutionalized households with landline telephones. The 2009 ACE module consisted of 11 questions that yielded eight categories of ACEs (i.e. verbal abuse, physical abuse, sexual abuse, household mental illness, household substance abuse, domestic violence, parental separation/divorce, and incarcerated family members). The 11 ACE questions were modified from the Kaiser-CDC ACE study to conform to fewer question categories and were tested for understanding using focus groups.

[80] *Id.* at 1611.

[81] *Id.* at 1609–10.

[82] Felitti, *supra* note 41, at 247.

[83] *MMW, supra* note 6, at 1610–11.

[84] *See supra* Table 4.

more.[85] Fifty-nine percent of participants in the Five-State Study reported experiencing one or more adverse childhood.[86] Approximately 9% of them reported experiencing five or more.[87]

Five thousand more individuals, about one third more, participated in the Five-State Study than the ACE study.[88] A corresponding increase in the sex abuse numbers in the larger study was expected. This was not the case. Twenty-one percent of the participants reported sex abuse in the ACE Study,[89] but only twelve percent reported sex abuse in the Five-State Study.[90] This totaled about half the percentage reported by the ACE study. Also, both studies indicated that sex abuse is less prevalent than other forms of abuse.[91] Thus, sex abuse is less prevalent than commonly believed.

D. Because the ACE Study has Rendered Past Child Abuse Research Unreliable and Inaccurate, Law and Policy Should Change to Reflect the New Understanding of the Effects of Child Abuse

In the past, researchers studied child abuse in distinct categories.[92] Thus, a researcher might study the damaging effects of sex abuse. Or she might study the damaging effects of physical abuse.

The ACE study demonstrated the narrowness of this approach.[93] It showed that the long-term effects of child abuse are not necessarily the result of a single type of abuse.[94] They are more likely due to many adverse childhood experiences.[95]

Single-category child abuse research does not include the effects of

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[85] *See supra* Table 4.

[86] *See supra* Table 5.

[87] *See supra* Table 5.

[88] *See* Dube, *supra* note 6.

[89] *See supra* Table 4

[90] *See supra* Table 5.

[91] *See supra* Tables 4 & 5.

[92] Dong et al., *supra* note 43; Valerie J. Edwards et al., *Relationship between multiple forms of childhood maltreatment and adult mental health in community respondents: results from the adverse childhood experiences study*, 160 AM. J. PSYCHIATRY 1453, 1459 (2003).

[93] The ACE study authors suggest that adverse childhood experiences should be viewed as a "complex set of highly interrelated experiences that may include childhood abuse or neglect, parental alcohol and drug abuse, domestic violence, parental marital discord, and crime in the home." *See* Dong et al., *supra* note 43 (citations omitted)

[94] *See* Dong et al., *supra* note 43; Edwards et al., *supra* note 92; Anda et al., *supra* note 43, at 181.

[95] *See* Dong et al., *supra* note 43.

co-occurring adverse childhood experiences.[96] Because of this, such research incorrectly attributes all the harm discovered to the category of abuse studied.[97] It is more likely, though, that many adverse childhood experiences caused the harm.[98] Thus, single-category child abuse research is unreliable and inaccurate.[99]

Clearly, the law is out of step with the research. Given the above, it is impossible to identify which – or if just one – adverse childhood experience caused the damage. Current law allows sex abuse survivors to recover for harm caused to them. But it is likely they are recovering for damage caused by the sex abuse and other forms of child abuse. Thus, adult survivors of all forms of abuse should have the same access as survivors of sex abuse to an extended statute of limitations and legislated delayed discovery rule. I address the most common challenges against this argument below

III. The Arguments Against Extending the Statute of Limitations to Survivors of Other Forms of Child Abuse are Invalid

There are three main arguments against extending the statute of limitations to survivors of other forms of child abuse. The first is such legislation will "flood" the courts with lawsuits. The second is child abuse is too difficult to define so that defendants know what behavior is actionable and courts can draw appropriate lines. The third is therapists will suggest to patients that they "recovered" the memory of abuse when none actually occurred. This in turn will cause a repeat of history: the wrongful accusation of parents, teachers, coaches and priests.

A. A Flood of Litigation Will Occur if We Extend the Statute of Limitations to Survivors of all Forms of Child Abuse.[100]

I am arguing to establish a new right: that survivors of *all* forms of child abuse be given a longer period after majority to sue for damage.

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[96] *Id.*

[97] Dong et al., *supra* note 43, at 772; Anda et al., *supra* note 43; Felitti et al., *supra* note 41.

[98] *Id.*

[99] Dong et al., *supra* note 43 at 772; Edwards et al., *supra* note 92, at 1459; Robert Anda, *The health and social impact of growing up with adverse childhood experiences: The human and economic costs of the status quo*, *in* CONFERENCE IN ANACORTES, WA ON JUNE 8 (2007) .

[100] Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs,* 62 MONT. L. REV. 59, 73 (2001).

Opponents of the right I propose might argue that such a right "will inundate the court with lawsuits."[101] Specifically, if we allow survivors of all forms of child abuse to use the extended statute of limitations currently applicable to sex abuse survivors, a flood of similar claims will overwhelm the courts. In section one below, I discuss the flaws in this argument. In section two, I analyze the case history that evolved from such an extension to see if a flood occurred.

1. The "Floodgates" Argument is a Flawed Argument

First, the use of this argument demonstrates the judiciary's desire to limit its workload[102] and decide claims based on number instead of merit.[103] Thus, a court that uses such an argument fails to uphold its sworn duty to provide an unbiased and impartial place to adjudicate valid claims on their merits.[104]

Second, Article III of the US constitution delineates what cases or controversies the court must hear.[105] But it does not limit the number.[106] Furthermore, there is no language in Article III that says if allowing a certain case to be heard would open the door to too many other such cases, it need not be heard.[107]

The same is true when state courts use the argument. State constitutions are modeled on the US constitution. They all establish the same three branches of government. Each establishes the jurisdiction of the courts in the judicial branch. For example, Article 6, section 10 of the CA constitution, after delineating the jurisdiction of the supreme and appellate courts, states, "Superior courts have original jurisdiction in all other causes."[108] Like Article III, the section does not limit the number. Consequently, state courts violate the separation of powers doctrine when they invoke the "floodgates" argument.

Thus, when courts use the "floodgates" argument they "impermissibly usurp the jurisdictional powers reserved solely to the

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[101] *Id.*; Toby J. Stern, Comment, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 381, 386 (2003).

[102] Stern, *supra* note 101, at 386-88.

[103] *Id.* at 399, 406, 408.

[104] *See id.*

[105] U.S. CONST. art. III, §§ 1-2.

[106] Stern, *supra* note 101, at 397.

[107] *Id.*

[108] CAL. CONST. art. VI, § 10.

legislature" violating the separation of powers doctrine.[109] The proper body to consider judiciary caseload is the legislature.[110] For example, Congress has the power to limit federal court caseload by raising court filing fees and amount in controversy limits.[111] When courts use the argument, without explicit statutory mandate, they imply legislative intent to limit the court's caseload that the legislature may not have had.[112]

Third, the argument does not specify what constitutes a "flood" of claims.[113] A "flood" to one judge might not be one to the next. Thus, one judge might allow the new right. Another might not. What results is inconsistent precedent.[114]

The final flaw is related to the third. No factual support accompanies the argument.[115] On the contrary, in the cases where the right is established despite the "floodgates" argument, the flood does not occur.[116] This is likely to be the case should the right I propose be established. Studies show that adult survivors of child abuse, when questioned about the abuse they experienced as children, tend to under report the abuse.[117] Thus, many survivors of childhood maltreatment will not bring actions against their perpetrators because they will have mentally minimized the harm they experienced.[118]

2. An Examination of Oregon's Case History—Did the Flood Occur?

Several states already allow survivors of multiple forms of child abuse to recover without apparent ill effect on the court system. Idaho and Louisiana have an extended statute of limitations for physical abuse claims.[119] Florida and Oregon both extend the statute of limitations for survivors of all forms of childhood maltreatment.[120] Oregon has the most

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[109] *Id.*; Stern, *supra* note 101, at 379, 397-400.

[110] Stern, *supra* note 101, at 399-400.

[111] *Id.*

[112] *Id.* at 400-01.

[113] *Id.* at 406-08.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] Donna Femina Della, et al., *Child abuse: adolescent records vs. adult recall,* 14 CHILD ABUSE NEGL. 227, 229-30 (1989); Linda Meyer Williams, *Recall of childhood trauma: a prospective study of women's memories of child sexual abuse.*, 62 J. CONSULT. CLIN. PSYCHOL. 1167 (1994); Dube et al., *supra* note 6, at 729.

[118] *Id.*

[119] IDAHO CODE ANN. § 6-1704(1) (2007); LA. REV. STAT., Tit. 2800.9(A) (2010).

[120] FLA. STAT. ANN. § 95.11(7) (2010); OR. REV. STAT. § 12.117 (2013).

liberal statute of all the states, allowing adult survivors of all forms of child abuse to bring claims until the age of 40 or five years from discovery, whichever is longer.[121] Thus, if such legislation will cause a flood it is most likely to occur in Oregon, the state with the most liberal legislation.

Below, I examine the evolution of the Oregon legislation and the ambiguous language within it that might prompt practitioners to bring more cases than they might otherwise. I also review the case law interpreting the statute from its enactment to the present to determine if a flood actually occurred. Finally, I review the statutory language that limited the "flood" by making the statute inapplicable against municipalities.

