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9 **The Victim of Historical Child Sexual Abuse in the Irish Courts 1999-**  
10 **2006.**

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14 Abstract

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16 In recent years, Ireland has been rocked by revelations of historical child  
17 sexual abuse. This has led to a variety of State responses but one question  
18 remains particularly difficult to answer: why did the sexual abuse of children  
19 go unrecognised as a societal problem for so long? This article seeks answers  
20 by scrutinising cases in which defendants sought to have their trial  
21 prohibited because of the delayed reporting. It explores the legal test used in  
22 the period 1999-2006, which focused on the abuser's 'dominion' over the  
23 victim. The use of the notion of dominion elicited valuable information about  
24 the reasons for the delay and how children were silenced. Uncovering these  
25 stories is essential to understanding the dynamics of child sexual abuse.  
26  
27 However, a critical feminist reading of the delay cases that draws on feminist  
28 critiques of Battered Woman's Syndrome and Rape Trauma Syndrome  
29 reveals law's power to impose hegemonic discourses onto victims and to  
30 produce new histories. Under the dominion paradigm, the courts distorted  
31 victims' accounts of their experiences and sidelined stories that pointed  
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9 towards a culture of indifference to abuse. Thus, law is shown to occupy a  
10 paradoxical position in relation to Ireland's history of child sexual abuse.  
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14 Keywords: Ireland, historical child sexual abuse, feminism, law and history,  
15 Battered Woman's Syndrome, Rape Trauma Syndrome, victims.  
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## 19 **Introduction**

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23 Like many other countries, Ireland has been rocked by revelations of  
24 widespread sexual abuse of children perpetrated decades ago. The  
25 heightened public awareness around historical child sexual abuse has led to a  
26 variety of responses by the State, including a formal apology by the  
27 Taoiseach, the establishment of statutory inquiries, the provision of  
28 mechanisms of redress for victims and the institution of criminal  
29 prosecutions for historical sexual abuse offences. However, one question  
30 remains particularly difficult to answer: why did the sexual abuse of children  
31 go unrecognised as a societal problem for so long? Some factors have been  
32 identified as important in this regard, such as the State's deferential attitude  
33 to the Catholic Church (Ferriter, 2009: 442-462; Commission to Inquire into  
34 Child Abuse (CICA), 2009; Department of Justice 2005; Commission of  
35 Investigation, 2010; Conway, 2014: 172), a lack of accountability  
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9 mechanisms within and between State and non-State bodies (Holoohan, 2011:  
10 18), and harmful constructions of childhood, child welfare and sexuality  
11 (Buckley, 2013; Powell et al, 2013). It is also clear that some victims of  
12 clerical abuse did not report due to a fear of not being believed (CICA, 2009).  
13 However, little consideration has been given to the role of Irish society in  
14 maintaining the silence that surrounded child sexual abuse for most of the  
15 20<sup>th</sup> century. This silence was not necessarily due to an ignorance about the  
16 nature and harms of abuse. Rather, it seems that for most of the last century  
17 child sexual abuse was well known, if not widely admitted (O'Malley, 2009:  
18 656; Ferriter, 2009: 21; Maguire, 2007: 86; CICA, 2009 Vol III: 114). Thus, it  
19 is important to ask: who was silencing abused children?<sup>1</sup> Specifically, how  
20 were children who were abused in families, residential institutions, day  
21 schools, sports teams and other places kept silent? What did adults do when  
22 faced with a child who was abused? How did victims – as children, and later  
23 as adults – try to resist or cope with a culture of indifference? These  
24 questions are important in order for Irish society to begin to understand its  
25 role in the dynamics of historical child sexual abuse and to learn how it can  
26 better protect children from abuse in the present.  
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9 One place to begin look for answers to these important questions is law.  
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11 From the early to mid-1990s onwards, unprecedented numbers of adults  
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13 reported to the police (gardaí) that they had been sexually abused as children  
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15 (Ring, 2013). These cases continue to feature frequently in work of the  
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17 courts. They involve a much broader range of abuse than that examined by  
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19 the State inquiries; they include abuse by fathers, uncles, teachers, coaches  
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21 and school bus drivers, for example. The delay between the abuse and  
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23 making of a formal complaint to the police is typically many decades.  
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26 Defendants charged with historical abuse offences may seek to have their  
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28 trials prohibited on the grounds that a fair trial is impossible due to the  
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30 delayed reporting.<sup>2</sup> The High Court (and, on appeal, the Supreme Court)  
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32 must decide whether to allow the prospective trial take place. From 1999-  
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34 2006, the courts employed a legal test that involved extensive scrutiny of the  
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36 reasons for the delay; in particular, whether the victim was suffering under  
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38 the 'dominion' of the abuser and was therefore unable to report sooner. If  
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40 dominion was found to have existed, the delay was held to be justified and  
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42 the trial was usually allowed to proceed. This test was replaced in 2006 with  
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44 one that focusses on the unfairness of the prospective trial.  
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9 This article focusses on all written decisions issued by the High Court or  
10 Supreme Court from 1999-2006 in relation to applications by defendants to  
11 have their trials prohibited. The jurisprudence developed in the period  
12 under the dominion test is a rich resource for anyone interested in  
13 understanding the history of child sexual abuse in twentieth century Ireland.  
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15 The volume of cases decided in this period alone is of note: using the  
16 databases Westlaw, Justis and the official courts website [www.courts.ie](http://www.courts.ie), I  
17 found 54 written judgments from this period. For a small jurisdiction, this is  
18 a very high figure, and indicates the importance of the delay issue in Irish  
19 criminal justice. Importantly, during this period the courts produced lengthy  
20 written judgments dealing with the circumstances surrounding the  
21 allegations and the fairness of the prospective trial (Ring, 2009). The  
22 judgments rehearsed in detail victims' testimonies of their experiences and  
23 the reports of psychologists who examined them. This level of detail and  
24 reliance on affidavits is a unique resource for researchers; trial judges do not  
25 issue written judgments and transcripts are rarely seen by anyone other than  
26 the parties, if at all. Most routine trials of historical child sexual abuse are not  
27 reported and only a few reach the appellate courts.  
