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THE INHERENT LIMITATIONS OF AFTER-THE-FACT STATUTES DEALING WITH THE EMOTIONAL AND SEXUAL MALTREATMENT OF CHILDREN

Judith G. McMullen*

I. INTRODUCTION

There are many forms of adult behavior that may seriously inhibit or prevent a child from reaching full human potential. Essentially, it is this kind of behavior to which we apply the terms "child abuse" and "child neglect." In its most blatant and recognizable form, child maltreatment may consist of physical beatings or failure to provide basic necessities such as food, clothing, or medicine. Child development experts and other professionals, however, have identified other less obvious forms of child maltreatment that cause at least as much long-term damage to the child as does a brutal physical battering. For example, failure to provide a basic level of nurturing through physical contact and emotional support can cause "failure to thrive syndrome" or even death to both infants and very young

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1. This Article employs the term "maltreatment," which includes both child abuse and child neglect.
such deprivation may also cause severe problems in older children ranging from depression or suicidal tendencies to aggressive and violent behavior, learning problems, and an inability to form normal relationships with others. Children that are subjected to sexually inappropriate behavior may also suffer severe consequences. Moreover, adult maltreatment of children is much more likely to occur in already stressful circumstances such as those experienced by families struggling with poverty, divorce, or substance abuse. All of these difficult situations are growing problems in our society, and are frequently accompanied by child maltreatment.

Recent research about the various forms of child maltreatment has been accompanied by new statutes addressing these problems. Some state statutes specifically address the problems of neglect, as well as emotional, physical, and sexual abuse. Like most laws dealing with maltreatment of children in the United States, however, these statutes essentially authorize after-the-fact interventions. If specific adult-inflicted damage to the child can be demonstrated, the law will intervene. Unfortunately, in many cases remedies are available only after irreparable harm has been done.

There are different ways to characterize what the law can accomplish in a given context, and different laws may be suited to achieving different goals. Laws may punish certain behaviors, which along with societal pressure, may deter certain behaviors. Punishment also has a retributive goal: laws may attempt to prevent some behaviors by eliminating offensive aspects of the behavior.

In the case of child maltreatment statutes, there are likely a number of goals. The types of statutes discussed in this Article are largely after-the-fact intervention laws impacting cases in which maltreatment has already occurred, and they potentially achieve some laudable goals. These statutes tend to set out minimum standards of parenting, thereby providing an educa-

2. See infra text accompanying note 150.
3. See infra text accompanying notes 85-106.
4. See infra text accompanying notes 74-84.
5. See, e.g., SANFORD KATZ, WHEN PARENTS FAIL 60-68 (1971). Minnesota and Idaho are unique because they have statutes specifically addressing emotional neglect of the child and the psychological health of the parent. Part II of this Article illustrates that many state statutes now address issues of psychological well-being. See infra text accompanying notes 18-58.
6. See, e.g., MINN. STAT. ANN. § 626.556(1)-(2) (West Supp. 1993) (mandating reporting of physical abuse, sexual abuse, or neglect of minors in certain circumstances); OHIO REV. CODE § 2151.031 (Page 1990) (defining “abused child” to include a child who is a victim of “sexual activity” or who “exhibits evidence of physical or mental injury or death, inflicted by other than accidental means”).
7. For example, the Minnesota statute cited at supra note 6 is a reporting statute, which necessarily implies that something has happened that must be reported. See MINN. STAT. ANN. § 626.556(1)-(2) (West Supp. 1993). Likewise, for a child to exhibit evidence of physical or mental injury or death under the Ohio statute cited, the injuring act must have already occurred. See OHIO REV. CODE § 2151.031 (Page 1990).
tional function and an influential statement of acceptable social norms.\textsuperscript{8} These statutes also serve a retributive as well as (hopefully) deterrent purpose by punishing persons that maltreat children.\textsuperscript{9} Finally, the statutes attempt to protect children from the harm caused by specific forms of maltreatment.\textsuperscript{10}

This Article argues that the after-the-fact laws dealing with the problems of emotional and sexual child maltreatment are inherently inadequate to achieve the goal of protecting children from maltreatment. These retroactive statutes also have drawbacks in cases of physical abuse. The Article focuses, however, on emotional and sexual maltreatment, because certain dynamics evident in those types of maltreatment make these laws even more problematic than when applied in circumstances of physical abuse. Even if such statutes could be applied and enforced perfectly by adequately staffed and funded social service organizations and police departments, there are at least three theoretical reasons a significant percentage of emotionally and sexually maltreated children cannot be protected.

First, the nature of after-the-fact laws dictates there will be no meaningful intervention until significant harm has already been inflicted on the child.\textsuperscript{11} Depression, anxiety, and "acting out" are behaviors that may indicate mental harm to a child,\textsuperscript{12} and are likely to develop gradually in response to a pattern of long-term destructive adult treatment.\textsuperscript{13} Once established, these maladaptive behavior patterns may be difficult to reverse.\textsuperscript{14} Yet, if this were the only problem with these statutes, the law at least could help to prevent subsequent abuse to victims for the balance of their childhood years.

The second problem with after-the-fact laws is that in many cases of emotional and sexual abuse, proof of harm or other indicators of abuse may not be apparent until the victim has reached adolescence or adulthood.\textsuperscript{15} This

\begin{itemize}
\item \textsuperscript{8} See infra text accompanying notes 18-58.
\item \textsuperscript{9} See infra text accompanying notes 18-58.
\item \textsuperscript{10} See infra text accompanying notes 18-58.
\item \textsuperscript{11} This is also true in cases of physical maltreatment, but is mitigated by the fact that the ascertainable injury such as a burn mark or broken bone appears immediately after the abusive act.
\item \textsuperscript{12} See, e.g., WIS. STAT. § 948.01(2) (1991). "Mental harm' means substantial harm to a child's psychological or intellectual functioning which may be evidenced by a substantial degree of certain characteristics of the child including, but not limited to, anxiety, depression, withdrawal or outward aggressive behavior." Id. (emphasis added).
\item \textsuperscript{13} See infra text accompanying notes 85-106.
\item \textsuperscript{14} Cf. BEVERLY ENGEL, THE RIGHT TO INNOCENCE 10-16 (1989). Many of the long-term symptoms associated with child sexual abuse, such as eating disorders, substance abuse, flashbacks, or chronic depression, are by their nature ongoing behaviors that are difficult to treat. See id.
\item \textsuperscript{15} Events that typically trigger the recovery of repressed memories of childhood sexual abuse include puberty, adult sexual relations, and the death of the perpetrator. See generally ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE 70-83 (1988).
\end{itemize}
is due to the nature of such abuse, as well as the psychological defenses characteristically employed by children in order to survive. In the case of emotional maltreatment, for example, the sort of demonstrable harm contemplated by some statutes may not become apparent until long after the damaging acts. In addition, sexual abuse statutes do not require proof of emotional harm, but because the clues that such abuse is occurring are behavioral rather than physical, there is the same time lag between the maltreatment and detection. In other words, the damage has been long done and reinforced before the symptoms may become obvious. State intervention at this point may satisfy a desire for retribution, but would not save the victim from harm.

The third problem with after-the-fact statutes is that it is even more difficult to delineate and recognize behaviors constituting emotional or sexual abuse than those constituting physical abuse. Burning, beating, or shaking are dramatic actions leaving characteristic marks, such as bruises, scars, and broken bones. In contrast, acts of emotional or sexual maltreatment may be covert; the origins of the depression, aggression, and other behaviors that may result are difficult to identify in some settings because they could be the result of other causes.