Oregon first enacted the Oregon Revised Statute ("ORS") § 12.117 in 1989. It allowed adult survivors to bring claims based on child abuse "or conduct knowingly allowing, permitting, or encouraging child abuse" within 5 years of age 18.[122] The statute defined child abuse as:

> (a) Intentional conduct by an adult that results in:
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> (A) any physical injury to a child; or
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> (B) any mental injury to a child which results in observable and substantial impairment of the child's mental or psychological ability to function caused by cruelty to the child, with due regard to the culture of the child;
>
> (b) Sexual abuse of a child including but not limited to rape, sodomy, sexual abuse, sexual penetration with a foreign object and incest, as those acts are defined in ORS chapter 163; or
>
> (c) Sexual exploitation of a child, including but not limited to:
>
> (A) Conduct constituting violation of ORS 163.435 and any other conduct which allows, employs, authorizes, permits, induces or encourages a child to engage in the performing for people to observe or the photographing, filming, tape recording or other exhibition which, in whole or in part, depicts sexual conduct or contact; and
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> (B) Allowing, permitting, encouraging or hiring a child to engage in prostitution, as defined in ORS chapter 167.[123]

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[121] OR. REV. STAT. § 12.117 (2013).

[122] OR. REV. STAT. § 12.117 (1989).

[123] *Id.*

This provision, ORS § 12.117, has been amended many times since its enactment. The most significant amendment was made in 2009.[124] Prior to 2009, survivors had six years past the age of majority or three years from discovery, whichever was longer, to bring their claims, but in no event could they bring an action after the age of 40.[125] The language of the statute was amended in 2009 to allow survivors until age of 40 or five years past discovery whichever is longer to bring their claims.[126] This expansion recognizes the time it takes for a person to understand the long-term detrimental effects of childhood maltreatment.

The statute defines child abuse as intentional conduct by an adult which results in: "(A) any physical injury to a child; or (B) Any mental injury to a child which results in observable and substantial impairment of the child's mental or psychological ability to function caused by cruelty to the child, with due regard to the culture of the child."[127]

None of the versions of the statute define physical and mental injury. While physical injury is fairly easy for courts to determine, the lack of definition of "mental injury" and the breadth of what this might entail is the kind of language that would be ripe for exploitation and in turn might arguably result in a "flood of cases." In addition, the "any mental injury to

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[124] The statute was amended in 1991, 1993, 2009, and 2011.

[125] OR. REV. STAT. § 12.117(1) (1993) ("1) Notwithstanding ORS 12.110, 12.115 or 12.160, an action based on conduct that constitutes child abuse or conduct knowingly allowing, permitting or encouraging child abuse accruing while the person who is entitled to bring the action is under 18 years of age shall be commenced *not more than six years after that person attains 18 years of age*, or if the injured person has not discovered the injury or the causal connection between the injury and the child abuse, nor in the exercise of reasonable care should have discovered the injury or the causal connection between the injury and the child abuse, *not more than three years from the date the injured person discovers or in the exercise of reasonable care should have discovered the injury or the causal connection between the child abuse and the injury, whichever period is longer.* However, in no event may an action based on conduct that constitutes child abuse or conduct knowingly allowing, permitting or encouraging child abuse accruing while the person who is entitled to bring the action is within 18 years of age be commenced after that person attains 40 years of age." (emphases added)).

[126] OR. REV. STAT. § 12.117(1) (2013) ("(1) Notwithstanding ORS 12.110, 12.115 or 12.160, an action based on conduct that constitutes child abuse or conduct knowingly allowing, permitting or encouraging child abuse that occurs while the person is *under 18 years of age must be commenced before the person attains 40 years of age,* or if the person has not discovered the causal connection between the injury and the child abuse, nor in the exercise of reasonable care should have discovered the causal connection between the injury and the child abuse, *not more than five years from the date the person discovers or in the exercise of reasonable care should have discovered the causal connection between the child abuse and the injury, whichever period is longer."* (emphases added)).

[127] OR. REV. STAT. § 12.117 (2)(a) (2013).

a child which results in observable and substantial impairment" language is so ambiguous that it could also result in decisions that lack a clear pattern. This arguably makes it difficult for practitioners to predict the likelihood of success when evaluating potential cases. In such situations, practitioners may bring more cases than they might otherwise.

Despite the ambiguity in the statute, no flood occurred. Oregon state courts have heard only 23 cases in the 26 years since the statute was enacted, and only one case alleging child abuse other than sexual abuse.[128]

Forty-two cases have cited the statute since its enactment in 1989.[129] Seventeen of these were state appellate cases.[130] Twelve of these interpreted

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[128] Sipes v. Sipes, 147 Or. App. 462 (1997).

[129] Doe 150 v. Archdiocese of Portland in Oregon, 469 Fed. Appx. 641 (9th Cir. 2012); Bonneau v. Centennial School Dist. No. 28J, 666 F.3d 577 (9th Cir. 2012); V.T. v. City of Medford, Or. et al., Slip Copy, Case No. 1:09-cv-03007, 2015 WL 300270 (D. Or. 2015); Prasnikar v. Our Savior's Lutheran Church of Lake Oswego, Or., Slip Copy No. 3:13-cv-00258-PK, 2014 WL 7499377 (D. Or. 2014); Watkins v. Archdiocese of Portland in Oregon, 2012 WL 5844699 (D. Or. 2012); Snegirev v. Mark, 2012 WL 566592 (D. Or. 2012); Wand v. Roman Catholic Archbishop of Portland in Oregon, 2010 WL 5678689 (D. Or. 2010); Sapp v. The Roman Catholic Archbishop of Portland in Oregon, 2008 WL 1849915 (D. Or. 2008); B.J.G. v. Society of the Holy Child Jesus, 2008 WL 896061 (D. Or. 2008); John Doe 130 v. Archdiocese of Portland in Oregon, 2008 WL 656021 (D. Or. 2008); Duncan v. Oregon, 2007 WL 789433 (D. Or. 2007); Halseth v. Deines, 2004 WL 1919994 (D. Or. 2004); Simone v. Manning, 930 F. Supp. 1434 (D. Or. 1996); *In re* Roman Catholic Archbishop of Portland in Oregon, 2006 WL 2038642 (D. Or. 2006); *In re* Roman Catholic Archbishop Of Portland, Or., 335 B.R. 815 (D. Or. 2005); Roman Catholic Archbishop of Portland, Or. v. Tort Claimants Committee, 2005 WL 1429945 (D. Or. 2005); *In re* Roman Catholic Archbishop of Portland in Oregon, 44 Bankr. Ct. Dec. 54, Bankr. L. Rep. P 80,225 (D. Or. 2005) (not reported); Doe 1 v. Lake Oswego School Dist., 353 Or. 321, 297 P.3d 1287 (2013); Schmidt v. Mt. Angel Abbey, 347 Or. 389, 223 P.3d 399 (2009); Lourim v. Swensen, 328 Or. 380 (1999); Fearing v. Bucher, 328 Or. 367 (1999); Owens v. Maass., 323 Or. 330 (1996); A.K.H. v. R.T.C, 312 Or. 497 (1992); State v. Pinard, 255 Or. App. 417, 300 P.3d 177 (2013); Jack Doe 1 v. Lake Oswego School Dist., 242 Or. App. 605, 259 P.3d 27, 270 Ed. Law Rep. 855 (2011); Schmidt v. Archdiocese of Portland, Or., 235 Or. App. 516, 234 P.3d 990' (2010); Schmidt v. Archdiocese, 218 Or. App. 661 (2007); T.R. v. Boy Scouts of America, 205 Or. App. 135 (2006); State ex rel Department of Human Services v. Shugars, 202 Or. App. 302 (2005); Jasmin v. Ross, 177 Or. App. 210 (2001); Matter of Adoption of Welshans, 150 Or. App. 498 (1997); Walthers v. Gossett, 148 Or. App. 548 (1997); Lourim v. Swensen, 147 Or. App. 425 (1997); Sipes v. Sipes 147 Or. App. 462 (1997); Fearing v. Bucher, 147 Or. App. 446, 936 P.2d 1023 (1997), Flaningam v. Flaningam, 145 Or. App. 432, 929 P.2d 1084 (1996); Cooksey Guardian v. Portland Public School, 143 Or. App. 527 (1996); State v. Rudder, 137 Or. App. 43 (1996); P.H. v. F.C., 127 Or. App. 592 (1994); Wimber v. Timpe, 109 Or. App. 139 (1991); S.V. v. R.V., 933 S.W.2d 1 (Texas 1996).

[130] State v. Pinard, 255 Or. App. 417, 300 P.3d 177 (2013); Jack Doe 1 v. Lake Oswego School Dist., 242 Or. App. 605, 259 P.3d 27, 270 Ed. Law Rep. 855 (2011); Schmidt v. Archdiocese of Portland in Oregon, 235 Or. App. 516, 234 P.3d 990 (2010); Schmidt v.

the language of the statute as it pertained to abuse claims.[131] Eleven of these were sex abuse claims.[132] Only one was a claim for general child abuse other than sex abuse.[133] As for the five remaining cases, three cases cited the statute in a footnote in reference to other issues not related to child abuse[134]

Archdiocese, 218 Or.App. 661 (2007); TR v. Boy Scouts of America, 205 Or. App. 135 (2006); State ex rel Department of Human Services v. Shugars, 202 Or. App. 302 (2005); Jasmin v. Ross, 177 Or. App. 210 (2001); Matter of Adoption of Welshans, 150 Or. App. 498 (1997); Walthers v. Gossett, 148 Or. App. 548 (1997); Lourim v. Swensen, 147 Or. App. 425 (1997); Sipes v. Sipes, 147 Or. App 462 (1997); Fearing v. Bucher, 147 Or. App. 446, 936 P.2d 1023 (1997); Flaningam v. Flaningam, 145 Or. App. 432, 929 P.2d 1084 (1996); Cooksey Guardian v. Portland Public School, 143 Or. App. 527 (1996); State v. Rudder, 137 Or. App. 43 (1996); P.H. v. F.C., 127 Or. App. 592 (1994); Wimber v. Timpe, 109 Or. App. 139 (1991). One case was heard twice by the appellate court. Schmidt v. Archdiocese, 218 Or. App. 661 (2007). The first appeal affirmed the trial court's granting of the Archdiocese's motion for summary judgment which alleged plaintiff failed to state a claim for sex abuse. The Supreme Court reversed and remanded in Schmidt v. Mt. Angel Abbey, 347 Or. 389 (2009). On remand, the appellate court, held that there was a factual issue as to whether acts that were within priest's employment resulted in abuse of the student so as to provide a basis for imposing vicarious liability on priest's employer, which precluded summary judgment. Schmidt v. Archdiocese of Portland in Oregon, 235 Or. App. 516, 234 P.3d 990 (2010).