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9 The dominion case law also provides valuable insights into how law  
10 (re)constructs the past. This article will show that law has produced  
11 authoritative stories that do not necessarily accord with the full complexity  
12 of the accounts offered by victims. The critical reading of the cases offered  
13 here shows that law (using the frame of psychology) produced a simple  
14 narrative of the passive and traumatised victim paralysed by the domination  
15 of the abuser. Not only did this perpetuate stereotypes about 'real' rape  
16 victims, it closed off broader questions of the structural factors and power  
17 relations that facilitate sexual violence. Furthermore, victims who did not fit  
18 the dominion narrative – such as those who attempted to report at the time,  
19 or those who went on to lead happy and healthy lives – were forgotten by  
20 law. Thus, the delay jurisprudence is a powerful reminder of law's power to  
21 impose identities onto people. This is particularly worrying in the context of  
22 child sexual abuse, because placing limits on the boundaries of victims'  
23 experiences may make it more difficult for current and future abused  
24 children to have their experiences recognised and acted upon by adults and  
25 by the law. Indeed, the delay cases show that law's power goes even further;  
26 it creates new histories. Evidence of societal complicity or acquiescence in  
27 the silencing of abused children who did try and report was erased so that  
28 law's truth became the simple idea that abuse could not be reported until the  
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9 end of the twentieth century. In this way questions of how children were  
10 silenced by adults, and how the culture kept them silent for decades after the  
11 abuse, have become irrelevant to law. Asking these kinds of questions is a  
12 particularly important exercise given the Irish State's reluctance to engage  
13 with the past. There exists no national memorial to victims of institutional  
14 child abuse (despite the recommendation to this effect in CICA, 2009: 27);  
15 victims who received payments from the Residential Institutions Redress  
16 Board (RIRB) are subject to the threat of criminalisation and imprisonment if  
17 they speak about their settlement,<sup>3</sup> and plans are underway to seal the  
18 records of people who engaged with the RIRB for 75 years without any  
19 provision for access for researchers.<sup>4</sup> In this context of State minimisation,  
20 scholars are presented with a challenge to continue to ask questions about  
21 why victims remained silent and to discover whether further silences around  
22 child sexual abuse might be being created in the present. If the judgments  
23 our courts produce become the stories we tell about our past (Sarat and  
24 Kearns, 2002), the critical reading of the delay cases from 1999-2006 offered  
25 here goes some way towards opening up a space for these questions.  
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### 48 *Structure*

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51 Part I sets out the genesis of the jurisprudence in relation to defendants'  
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9 applications to prohibit their trial on historical abuse charges. Particular  
10 emphasis is placed on the development of the notion of 'dominion'. Part II  
11 examines the harms of dominion and highlights the similarities between  
12 dominion on the one hand, and Battered Woman Syndrome and Rape  
13 Trauma Syndrome on the other. Both syndromes are legal constructs  
14 employed to make the audible to law the experiences of victims of domestic  
15 and sexual violence. Feminist critiques of these syndromes are employed to  
16 unpack the problematic construction of victims' experiences within the trope  
17 of dominion. Part III provides a close reading of a sample of the delay cases  
18 between 1999 and 2006. In the cases selected, victims disclosed the abuse to  
19 an adult at the time, but their disclosures were not acted upon. Particular  
20 attention is paid to the evidence of victims' resilience and agency and how  
21 the courts interpreted the notion of dominion in a way that silenced these  
22 elements of victims' histories and closed off consideration of the indifference  
23 shown by adults at the time. Part IV reflects on what the delay cases from  
24 1999-2006 reveal about law's capacity to create new subjectivities and  
25 histories, and considers the implications for Irish society's understanding of  
26 its past. Throughout this article the term 'victim' is used, rather than  
27 'survivor' or 'complainant', in order to give expression to the position in the  
28 case of the person who suffered the abuse and called on law to act.  
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## I The evolution of the delay jurisprudence

Although statutes of limitations do not apply to serious crimes in Ireland, the established view prior to the advent of large numbers of historical abuse prosecutions was that delay by the prosecutor or by the victim was fatal to a prosecution. This was founded in a commitment to defendants' rights. The approach proved particularly harsh in child abuse cases; in 1992 a delay of one year rendered a child's complaint of abuse inadmissible (*People (DPP) v Synott* (29 May 1992, unreported, Court of Criminal Appeal)). However, in response to the changed context of the early to mid-1990s, the High Court and Supreme Court adopted a more flexible approach to delayed reporting of child sexual abuse (Ring, 2013).

The case of *B v DPP* [1997] 3 IR 140 heralded the new approach. The defendant was charged with 69 counts of indecent assault and rape offences against three of his daughters between the years 1962-1974. The Supreme Court held that the defendant's right to a trial with reasonable expedition was to be balanced against the right of the community to have offences prosecuted. The key issue in achieving this balance was whether the delay was 'reasonable'. In answering this question the Court had to determine whether the defendant had exercised 'dominion' over the victims. Dominion

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9 was essentially a legal version of a psychological explanation for delayed  
10 reporting, based on the traumatic effects of sexual abuse. The Court quoted  
11 directly from the psychologist's affidavit: '[a]s a direct result of this  
12 psychological reaction to the abuse [the victim] was unable to report the  
13 matter to an external agency, and did not discuss it with her own mother  
14 until she was aged approximately 25 years' (1997:197).  
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23 This dominion-centred approach was confirmed by the Supreme Court in *PC*  
24 *v DPP* [1999] 2 IR 25 (hereafter *PC*). *PC* was the leading judgment in this area  
25 until it was replaced in 2006 in the case of *SH v DPP* [2006] 3 IR 575  
26 (hereafter *SH*). It required the Court to ask: (1) Whether, depending on the  
27 nature of the charges, the delay was such that, despite the absence of actual  
28 prejudice, the trial should be prohibited; (2) What were the reasons for the  
29 delay and whether, assuming the complaint to be true, the delay in making it  
30 was referable to the accused's conduct; (3) Whether the accused had suffered  
31 actual prejudice such that the trial should not be allowed to proceed. The  
32 inquiry focussed on (2), which required an assessment of whether the  
33 defendant's dominion over the victim had prevented timely reporting.  