After-the-fact laws have valid uses, but more laws of this type will not effectively protect "at risk" children. This Article uses current social science research in the area of child maltreatment to illustrate the limitations of these ex post laws. It concludes that the law must shift its focus, perhaps to laws that can provide a structure for preventing child maltreatment. Only by acknowledging where our current laws fail can we begin to seek more effective means of addressing the problem of child maltreatment.

II. STATUTES DEALING WITH CHILD MALTREATMENT

In order to evaluate the claim that many of the current statutory approaches to child maltreatment are fundamentally inadequate, it is first necessary to briefly examine the nature of those statutes.

There are three federal statutes directly addressing the problems of child maltreatment: the Indian Child Protection and Family Violence Prevention Act, the Child Abuse Prevention and Treatment and Adoption

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16. See infra text accompanying notes 74-106.
17. Some effects associated with child sexual abuse, such as sleeping disturbances or sexual precocity, may occur relatively soon after the abuse. See LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE 169-70 (1989). Other effects such as substance abuse, character disorders, eating disorders, or sexual dysfunction, however, are likely to make a delayed appearance in adolescence or adulthood. Id.
Reform Act of 1978, and the Victims of Child Abuse Act of 1990. The first deals with the particular problems facing Native American children. The other two deal with child maltreatment generally, focusing on funding for research and enforcement, providing uniform definitions and standards, and encouraging prevention and education. Actual interventions into individual families, however, are undertaken pursuant to state laws, and it is these laws that are the primary focus of this Article.

There are two types of state legislative approaches to the problem of child maltreatment. Criminal statutes generally focus on punishment of the perpetrator. Child protective services statutes, on the other hand, seek to remove the child from the inadequate environment and provide treatment for the parents, with the goal of eventual reunification wherever possible. These statutes may co-exist in the same states, and represent the tension between the desire to punish people that mistreat children, and the desire to offer nonpunitive interventions to protect the children of families in trouble. Among the many criticisms leveled against the protective services approach, perhaps the most significant is that the professed “nonpunitive” character of the process is illusory, given the fact that most adults will probably perceive state intervention as punitive.

Much of the current approach to legal intervention in cases of child abuse and neglect originates with C. Henry Kempe’s 1962 work, which identified the “battered child syndrome.” The battered child syndrome is a
pattern of physical injuries of a type unlikely to be accidental, and which, upon diagnostic evaluation, can be demonstrated to have occurred over a continuing period of time. 28 Kempe’s work caused new attention to be focused on the problem of child abuse, and most states now have more comprehensive statutes addressing child maltreatment. 29 Before Kempe’s work, however, most state statutes were designed to curb only severe physical abuse causing loss or endangerment of life or permanent and serious physical injury. 30 Even in such severe cases, intervention was often somewhat sporadic. 31

Gradually, researchers became aware of severe psychological dangers posed by physical abuse and neglect, and further research revealed a wide range of behaviors that could be equally damaging to a developing child. 32 The legislative response to this increasing psychological knowledge was a plethora of laws specifically attacking emotional and sexual maltreatment as well as physical maltreatment. 33

The statutes addressing emotional maltreatment fall into three categories. The first type uses language that chiefly describes physical maltreatment, and does not address psychological maltreatment specifically. For example, the Illinois statute provides:

> It shall be unlawful for any person having the care or custody of any child, wilfully to cause or permit the life of such child to be endangered, or the health of such child to be injured, or wilfully cause or permit such child to be placed in such a situation that its life or health may be endangered. 34

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28. Id. at 90.
29. See infra text accompanying notes 39-60.
30. See, e.g., ILL. ANN. STAT. ch. 23, para. 2053b (Smith-Hurd 1988).
32. See generally JAMES GARBARINO & GWEN GILLIAM, UNDERSTANDING ABUSIVE FAMILIES (1980).
33. Actually, laws that addressed mental harm to children can be seen as both increasing and decreasing intervention in such cases, depending on how these statutes are interpreted. Requiring proof of actual harm in order to justify state intervention meant that vague or externally observable parental behavior, such as lack of moral supervision, would no longer justify intervention. See Judith Areen, Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases, 63 GEO. L.J. 887, 911 (1975).
34. ILL. ANN. STAT. ch. 23, para. 2354 (Smith-Hurd 1988). New York offers another example of this type of statute. Section 1012 of the New York Family Court Act states: "Abused child" means a child less than (18) years of age whose parent or other person legally responsible for his care
(i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health, or protracted loss or impairment of the function of any bodily organ, or
(ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or
Although the term “health” could theoretically include mental as well as physical health, the term has been construed quite literally under this statute to mean only physical well-being. Additionally, “merely” causing pain to a child has been found to be insufficient to constitute a violation.

The second type of statute specifically outlaws emotional maltreatment as well as physical abuse, but offers no statutory standard for ascertaining when emotional maltreatment is present. Such statutes rely instead on vague and subjective terms like “mental injury” or “harm to mental health.” For instance, the Minnesota statute states: “A parent, legal guardian, or caretaker who endangers the child’s person or health by intentionally causing or permitting a child to be placed in a situation likely to substantially harm the child’s physical or mental health or cause the child’s death is guilty of

protracted disfigurement, or protracted impairment of physical or emotional health, or
protracted loss or impairment of the function of any bodily organ, or
(iii) commit or allows to be committed, a sex offense against such child, as defined
in the penal law ....

N.Y. FAM. CT. ACT § 1012(e) (McKinney 1984) (emphasis added). The statute goes on to give a specific definition of “impairment of emotional health”:

“Impairment of emotional health” and “impairment of mental or emotional condition” includes a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including incorrigibility, ungovernability or habitual truancy; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.

Id. § 1012(h). Although this statute reveals a rather sophisticated awareness of behaviors that may indicate impaired emotional health, the language of § 1012(e) seems to limit intervention for emotional impairment to those cases where the impairment is a direct result of inflicted physical injury or neglect.

Cf. People v. Vandiver, 283 N.E.2d 681 (Ill. 1971). In finding that the Illinois statute was not unconstitutionally vague, the court discussed the defendant’s contention that the word “health,” as used in the statute, might refer to freedom from disease rather than freedom from physical injury. Id. at 683. The court concluded that the statutory language clearly proscribes inflicting personal injury on a child. Id. The possibility that the statute might prescribe emotional maltreatment was not recognized.

See State v. Moore, 459 N.E.2d 1120, 1122 (Ill. 1984) (holding evidence defendant spanked her daughter after the daughter was burned on the buttocks was insufficient to sustain a conviction for endangering the life or health of a child).

For example, Nevada defines “abuse or neglect of a child” to mean: “(a) Physical or mental injury of a nonaccidental nature; (b) Sexual abuse or sexual exploitation; or (c) Negligent treatment or maltreatment ....” NEV. REV. STAT. § 432B.020 (1991). “Mental injury” is defined as “an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of his ability to function within his normal range of performance or behavior.” Id. § 432B.070. Although this definition appears to be specific, no objective criteria for measurement are given, nor are specific behaviors suggested for observation. Thus, any evaluation of “mental injury” would be purely subjective.
child endangerment." However, "substantial harm to mental health" is not
defined, nor is a method for measuring it mandated.

It should be noted that in practice, the difference between a type I
statute (which does not address emotional maltreatment per se and focuses
on physical maltreatment) and a type II statute (which outlaws emotional
maltreatment, but does not clearly define it) may be a matter of judicial
interpretation. For instance, the Colorado statute contains the following
language:

A person commits child abuse if such person causes an injury to a child's
life or health or permits a child to be unreasonably placed in a situation
which poses a threat of injury to the child's life or health, or engages in a
continued pattern of conduct which results in malnourishment, lack of
proper medical care, cruel punishment, mistreatment, or an accumula-
tion of injuries which ultimately results in the death of a child or serious
bodily injury to a child.