[131] Jack Doe 1 v. Lake Oswego School Dist., 242 Or. App. 605, 259 P.3d 27, 270 Ed. Law Rep. 855 (2011); Schmidt v. Archdiocese of Portland in Oregon, 235 Or. App. 516, 234 P.3d 990 (2010); Schmidt v. Archdiocese, 218 Or. App. 661 (2007); T.R. v. Boy Scouts of America, 205 Or. App. 135 (2006); Jasmin v. Ross, 177 Or. App. 210 (2001); Walthers v. Gossett, 148 Or. App. 548 (1997); Lourim v. Swensen, 147 Or. App. 425 (1997); Sipes v. Sipes, 147 Or. App. 462 (1997); Fearing v. Bucher, 147 Or. App. 446, 936 P.2d 1023 (1997); Flaningam v. Flaningam, 145 Or. App. 432, 929 P.2d 1084 (1996); Cooksey Guardian v. Portland Public School, 143 Or. App. 527 (1996); P.H. v. F.C., 127 Or. App. 592 (1994).

[132] Jack Doe 1 v. Lake Oswego School Dist., 242 Or. App. 605, 259 P.3d 27, 270 Ed. Law Rep. 855 (2011); Schmidt v. Archdiocese of Portland in Oregon, 235 Or. App. 516, 234 P.3d 990 (2010); Schmidt v. Archdiocese, 218 Or. App. 661 (2007); T.R. v. Boy Scouts of America, 205 Or. App. 135 (2006); Jasmin v. Ross, 177 Or. App. 210 (2001); Walthers v. Gossett, 148 Or. App. 548 (1997); Lourim v. Swensen, 147 Or. App. 425 (1997); Fearing v. Bucher, 147 Or. App. 446, 936 P.2d 1023 (1997); Flaningam v. Flaningam, 145 Or. App. 432, 929 P.2d 1084 (1996); Cooksey Guardian v. Portland Public School, 143 Or. App. 527 (1996); P.H. v. F.C., 127 Or. App. 592 (1994).

[133] *Sipes,* 147 Or. App. at 466.

[134] In State ex rel Department of Human Services v. Shugars, 202 Or. App. 302 (2005), the appellant sought to overturn a grant of dependency jurisdiction under O.R.S § 419B.100(1)(c) for emotionally abusing a child. The court mentions O.R.S. § 12.117 in a footnote stating that O.R.S § 419B.100(1)(a)(B)'s definition of child abuse for purposes of abuse reporting obligations is substantially similar to the definition in O.R.S. § 12.117. In State v. Rudder, 137 Or. App. 43 (1996), the court cited A.K.H. v. R.T.C, 312 Or. 497 (1992), which discussed the constitutionality of the retroactive provision in O.R.S § 12.117. However it noted that in State v. Rudder the legislature's attempt to validate actions taken

and two others discussed the statute as an aside to the main issue.[135] Thus, the total burden on the state appellate courts in Oregon from cases brought under the statute in 26 years was twelve, or approximately 0.5 cases a year or, alternatively, one case every two years.

The Oregon Supreme Court has heard six cases.[136] Four of them interpreted the statute.[137] One held that the statute was to be applied retroactively.[138] Another overturned two appellate cases that had ruled plaintiff failed to state a claim because plaintiff had alleged facts stating a claim for vicarious liability based on *respondeat superior*.[139] A third case

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in misdemeanor cases by district courts without jurisdiction by passing an amendment violated the separation of powers doctrine. In Wimber v. Timpe, 109 Or.App. 139 (1991), a child, who was sexually abuse by his adoptive father, moved to vacate the adoption under O.R.S. § 109.391 after the 1 year limitation had past. The child argued that the time limitation in O.R.S. § 109.381 was tolled by his minority under O.R.S. § 12.160 and 12.117 both of which extend the statute of limitations past the age of majority by a set number of years for different claims. In a footnote, the court noted that they would not consider the O.R.S. § 12.117 argument because the argument was not raised at the trial court level.

[135] In State v. Pinard, 255 Or. App. 417, 300 P.3d 177 (2013), appellant, who was convicted of animal abuse, argued that the trial court should have merged guilty verdicts of count 1 and 4 because the statutes governing each included the same elements. One made it a crime to "[c]ruelly cause [ ] the death of an animal" (OR. REV. STAT. § 167.320(1)(b)) and the other made it a crime to "[m]aliciously kill [ ] an animal" (OR. REV. STAT. § 167.322(1)(a)). The court then cited resources defining "cruelly," including OR. REV. STAT. § 12.117. In Matter of Adoption of Welshans, 150 Or.App. 498 (1997), the Attorney General cited A.K.H. v. R.T.C, 312 Or. 497 (1992), which discussed the constitutionality of the retroactive provision in O.R.S § 12.117, to support its argument that the time limit to set aside an adoption in O.R.S. § 109.381(3) does not violate the separation of powers doctrine because it operates as a statute of limitations.

[136] Doe 1 v. Lake Oswego School Dist., 353 Or. 321, 297 P.3d 1287 (2013); Schmidt v. Mt. Angel Abbey, 347 Or. 389; 223 P.3d 399 (2009); Lourim v. Swensen, 328 Or. 380, 977 P.2d 1157 (1999); Fearing v. Bucher, 328 Or. 367, 977 P.2d 1163 (1999); Owens v. Maass, 323 Or. 430, 918 P.2d 808 (1996); A.K.H. v. R.C.T., 312 Or. 497, 822 P.2d 135 (1991).

[137] Schmidt v. Mt. Angel Abbey, 347 Or. 389; 223 P.3d 399 (2009); Lourim v. Swensen, 328 Or. 380, 977 P.2d 1157 (1999); Fearing v. Bucher, 328 Or. 367, 977 P.2d 1163 (1999); A.K.H. v. R.C.T., 312 Or. 497, 822 P.2d 135 (1991).

[138] A.K.H. v. R.C.T., 312 Or. 497, 822 P.2d 135 (1991). This case was a certified question from the district court on whether O.R.S. § 12.117 should be applied retroactively. After the supreme court certified the question, the legislature amended the statute to clearly state that the act applies to all claims filed after October 3, 1989 including any action that would have been barred by application of any other period of limitations prior to October 3, 1989. The Supreme Court, citing the 1991 amendment by the legislature, answered the district court's question affirmatively.

[139] Lourim v. Swensen, 328 Or. 380, 977 P.2d 1157 (1999). The plaintiff brought a claim against the Boy Scouts of America under the doctrine of respondeat superior for sexual assault 30 years prior. The trial court dismissed the action. The appellate court affirmed.

defined "cruelty" and "sexual exploitation" as used in the statute and found that plaintiff alleged sufficient facts to state a claim based on these definitions.[140]

In each of the remaining two cases, one of the parties cited ORS § 12.117 as an argument that the court dismissed.[141] In *Doe 1 v. Lake Oswego School Dist.*,[142] plaintiff sued for sex abuse by a teacher under the Oregon Tort Claims Act. The defense compared ORS § 12.117 to the Oregon Tort Claims Act, arguing that because the former contained a delayed discovery rule and the latter did not, the legislature intended to legislate the discovery rule for sex abuse, but not against public entitles, which the Tort Act governs.[143] Thus, the defendants claimed that the plaintiff's claim under the

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The Supreme Court reversed stating that plaintiff's allegations were sufficient to state a claim against the Boy Scouts for vicarious liability under respondeat superior. The Supreme Court said the plaintiff's negligence claim alleged "knowingly allowing, permitting or encouraging child abuse" by the Boy Scouts and was sufficient to withstand a motion to dismiss. Fearing v. Bucher, 328 Or. 367, 977 P.2d 1163 (1999). A parishioner sued a priest and the archdiocese for sex abuse when he was a minor. The archdiocese argued 1) that plaintiff failed to state a claim alleging facts demonstrating that the priest's actions were within the scope of employment and 2) plaintiff was not entitled to use the extended statute of limitations because the priest's actions on which vicarious liability was based were not themselves alleged to have caused harm and are therefore are not acts of "child abuse" under the code and thus plaintiff's claim was barred because the statute of limitations had run. The circuit (trial) court dismissed. The appellate court affirmed. Parishioner appealed. The Supreme Court reversed and remanded stating that "[a] jury reasonably could infer that Bucher's performance of his pastoral duties with respect to plaintiff and his family were a necessary precursor to the sexual abuse and that the assaults thus were a direct outgrowth of and were engendered by conduct that was within the scope of Bucher's employment" and the plain wording of the statute allows for an extended limitations period for "actions *based on* conduct that constitutes child abuse." *Id.* at 377.

[140] Schmidt v. Mt. Angel Abbey, 347 Or. 389; 223 P.3d 399 (2009), concerned the proper interpretation of the terms "sexual exploitation" and "cruelty" as used in O.R.S. § 12.117. The court ruled that a person has engaged in cruelty to a child for purposes of the statute that extends the applicable statute of limitations when a person engages in conduct with the specific intent to injure or harm a child and the conduct is capable of producing those results and that there was a genuine issue of material fact as to whether the priest's conduct constituted cruelty to a child within the meaning of the statute. The court further held that conduct qualifies as sexual exploitation of the child under the statute if an individual uses a child in a sexual way for his own gratification or benefit and the child is personally involved and held there was a genuine issue of material fact as to whether the priest's conduct constituted sexual exploitation within the meaning of the statute making summary judgment was inappropriate.

[141] Doe 1 v. Lake Oswego School Dist., 353 Or. 321, 297 P.3d 1287 (2013); Owens v. Maass, 323 Or. 430, 918 P.2d 808 (1996).

[142] 353 Or. 321, 297 P.3d 1287 (2013).