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48 Denham J quoted extensively from the psychologist's affidavit, which set out  
49 the reasons why a victim might not report for many years, if ever. It  
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9 explained that the dynamics of child abuse often involve a known adult in a  
10 legitimate position over a child who exploits the accepted patterns of  
11 dominance and authority to engage the child in sexual activity. It also stated  
12 that there may be many reasons why the victim may not complain for a long  
13 time: feelings of guilt; the abuser may be a person in authority held in high  
14 esteem not only by the victim, but also by adults and the child's parents. In  
15 such circumstances the victim may feel that s/he will not be believed if s/he  
16 complains. Alternatively, s/he may be daunted by what s/he sees as the  
17 difficulty in having the story accepted. The affidavit went on to explain that  
18 when the victim matures and is no longer under the influence of the abuser  
19 and is in a better position to understand how s/he has been wronged, s/he  
20 may still feel prevented from making a complaint because the recall of the  
21 incidents might be humiliating. In addition, the victim may feel that  
22 publication of the fact s/he has been abused would be humiliating. Victims  
23 might not be able to talk about the abuse because of an unhealthy attitude to  
24 sexuality or they may not be able to view the abuse as a criminal offence or  
25 they may have decided to put it behind them. The affidavit went on to state  
26 that many adult victims decide to make a formal report after undergoing the  
27 process of counselling, in which they realise the seriousness of the abuse they  
28 suffered (1999: 59-60).  
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9 From *PC* until it was replaced in 2006, dominion was the key issue for courts  
10 hearing applications brought by defendants to halt their trial on historical  
11 child sexual abuse offences. If dominion was found, the delay was held to be  
12 reasonable and thus excusable. Therefore, a finding of dominion usually  
13 meant the trial would go ahead; conversely, if no dominion was found (which  
14 was rare) the defendant was more likely to succeed in having the  
15 proceedings stopped (Ring, 2013). In order to decide the dominion issue the  
16 High Court would examine the victim's affidavit, which contained detailed  
17 accounts of the abuse, as well as explorations of the reasons for the delay.  
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19 The Court also received the reports of assessments by clinical psychologists  
20 of the victim(s), in which they would give an opinion as to whether the delay  
21 could be attributed to the abuse. Psychologists were required to go beyond a  
22 mere rehearsal of the literature and to offer an opinion on the individual  
23 being assessed. They were cross-examined at length on their reports  
24 (O'Malley, 2009: 661). In their written judgments, the High Court and  
25 Supreme Court would explore the dominion issue at length, citing the  
26 victim's affidavit, as well as the psychologist's affidavit and testimony. The  
27 judgments contained lengthy and detailed consideration of the reasons  
28 offered by victim for the delay and a detailed consideration of the  
29 psychologist's assessment of whether the delay was 'reasonable.' Thus, the  
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9 courts developed a considerable body of cases between 1999 and 2006 that  
10 focussed primarily on dominion.

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14 The development of the dominion discourse can be understood as a  
15 progressive moment in Irish law's treatment of victims of historical child  
16 sexual abuse. Dominion allowed law to carve out an exception to the  
17 established approach to delay in criminal prosecutions and allowed the  
18 prosecution of sexual offences committed against children decades earlier.  
19 The reasons for the victim's silence over decades were taken seriously as a  
20 justification for changing the established rules of criminal procedure. This  
21 indicates the flexibility of the common law and the willingness of the courts  
22 to recognise the victim of childhood sexual violence as a legal subject whose  
23 rights to bodily integrity, to autonomy and to privacy require vindication.  
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38 Furthermore, the admission of and reliance by the High Court and Supreme  
39 Court on psychologists' reports and testimony was an important move by law  
40 to bring expertise about the effects of sexual abuse into its decision-making  
41 process. Feminist scholars have long argued for courts to receive similar  
42 expertise in rape and sexual assault trials (Ellison, 2005; Smart, 2000). Thus,  
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49 the focus on the issue of dominion under *PC* may be understood as an  
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9 important attempt by law to discover the lived experiences of victims and to  
10 incorporate them into its process of judgment.  
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14 However, there are other readings of the courts' use of dominion that expose  
15 its problematic construction of victims' subjectivities and its effects in  
16 shutting down important questions about Ireland's history of child abuse.  
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19 The next section explores these readings.  
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## 22 23 24 25 26 27 28 **II Dominion's harms** 29

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31 A close reading of the cases decided under *PC* reveals a number of  
32 problematic constructions of victims of historical child sexual abuse. Many of  
33 these have strong resonances with the construction of women under the  
34 Battered Woman Syndrome defence (BWS) and the Rape Trauma Syndrome  
35 (RTS). Therefore, despite the radical appearance of dominion, on closer  
36 examination, it has continuities with a controversial tradition in law of using  
37 psychological discourses to articulate the experiences of victims of domestic  
38 and sexual violence. Before considering how dominion constructed victims  
39 in problematic ways, the next subsection sketches the contours of BWS and  
40 RTS and sets out the feminist critiques of both.  
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9 (i) BWS

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11 BWS is a psychological category that describes the psychological  
12 consequences and patterns of behaviour that result from cyclical violence  
13 and long-term abuse (Walker: 1984). BWS is included in the American  
14 Psychiatric Association's Diagnostic and Statistical Manual of Disorders  
15 (DSM) as a sub-category of Post-Traumatic Stress Disorder (PTSD).  