In addition, the dependency and neglect sections of the Colorado statute
provide the following definitions:

"Abuse" or "child abuse or neglect" means an act or omission in one of the
following categories which threatens the health or welfare of a child:
(I) Any case in which a child exhibits evidence of skin bruising,
bleeding, malnutrition, failure to thrive, burns, fracture of any
bone, subdural hematoma, soft tissue swelling, or death and
either: Such condition or death is not justifiably explained; the
history given concerning such condition is at variance with the
degree or type of such condition or death; or the circumstances
indicate that such condition may not be the product of an acciden-
tal occurrence; (II) Any case in which a child is subjected to sexual
assault or molestation, sexual exploitation, or prostitution; (III)
Any case in which a child is in need of services because the child's
parents, legal guardian, or custodian fails to take the same actions
to provide adequate food, clothing, shelter, medical care or super-
vision that a prudent parent would take.

Although these provisions only list physical examples of injury to a
child's life or health, and there is no specific reference to mental injury, the
Colorado Supreme Court has held that the term "abuse" includes emotional
as well as physical abuse.

38. MINN STAT. ANN. § 609.378(1)(a)(1) (West Supp. 1993). As previously noted, the
Minnesota abuse reporting statute also specifically mentions causing mental injury in its
definition of child maltreatment. See supra notes 6-7.
40. Id. § 19-3-303(1)(a).
The third type of statute refers to psychological maltreatment, and offers a standard for ascertaining when such maltreatment is likely to have occurred. For instance, Wisconsin's statute is quite specific: "Whoever is exercising temporary or permanent control of a child and causes mental harm to that child by conduct which demonstrates substantial disregard for the mental well-being of the child is guilty of a Class C felony." The statute defines "mental harm" as substantial harm to a child's psychological or intellectual functioning which may be evidenced by a substantial degree of certain characteristics of the child including, but not limited to, anxiety, depression, withdrawal or outward aggressive behavior. "Mental harm" may be demonstrated by a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child's age and stage of development.

Statutes of this type apparently accept the proposition that children can be severely injured in ways other than physical beating.

Another indicator of the legislative trend away from limiting legal intervention to cases of severe physical abuse can be seen in statutes outlawing sexual abuse. These statutes outlaw both sexual contact with a child such as fondling or intercourse, as well as covert types of sexual activities with children such as exploitation of children in sexually explicit pictures or movies. Both types of provisions are likely to complement each other. For example, Tennessee's statute lists sexual exploitation as one of six acts that constitute child sexual abuse. Georgia's statute includes both sexual assault and sexual exploitation of a child in its definition of child abuse. Some statutes specifically delineate not only the inappropriate acts, but also outline the harm caused by sexual abuse. For example, California defines

42. WIS. STAT. § 948.04(1) (1991).
43. Id. § 948.04(2). For other examples of type III statutes, see N.C. GEN. STAT. § 7A-517(1)(d) (1991), and WYO. STAT. § 14-3-202(a)(ii) (1991).
44. Some forms of sexual maltreatment, because of their violent or physically intrusive nature, qualify as acts of severe physical abuse. In addition, "all types of sexual abuse or exploitation are also forms of serious psychological abuse." DOUGLAS J. BESHAROV, RECOGNIZING CHILD ABUSE 115 (1990). Categorization of child maltreatment, although useful for some purposes, is an over-simplification in general.
46. TENN. CODE ANN. § 37-1-602 (1991). The other acts are penile penetration of the vagina or anal opening, oral-genital contact, any intrusion of the genitals or anal opening of another person, intentional touching of the genitals or intimate parts or the clothing covering them, and exposure of the perpetrator's genitals or perpetration of other sexual acts in the presence of a child for the purpose of sexual arousal, gratification, aggression, degradation, or similar purpose. Id.
child abuse as a situation "in which a child suffers from . . . harm by reason of intentional neglect or malnutrition or sexual abuse."  

Like emotional maltreatment, sexual maltreatment could reasonably be subsumed within a broader anti-abuse statute. Most statutes, however, opt for specific provisions. For example, Florida has a statute that specifically addresses deprivation of food, clothing, shelter, medical treatment, or the infliction of physical or mental injury to the child or "any act which causes or tends to cause or encourage any person under the age of [eighteen] years to become a delinquent or dependent child or a child in need of services." Florida civil statutes addressing prevention of child abuse and neglect define harm to a child's health or welfare to include sexual battery and sexual abuse. In addition, the Florida statute also contains a specific prohibition against the sexual performance of a child. This prohibition is directed at movies, photographs, or live public appearances in which a child is engaged in sexual conduct.

None of these presumably well intentioned statutes change the essentially "after-the-fact" nature of state intervention. As this Article argues, ex post facto application makes these attempts fundamentally inadequate to reduce the incidence and severity of child maltreatment. Furthermore, the laws may be over-inclusive. Obviously, not everything that is potentially harmful to children is, or should be, classified as a crime. For example, it is of course not a crime to raise children in poverty. Failing to provide children with adequate food and shelter is not a crime if the parent cannot afford to provide these things. The parent may still be held to a moral obligation to seek outside sources of aid, however, when he cannot provide enough. Failure to do so is child neglect.

Similarly, statutes specifically identifying emotional maltreatment as harmful and subject to state intervention by implication impose a comparable affirmative obligation on parents to find other sources of essentials—in this case psychological essentials—which they are not capable of providing for

50. Id. § 415.503(9)(b).
51. Id. § 827.07(1)-(5).
52. Id. § 827.071.
53. Some of the statutes examined in this Article are explicitly criminal, while others are characterized as social welfare interventions. Criminalization of many acts or omissions classified as child abuse or neglect may well be an essential part of a system that effectively reduces or eliminates maltreatment, but the debate over whether to impose criminal sanctions in maltreatment cases is beyond the scope of this Article.
54. For instance, such statutes are particularly prone to the charge that they favor majoritarian views on appropriate child rearing to the exclusion of other points of view. See generally KATZ, supra note 5, at 52-82.
55. See generally Areen, supra note 33.
56. See BESHAROV, supra note 44, at 99-107.
57. See BESHAROV, supra note 44, at 99-107.
their children. Unlike situations involving economic or educational impoverishment, however, other sources of emotional support are less readily available and less organized. Moreover, even recognizing the need for help presupposes a level of insight and emotional functioning that may simply not be there.

Theoretically, more specific and exhaustive statutes dealing with child maltreatment could promote more effective intervention that could save more children from the dire consequences of maltreatment. Statutory recognition of the psychological effects of parental behavior would require courts to examine a very important facet of the parent-child relationship. In 1971, when such statutes were rare, Sanford N. Katz said:

[It is] highly desirable that legislative recognition be given to "emotional neglect" as an independent legal standard. This view is a result of experience showing a judicial reluctance to carve out categories of neglect that are not clearly provided for in the statute itself. Specific statutory reference to mental health would provide the needed "peg" upon which to hang a finding of emotional deprivation. 58

Enforcement of prohibitions against emotional and sexual maltreatment is fraught with the same difficulties that impede enforcement of statutes criminalizing physical abuse of children. Proof is difficult at best. Inadequate funds and overworked social service staffs ensure only a fraction of the most blatant cases of physical abuse will be adequately investigated and followed. In such a system, many children will not be helped.

Even with more funding and larger social service staffs, statutes broadening the legal definition of child abuse cannot save children from emotional and sexual abuse. In essence, ex post statutes are inherently ill-suited to address the complex psychological and social dynamics of emotional and sexual child maltreatment.

III. PSYCHOLOGICAL DYNAMICS OF ABUSE AND NEGLECT

Social scientists preceded legislators in distinguishing among different types of abuse and neglect. Categorization of acts of maltreatment is an oversimplification, but it does facilitate research and discussion of certain dynamics.