[143] *Doe 1*, 353 Or. at 324. Plaintiff, an adult, sued the school district, a municipality, for vicarious liability for sexual abuse by a teacher. The Oregon Tort Claims Act applies when

Tort Act was barred. The Oregon Supreme Court dismissed the defense's argument and held that its reasoning did not prove the legislature intended to deprive those suing public entities the use of the delayed discovery rule.[144] In *Owens v. Maass*, petitioner sought post-conviction relief that was time barred by the statute of limitations.[145] He argued the legislature intended that the extended period in the more recent amendment of ORS § 12.117 applied retroactively to his petition.[146] The court disagreed. It found that there was no express intention in the amended statute that it apply retroactively.[147] Thus, in 26 years, the Oregon Supreme court has heard only 4 cases that were based on claims under the statute. This amounts to 1 case every 6.5 years, which hardly amounts to a flood.

The statute has made an infrequent presence in the federal courts as well. The combined federal courts have heard 14 cases in 26 years. This is 1.58 cases per year including the lower trial court numbers. None of these cases alleged child abuse other than sexual abuse.

Only twelve federal district court cases have cited ORS § 12.117 since its enactment in 1989.[148] Two cases covered the applicability of ORS

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a claim is brought against a municipality. It requires plaintiff to notify the municipality within 270 days of the alleged injury of the claim and bring the action "within two years of the alleged loss or injury." OR. REV. STAT. § 30.275(2). The defendant argued that because the legislature wrote the delayed discovery rule in O.R.S. § 12.117 and not in the Oregon Tort Claims Act they intended to communicate the legislative policy that the discovery rule was inapplicable. The court disagreed. Holding that the judicial discovery rule applied to the Oregon Tort Claims Act it stated "that the legislature saw fit to *grant* individuals subjected to 'child abuse' by private actors at least five years from the date of discovery of the causal connection between the injury and the abuse to bring their claims does not indicate a legislative intent to *deprive* others subjected to battery by public actors of a two-year period from the date they discover their injuries to commence their actions. O.R.S. 12.117 does not render the discovery rule inapplicable to plaintiffs' claims." *Doe 1*, 353 Or. at 336.

144 *Id.*

145 Owens v. Maass, 323 Or. 430, 918 P.2d 808 (1996). In *Owens*, the petitioner contended that the two-year filing period contained in O.R.S. § 138.510(2) (1993), rather than the 120–day filing period contained in O.R.S. § 138.510(2) (1991), should apply to his petition for post-conviction relief, because he did not file his petition until after the effective date of the new, two-year filing period. The petitioner cited O.R.S. § 12.117 as an example of the legislature expressly reviving claims that were previously time barred. The court found, however, there was no express intention in the 1993 statute granting post-conviction relief and thus the petitioner's petition was time barred.

146 *Id.*

147 *Id.*

148 *V.T.*, No. 1:09-cv-03007, slip op., 2015 WL 300270 (D. Or. 2015); Prasnikar v. Our Savior's Lutheran Church of Lake Oswego, No. 3:13-cv-00258-PK, 2015 WL 94569 (D. Or. 2015); Sapp v. The Roman Catholic Archbishop of Portland, Or., 2008 WL 1849915

§ 12.117's statute of limitations to federal civil rights claims under 42 U.S.C. § 1983 and claims against municipalities under the Oregon Tort Claims Act. Neither found the statute of limitations applicable.[149] One case found plaintiff's claim was time barred under ORS § 12.117.[150] Another case found that plaintiff failed to state a claim that defendant "knowingly, allowed, permitted, or encouraged" child abuse under ORS § 12.117.[151] One case granted and another denied defendant's motion for summary judgment alleging that plaintiff failed to timely file her claim.[152] One case held that the negligence and breach of fiduciary claims asserted against plaintiff stemmed from the original intentional sexual abuse of a child as defined in ORS § 12.117, and thus no coverage was owed under plaintiff's umbrella insurance policy.[153] Of the unreported cases, three involved sex abuse claims and one involved a child abuse claim brought by a pro se plaintiff against a municipality. The federal court dismissed all of the foregoing claims.

A mere two circuit cases have cited ORS § 12.117; only one reported.[154] It held that the statute of limitations in ORS § 12.117 does not apply to federal civil rights claims under 42 U.S.C. § 1983.[155] The unreported case affirmed a district court ruling that plaintiff's claims were brought past the bankruptcy claims bar date and past the Oregon statute of limitations date.[156] Thus, in 26 years, the total burden on the federal circuit court from cases brought under the statute was two, or one case every 13 years.

Part of the reason there has been no "flood," despite the rather liberal and ambiguous language of the statute, is that ORS § 12.117 only applies to private actions. The federal courts have decided that the regular (non-

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(D. Or. 2008); B.J.G. v. Society of the Holy Child Jesus, 2008 WL 896061 (D. Or. 2008); John Doe 130 v. Archdiocese of Portland, Or., 2008 WL 656021 (D. Or. 2008); *Duncan*, 2007 WL 789433 (D. Or. 2007); State Farm Fire & Cas. Co v. Wolf, 2005 WL 3071583 (D. Or. 2005); Simone v. Manning, 930 F. Supp. 1434 (D. Or. 1996); Watkins v. Archdiocese of Portland, Or., 2012 WL 5844699 (D. Or. 2012); Snegirev v. Mark, 2012 WL 566592 (D. Or. 2012); Wand v. Roman Catholic Archbishop of Portland, Or., 2010 WL 5678689 (D. Or. 2010); Halseth v. Deines, 2004 WL 1919994 (D. Or. 2004).

149 *V.T.*, 2015 WL 300270; *Duncan*, 2007 WL 789433.

150 *Prasnikar*, 2014 WL 7499377.

151 *Sapp*, 2008 WL 1849915.

152 *See B.J.G.*, 2008 WL 896061, and *Simone*, 930 F. Supp. 1434.

153 State Farm Fire & Cas. Co v. Wolf, 2005 WL 3071583 (D. Or. 2005).

154 Bonneau v. Centennial School Dist. No. 28J, 666 F.3d 577 (9th Cir. 2012); Doe 150 v. Archdiocese of Portland, Or., 469 Fed.Appx. 641 (9th Cir. 2012) (not reported).

155 *Bonneau*, 666 F.3d at 577.

156 *Doe 150*, 469 Fed. Appx. at 641.

extended, no delayed discovery rule) statute of limitations under ORS § 12.110 and ORS § 12.160 disability tolling statute applies to the Oregon Tort Claims Act, which governs cases brought against municipalities.[157]

Finally, people sue where there are deep pockets. The Oregon Torts Claims Act protects governments, school districts and other institutions from the application of ORS § 12.117, and thus few cases are brought against them. Few cases can be brought under ORS § 12.117 against insured individuals because insurance does not cover intentional acts of child abuse. And the alternative cause of action, negligence, is much harder to prove than intentional child abuse, and so is less likely to be brought. This may leave few viable defendants. The Catholic Church, for example, has filed bankruptcy to avoid claims.

It is unlikely, given the few cases brought under the liberal Oregon statute, that extending the statute of limitations for survivors of any child abuse will result in a "flood" of cases. And, if there is a genuine "flood" after such extension, it is the legislature's purview to address the problem—not the judiciary's.[158] Finally, the legislature can address the issue in advance by indicating its intent in the statute.

B. Child Abuse is too Hard to Define

"Physical and emotional abuse is too difficult to define to give notice of actionable behavior and assist courts in drawing appropriate lines" is another argument against extending the limitations period for survivors of all child abuse. Courts also used the "too difficult to define argument" in the early sexual harassment cases until the concept was finally accepted and defined. Since courts and legislatures can define sexual harassment, they can define child abuse. As discussed next, courts can define these concepts in many viable ways.

1. Courts Could Adopt the Centers for Disease Control and Prevention (CDC) Uniform Definitions

The CDC considers child maltreatment a public health issue. Child maltreatment causes "physical, behavioral, social, and emotional harm and disability and is a risk factor for a range of other health risk factors that contribute to acute and chronic health problems."[159] Thus, the CDC collects

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[157] *V.T.*, 2015 WL 300270; *Duncan*, 2007 WL 789433.

[158] Stern, *supra* note 101, at 380.

[159] Centers for Disease Control and Prevention, U.S. Department of Health and Human Services, *Child Maltreatment Surveillance: Uniform Definitions for Public Health and Recommended Data Elements, Version 1.0* 4 (2008),

data from state and federal agencies to determine the extent of child maltreatment.[160] Unfortunately, the varied agencies and entities - state agencies, medical facilities and the legal community - that report statistics to the CDC use their own non-uniform definitions. This hampers efforts to identify the extent of the problem and a response to it.[161]

To solve this problem, the CDC gathered experts from universities, state and federal agencies, hospitals and research firms to draft uniform definitions of child maltreatment "to promote consistent terminology and data collection related to child maltreatment."[162] After three years of drafting, reviewing and revising, the National Center for Injury Prevention and Control ("NCIPC"), a part of the CDC, published Child Maltreatment Surveillance: Uniform Definitions for Public Health and Recommended Data Elements, Version 1.0.[163] The report defines child abuse generally. It also provides specific definitions for each individual form of child abuse.

Therefore, the claimed difficult-to-define concepts of psychological and emotional abuse do have specific definitions. For example, the Uniform Definitions defines psychological abuse as "intentional caregiver behavior (i.e. act of commission) that conveys to a child that he/she is worthless, flawed, unloved, unwanted, endangered or valued only in meeting another's needs."[164] It includes "blaming, belittling, degrading, intimidating, terrorizing, isolating, [emphasis in original] restraining, confining, corrupting, exploiting, spurning, or otherwise behaving in a manner that is harmful, potentially harmful, or insensitive to the child's developmental needs, or can potentially damage the child psychologically or emotionally."[165] Finally, the definitions state that psychological abuse can be "chronic and pervasive" over time or "episodic," such as when triggered by an event such as caregiver substance abuse.[166]

The report further defines "terrorizing" and "isolating," which are terms used to define psychological abuse. "Terrorizing" includes:

> caregiver behavior that is life-threatening; makes a child feel unsafe (e.g., situations that are likely to physically hurt, kill, or abandon the child) . . . ; sets unrealistic expectations of the

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https://www.cdc.gov/violenceprevention/pdf/cm_surveillance-a.pdf.