16 According to Walker, a battered woman may experience a state of  
17 'psychological paralysis', which can only be ended by an act of violence on  
18 her part. The theory has had a significant impact on the treatment and  
19 prosecution of cases where a battered woman is charged with the killing of  
20 her violent partner. It was influential in the United States and to a lesser  
21 extent in England and Wales throughout the 1990s (*R v Lavallee* [1990] 1 SCR  
22 852; Wells: 1994), but it is now not as popular. It has been subjected to  
23 sustained critique by feminist scholars (Raitt and Zeedyck, 2000: ch 4). The  
24 criticisms of BWS by some feminist scholars are important to a consideration  
25 of the use of dominion in the Irish delay cases. One major criticism is that  
26 BWS ignores the fact that domestic violence is not an exceptional form of  
27 violence, but is a structural phenomenon that might affect any woman  
28 (Mahoney, 1994). As such, psychological evidence to explain the context of  
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9 an abusive relationship is only needed because of law's refusal to accept the  
10 reality that violence is a feature of many women's lives. Furthermore, there  
11 is nothing unusual about women's decisions to stay, to abandon the attempt  
12 to leave, or to return. Given the lack of other viable choices for women who  
13 wish to leave and the risk of further violence or death associated with  
14 leaving, staying in an abusive relationship may well be the only rational  
15 choice available, and not a kind of 'learned helplessness', as suggested by  
16 BWS. However, law refuses to accept this and demands expert psychological  
17 evidence that a woman suffered BWS. In this way, her 'unreasonable'  
18 behaviour in staying in an abusive relationship becomes understandable to  
19 law, but in the process women are characterised as passive, dependent and  
20 disordered (Sheehy et al, 1992).  
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37 (ii) RTS  
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40 Expert psychological evidence has also had an important role to play in  
41 legitimating the experience of rape victims. The law has traditionally treated  
42 the evidence of victims of sexual offences with extreme skepticism (Hanly et  
43 al, 2009; Temkin and Krahé, 2008). Numerous reforms have been aimed at  
44 making the trial process a more positive experience for rape victims, such as,  
45 the introduction of limits on questions about previous sexual experience,<sup>5</sup> the  
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9 removal of the mandatory corroboration warning<sup>6</sup> and allowing special  
10 measures to be used to facilitate victims giving evidence.<sup>7</sup> Despite these  
11 improvements, however, myths about the behaviour of 'real' rape victims  
12 persist (Temkin et al: 2016; Ellison and Munro: 2009a). RTS comprises a  
13 constellation of reactions and behaviours of women who have been raped  
14 (Burgess and Holmstrom, 1974). Like BWS, it has also been included in the  
15 DSM as a sub-category of PTSD. Expert evidence on RTS has been used by  
16 the prosecution to explain some victims' apparently 'counter-intuitive'  
17 behaviours, such as: failure to immediately report a rape; lying to the police;  
18 refusing to name the perpetrator; exhibiting emotional 'flatness' and  
19 returning to the scene of the attack. In the United States in particular RTS  
20 proved helpful in educating jurors about 'real rape' stereotypes.  
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37 However, feminist scholars have exposed the problems with RTS. It  
38 reinforces the belief that women's reactions to rape are pathological (Stefan,  
39 1994) and constructs all rape victims as traumatised, despite their individual  
40 characteristics (Gilfus, 1999). It also imposes a standard that all victims have  
41 to meet in order to be believed (Raitt and Zeedyk, 2000: 100). RTS has also  
42 been criticised for providing support to improper attacks on the victim's  
43 credibility by the defence. Furthermore, because RTS is based on  
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9 psychological constructs and is linked to ideas such as denial, this is said to  
10 expose rape victims to a form of symbolic violence, in which one legitimate  
11 interpretation is that others know better than the victim herself, or the victim  
12 is no longer in control of meaning making of her life and sense of self (Gavey  
13 and Schmidt, 2011). Perhaps most importantly, a focus on the pathology of  
14 individual victims diverts attention from the wider structural context of  
15 pervasive male violence against women. Therefore, expert evidence on RTS  
16 (unlike general educational guidance to jurors on the effects of rape: Ellison  
17 and Munro, 2009b) only bolsters law's individualised approach to the  
18 problem of rape and allows law to ignore the societal context in which it  
19 takes place.  
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34 (iii) How the insights gained from feminist critiques of BWS and RTS may be  
35 applied to dominion in historical child sexual abuse cases  
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40 The feminist critiques of BWS and RTS provide valuable insights into the  
41 roots of dominion and its problematic effects on the courts' construction of  
42 victims' subjectivities. Of course, the *PC* test's concern with checking the  
43 delay was 'justified' was an expression of the criminal courts' anxiety about  
44 all delayed prosecutions, and was an attempt perhaps to identify a public  
45 interest in allowing these cases to proceed. However, on closer examination  
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9 it is clear that due process was not at the heart of the test. After all, in looking  
10 for dominion, the court was required to suspend the presumption of  
11 innocence and assume the truth of the complaint (1999: 68). Furthermore,  
12 the question of fairness of trial in evidential terms is logically unconnected to  
13 that of whether any delay in reporting the alleged crime was justified. Rather  
14 than flowing from the criminal law's concern for defendants' rights in  
15 delayed prosecutions, then, the inquiry into the reasons for the delay can  
16 better be understood as being primarily based on an historical distrust of  
17 sexual violence and domestic violence victims. In *PC* the Supreme Court  
18 chose to make the reasons for the delay relevant on the ground that the  
19 delayed reporting was *prima facie* unreasonable and blameworthy. This  
20 resonated with the myth that 'real' rape victims complain at the earliest  
21 opportunity. Furthermore, the requirement to check if the psychologist had  
22 deemed the reasons for the delay to be 'reasonable' fits squarely within  
23 requirements of independent validation or corroboration of the testimony of  
24 sexual assault victims. When considered in this light, dominion becomes, like  
25 BWS and RTS, indicative of law's inability to move beyond unfounded  
26 assumptions about victims of sexual violence.  