Physical abuse and neglect have long been recognized, although the definition of these terms may remain unsettled. Sexual abuse has also been long recognized by the social science and mental health professions. "Sexual

58. KATZ, supra note 54, at 68. Katz is quick to acknowledge "that by using their discretion in interpreting and applying statutory guides for intervention, judges have enormous power to establish, administer, and reorganize families according to their own values, biases, and prejudices." KATZ, supra note 54, at 68.
abuse refers to involvement, by an individual at least [five] years older than the child, in sexual activities that the child does not fully comprehend [and] to which the child is unable to give informed consent." Sexual abuse may include genital contact, genital-oral contact, fondling with or without clothing, and noncontact activities such as utilization of children in pornographic pictures or forcing children to witness sexual activities.

Emotional abuse and neglect represent another dimension of child maltreatment. Emotional abuse includes "verbal or emotional assault, close confinement and threatened harm," while emotional neglect includes "inadequate nurturance/affection, knowingly permitting maladaptive behavior, and refusal to provide essential care." Psychological maltreatment can be defined as "a concerted attack by an adult on a child's development of self and social competence, a pattern of psychologically destructive behavior."

Experts generally recognize it is rare for one type of maltreatment to occur independently of other forms of maltreatment. Moreover, the adverse psychological consequences of a caretaker's behavior can cause that behavior to be defined as abusive. Evidence supports the view that "psychological maltreatment is present in all forms of abuse and that the resulting psychological damage is not necessarily related to the extent of physical damage."

All types of abuse and neglect can have very serious consequences. Except for a relatively small percentage of cases in which children are in danger of death or permanent physical injury, the most debilitating injuries are emotional. Because more than one type of abuse or neglect will likely occur within the same family, conclusions about the damage from a particular kind of maltreatment must be viewed with some caution. There is a clear consensus, however, that there is a high correlation between maltreatment and certain problems and dysfunctions. Although certainties are rare,

60. See ENGEL, supra note 14, at 23.
61. KARP & KARP, supra note 17, § 3.07 (citing JAMES GARBARINO ET AL., THE PSYCHOLOGICALLY BATTERED CHILD 4 (1987)).
62. KARP & KARP, supra note 17, § 3.07.
63. KARP & KARP, supra note 17, § 3.07 (citing GARBARINO & GILLIAM, supra note 34, at 8).
64. GARBARINO & GILLIAM, supra note 32, at 7-8.
65. GARBARINO & GILLIAM, supra note 32, at 7-8.
social science and mental health professionals have drawn a number of conclusions about child maltreatment.

First, maltreatment is not an isolated event. Rather, it is a continuing pattern of inappropriate and damaging interactions between caretakers and children. It is rare to find only one form or instance of maltreatment in a family; usually there are several at the same time or over time. Second, the serious psychological damage resulting from any type of maltreatment is the most disruptive effect on the child's short- and long-term functioning. The severity of these psychological effects is not directly related to the amount of physical injury suffered. Finally, a pattern of child maltreatment tends to pass from generation to generation. Some of the possible long-term effects, such as substance abuse or sexual aggression, make child maltreatment a full-scale social problem.

A. Maltreatment as a Pattern of Interaction

Psychiatric studies of parents that physically abuse their children reveal a complicated constellation of dysfunctional parent-child interactions. In one study, child abuse was described as "a pattern of child rearing characterized by derailment of the normal mothering function." The basic ingredients of mothering are usually, but not always, performed by a mother and include "mechanical" components such as feeding, holding, clothing, or protecting the infant, and "subtle" components such as tenderness, "awareness and consideration of the needs and desires of the infant, and . . . appropriate emotional interaction with [the infant]." Studies do not reveal a basic personality disorder common to abusive parents, although these parents frequently share a pattern of childhood experiences characterized by excessive and unrealistic demands placed on them as children, lack of nurturing, perfectionism, and constant criticism.

69. See infra text accompanying notes 74-84.
70. See infra text accompanying notes 85-106.
71. See GARBARINO & GILLIAM, supra note 32, at 8-10.
72. See GARBARINO & GILLIAM, supra note 32, at 8-10.
75. Id.
77. Steele & Pollock, supra note 74, at 111-13; see also Spinetta & Rigler, supra note 76, at 113-14.
Abuse is rarely isolated or even sporadic instances of violence; rather, it is an environment.\textsuperscript{78} It is the atmosphere and the overall quality of the parent-child relationship that are pathogenic, not isolated acts of parental cruelty.

In the case of physical abuse, it is often assumed that the abuse occurs in an otherwise normal home. \ldots [I]n addition to overt abuse and neglect, [however,] the homes of many of these children are characterized by chaos, disruption, and disorganization. Drug and alcohol abuse are common, the mothers often are physically abused, and in general, the homes provide a very aversive environment for raising children. For the maltreated children, the home environment fails to meet the needs of the child in many different areas.\textsuperscript{79}

Characterizing child maltreatment as an environment or destructive pattern of interaction is well illustrated by drawing an analogy between maltreatment and a fever. Specific incidents of child maltreatment indicate a dysfunctional pattern of family interactions just as fevers indicate disease in the body. Specific acts of child maltreatment are usually not life threatening in themselves, and only a small percentage result in immediate injuries requiring medical attention.\textsuperscript{80} A very high fever or extreme acts of abuse, however, could in themselves be life threatening.

Patterns of parent-child interaction that characterize child maltreatment, such as over stimulating the child,\textsuperscript{81} failing to empathize with the child and ignoring his needs,\textsuperscript{82} using the child to fulfill the adults' needs,\textsuperscript{83} and imposing age-inappropriate expectations on the child violate the child's self image in many ways.\textsuperscript{84}

B. Adverse Effects of Child Maltreatment

As noted above, one can rarely be certain a particular act will have a specific effect on an individual child. There are too many variables, including the child's personality, vulnerabilities, and defenses. Many mental health professionals, however, agree that child maltreatment leads to characteristic short- and long-term problems for a significant percentage of maltreated children. For instance, Eliana Gil, a therapist and writer specializing in

\textsuperscript{78} Byron Egeland & Martha Farrell Erickson, \textit{Psychologically Unavailable Caregiving}, \textit{in \textbf{PSYCHOLOGICAL MALTREATMENT OF CHILDREN AND YOUTH}}, supra note 66, at 110, 115.

\textsuperscript{79} \textit{Id.} at 115-16.

\textsuperscript{80} \textit{GARBARINO \& GILLIAM}, supra note 32, at 8-9.

\textsuperscript{81} \textit{LEONARD SHENGOLD, SOUL MURDER} 1-3 (1989).

\textsuperscript{82} \textit{See generally} Steele & Pollock, \textit{supra} note 74, at 106-26.

\textsuperscript{83} \textit{See, e.g.}, \textit{ALICE MILLER, THE DRAMA OF THE GIFTED CHILD} 5-9 (1981). \textit{See also chapter two of SUSAN FORWARD, TOXIC PARENTS} (1989), which is titled "Just Because You Didn't Mean It Doesn't Mean It Didn't Hurt—The Inadequate Parents." \textit{Id.} at 31-48.