[160] *Id.* at 3.

[161] *Id.*

[162] *Id.* at iv.

[163] *Id.* at 16.

[164] *Id.*

[165] *Id.*

[166] *Id.*

> child with threat of loss, harm, or danger if expectations are not met; and threatens or perpetrates violence against a child or a child's loved ones or objects (including toys, pets, or other possessions). . .For example, placing a child in unpredictable or chaotic circumstances would be considered terrorizing as would be placing a child in a situation reasonably considered dangerous by either the child or another adult.[167]

"Isolating" "occurs when a caregiver forbids, prevents, or minimizes a child's contact with others."[168]

Emotional neglect, another difficult-to-define abuse, is also defined. Emotional neglect results when the caregiver "ignores the child, or denies emotional responsiveness or adequate access to mental health care (e.g. caregiver does not respond to infant cries or older child's attempt to interact.)."[169]

The final difficult-to-define form of child abuse is abuse caused by omission. The report defines this as well. Exposing a child to violent environments and failing to "protect the child from pervasive violence within the home, neighborhood, or community" are all acts of omission that constitute child abuse.[170] Also included is exposing a child to intimate partner violence.[171]

Child abuse is definable. Legislatures can use these definitions to revise limitations statutes. In turn, courts would have specific statutory language to guide them in deciding cases. And potential defendants would know exactly what behavior was actionable.

2. Courts Could Adopt Definitions From States that Allow Child Abuse Survivors the Use of an Extended Statute of Limitations and the Delayed Discovery Rule

Florida and Oregon allow child abuse survivors to use an extended statute of limitations and the delayed discovery rule to bring tort claims for child abuse after reaching adulthood.[172]

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[167] *Id.* (citations omitted).

[168] *Id.*

[169] *Id.* at 17 (citation omitted).

[170] *Id.*

[171] *Id.* at 18.

[172] FLA. STAT. ANN. § 95.11(7) (2010); OR. REV. STAT. § 12.117 (2013); IDAHO CODE ANN. § 6-1704(1) (2010).

Florida allows adult survivors of child abuse to sue for "intentional torts based on abuse."[173] The statute cites to three code sections to define child abuse.[174] First, Florida Statute § 39.01 defines abuse for proceedings pertaining to children. Florida Statute § 415.102 defines abuse for adult protective services. And Florida Statute § 984.03 defines abuse for purposes of juvenile criminal actions. The language is similar in all three. For example, Florida Statute § 39.01 abuse is defined as

> any willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired. Abuse of a child includes acts or omissions. Corporal discipline of a child by a parent or legal custodian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child.[175]

Oregon takes a different approach. It defines child abuse within the extended statute of limitations statute. Child abuse is defined as

> intentional conduct by an adult that results in (A) Any physical injury to a child; or (B) Any mental injury to a child which results in observable and substantial impairment of the child's mental or psychological ability to function caused by cruelty to the child, with due regard to the culture of the child.[176]

Idaho also gives child abuse survivors an extended period to sue for assault, battery and negligence.[177] Unlike Florida and Oregon, the Idaho statute does not define child abuse.

These definitions, or lack thereof, allow child abuse survivors in Florida, Idaho and Oregon to offer facts to qualify for the use of the extended statute of limitations and delayed discovery rule. They also leave the line drawing to judges, whose job it is to do just that.

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[173] FLA. STAT. ANN. § 95.11(7) (2010).
[174] *Id.*
[175] FLA. STAT. ANN. § 39.01(2).
[176] OR. REV. STAT. § 12.117(2) (2013).
[177] IDAHO CODE ANN. § 6-1704(1) (2010).

3. Viable Options for Defining Difficult-to-Define Psychological Abuse and Emotional Neglect Exist

Viable options for defining "difficult-to-define" psychological abuse and emotional neglect, the two forms of child abuse that are most difficult to define, exist. A moment of "losing it" and calling your child a bad person should not be enough to prove emotional abuse. One option is to require plaintiffs demonstrate a persistent pattern of psychological abuse to use the limitations statute. For example, only evidence of repeated name calling, extensive neglect, or a persistent pattern of criticism, contempt, humiliation or neglect would be proof of emotional abuse. Extensive physical abuse should also establish emotional harm.

Another option is to include a list of actionable behavior proven to cause emotional harm within the limitations statute. For example, there is research that indicates witnessing violence against siblings causes emotional harm.[178] Thus, the list might include emotional harm caused by repeatedly witnessing physical abuse or sadistic treatment of siblings. There is also research that demonstrates that witnessing intimate partner violence causes emotional harm.[179] Many states now impose stronger penalties for domestic abuse when children are present.[180] Thus, it is logical to include these actionable behaviors in the list as well.

Finally, legislatures should include in the list repeatedly witnessing physical abuse of the family pet. Research indicates that child abuse and animal cruelty co-occur in violent homes.[181] Since family pets are just as powerless as a child, it is logical, therefore, to deduce that if witnessing repeated violence against a caregiver or sibling causes emotional harm, then

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[178] *See* Martin H. Teicher & Gordana D. Vitaliano, *Witnessing Violence Toward Siblings: An Understudied but Potent Form of Early Adversity*, 6 PLoS ONE e28852 (2011).

[179] *See* Steve Stride, Robert Geffner & Alan Lincoln, *The Physiological and Traumatic Effects of Childhood Exposure to Intimate Partner Violence*, 8 J. EMOT. ABUSE 83 (2008).

[180] When ex-49er Ray MacDonald was arrested for domestic violence against his girlfriend, he was also charged with child endangerment because he assaulted her while she was holding a child. California criminal code contains stronger penalties for intimate partner violence witnessed by children. *See* Henry K. Lee, *Former 49ers Lineman Ray McDonald Arrested; Bears Let Him Go*, S.F. CHRON. (May 25, 2015), http://www.sfgate.com/crime/ article/ Former-49ers-lineman-Ray-McDonald-arrested-in-6285161.php.

[181] *See, e.g.*, Sarah DeGrue & David K. DiLillo, *Is Animal Cruelty a "Red Flag" for Family Violence?: Investigating Co-Occurring Violence Toward Children, Partners, and Pets*, 24 J. INTERPERSONAL VIOLENCE 1036 (2009); Clifton P. Flynn, *Examining the links between animal abuse and human violence*, 55 CRIME LAW SOC. CHANGE 453 (2011); C. A. Simmons & P. Lehmann, *Exploring the Link Between Pet Abuse and Controlling Behaviors in Violent Relationships*, 22 J. INTERPERS. VIOLENCE 1211-1222 (2007).

viewing physical abuse of the family pet also causes emotional harm.

Clearly, viable options for defining the terms exist and are in use. In the past, courts and legislatures argued sexual harassment was "too-difficult-to-define." They both turned away from defining such emotionally charged concepts. But plaintiffs rallied in the face of their cowardice. As a result, legislatures and courts did define actionable sexual harassment behavior.[182] Thus, they can also define child abuse.

C. The Recovered Memory Controversy Will Reoccur

Fear that the "recovered" memory controversy will reoccur is another argument against extending the limitations period for child abuse survivors. "Repressed memory theory" asserts that traumatic childhood experiences are frequently buried in the subconscious.[183] Thus, it states, it is common for survivors to have no memory of abuse until memories are "recovered" in therapy.[184]

Survivors used this theory, among other evidence, in lobbying legislatures to extend the statute of limitations. Specifically, they asked legislatures to codify the delayed discovery rule for use by survivors who "recovered" the memory of the abuse.[185] Legislatures complied.[186] In addition, many of these statutes also extended the limitations period for survivors who always remembered the abuse, but were unable to meet the statute of limitations because they were underage or did not understand the causal connection between the abuse they suffered and their current psychological symptoms.[187]

Subsequently, plaintiffs, who recently "recovered" memories of abuse in therapy, began to use the extended statute of limitations to sue for damages. These cases, "recovered memory" cases (labeled Type II by the courts), were more successful than the always-remembered-the-abuse cases (labeled Type I).[188] This was because courts believed that if a survivor always remembered the abuse, it was reasonable to expect that she ". . .disclose the offense against her, connect her injuries with their cause,

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[182] Vicki Schultz, *Reconceptualizing Sexual Harassment*, YALE L.J. 1683, 1690 (1998).

[183] *See generally* ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY (1994).

[184] *Id.*

[185] *See* Wilson, *supra* note 1.

[186] *Id.* at 147, 154-55.

[187] *Id.* at 149.

[188] *See* Johnson v. Johnson, 701 F. Supp. 1363, 1369 (N.D. Ill. 1988).

and file a suit within the timeframe of the standard statute of limitations."[189] As a result, many more Type II cases were brought than Type I cases.[190] And these cases were successful even though the plaintiff, with the help of a therapist, recently "recovered" the abuse memory in therapy.[191]

After some individuals were wrongly accused of sex abuse, the "recovered" memory and the techniques used for "recovery" came under scrutiny.[192] Thereafter, research revealed that memories could be distorted or implanted by well-meaning professionals using suggestive techniques for "recovering" memory because memory is a reconstructive process.[193] It also established that there is no evidence that traumatic experiences, such as sex abuse, are frequently repressed, only to be recalled decades later.[194] It states that repression can occur, but only in a small number of cases.[195]

This research ended the success of Type II "recovered memory" cases. Now they are the exception rather than the norm.[196] Current cases are of the Type I category, always-remembered-the-abuse cases.[197] Thus, it is highly unlikely that an extension of the statute of limitations and the delayed discovery rule to survivors of any child abuse would cause a resurgence in a largely discredited theory.

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[189] Wilson, *supra* note 1, at 171–91 & 176.