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9 Second, dominion interpellated the victim into a universal identity of the  
10 traumatised and passive victim. This meant that anyone who was not  
11 psychologically damaged 'enough' would be excluded from the category of  
12 dominion. In one incest case the victim's fear of causing problems in her  
13 family was not enough to excuse the delay in reporting (*PC v Malone* [2002] 2  
14 IR 560).<sup>8</sup> In *JL v DPP* [2000] 3 IR 122 the fact that the abuse was not part of a  
15 systematic pattern of abuse meant that the delay was inexcusable, despite  
16 the psychologist's finding that the delay was reasonable. Furthermore,  
17 victims were required to have conformed to a traumatised identity  
18 throughout their adult lives. Indications of psychological health and coping  
19 mechanisms in adulthood were found to be inconsistent with dominion. In  
20 *TS v DPP* [2005] 2 IR 595, a case involving complaints dating back to 1958,  
21 the Supreme Court quoted extensively from the psychologist's report, which  
22 stated that the delay was reasonable. However, because the psychologist had  
23 conceded under cross-examination that neither victim had any serious  
24 psychological or psychiatric problems, it was 'hard [for the Court] to place  
25 too much reliance on [the psychologist's] evidence' (2005: 605). Dominion  
26 was not found in a case where the victim went on to enjoy a supportive  
27 relationship as an adult (*PC v DPP* [2005] IEHC 103). Nor was it found where  
28 the victim decided to remain silent as an adult because of a concern for her  
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9 career in the gardaí (*DPP v JO'C* unreported High Court, 27 July, 2001). Thus,  
10 like BWS and RTS, dominion operated to disqualify certain victims of  
11 historical child sexual abuse who did not fit the individualised and  
12 disordered identities required by dominion.  
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19 Third, dominion closed off consideration of the broader societal actors why a  
20 child remained silent for so many years. This was despite the promise of  
21 dominion as a frame for law to understand and contextualise the experience  
22 of the victim. Indeed, dominion, like BWS and RTS, was a way of giving  
23 context and detail to the abstract legal subject in these difficult cases. Thus,  
24 allowed law to push beyond the narrow confines of the abstract legal subject  
25 and come closer to the lived reality of victims' experiences. However, just as  
26 with BWS and RTS, dominion failed to offer law a way of seeing the broader  
27 societal and structural factors surrounding sexual violence against children  
28 (Chunn, 2002; Kitzinger, 1997; Keenan, 2013) and the social context in which  
29 a child could be prevented from reporting abuse. Instead, the courts  
30 preferred to attach all responsibility for the delayed reporting to the actions  
31 of the defendant in (allegedly) abusing the victim. Thus the defendant's  
32 actions were the cause of the victim's passive and traumatised identity. Just  
33 as BWS and RTS translates the deeply structural and political issue of  
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9 violence against women into a private mental health crisis, dominion  
10 expressed the fiction that the delay was an individual's disordered reaction  
11 to the crime. In this narrative important historical questions inevitably got  
12 lost, such as: were there other reasons, beyond the effects of the abuse, why  
13 victims remained silent in the decades after the abuse? Why was the criminal  
14 law so ineffective in protecting children? What was the role of parents,  
15 teachers and other members of society in sustaining a culture of silence  
16 around sexual violence against children?  
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20 Therefore, law, using the notion of dominion, perpetuated older stereotypes  
21 about the credibility of victims of sexual violence, created new subjectivities  
22 of victims that did not correlate with their lived experiences, and closed off  
23 questions about the broader societal context in which abuse took place.  
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27 However, perhaps the most worrying dimension of dominion was how the  
28 courts dealt with victims whose very existence called into question the  
29 notion of dominion. These were people who gave evidence on affidavit that  
30 they had not remained silent about the abuse until recent times, but had in  
31 fact attempted to disclose the abuse as children and were not listened to.  
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37 These stories provide insights into the silencing of children by adults who  
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9 were not the abuser. How law treated these stories of agency and resilience  
10 under the dominion paradigm reveals law's power to create new histories.  
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### 14 15 16 17 18 **III Stories of agency and resilience** 19

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21 This Part scrutinises a small selection of the delay cases. They were chosen  
22 because they contain evidence information presented by the prosecution to  
23 the effect that the victim did disclose the abuse at or around the time of the  
24 abuse, but the adult to whom they disclosed did nothing. The evidence  
25 presented by victims to the courts in these cases suggests that the abuse of  
26 children was taking place in a culture that was indifferent to the harms of  
27 child sexual abuse. Furthermore, law, using the trope of dominion,  
28 subordinated themes of agency and resilience in these victims' accounts and  
29 refused to consider their treatment by adults to whom they disclosed. In  
30 examining these cases there is no suggestion that there is a 'correct' way to  
31 represent victimhood in historical sexual abuse cases, nor is there any desire  
32 to contribute to an unhelpful binary construction of victims as *either* agentic  
33 or not. Most importantly, there is no suggestion that people who did not  
34 report at the time are less important or less deserving of justice. Rather, the  
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9 intention is to show that stories of victims' agency and stories of inaction by  
10 adults were present in the case law, and that the law closed off consideration  
11 of these elements of the stories.  
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16 In the seminal case of *PC* the charges were five counts of indecent assault and  
17 three counts of unlawful carnal knowledge, dating back to the early 1980s.  
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19 The defendant was a bus driver who drove school children to swimming  
20 lessons. The abuse of the victim, who was aged between 12-15 years at the  
21 time, was alleged to have taken place on the bus, in the swimming pool and  
22 elsewhere. The victim did not disclose the abuse until 1988, when she was in  
23 her final year of school. She told her classmates, her parents, a teacher and  
24 the head teacher. Her motivation for telling the head teacher was to protect  
25 other potential victims, which indicates her altruism and resilience. She also  
26 told a garda sergeant who was a friend of her parents. Unfortunately, instead  
27 of pursuing the matter he told the victim to inform her parents if she had any  
28 problems with the defendant. The victim went on to complete her university  
29 education and put the abuse out of her head until she finally made a formal  
30 complaint to the gardaí in 1995.  