\textsuperscript{84} \textit{See, e.g.}, Steele & Pollock, \textit{supra} note 74, at 110-11.
Childhood abuse, divides the symptoms of adult survivors of child abuse into three main categories: psychosocial problems, physical and eating disorder problems, and relationship and sexual problems.\textsuperscript{85} Psychosocial problems include depression; low self-esteem; dissociative phenomena; alcohol, drug, gambling, or other addictions; self-mutilation; suicide attempts; and parenting problems.\textsuperscript{86} Physical and eating disorder problems include anorexia, bulimia, obesity, headaches, stomachaches, skin problems, and various other diseases and infections.\textsuperscript{87} Relationship and sexual problems include unstable relationships, poor choice of partners, orgasmic disorders, desire disorders, and promiscuity.\textsuperscript{88} There also appears to be a high correlation between childhood abuse and both post traumatic stress disorder and multiple personality disorder.\textsuperscript{89} Moreover, abused children are more likely to run away from home, and are more likely to engage in delinquent behavior.\textsuperscript{90}

The effect abuse will have on a maltreated child will, of course, vary with the individual child. Some children are more vulnerable, although others, to the puzzlement of researchers, appear to emerge unscathed from objectively horrendous family circumstances.\textsuperscript{91} In order to survive abusive homes, however, most children must employ one or more psychological defenses. A complete discussion of the dynamics of psychological defenses is beyond the scope of this Article. This section will, however, briefly discuss four defenses frequently encountered in abused children: repression, denial, self-blame, and projection.

Repression is the eradication of a traumatic memory from the conscious mind.\textsuperscript{92} A child that has been physically harmed, verbally attacked, or sexually molested may simply not remember the event in order to avoid bringing up extremely painful feelings the child cannot handle.\textsuperscript{93} This is not, however, a benevolent memory loss because it takes a tremendous amount of psychic energy to repress an event—energy that the child could instead use to develop a healthy self image.\textsuperscript{94} In addition, a traumatic event may never be entirely forgotten, and may surface later in frightening nightmares, painful

\begin{itemize}
  \item \textsuperscript{85} GIL, supra note 68, at 49-54.
  \item \textsuperscript{86} GIL, supra note 68, at 49-51.
  \item \textsuperscript{87} GIL, supra note 68, at 51-52.
  \item \textsuperscript{88} GIL, supra note 68, at 52-54.
  \item \textsuperscript{89} GIL, supra note 68, at 54.
  \item \textsuperscript{90} See generally DAVID SANDBERG, THE CHILD ABUSE-DELINQUENCY CONNECTION (1989).
  \item \textsuperscript{91} GARBARINO & GILLIAM, supra note 32, at 5 (citing Maya Pines, \textit{Invulnerability: Pioneer Studies}, PSYCH. TODAY, Jan. 1979, at 58-61).
  \item \textsuperscript{92} See generally ALICE MILLER, \textit{THOU SHALT NOT BE AWARE: SOCIETY'S BETRAYAL OF THE CHILD} (1986).
  \item \textsuperscript{93} See generally id.
  \item \textsuperscript{94} BEVERLY JAMES, TREATING TRAUMATIZED CHILDREN 158 (1989). For one theoretical approach to understanding the energy used to suppress the emotions associated with a traumatic event, see MILLER, supra note 85.
\end{itemize}
flashbacks, or destructive behavior. Moreover, many therapists believe a victim that has repressed traumatic events may unconsciously seek to re-enact them until the victim can achieve mastery over the attacker. This is sometimes referred to as “repetition compulsion,” and may explain why adults abused as children often re-enact their families of origin, either as abuser or victim.

Denial is the partial or complete refusal to accept the reality of a painful situation. Unlike repression, in which key parts of an event are banished from consciousness, a person in denial may recall entire events, yet be unable to cognitively recognize the meaning of those events. For instance, a child may see his parents intoxicated nightly, but will vehemently deny they are alcoholics. Similarly, a child may suffer from intense physical or emotional abuse, but will insist that he has “the best parents in the world.”

A victim that accepts responsibility for the abuse engages in self-blame. In other words, the child concludes he was hit or humiliated because he somehow deserved it. Not only does this relieve the parent from responsibility, but it gives the child the illusion that he has some control over a situation in which he is, in fact, powerless. This illusion manifests itself in the child’s belief that the abuse will stop if the child is “better.” The truth is that the parent’s actions are not the result of the child’s behavior, but are a manifestation of the adult’s own needs, which will likely not be affected by a change in the child’s behavior.

Projection is almost the opposite of self-blame; it is the refusal to accept responsibility for one’s own actions. In the context of abuse, it is best illustrated by the attitude of many abusive adults toward their child victims: “You were so bad I had no choice but to beat you,” or “You seduced me so I had to take you to bed with me.” This “blame-the-victim” mentality is often imitated by abused children when dealing with individuals smaller or less powerful than themselves. They are essentially modeling the adult behavior directed at them. For example, an abused child may hurt younger children or animals, and may explain his sadistic behavior by claiming the

95. See ENGEL, supra note 14, at 71-74.
96. See generally MILLER, supra note 83.
97. See generally MILLER, supra note 83.
98. See ENGEL, supra note 14, at 42-44.
99. See ENGEL, supra note 14, at 5-7.
101. Id. at 26-27.
102. See ENGEL, supra note 14, at 31-35, 76-78.
103. See THE AMERICAN HERITAGE DICTIONARY 1448 (2d ed. 1992) (definition 8b. under “projection”).
104. Edward Mueller & Nancy Silverman, Peer Relations in Maltreated Children, in CHILD MALTREATMENT, supra note 73, at 529, 564-661.
child "asked for it" or "deserved it." When they become parents themselves, these children may continue to use projection as their main defense, and will essentially identify with the aggressor that attacked them as children, thus perpetuating the cycle of abuse for yet another generation.106

C. Child Maltreatment as an Intergenerational Pattern

Child maltreatment has a tendency to pass from one generation to another.107 This is to be expected because people learn much about parenting from their own parents.108 This intergenerational pattern has societal ripple effects because maltreatment is linked to such problems as running away from home, substance abuse, sexual disfunction, and depression.109

One study of physically abusive parents found emotional neglect to be a prominent factor in the childhood of all the parents studied:

[All] of our parents were deprived as infants and children. We are not concerned here with material deprivation. . . .

We are referring to deprivation of . . . being cared for and cared about from the beginning of one's life.
The central issue involved concerns a breakdown in what we have referred to earlier as "mothering"—a disruption of the maternal affectional system.110

Any theoretical framework based in part on the importance of early childhood experiences recognizes deficient parenting in one generation will likely have an impact on the quality of parenting in the next. "The reason . . . parents mistreat their children has less to do with character and temperament than with the fact that they were mistreated themselves . . . ."111

There are a number of possible explanations for the similarity of action and experience between generations. For example, the psychoanalytic tradition argues that individuals have a tendency to repeat traumatic situations from the past.112 Learning theories argue a person's behavior is shaped by

105. One child attending a Parents Anonymous child care session at which I was the facilitator said he would not feed his cat because the cat "doesn't deserve to eat."
107. Id.
108. See infra text accompanying notes 111-14.
109. See infra text accompanying notes 86-90.
110. Steele & Pollock, supra note 74, at 112.
111. ALICE MILLER, FOR YOUR OWN GOOD 105 (Hildegarde Hannum & Hunter Hannum trans., 1983).
112. This concept is sometimes described as a "repetition compulsion." A person that was abusively treated in childhood might repeat the pattern in adult life, and depending on various factors could be in the aggressor's role.
imitation and reinforcement throughout life.\textsuperscript{113} Children learn parenting and other social behaviors from their families of origin, and then go on to repeat these behaviors with their own children.\textsuperscript{114}

Although abusive parents are likely to have been maltreated themselves, not all maltreated children will in turn abuse their children. One study indicates that approximately one-third of the people abused in childhood will grow up to abuse their own children.\textsuperscript{115} Some researchers suggest that a key factor for people who do not go on to abuse their children is the insight that their own parents were wrong to abuse them.\textsuperscript{116} Moreover, among those who do become abusive parents, the type of abuse suffered by the parents as children will not necessarily be the same kind they inflict on their children.\textsuperscript{117}

IV. THE DISAPPOINTING INTERACTION OF AFTER-THE-FACT STATUTES AND PSYCHOLOGICAL DYNAMICS

The limitations of most current statutes addressing emotional or sexual child maltreatment become clearer in view of the psychological dynamics discussed above. This Article has claimed there are at least three reasons these statutes are inherently ineffective in dealing with the problems of emotional or sexual abuse. First, there is no meaningful intervention until substantial damage has already been done to the child.\textsuperscript{118} Second, due to the nature of emotional and sexual abuse and the ways in which children typically cope with it, proof of harm or other triggers for intervention may not become apparent until the victim is no longer a child.\textsuperscript{119} Finally, it is even more difficult to delineate and recognize the behaviors constituting emotional or sexual abuse than it is to define physically abusive behaviors.\textsuperscript{120} This section will re-examine each of these claims in light of the current psychological views discussed above.