[190] *Id.*

[191] *Id.*

[192] *See id.* at 183. *See also* Elizabeth F. Loftus, *The Repressed Memory Controversy*, 49 AM. PSYCHOL. 443 (1994); Elizabeth F. Loftus, *The Reality of Repressed Memories*, 48 AM. PSYCHOL. 518 (1993).

[193] ELIZABETH LOFTUS & KATHERINE KETCHUM, THE MYTH OF REPRESSED MEMORY (1994).

[194] *Id.* at 214-15, 218-19.

[195] *See* Diana M. Elliott, *Traumatic Events: Prevalence and Delayed Recall in the General Population*, 65 J. CONSULTING & CLINICAL PSYCHOL. 811, 814 (1997) (finding 20% of the child sexual abuse victims surveyed experienced a "history of complete memory loss," with another 22% reporting a "history of partial memory loss"); Shirley Feldman-Summers & Kenneth S. Pope, *The Experience of "Forgetting" Childhood Abuse: A National Survey of Psychologists,* 62 J. CONSULTING & CLINICAL PSYCHOL. 636, 637 (1994) (conducting a survey of psychotherapists which found that 44.4% of victims experienced either partial or total forgetting); Elizabeth F. Loftus et al., *Memories of Childhood Sexual Abuse: Remembering and Repressing*, 18 PSYCHOL. WOMEN Q. 67, 78 (1994) (finding that 19% of the women with child sexual abuse histories in an outpatient clinic for substance abuse reported a period of total amnesia for the abuse).

[196] *See* Wilson, *supra* note 1, at 149.

[197] *Id.*

IV. Why Extension of the Statute of Limitations for Survivors of all Forms of Child Abuse is Necessary

Extension of the limitations period to survivors of all child abuse is necessary. First, society has developed an increased awareness and understanding of the effects of child abuse. Thus, the current extended limitations period, applicable to sex abuse survivors only, is inconsistent with this shift. Second, child abuse impairs survival skills. This results in tremendous societal economic costs if the harm is not addressed. Finally, child abuse causes long-term damage that is often hidden until adulthood. Our current legal structures are inadequate to address it.

A. The Limitations Period Applicable Only to Sex Abuse Survivors is Inconsistent with the Shift in Society's Awareness and Understanding of the Damaging Effects of Childhood Maltreatment

In the last 25 years, society's awareness and understanding of the effects of childhood maltreatment has increased. This began with international recognition and adoption of a child's right to be free of oppression and violence. The shift was strengthened by research that revealed the ineffectiveness of ending child abuse by intervening after it occurs, as well as research that documented the reality and extent of worldwide violence against children. Finally, evidence of the shift is reflected in recent legislation acknowledges that domestic violence committed in a child's presence is child abuse and in public reaction to recent arrests of professional athletes for child abuse and domestic violence committed in the presence of a child.

1. International Recognition that Children Have a Right to be Free of Oppression and Violence Began the Shift toward a New Understanding of the Effects of Child Abuse

International recognition of a child's right to be free of oppression and violence first occurred in 1990. One hundred and forty nations signed the United Nations Convention on the Rights of the Child.[198] This document acknowledges and enforces the rights of children to be free of violence and oppression.[199]

International awareness and discussion has continued since then. In 2008, Stanford Law Professor Michael Wald, a leading authority on legal

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[198] United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

[199] *Id.*

policy toward children, advised international experts that the goal of child protection should be the well-being of the child rather than short-term protection from harm.[200] In 2009, the Committee on the Rights of the Child, the committee that oversees worldwide implementation of the United Nations Treaty on the Rights of the Child, issued a General Comment to the Treaty which called for a worldwide child's rights orientation to child protection.[201]

2. Research Demonstrating the Ineffectiveness of the Reactive Approach to Child Protection and Revealing Worldwide Violence Against Children Contributed to the Shift

Research contributed to the shift as well. Research demonstrates that the reactive nature of child protection is ineffective in ending child abuse.[202] In 2006, The Report of United Nations Secretary General's Study on Violence against Children documented the reality of worldwide violence against children.[203] The report detailed the nature, extent and causes of violence against children. It also proposed recommendations to prevent and respond to it.[204]

3. Evidence of the Shift Can Be Found in Legislation and Public Outcry

The child's rights understanding and adoption can be observed in legislation and public reaction as well. Twenty-three states in the last 20 years have enacted legislation that acknowledges that domestic violence committed in the presence of children is detrimental to a child's mental health and development. Eight states treat such an event as an "aggravating circumstance" for sentencing.[205] Eight states treat it with more severe

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[200] Stuart N. Hart & Danya Glaser, *Psychological maltreatment – Maltreatment of the mind: A catalyst for advancing child protection toward proactive primary prevention and promotion of personal well-being*, 35 CHILD ABUSE NEGL. 758 (2011).

[201] *Id.* at 760. The Comments guide nation members in fulfilling their treaty obligations.

[202] *Id.* at 758-66.

[203] Paolo Sergio Pinheiro, *Report of the Independent Expert for the United Nations Study on Violence Against Children, transmitted by Note of the Secretary-General*, U.N. Doc. A/61/299 (Aug. 29, 2006).

[204] *See id.* at 25-33.

[205] ALASKA STAT. § 12.55.155(c)(18)(C) (2015) (originally enacted 2012); ARIZ. REV. STAT. § 13-702(C), § 13-701(D)(18) (2014) (originally enacted 2012); CAL. PENAL CODE § 1170.76 (2006) (originally enacted 2005); HAW. REV. STAT. § 706-606.4 (2016) (originally enacted 2003); MISS. CODE ANN. § 97-3-7(3), (4) (2016) (originally enacted 2002); MONT. CODE ANN. § 45-5-206(3)(a)(v) (2015) (originally enacted 2001); OHIO REV. CODE § 2929.12(B)(9) (2015) (originally enacted 2014); WASH. REV. CODE § 9.94A.535(3)(h)(ii) (2015) (originally enacted 2007).

penalties.[206] Five states treat it as a separate crime that may be charged separately and in addition to the act.[207] Nevada gives the court the discretion to refer a child who has witnessed a battery that constitutes domestic violence to the child welfare services agency and require the defendant to reimburse the agency for the costs of any services provided.[208] Vermont gives the court discretion when imposing a sentence for domestic assault to consider whether the offense was committed within the presence of a child.[209]

Although New Jersey has no legislation governing domestic violence committed in the presence of a child, the State recognizes the detrimental effects of violence witnessed by children. Assault of another at a school or community sponsored youth sports event in the presence of a child under 16 years of age is assault in the fourth degree and subject to harsher penalties than simple assault.[210]

Finally, the public sphere has become invested in protecting children's well-being when confronted by abuse. This was illustrated by the extensive media coverage and commentary after Minnesota Vikings Adrian Peterson was arrested for felony child abuse for beating his 4-year-old son with a tree branch in September 2014[211] and after Chicago Bear Ray

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[206] ARK. CODE ANN. § 5-4-702 (2015) (originally enacted 2001); FLA. STAT. § 921.0024 (2016) (originally enacted 2000); IDAHO CODE ANN. § 18-918(4) (2016) (originally enacted 2009); 720 ILL. COMP. STAT. 5/12-3.2 (2016) (originally enacted 2001); IND. CODE ANN. § 35-42-2-1.3(b)(2) (2015) (originally enacted 2006); LA. REV. STAT. ANN. § 14:37.7(D) (2016) (originally enacted 2012); MD. CODE ANN., CRIM. LAW § 3-601.1 (2016); OR. REV. STAT. § 163.160(3)(a) (2016) (originally enacted 2010).

[207] DEL. CODE ANN. tit. 11, § 1102(a)(4) (2016) (originally enacted 1998); GA. CODE ANN. § 16-5-70(d) (2016) (originally enacted 2004); N.C. GEN. STAT. § 14-33(d) (2016) (originally enacted 2005); OKLA. STAT. tit. 21, § 644(G)-(H) (2016) (originally enacted 1999); UTAH CODE ANN. § 76-5-109.1 (2016) (originally enacted 1997).

[208] NEV. REV. STAT. § 200.485(7) (2015) (originally enacted 2007).

[209] VT. STAT. ANN. tit. 13, § 1047 (2016) (originally enacted 2007).

[210] N.J. STAT. ANN. § 2C:12-1(f) states in pertinent part that "[a] person who commits a simple assault as defined in paragraph (1), (2) or (3) of subsection a. of this section in the presence of a child under 16 years of age at a school or community sponsored youth sports event is guilty of a crime of the fourth degree. The defendant shall be strictly liable upon proof that the offense occurred, in fact, in the presence of a child under 16 years of age. It shall not be a defense that the defendant did not know that the child was present or reasonably believed that the child was 16 years of age or older."

[211] *See, e.g.*, Steve Eder & Pat Borzi, *N.F.L. Rocked Again as Adrian Peterson Faces a Child Abuse Charge*, N.Y. TIMES (Sept. 13, 2014), http://www.nytimes.com/2014/09/13/sports /football/adrian-peterson-indicted-on-child-injury-charge.html?_r=0 (last visited June 10, 2015). "Peterson beat his 4-year-old son with a tree branch . . . causing cuts and bruises in several areas of the boy's body, including his

MacDonald was arrested for misdemeanor domestic violence and child endangerment for assaulting his girlfriend while she was holding an infant in August 2015.[212]

Given the above, statutes of limitations allowing sexual abuse survivors extended time to bring claims against their perpetrators and not allowing the same for survivors of other forms of child abuse do not reflect the legal and societal shift that has occurred and is still ongoing. They are inconsistent with society's developed awareness and understanding of the effects of child abuse and should be changed to reflect this shift.[213]

B. Child Abuse Harm Causes Significant Detrimental Economic Consequences to the Individual and Society

Child abuse harm causes significant detrimental economic consequences to the individual and society. Psychological issues impede education completion and diminish job opportunities. They can also make it difficult for survivors to stay employed. Society also bears the cost of child abuse harm. These costs are likely much higher than estimates since they are based on documented reports only. Even so, conservative estimates of these costs rival the costs of other major societal health problems.