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49 In the Supreme Court Denham J, Keane CJ and Lynch J gave written  
50 judgments. Denham J held that because of his status as an adult and his  
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9 position of authority, the defendant had been in a dominant position over the  
10 victim while she was in school. The victim's decision not to make a formal  
11 complaint in 1988 was 'entirely comprehensible in light of the reaction she  
12 got to her initial disclosure of the abuse. She was not supported. She was  
13 not brought to a counsellor. She was not brought to a garda station.' (1999:  
14 63). Thus, the fact that the authority figures in her life did not take  
15 appropriate action in 1988 was part of the circumstances. However, Denham  
16 J quickly moved on from this insight to say that the delay was in fact caused  
17 by the defendant: 'The delay was caused by the [victim's] inability to make a  
18 formal complaint until 1995. This was a consequence of the alleged sexual  
19 abuse, the alleged criminal actions. Thus, fault lies with the alleged  
20 perpetrator of the actions – the [defendant]' (1999: 63). Denham J did give a  
21 nod to broader factors involved in the silencing of children when she stated:  
22 'It appears that rational consideration of abusive events is frequently  
23 suppressed for complex personal, family and social reasons.' (1999: 64). She  
24 then went on to inquire as to whether the defendant would risk an unfair  
25 trial, and held that he would not. Keane CJ also relied on the psychologist's  
26 evidence to say that the delay was explicable in light of all the circumstances,  
27 including the lack of action by adults in 1988. However, the delay was  
28 ultimately the result of the defendant's actions. Both of these judgments  
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9 show that the Court placed most emphasis on the negative psychological  
10 effects of the abuse on the victim and thus underemphasised her agency in  
11 reporting in her final year of school to protect other children. Furthermore,  
12 the failures of a number of adults to take the problem seriously became  
13 merely a minor detail in the story told by the Court. This theme of  
14 minimisation of stories of victims' agency and inaction by responsible adults  
15 is also clear in other cases decided under the *PC* test.  
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25 In *SF v DPP* [1999] 3 IR 235 the accused was a Roman Catholic curate  
26 charged with 66 counts of indecent assault or gross indecency against eight  
27 boys aged 11 or 12 years of age in the period 1981-1987. The victims were  
28 altar boys. The appeal to the Supreme Court concerned the charges relating  
29 to one victim who had reported the abuse to the defendant's replacement  
30 following his departure from the parish in 1986. He also spoke about the  
31 abuse to a person in All Hallows College, an educational institution for priests  
32 and nuns. He was asked to write down everything that had happened to him  
33 and subsequently received a letter of thanks from the local bishop. The letter  
34 did not specifically refer to the allegations. Nothing else was done to address  
35 the allegations. He eventually reported to the gardaí in 1995. The Supreme  
36 Court found that the continued delay in reporting the complaints to the  
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9       gardaí was to be attributed to the continuing psychological damage and/or  
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11       ‘*sequelae*’ of the abuse (1999: 252). The Court then found that that there was  
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13       no specific prejudice caused by the delay and the application for prohibition  
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15       was denied. Clearly then, the logic of dominion could not accommodate the  
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17       part of the story that showed that the victim’s courage and rationality in his  
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19       action in attempting to bring the abuse to the attention of the Church  
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21       authorities. Instead the Court imposed the dominion narrative. Not only did  
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23       this deny the reality of the experience conveyed to the Court, but it also  
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25       translated the failure of the Church authorities to stop the abuse into a minor  
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27       detail in the Court’s account of the past.  
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32       *PJC v DPP* [2005] IEHC 98 and *RC v DPP* [2005] IEHC 97 were two of a cluster  
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34       of cases involving a long and complicated history of abuse in a family.<sup>9</sup> PJC  
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36       was charged with 21 charges of indecent assault on his niece between the  
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38       years 1978 and 1983. She was aged between 10 and 15 years at the time.  
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40       She gave evidence that when she was about 15 she told her doctor about the  
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42       abuse. The doctor suggested that she should attend the Rape Crisis Centre. It  
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44       seems that no further action was taken to protect her or the other children.  
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46       In 1987 the victim made a statement to the gardaí where she described abuse  
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48       by her uncles but not the defendant. This statement was withdrawn. She  
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9 eventually made a formal complaint in 1999. MacMenamin J found that the  
10 delay and the withdrawal of complaints was due to dominion and oppressive  
11 conduct by the defendant and other members of his family. The fact that a  
12 doctor and the gardaí had been alerted to the sexual abuse within the family  
13 did not feature in the Court's reasoning.  
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21 In *RC* the defendant was charged with nine counts of indecent assault against  
22 his two nieces. In relation to one victim the charges dated back 21-23 years  
23 to when the victim was aged between 15 and 18 years. The psychologist's  
24 evidence was that when she was 17 or 18 she tried to formally report the  
25 abuse, but the Garda she met told her to leave the station and made  
26 derogatory remarks about her family. When she tried to tell her father about  
27 the abuse he ordered her to keep quiet. As a result, she chopped all of her  
28 hair and slashed her face with her father's razor. She eventually reported the  
29 abuse in 1999. MacMenamin J also recited and accepted the evidence of a  
30 social worker that allegations of abuse within the family in question had been  
31 brought to the attention of the Eastern Health Board. Meetings were held  
32 with the family, but ultimately the accused avoided any further interaction  
33 with the social services by emigrating to England with his family in 1988.  
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9 The Court refused to grant the order of prohibition on a number of grounds,  
10 including the familial relationship, the close proximity of the victim's and  
11 defendant's homes, the victim's fear of the defendant and his brother and the  
12 'dominion conduct on the part of the [defendant].' In so doing, the Court  
13 sidestepped any consideration of the agency and courage shown by this  
14 young woman in looking for help from responsible adults. This simplistic  
15 approach transformed the original story of a complex array of factors  
16 relating to the victim's silence over 21 years, into a simple story of a damaged  
17 victim who was afraid of the defendant and his brothers. Thus, in both *PJC*  
18 and *RC*, the focus on the dominion issue meant that law effectively  
19 exonerated both the gardaí and the social services.  
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35 *JO'C v DPP* [2000] 3 IR 478 involved systematic abuse of the victim when she  
36 was aged between 10 and 14/15 years old, in the years 1974-1978. The  
37 victim lived next door to the defendant. The victim's parents were very  
38 friendly with the defendant who was a garda. In this case the Supreme Court  
39 took the opportunity to explore the ways in which the delay jurisprudence  
40 was developing. The lead judgment was delivered by Keane CJ who quoted  
41 the victim's statement in its entirety. He also quoted extensively from the  
42 affidavits of the expert consultant psychologist who had examined the victim.  