\textsuperscript{114} Id.


\textsuperscript{116} Id.

\textsuperscript{117} Id.

\textsuperscript{118} See supra text accompanying notes 11-14.

\textsuperscript{119} See supra text accompanying notes 15-17.

\textsuperscript{120} See supra text accompanying notes 17-18.
A. Intervention Only After Harm Has Been Done

The statutes examined in this Article,121 whether addressing "mental injury,"122 "harm by reason of sexual abuse,"123 "mental harm,"124 material endangerment of the physical or mental health of a child causing permanent disability,125 or injury to the child's health or welfare,126 are statutes that allow intervention in the family only after provable abuse has caused demonstrable harm.127 Because abuse tends to be an entire dysfunctional environment acting on a child over a period of time,128 the child is likely to have suffered enormous damage before any external proof of harm is visible. Far from being a phenomenon limited to cases of emotional or sexual abuse, this problem is frequently illustrated in cases of gross physical abuse.129 "How is it," we ask ourselves after the fact, "that none of us noticed the warning signs in time to stop this child from being beaten to the point of death or permanent disability?" Yet even if we were able to intervene and stop life-threatening physical abuse, the long-standing and insidious character of an inadequate psychological climate makes effective and timely intervention in such cases less likely.

In one infamous case in New York, six-year-old Lisa Steinberg was viciously beaten to death by her father.130 Subsequent investigations suggested the physical abuse was only one factor in an environment characterized by emotional abuse and neglect, sexual exploitation, and substance abuse.131 Even if Lisa's life had been saved and her physical health restored, and even if further physical abuse and neglect could have been prevented, it is extremely likely severe psychological damage had already been, and would continue to be, inflicted on the child. The child's mother recounted that Lisa's father abused Lisa verbally as well as physically.132 Lisa's relationship with her mother was competitive, and it does not appear her mother had many warm, maternal feelings toward the child.133 Both parents were addicted to drugs, and may have participated in or allowed the sexual abuse of Lisa.134

121. See supra text accompanying notes 20-58.
122. See supra text accompanying notes 37-38.
127. See supra text accompanying notes 6-7.
128. See supra text accompanying notes 74-84.
129. See generally Kempe et al., supra note 27. Because one clinical indicator of battered child syndrome is bone fractures in various stages of healing, it follows that injuries occur over a period of time and are detected later.
130. JOYCE JOHNSON, WHAT LISA KNEW 269-78 (1990).
131. Id. at 177-79, 187-90.
132. Id. at 264-78.
133. Id. at 151-53.
134. Id. at 170-72.
This picture of family life is the epitome of "a very aversive environment for raising children,"\(^\text{135}\) and a breakdown of mothering.\(^\text{136}\)

The kinds of warning signs or evidence of harm envisioned by child maltreatment statutes, however, were either not yet present, or hidden from public view. "In her striped Oshkosh overalls and her Health-Tex T-shirts, Lisa looked just as carefully nurtured as the other Greenwich Village five-year-olds in her class."\(^\text{137}\) Teachers recalled vague impressions that there was nothing unusual about Lisa's relationship with her parents.\(^\text{138}\) Everyone assumed Lisa was a normal, happy little girl.\(^\text{139}\) She was described "as an extremely articulate, very verbal, beautiful kid to look at."\(^\text{140}\) "She was a cooperative and cheerful little girl, very popular with the other students. [Her kindergarten teacher] found her demonstrably affectionate, the kind of child who'd come up to you and wind her arms around your waist."\(^\text{141}\) At least around her classmates and teachers, Lisa apparently did not exhibit suspicious behaviors that might have indicated she was a maltreated child.

To all outward appearances, Lisa and her father adored each other—she was Daddy's girl, exquisitely attuned to her father's desires and adept at pleasing him.\(^\text{142}\) Yet, in this kind of symbiotic relationship, it can be argued that Lisa assumed the parental role, providing nurturing and support to her father. Such a relationship can ultimately be very damaging: it forces a child to use resources that should properly be applied to her own developing personality to reinforce and support her parents' shaky personalities.\(^\text{143}\) Ultimately, the child may not get the emotional guidance she needs to develop into a healthy adult and may continue to seek fulfillment of her own needs from anyone possible, including her own children.\(^\text{144}\) The seeds of severe personality disturbances had clearly been planted in Lisa.

This troubling case illustrates how the subtlety or absence of signs of abuse make after-the-fact maltreatment laws ineffective. Unfortunately, the Lisa Steinberg case is not unique. Children may be severely harmed by parents for years without detection or without any clear signals the child is at risk. Depression, acting out, and other behaviors indicating a child has been maltreated may also occur for other reasons; a fact that makes the judgment about when to intervene in the parent-child relationship even more diffi-

\footnotesize{\begin{enumerate}
  \item 135. See supra text accompanying note 79.
  \item 136. See supra text accompanying note 74.
  \item 137. JOHNSON, supra note 130, at 195.
  \item 138. JOHNSON, supra note 130, at 195-96.
  \item 139. JOHNSON, supra note 130, at 197.
  \item 140. JOHNSON, supra note 130, at 195 (quoting Elliot Koreman, Lisa's principal).
  \item 141. JOHNSON, supra note 130, at 196.
  \item 142. JOHNSON, supra note 130, at 185-86, 207-11.
  \item 144. Id.
\end{enumerate}}
Legitimate concerns about privacy and protection of family autonomy may also cause society to err on the side of nonintervention.

B. Characteristic Defenses and Delayed Symptoms

An additional problem, due to characteristic psychological reactions of children, is that the extent of the damage inflicted on an emotionally or sexually abused child may not become evident until months or years after the harmful interactions. Lisa Steinberg apparently used psychological coping mechanisms, such as repression or self-blame, which effectively hid her anguish from outsiders. To some extent, most children will instinctively hide maltreatment from others, or even from themselves.