1. Child Abuse Survivors Receive Less Education, Have Fewer Job Opportunities and Often Have Difficulty Staying Employed

Child abuse survivors often suffer throughout their lives from mental and psychological health problems. These issues interfere with learning.[214] They impair survival skills.[215] Some drop out of high school,[216]

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back, ankles and legs. Peterson told the police that the punishment was a 'whooping' administered after the boy pushed another of Peterson's children." *Id.*

[212] *See, e.g.*, Ken Belson, *Bears Release Ex-49er Ray McDonald After Arrest in California*, N.Y.TIMES (May 25, 2015), http://www.nytimes.com/2015/05/26/sports/football/bears-release-ray-mcdonald-after-arrest-in-california.html.

[213] *Id.*

[214] Anda, *supra* note 6, at 30.

[215] J. P. Shonkoff et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 PEDIATRICS e232–e246 (2012); Xiangming Fang et al., *The economic burden of child maltreatment in the United States and implications for prevention*, 36 CHILD ABUSE NEGL. 156, 158 (2012); Hart & Glaser, *supra* note 200, at 758-66.

[216] Ruth Gilbert et al., *Burden and consequences of child maltreatment in high-income countries*, 373 THE LANCET 68, 74 (2009); J. Currie & C. Spatz Widom, *Long-Term Consequences of Child Abuse and Nelect on Adult Economic Well-Being*, 15 CHILD MALTREAT. 111, 114 (2010).

while others finish, but never go to college.[217] With less education, survivors have fewer job opportunities than they would otherwise.[218] Thus, many of the jobs available to them are low paying.[219] In 2010, survivors of child abuse earned $5,890 less per year on average than individuals in a control group of non-abused individuals.[220] Survivors also often have trouble staying employed.[221] Survivors with psychological issues, such as post-traumatic stress syndrome, can overreact to stimulus.[222] This can result in inappropriate behavior leading to termination.[223]

2. Research Shows, and Underestimates, the Average Lifetime Cost of Child Abuse

The costs of child abuse include childhood healthcare costs, adult medical costs, productivity losses, child welfare costs, criminal justice costs and special education costs.[224] To calculate the total costs incurred between the ages 6 and 64, researchers studied 579,000 individuals for whom child protective services had intervened.[225] They found that the average lifetime cost of non-fatal child abuse, in 2010 dollars, was $210,012 per person.[226]

This figure likely underestimates the actual lifetime costs.[227] Cases reported to Child Protective Services likely represent only a fraction of the total incidents of child abuse that occur each year.[228] Thus, since the research used only substantiated cases reported to Child Protective Services, it is likely that the correct figure is substantially higher.

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217 *Id.*

218 Currie et al., *supra* note 216, at 120; David S. Zielinski, *Long-Term Socioeconomic Impact of Child Abuse and Neglect: Implications for Public Policy. Policy Matters.*, CENT. CHILD FAM. POLICY DUKE UNIV. NJ1 (2005), http://eric.ed.gov/?id=ED492018 (last visited Jun 17, 2015); David S. Zielinski, *Child maltreatment and adult socioeconomic well-being*, 33 CHILD ABUSE NEGL. 666, 674 (2009) [hereinafter *Child Maltreatment*].

219 Currie et al., *supra* note 216, at 117; Zielinski, *supra* note 218, at 3.

220 Fang et al., *supra* note 215, at 159.

221 Currie et al., *supra* note 216, at 116; Zielinski, *supra* note 218, at 2-3; Gilbert, *supra* note 216, at 74.

222 Gilbert et al., *supra* note 216, at 75.

223 Anda, *supra* note 99; Anda et al., *supra* note 6, at 38.

224 Fang et al., *supra* note 215, at 159–60.

225 *Id.* at 158.

226 *Id.* at 162.

227 *Id.* at 162.

228 *Id.*

3. The Cost of Child Abuse Harm is Comparable to the Cost of Other Serious Social Health Problems

It is helpful to compare the cost society pays for child abuse to the cost of other serious social health problems to understand its impact. Below is a chart that compares the average lifetime cost of child abuse with the average lifetime cost of stroke and type II diabetes per person in 2010 dollars.

Table 6. Average Lifetime Cost of Per Person of Stroke, Child Abuse and Type II Diabetes in 2010 Dollars Compared

Major Societal Health Problem	Lifetime Cost Per Person in 2010 Dollars
Stroke	$159,846
Child Abuse	$210,012
Type II Diabetes	$181,000 to $253,000

The average lifetime cost of child abuse is $210,012 per person.[229] The average lifetime cost of a stroke survivor is $150,846.[230] Thus, child abuse costs society $59,166 or 39% more per person than stroke. The average lifetime cost of type II diabetes is between $181,000 and $253,000 per person.[231] Thus, child abuse costs society between $29,012 more and $42,988 less per person than type II diabetes. Thus, child abuse harm costs surpass the lifetime costs of other serious societal health problems.[232]

Table 7. Additional average lifetime costs per person in 2010 dollars of child abuse than stroke and type II diabetes

	Average Lifetime Cost Per Person	Additional Cost Per Person for Child Abuse
Stroke	$150,846	$59,166
Type II Diabetes	$181,000	$29,012

The untreated long-term effects of child abuse continue into adulthood. The resulting psychological harm inhibits the ability to self-

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229 *Id.* at 162.

230 *Id.*

231 *Id.*

232 *Id.*

regulate emotions and behavior.[233] Without this ability, staying employed can be difficult. Survivors of child abuse are twice as likely as their non-abused peers to fall below the federal poverty line as adults.[234] They are twice as likely as their non-abused peers to have their family income fall into the lowest quartile of income distribution.[235] They also have a higher risk of poverty and unemployment because they have less education.[236]

Society pays too. Survivors are more likely to need welfare, disability and unemployment benefits. Some find themselves in prison. Extending the statute of limitations to survivors of all child abuse would allow some to seek redress and improve their quality of life.

C. Current Legal Structures are Inadequate to Address the Harm

The current legal structures are inadequate to address the societal and individual harm child abuse causes. Child Protective Services "protects" only a small number of children abused.[237] Its reactive approach, intervening only after abuse has occurred, does not prevent the damage from occurring.[238]

The current extended limitations legislation sends the message that survivors of non-sexual forms of child abuse have not suffered enough to be worthy of the rights afforded survivors of childhood sex abuse. It also encourages those seeking recovery for co-occurring abuse to describe it all as "just sex abuse" and allows sex abuse survivors to recover for non-sexual abuse harm otherwise not actionable. In enacting it, legislatures avoided the responsibility of redressing the harm caused by co-occurring forms of abuse.

Intentional tort and negligence are also inadequate. These theories require that harm caused by co-occurring forms of child abuse be apportioned. But, since child abuse forms co-occur, segregating the harm caused among these theories is not possible.[239] Doing so may result in under or over recovery.

Finally, the shortened limitations period applicable to non-sexual abuse does not allow survivors enough time to discover the damage and

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233 Shonkoff et al., *supra* note 215.

234 Zielinski, *supra* note 218, at 674.

235 *Id.*

236 *Id.* at 675.

237 Hart & Glaser, *supra* note 200, at 760.

238 *Id.* at 759, 762.

239 Dong et al., *supra* note 43, at 636; Edwards, *supra* note 92, at 1453-54.

seek redress. Child abuse damages the developing brain of the child. The effects of this damage appear later in life in increased risk of unhealthy behavior, re-victimization, violence and premature mortality. Counseling and educational support can diminish the long-term effects of this damage,[240] but without resources many will not seek treatment staying in a cycle of self-destruction and financial insecurity.[241] An extended statute of limitations would allow these survivors time to realize the damage, seek redress and get treatment.

1. The Reactive Approach to Child Abuse is Ineffective

The reactive approach to child abuse, intervention after it occurs, is ineffective.[242] First, Child Protective Services intervene to protect a child after child abuse has occurred.[243] Second, they are restricted by a narrow definition of child abuse.[244] This allows them to intervene only in extreme cases. Consequently, they address only 25% of the child abuse that occurs yearly.[245] The discrepancy between Child Protective Services interventions reported and retrospective reporting studies demonstrates this.[246]

2. Legislators Are Unwilling to Invest in Prevention

Prevention is the best way to end child abuse.[247] Prevention entails spending money for years before seeing the benefits, requiring foresight and delayed gratification.[248] Prevention legislation does not help legislators get elected since it may be years until they can point to results. Until the legislature makes a commitment to prevention legislation, adult abuse survivors will continue to bear the costs of living with the harm caused by child abuse.[249]

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[240] *MMW, supra* note 6, at 1613; *see* Dube et al., *supra* note 6, at 729. "Psychological treatment that can mitigate the progression of ACE-related health problems, such as trauma-focused cognitive-behavioral therapy, are effective and should be widely disseminated."

[241] Zielinski, *supra* note 218, at 674.

[242] Hart & Glaser, *supra* note 200, at 759.

[243] *Id.* at 759.

[244] *Id.* at 764.

[245] *Id.*

[246] *MMW, supra* note 6, at 1613; Dube et al., *supra* note 6, at 737.

[247] *See MMW, supra* note 6, at 1613.

[248] World Health Organization, *Preventing child maltreatment: a guide to taking action and generating evidence* (2006).

[249] *Id.* at 23; Gilbert et al., *supra* note 216, at 77.