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9 The victim told her mother about the abuse in 1988 when she was a young  
10 adult. However, her parents did not take any action at that time. She finally  
11 made a complaint almost ten years later to the Eastern Health Board, having  
12 realised through counselling that she was not to blame for the abuse. She  
13 also was motivated by a desire to protect a child who was living next door to  
14 the defendant. Keane CJ relied on the psychologist's evidence to the effect  
15 that the delay was explicable on the ground that her parents had not acted on  
16 her disclosure of abuse in 1988 (2000: 485). This was an important judicial  
17 recognition of the role of people other than the defendant in keeping victims  
18 silent. However, Keane CJ did not pursue this point, but simply stated that  
19 the delay was 'ultimately referable to the defendant's actions, assuming them  
20 to be true.' The order of prohibition was refused. Therefore, dominion was  
21 used to convert what was completely understandable behaviour on the part  
22 of the victim, into a matter that needed to be certified by a psychologist and  
23 that was ultimately an effect of the abuse. In this way, the Court elided any  
24 consideration of how the defendant's status as a garda could have provided  
25 him with a certain degree of immunity, and it also shut down the discussion  
26 of her parents' failure to act in 1988.  
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9 *SA v DPP* [2005] IEHC 262 involved eight charges of buggery, 3 charges of  
10 indecent assault and one charge of attempted buggery by a Christian Brother  
11 against six children, five of whom were residents or inmates of an industrial  
12 school and one of whom was a grandchild of an employee of the Christian  
13 Brothers. The offences against the inmates were alleged to have been  
14 committed between 1961 and 1964, and the offence against the sixth victim  
15 was alleged to have been committed between 1964 and 1969. One victim  
16 stated that he complained to the school authorities and the defendant was  
17 removed from his position. However, he received a three-day long beating  
18 from other members of the religious congregation. When he left the school  
19 he did not report because of a fear of not being believed, a fear that was  
20 confirmed when he spoke with a psychiatrist in 1969. Another victim did not  
21 complain because of his feelings of shame and because of the status of the  
22 Christian Brothers in Irish society. Another victim did not report because of  
23 a fear of getting a physical beating and a fear that no one could believe him  
24 since the defendant was 'a man of the cloth.' This fear was echoed in the  
25 evidence of another victim, who did not think anybody would believe that a  
26 member of the Catholic Church would be involved in that kind of activity. For  
27 four of the six victims, the psychologist's evidence involved assessing their  
28 behaviour according to the Trauma Symptom Inventory.  
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9 In deciding not to prohibit the trial O'Neill J held that the psychologist's  
10 evidence reinforced and added to the reasons given by the victims for the  
11 delay. This case also points up the deeply-embedded social disbelief of  
12 victims of clerical abuse. This was not, contrary to the logic of dominion,  
13 something that clerical abusers were responsible for (although they surely  
14 exploited their status in order to offend: Keenan, 2013), but was rather a  
15 result of the prevailing deferential attitude in society towards the Catholic  
16 Church. The fact that children felt they could not report because of a climate  
17 of disbelief is a very important consideration for any society attempting to  
18 come to terms with its past. However, the Court in *SA* was far more  
19 interested in gaining expert certification of victims' stories and in making  
20 each victim's story part of an individualised narrative that expressed their  
21 inability to complain, than in exploring the role of society in preventing  
22 disclosure.

#### 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 **IV The delay cases and Ireland's relationship to its past**

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45 The courts' focus on dominion was rooted in the well-intentioned aim not to  
46 allow the defendant to escape prosecution merely because of the passage of  
47 time. However, close scrutiny of the cases reveals that the dominion  
48 discourse also had a number of other consequences. It silenced stories of  
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9 agency and resilience of victims who tried to report at the time or at an  
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11 earlier point in their lives, in order to maintain the fiction of the traumatised  
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13 victim. Dominion was therefore part of a continuum of silencing in law and  
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15 in society, which involves processes that distort, minimise and discount the  
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17 testimonies of victims of sexual violence (Haaken, 1992; Young, 1998).  
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21 The dominion discourse also excluded any consideration of the role of society  
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23 in keeping victims silent. This is especially significant because the cases  
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25 presented in Part III suggest that a key factor in non-reporting in those cases  
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27 was that family members, or other adults in positions of responsibility over  
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29 the child, failed to act when told by the child about the abuse. The stories  
30  
31 examined point to an attitude of indifference on the part of some gardaí,  
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33 religious, teachers and social workers towards the problem of child sexual  
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35 abuse. Children were silenced in a variety of ways, including a failure to  
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37 provide support (*PC*); minimisation and mocking (*PJC*); a refusal to act (*SF*);  
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39 societal attitudes towards the Catholic Church (*SA*) and the status of the  
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41 offender in society (*JO'C*; *SA*). They also suggest that the reason other  
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43 children did not report was that they were living in a society in which there  
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45 was no reason to expect action on sexual violence by adults. However, law  
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47 subordinated all of these stories into a narrative that attributed full  
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9 responsibility for the delay to the alleged abuser and thus produced a  
10 decontextualised version of history.  
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14 Of course, this approach might be seen as mandated by the individualised  
15 logic of criminal law, which does not hold a society to account for failures to  
16 protect victims. However, this does not mean that the courts were compelled  
17 to take the approach they did. The 'delay' could have been constructed  
18 within legal doctrine not as presumptively blameworthy, but as a rational  
19 response to a repressive culture, in which Irish society was complicit. This  
20 approach would not have had any bearing on the ultimate question for the  
21 court, which was the likelihood of the defendant receiving a fair trial. Neither  
22 would it have risked prejudicing the jury because these were pre-trial judicial  
23 review applications.  