One reason for this may be that children have a basic need to view their primary caretakers as nurturing and supportive figures. If nurturing and support are not sufficiently forthcoming, the trauma to the child is enormous, even life threatening. To maintain psychic equilibrium, the child instinctively clings to the image of the parent as good, even if there is little objective evidence to support that view. "To children—even adolescents—their parents are like gods." One commentator presents a convincing explanation for this phenomenon:

[T]he child who is tormented by a parent must frequently call on that same parent for help and rescue. The other parent is only too often weak or absent, or is at least an unconscious abettor of the tormentor... If the child must turn to the very parent who inflicts abuse and who is felt as bad for relief of the distress that the parent has caused, then the child must break with what has been experienced and out of a desperate need for rescue, must register the parent, delusionally, as good. Only the mental image of a good parent who will rescue can help the child deal with the terrifying intensity of fear and rage that is the effect of the tormenting experiences. The alternative—to maintain the overwhelming stimulation and bad parental image—means annihilation of identity, of the feeling of the self. So the bad has to be registered as good. This is a mind-splitting or mind-fragmenting operation. To survive, such children must keep in some compartment of their minds the delusion of good

145. See, e.g., GARBARINO & GILLIAM, supra note 32, at 5-10.
146. See generally GIL, supra note 68, at 40-47.
147. See generally JOHNSON, supra note 130.
148. See Camerond, supra note 100, at 21.
149. SHENGOLD, supra note 81, at 26 (1989).
150. One researcher documented a high infant mortality rate (over 30% in the first two years of the study) in a sample of institutionalized children whose physical needs were shown to be adequately met. See RENI A. SPITZ, THE FIRST YEAR OF LIFE: A PSYCHOANALYTIC STUDY OF NORMAL AND DEVIANT DEVELOPMENT OF OBJECT RELATIONS 281 (1965).
151. SHENGOLD, supra note 81, at 26.
parents and the delusive promise that all the terror, pain, and hate will be transformed into love. 153

Another author presents the case of Christine F., whose unpredictable father frequently subjected her to brutal beatings. 154 Her mother typically watched these incidents without intervening. 155 Christine later reported, "I somehow loved and respected my father in spite of it all. He towered above other fathers in my eyes." 156

Sometimes children utilize the defense of repression to maintain the image of the good parent and to otherwise survive psychologically. 157 When faced with events too traumatic to cope with, the child may erase part or all of the events from conscious perception. 158 Repression is probably a related form of dissociative phenomena. 159 "The dissociative process is a sudden, temporary alteration in the integrative functions of consciousness and/or identity, whereby one's experience is separated from one's conscious awareness." 156 Some forms of dissociation are common and harmless—for example, becoming "lost in thought" and missing one's bus stop. However, "[t]he trauma victim [that] does not remember parts of what happened to him and the person with multiple personalities has also dissociated, but more intensely and with more potentially severe consequences." 161 The frequent use of repression can interfere with a child's functioning and development. 162

Another defense is denial, under which the child refuses to see or acknowledge the importance or meaning of the traumatic event. 163 One therapist explained:

"When you ask them if they were ever abused, they tell you, 'No,' ... But if you ask them to describe what would happen if they broke a rule, they'll say something like, 'I was locked in a closet for a day, then beaten with a belt until I was black and blue.' Then you ask them, was that abuse? and their answer is, 'No, I was a bad kid and my parents had to beat me to make me turn out okay.' " 164

153. SHENGOLD, supra note 81, at 26.
154. MILLER, supra note 111, at 110-12 (quoting CHRISTINE F., CHRISTINE F: AUTOBIOGRAPHY OF A GIRL OF THE STREETS AND HEROIN ADDICT (Susanne Flatauer trans., 1982)).
155. MILLER, supra note 111, at 111 (quoting CHRISTINE F., supra note 154).
156. MILLER, supra note 111, at 111 (quoting CHRISTINE F., supra note 154).
157. SHENGOLD, supra note 81, at 26.
158. See supra text accompanying notes 92-97.
159. BEVERLY JAMES, TREATING TRAUMATIZED CHILDREN 101 (1989).
160. Id.
161. Id.
162. Id.
163. See supra text accompanying notes 98-102. For an interesting example of denial, see infra text accompanying notes 188-89.
164. Goleman, supra note 115, at C6 (quoting Dr. Richard Krugman).
From a legal perspective, psychological defenses such as repression and denial pose at least two major problems. First, it is even more difficult to ascertain what happened between a child and a caretaking adult if the child has defensively repressed or denied traumatic incidents. Thus, as in the Lisa Steinberg case, there may not be any overt evidence to trigger legal intervention. Even if an initial intervention can be justified, there are enormous problems in proving the acts of maltreatment and the resulting harms. When the victim and chief witness deny any abusive behavior has occurred, the type of fact-finding required under our legal system is nearly impossible. Moreover, therapeutic efforts to bring the repressed trauma into consciousness or to overcome denial, may lead to a claim that the child, vulnerable to suggestion, has been prompted to recount an untrue tale. In addition, some researchers believe denying abuse is “part of the cycle by which abused children become abusive parents.”

Children may become even more entrenched in denial because of their tendency to self-blame. This tendency is usually reinforced by the parent’s tendency to project the blame for any abusive action onto the child. Parental idealization can be maintained in the face of abuse if the child assumes responsibility for the abuse. This is indicated by the statement: “I was a bad kid, and my parents had to beat me to make me turn out okay.”

Eliana Gil recounts an interview with Mary, a forty-one-year-old patient, who still blamed herself for her mother’s rejection:

Mary: When my mom would push me off her lap and send me to my room, I would go curl up under my covers and suck my thumb.

Dr. G: What did you say to yourself as you lay there curled up with your thumb in your mouth?

Mary: I’d tell myself I was dumb.

Dr. G: How did you phrase it?

Mary: I’d say, “You are dumb.”

165. See supra text accompanying notes 130-44.

166. See JAMES, supra note 159, at 157-75.

167. See Jennifer Marie Batterman-Faunce & Gail S. Goodman, Effects of Context on Accuracy and Suggestability of Child Witnesses, in CHILD VICTIMS, CHILD WITNESSES 301, 306 (Gail S. Goodman et al. eds. 1993); JOHN E.B. MYERS, LEGAL ISSUES IN CHILD ABUSE AND NEGLECT 67-74 (1992). Even Dr. Sigmund Freud himself came to doubt the accuracy of “recalled” traumas, eventually characterizing them as unrealized childhood sexual fantasies. But some people think Freud was wrong. See generally, MILLER, supra note 111.


169. See supra text accompanying notes 100-02.

170. See supra text accompanying notes 103-06.

171. See supra text accompanying note 164.

172. GIL, supra note 68, at 170.
In fact, Mary's mother was a physically and emotionally abusive woman who was also an alcoholic.\(^{173}\) Despite these facts, Mary did not find it easy to relinquish the blame she had taken upon herself. The following exchange between Dr. Gil and Mary demonstrates her reluctance:

Mary: God, I wish I had known what to do so she would have never gotten mad at me and thrown me off her the way she used to do.

Dr. G: And I wish you could see now that it was not you who were stupid or dumb. You were just a little girl who liked to sleep in her Mommy's lap. You didn't do anything to make her mad. Sometimes she just got mad because of other things. Can you see that?

Mary: I guess so ....

Dr. G: But it's hard for you, because there's a little part of you that wants to think it was your fault.

Mary: Why would I want to do that?

Dr. G: What do you think?

Mary: (Wipes away a few tears and blows her nose.) I guess if I'm to blame, then she isn't mean or a drunk.

Dr. G: I think that's probably true. But Mary, your mom is not alive anymore and you are; and it would sure be nice if you could stop thinking of yourself as a bad little girl, who is dumb and who nobody would want. You are a very smart and pretty woman, who has a lot to offer.

Mary: I just hate saying she's a drunk. I once hit a kid in the face who laughed at her and called her a drunk.

Dr. G: It's very hard when others call your parents names and laugh at them. The truth is Mary, that your mother was an alcoholic and had a serious disease. She was not able to get help with that problem. Because she drank she was not the best mother in the world. She was very hard on you.

Mary: I hate hearing you say that.\(^{174}\)

Another adult survivor of childhood maltreatment put it this way:

I can look back at my childhood and know that my father had a mean streak. But I still make excuses for him because maybe he really did believe that what he did for me was for my own good. In my head, I know that what he did was horrible and that no child deserves to be treated like I was treated. But in my gut, I still feel like a rotten kid who deserved what he got. And I still feel so damned guilty that I couldn't protect my mother.\(^{175}\)

\(^{173}\) GIL, supra note 68, at 170.

\(^{174}\) GIL, supra note 68, at 171-72.