3. Legislators Have Singled Out Sex Abuse as Worthy of Redress and Non-Sexual Abuse as Not "Bad Enough" to Warrant the Same Treatment Avoiding the Responsibility of Redressing the Harm Caused by Co-Occurring Forms of Abuse

Legislatures and judges have singled out sex abuse as intolerable, and thus have granted its survivors an extended statute of limitations. This sex/non-sex split is not new in legal jurisprudence. Professor Vicki Schultz noted that "[s]ingling out sexual advances as the essence of workplace harassment has allowed courts to feel enlightened about protecting women from sexual violation, while at the same time relieving judges of the responsibility to redress other, broader gender-based problems in the workplace."[250]

The same is true in this situation. Legislators and judges, in ignoring the rights of survivors of non-sexual abuse, demonstrate their belief that other forms of abuse are "just not that bad" or not "as bad" as sex abuse. Current legislation sends the message that survivors of non-sexual forms of child abuse have not suffered enough to be worthy of the rights afforded survivors of childhood sex abuse. In enacting it, legislatures avoided the responsibility of redressing the harm caused by co-occurring forms of abuse.

4. The Extended Limitations Period for Sex Abuse Survivors Encourages Individuals to Describe All Abuse Suffered as "Sex Abuse" and Allows Sex Abuse Survivors to Recover for Non-Sex Abuse Harm that is Otherwise Not Actionable

As stated above, child abuse survivors often experience more than one form of abuse. For example, secondary emotional abuse often co-occurs with sex abuse.[251] A sexually abused child feels inferior, vulnerable and undeserving of good treatment.[252] Other forms of child abuse co-occur with sex abuse as well.[253] Thus, most "sex abuse" survivors experienced many forms of child abuse. But the extended limitations period is only for sex abuse survivors. Thus, it encourages those seeking recovery for co-occurring abuse to describe it all as "just sex abuse."

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[250] Schultz, *supra* note 182, at 1690.

[251] *See generally* Dong et al., *supra* note 43; Edwards et al., *supra* note 92; Anda, *supra* note 99, at 8; Hart, *supra* note 200, at 760-62.

[252] *See generally* Dong et al., *supra* note 43; Edwards et al., *supra* note 92; Anda, *supra* note 99, at 8; Hart & Glaser, *supra* note 200, at 760-62.

[253] *See generally* Dong et al., *supra* note 43; Edwards et al., *supra* note 92; Anda, *supra* note 99, at 8; Hart & Glaser, *supra* note 200, at 760-62.

Thus, the "sex abuse" survivor likely experienced many forms of abuse. And she can recover damages for those other forms because she suffered sex abuse. Yet, had she not, she could not recover for the co-occurring forms of child abuse she suffered. For example, a sex abuse survivor may recover for the harm caused by the sex abuse, while also being compensated for secondary emotional abuse, physical abuse, neglect, or direct emotional abuse she experienced. Thus, sex abuse survivors are recovering for harm caused by non-sexual forms of abuse otherwise not recoverable.

5. Harm from Co-Occurring Forms of Child Abuse is Not Divisible Among Tort Claims and Thus May Result in Under or Over Recovery

Previous studies on harm caused by individual types of child abuse attributed the harm discovered to that one form of abuse.[254] In reality, however, the harm discovered was most likely caused by co-occurring types of abuse.[255] This is because the ACE study proved that the long-term effects of child abuse are likely due to co-occurring forms of abuse.[256] Thus, previous studies of individual child abuse forms are now considered inaccurate[257] and illogical.[258]

Thus, co-occurring forms of child abuse cause harm that cannot be segregated between intentional tort and negligence theories. For example, a survivor of sex abuse and extreme neglect may sue for battery for the former and negligence for the latter. The jury must then segregate the sex abuse harm from the neglect harm to award damages. The ACE study proved there was no accurate way to do this. Furthermore, doing so was illogical. Thus, dividing harm may result in under or over recovery because it does not account for the co-occurrence of abuse.

A cause of action for child abuse would account for the co-occurrence of child abuse and its adverse effects. It would end the need for sex abuse survivors to characterize all the abuse suffered as sex abuse. It would allow survivors of all child abuse forms to recover. It would end segregation of harm caused among causes of action and the resulting under or over recovery. Finally, it would reflect a more accurate understanding of child abuse and the harm it causes.

It appears that such a cause of action might be possible in the future.

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254 Dong et al., *supra* note 43, at 772; Edwards et al., *supra* note 92, at 1459.

255 Dong et al., *supra* note 43, at 772.

256 *Id.*

257 *Id.*; Felitti et al., *supra* note 41.

258 Dong et al., *supra* note 43, at 772; Edwards et al., *supra* note 92; Anda, *supra* note 99.

Legislatures and courts seem to be evolving toward a broader understanding of workplace harassment. Healthy workplace legislation protects workers from abuse in the work place.[259] This includes verbal abuse, threatening, humiliating or intimidating conduct and work interference.[260] Healthy workplace legislation has been introduced in 29 states,[261] including Tennessee and California.[262] The California law states that "abusive conduct" "may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance."[263]

The trend toward protecting adults from abuse at work is laudable. Yet, an adult abused at work is not as vulnerable as a child abused at home. Additionally, unlike a child, an adult has options to change her situation. Child abuse, because of the vulnerability and powerlessness of the child, causes lifetime damage. If the law acknowledges that adults need a cause of action for protection, surely it is time to acknowledge the same for child abuse survivors. Until then, an extension of the limitations period to survivors of all forms of child abuse to sue using tort causes of action must suffice.

6. The Shortened Limitations Period Applicable to Non-Sexual Abuse Does Not Allow Survivors Enough Time to Seek Redress for the Long-term Deleterious Effects of Child Abuse that Appear Later in Life

Child abuse in all forms causes permanent alterations in the brain's stress response systems.[264] Studies show child abuse reduces the corpus

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[259] *See States*, Healthy Workplace Bill (2016), http://healthyworkplacebill.org/states/; *see also* David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475 (2004).

[260] *Id.*

[261] *Id.*

[262] *See* TENN. CODE. ANN. § 50-1-503 (2015); *see also* CAL. GOV. CODE ANN. §§ 12950-12950.1.

[263] CAL. GOV. CODE ANN. § 12950.1(2).

[264] *See* Anda et al., *supra* note 43; Martin H Teicher et al., *Developmental neurobiology of childhood stress and trauma*, 25 PSYCHIATR. CLIN. NORTH AM. 397–426 (2002); Christine Heim & Charles B. Nemeroff, *The role of childhood trauma in the neurobiology of mood and anxiety disorders: preclinical and clinical studies*, 49 BIOL. PSYCHIATRY 1023–1039 (2001); Rena L. Repetti, Shelley E. Taylor & Teresa E. Seeman, *Risky families: Family social environments and the mental and physical health of offspring.*, 128 PSYCHOL. BULL. 330–366 (2002); Michael D. De Bellis & Lisa A. Thomas, *Biologic findings of post-traumatic stress disorder and child maltreatment*, 5 CURR. PSYCHIATRY REP. 108–117 (2003); J. Douglas Bremner & Eric Vermetten, *Stress and development:*

callosum size,[265] arrests the development of the prefrontal cortex (responsible for moderating social behavior and decision making),[266] and damages the hippocampus (which regulates stress and anxiety).[267] These alterations increase the risk of unhealthy behaviors, re-victimization, violence and premature mortality.[268] The damage to the brain in childhood impairs the survivor's ability to function as an adult.[269] Thus, long-term effects of child abuse appear well after their cause.[270]

Counseling and educational support can diminish the long-term effects of this damage.[271] Yet, the law, with limited exceptions, only allows sex abuse survivors to pursue recovery to pay for such support.[272] Survivors of all forms of child abuse need an extended limitations period to realize the damage done and seek redress. Without this recovery, survivors of non-sexual child abuse must use their own economic resources to get the support they need. Many will not seek treatment because of limited funds.[273] As a result, they will remain in a cycle of self-destructive behavior and financial insecurity.[274] Extending the limitations period for survivors of all child abuse would allow survivors the time they need to discover the damage, seek redress and get the treatment they need.

Conclusion

Child abuse impairs the health and socioeconomic well-being of its survivors. It also detrimentally affects public resources, such as unemployment and welfare benefits, workforce production, the health care system, and the global economy.

Only four states allow adult survivors of non-sexual child abuse an extended limitations period to seek redress. This disparity is partly due to the pressure adult sexual abuse survivors applied to legislatures. It is also

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Behavioral and biological consequences, 13 DEV. PSYCHOPATHOL. 473–489 (2001); Shonkoff et al., *supra* note 215, at 246.

265 Anda et al., *supra* note 99, at 3.

266 *Id.*

267 *Id.* at 8.

268 Repetti et al., *supra* note 264, at 357.

269 *See id.*

270 *Id.*

271 *MMW*, *supra* note 6, at 1613. "Psychological treatment that can mitigate the progression of ACE-related health problems, such as trauma-focused cognitive-behavioral therapy, are effective and should be widely disseminated." *Id.*

272 *See* Anda, *supra* note 93.

273 *Id.*

274 *Id.*

due to society's belief that sexual abuse causes more harm and is more prevalent than other forms of child abuse.

These beliefs reflect an ignorance of the nature of child abuse and the damage it causes. The ACE study demonstrated that sex abuse is not the most prevalent form of abuse and that different forms of child abuse co-occur. This makes it impossible to attribute all the harm discovered to one particular form of child abuse.

Extending the limitations period for all child abuse claims will not strain the courts nor will it re-ignite the recovered memory controversy. Oregon extended the limitations period for survivors of non-sexual forms of child abuse 26 years ago. No flood resulted. Concerns about recovered memory are also unwarranted. In fact, memory research has made such cases the exception rather than the norm.

Worries about defining child abuse are also unfounded. Legislatures and courts have grappled with defining difficult concepts before and thus are capable of defining child abuse. There are ample definitions promulgated by the CDC that can be used to craft clear legislation.

Current legal structures are inadequate to address the harm. Child Protective Services intervenes only *after* extreme abuse occurs. The current legislation also inadvertently allows sex abuse survivors to recover for the secondary emotional abuse and other abuse that co-occurs with sexual abuse. Thus, until society is willing to provide survivors with the support needed to fully participate in society, they should at least be allowed to pursue recompense through the legal system. Allowing survivors of non-sexual child abuse the same limitation rights currently awarded sexual abuse survivors will rectify an enormous unfairness in the law and convey the message that all forms of child abuse are equally unacceptable.