\(^{175}\) FORWARD, supra note 83, at 222.
The likelihood a child will blame himself further diminishes the chances for meaningful third party intervention. Self-blame is potentially very damaging to the child, and is likely to result in low self-esteem and problems in relationships.176 "The key [to successful treatment of adults abused as children] is [getting them to] face the fact that their parents were so cruel to them; they've bought the parent[s]' word that they were bad and deserved it. The damage shows up in their intimate relationships: they're waiting to get hit or used again."177

As noted above, adults abused as children have distorted and painful relationships as adults. The law simply cannot, however, be expected to protect people from such forms of pain. Realizing their own parents were abusive may be essential in breaking the cycle of abuse.178

C. Difficulties of Defining Emotional and Sexual Abuse

Defining any kind of maltreatment is difficult, but the difficulties become even more evident in cases of possible emotional or sexual maltreatment. A broad definition is possible, but a definition that clarifies specific applications is problematic. One author defines emotional abuse as "an assault on the child's psyche,"179 and emotional neglect as "a gross failure to provide the emotional nurturing and the physical and cognitive stimulation needed to prevent serious developmental deficits in children."180 This same author also concludes the term "psychological maltreatment" is more useful for describing "the parental behaviors that can cause serious conduct, cognitive, affective, or other mental disorders in children."181

Whatever definition is used, parental behavior is the key concern because it causes psychological harm to the child. Establishing causation is an extremely complicated and unavoidably individualized process. Simply put, behavior adequate for one child may be devastatingly inappropriate for another child. Although severe forms of emotional maltreatment, such as close confinement or torture, have clear and predictable effects on a child, in less severe cases, assessments become more difficult.182 Even mental health professionals have difficulty predicting with any degree of certainty "whether a particular parent's behavior will result in severe harm to the child."183

176. GIL, supra note 68, at 49-54.
177. Goleman, supra note 115, at C6 (quoting Terry Hunt).
179. BESHAROV, supra note 44, at 114.
180. BESHAROV, supra note 44, at 115.
181. BESHAROV, supra note 44, at 114 (citing AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980)).
182. These less severe cases include "inadequate nurturance and habitual scapegoating, belittling, taunting, and rejecting behavior." BESHAROV, supra note 44, at 116.
183. BESHAROV, supra note 44, at 116.
The use of rather vague terms such as “psychological harm”184 or “mental injury”185 requires factfinders to make a case-by-case determination, but this is necessarily subjective, and offers little before-the-fact guidance.

Some suggest addressing this problem by intervening in “those patterns of behavior that impose a high level of risk on their victims, that is, treatment that would cause most normal children and teenagers to suffer some social or psychological harm.”186 Yet, the concept of a “normal” child or teenager presents the same problem of subjective assessment without predictive usefulness as the concept of causation of harm.

Emotional maltreatment may be inflicted by body language, tone of voice, facial expression, and words, all of which are difficult to pinpoint.187 Outside a particular context, emotional maltreatment is especially difficult to define precisely. For example, it does not make sense to characterize opening windows or telling a child to take a bath as emotional abuse. Yet the following exchange between Eliana Gil and her patient Charlene demonstrates the power of those actions:

Dr.G: Was [your father] ever complaining about you or your brothers?
Charlene: Oh, all the time, but mostly it was about me.
Dr.G: OK. What specific things about you did he complain about?
Charlene: Mostly that I was dirty.
Dr. G: Dirty?
Charlene: Yeah.

... 
Charlene: He really didn't like me too much.
Dr. G: What gave you that feeling?
Charlene: He would say I smelled a lot.
Dr. G: And he said you were dirty?
Charlene: Yeah.
Dr. G: What did you think about what he said?
Charlene: Well, I just tried to smell better.
Dr.G: Did you ever understand what he was talking about?
Charlene: He kept screaming that my mother didn't bathe me ... that I had a horrible smell on my body. He didn't want anyone to come to the house, because he said they would vomit if they smelled me.
Dr.G: How did you react to the things he said?
Charlene: I felt ... you know ... bad.
Dr.G: Like you were doing something bad? Or you just were bad?
Charlene: I thought I was just bad. There was something wrong with me.

184. See supra text accompanying notes 37-41.
185. See supra text accompanying notes 37-41.
186. GARBARINO & GILLIAM, supra note 32, at 8.
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Dr. G: And did you ever ask your mom about the smell that your dad kept talking about?

Charlene: She just said that Dad was wrong and I shouldn't listen to him... especially when he was drinking.

Dr. G: How old were you when your father first started complaining about your smell?

Charlene: I don't know.

Dr. G: When's the first time you remember hearing about it?

Charlene: I think I was in kindergarten, because I was afraid to go to school and have people notice it.

Dr. G: How long did your dad complain about it?

Charlene: He still does.

[When] I visit he opens the windows. He also asks anyone who is visiting to leave. He also has Mom put out the paper towels so I don't dirty anything.188

Gil comments:

[Charlene] does not understand why [her father] behaved towards her as he did, and she is not really consciously aware of the many ways she may have reacted. This is clearly a case of emotional abuse, and the impact on this client has been enormous. It is probable that the way her father treated her as a child is directly related to her inability to allow men to be nice to her today. Charlene and her mother both used denial to cope with living with an alcoholic, who may have been seriously emotionally disturbed. Since her mother was unable to model a protective and appropriate response to the father, Charlene never learned how to deal with inappropriate, excessive, or abusive behavior directed towards her.189

The harm to the child seems intuitively obvious in this example. Moreover, the difficulty of drafting a statute that could adequately address such parental behavior is equally obvious.190 Even if a statute could silence Charlene's father from making these belittling and untrue statements, it is unlikely such a statute could define and address his obvious lack of empathy for the child, his cruelty, or for that matter, his excessive drinking.

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188. GIL, supra note 68, at 81-83.
189. GIL, supra note 68, at 86.
190. It is difficult to even imagine a statute that could specifically address the described behavior without getting ridiculous. Consider: "It shall be unlawful to make untrue statements about a child's body or appearance." An additional point to consider is how much the mother's acquiescence in the father's abuse may have itself harmed Charlene.
V. CONCLUSION

The psychological evidence convincingly demonstrates that individual acts of maltreatment indicate serious flaws in the parent-child relationship. The real damage is caused, however, by a constantly inadequate, nonempathic emotional environment in which specific acts are only a symptom. Specific acts are red flags, but they do not convey the whole story.

This Article has used psychological theories to argue that the dynamics of sexual and emotional maltreatment of children make after-the-fact statutes particularly inadequate to address those problems. Even when a law can be invoked to intervene and curtail specific abusive behaviors, intervention will not necessarily alter the underlying abusive relationships. If a parent does not understand the essence of a healthy relationship with his child, an ex post law directed at specific symptomatic behaviors simply cannot solve the problem.

Psychological research supports the conclusion that law should respond to unhealthy situations rather than only to specific acts of parents toward children. To completely protect children from harm, the law would have to eliminate destructive parent-child relationships in their entirety. This may not be possible.

Ex-ante laws could, however, make these destructive relationships less likely to occur by mandating programs and institutions that make help more readily available to at-risk families. Laws could mandate child development, child psychology, and parenting education; smaller student-teacher ratios, and more school-based counseling staffs to give children not receiving enough support at home more support in school. Other possibilities include more economic support for family therapy and counseling, mandatory psychological testing of parents and children to detect parenting problems, and more support groups and classes for parents suffering stress. Of course, laws addressing the social, economic, and cultural problems associated with a greater incidence of child maltreatment would also be beneficial.

It is important to recognize the inherent limitations of our child protection laws. Only when we admit where these laws fall short can we begin to look for new, more effective ways of giving our children a meaningful opportunity to achieve their full human potential.