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38 Instead, law produced 'frames of remembrance' (Irwin-Zarecka, 1994) that  
39 set parameters on how Irish society understands its past. This process  
40 reached its conclusion in the case of *SH* when the Supreme Court replaced the  
41 *PC* test with one that asks only whether the defendant runs the risk of an  
42 unfair trial (Ring 2009, 2013). It is difficult to ascertain exactly why the  
43 Court decided to institute a new test. However it would seem that it was  
44 responding to the uncertainty among judges and practitioners about the  
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9 principles governing the so-called 'sex delay' cases (Conroy, 2005; Carolan,  
10 2006) as well as a growing trend of defendants seeking to have the victim  
11 examined by their psychological experts, which involved further delays  
12 (Carolan, 2006). There had also been indications of a move towards the  
13 eventual *SH* approach in the earlier judgments of Hardiman and Murray JJ.<sup>10</sup>  
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15 While the decision is an undeniably positive one from a due process  
16 perspective (Ring 2013), it has entrenched law's refusal to engage with  
17 structural and societal issues surrounding child sexual abuse.  
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28 The accused was a primary school teacher who was charged with 50 charges  
29 of indecent assault against four victims, who were all aged between seven  
30 and ten years at the time. The offences were alleged to have been committed  
31 in the mid to late 1960s but no formal complaint was made until 1999. The  
32 appeal from the High Court's refusal of an order of prohibition was heard  
33 before five judges of the Supreme Court. The Court received full legal  
34 submissions about the jurisprudence relating to the right to a fair trial and  
35 the need to inquire into the reasons for the delay. In the case report in the  
36 Irish Reports the transcript of counsels' oral arguments is reproduced,  
37 including questions from the bench. This indicates the importance of the  
38 case in setting a new precedent in historical child sexual abuse cases.  
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9 Murray CJ gave the judgment of the Court. He set out the evidence given by  
10 the four victims regarding the abuse and their reasons for not reporting  
11 contemporaneously. The evidence of one victim, JM, resonated strongly with  
12 the theme of disbelief running through the cases. JM told his mother about  
13 one particular incident of abuse. She eventually believed him and brought  
14 him to a garda station to report the abuse. His mother told a uniformed  
15 Garda about the assault – all JM could remember from this episode was  
16 shouting between the Garda and his mother (2006: 603). On returning home,  
17 the victim's father beat him for having made the allegation. The complaint  
18 was not pursued any further. The other victims cited similar reasons such as  
19 disbelief by others and fear. Murray CJ also referred to the report prepared  
20 for the Court by Dr Harry Ferguson, an academic and professional social  
21 worker who had researched the files of the Irish Society for the Prevention of  
22 Cruelty to Children. His evidence was that, 'Any 'disclosure' of sexual abuse  
23 that occurred in decades prior to the late 1980s and 1990s cannot reasonably  
24 be defined or treated as a disclosure in the sense that that term is understood  
25 today, given the massive social pressure that existed which rendered the  
26 child's statement illegitimate and a protective response unthinkable' (2006:  
27 617). Murray CJ did not comment on this part of Dr Ferguson's evidence but  
28 simply stated that it correlated with the experience of the Court and that 'the  
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9 court's experience extends to a broader set of issues and it has found that  
10 there is a range of circumstances extending beyond dominion or  
11 psychological consequences flowing directly from the abuse which militate or  
12 inhibit victims from bringing complaints of sexual abuse to the notice of  
13 other persons, in particular those outside their family and even more  
14 particularly the gardaí with a view to a possible trial' (2006: 618). This was a  
15 long overdue acceptance by the Supreme Court that a climate of disbelief  
16 existed for decades in Ireland. Murray CJ stated that at issue in each  
17 historical abuse prosecution is the constitutional right to a fair trial and that  
18 'in reality the core inquiry is not so much the reason for a delay in making a  
19 complaint by a complainant but rather whether the accused will receive a fair  
20 trial [...]' (2006: 618). He noted 'the extensive affidavits and oral evidence  
21 along with psychological and medical reports which have come before the  
22 court for the purpose of explaining the [delay]' and held that 'in the end, what  
23 concerns the court is whether an accused will receive a fair trial or whether  
24 there is a real or serious risk of an unfair trial'(2006: 618). On this basis, the  
25 Court decided that it was no longer necessary to inquire into the reasons for  
26 the delay. The only inquiry now is whether the defendant is at risk of an  
27 unfair trial because of the delay, and whether there are wholly exceptional  
28 circumstances which justify an order of prohibition (Ring, 2013).  
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9 The *SH* test is a welcome vindication of the importance of the presumption of  
10 innocence and the right to a fair trial. However it also points up law's power  
11 to make parts of victims' histories relevant or not to its treatment of the past.  
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13 Despite effectively taking judicial notice of a culture of indifference towards  
14 abused children, the Court refrained from any detailed discussion of how  
15 society kept children silent. In doing so, it missed an opportunity to formally  
16 acknowledge the role played by society in the dynamics of child abuse. This  
17 omission is particularly regrettable because under *SH*, courts hearing  
18 prohibition applications no longer receive evidence on the particular ways in  
19 which victims were silenced by adults. Of course these stories may still be  
20 told in courtrooms during trials when victims are asked about the  
21 circumstances of the abuse, and how they eventually came to report.  
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23 However, these stories are not being told to the Superior Courts and are not  
24 repeated by them in their written judgments. Therefore, Irish society has  
25 lost a rich repository of information on its history of child sexual abuse.  
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43 The dominion case law is a powerful reminder of law's power to impose  
44 hegemonic discourses on victims of sexual violence. This power endures  
45 even post-*SH*; for example at trial, defence lawyers may argue that certain  
46 grounds for delayed reporting are 'unreasonable' and indicative of dubious  
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9 credibility. This matters for child victims today too, because the stories  
10 adults are allowed to tell about child abuse limit the stories children can tell  
11 about it (Woodiwiss, 2014). Therefore, if adult victims have been made to  
12 conform to a discourse of trauma and passivity, it is very possible that law  
13 will similarly construct boundaries around the permissible limits of the  
14 stories that children can tell about their experiences. It is imperative that  
15 spaces are created within law and society where adult victims of historical  
16 abuse and child victims can express the full complexity of their experiences.  
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### 31 **Conclusion**

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34 As societies grapple with the problems of ensuring that child sexual abuse is  
35 adequately addressed in the present and into the future, a key objective must  
36 be finding out why sexual abuse was invisible in so many countries for so  
37 long. The cases presented here offer some insights into the answer in  
38 relation to the Irish context. They suggest that a significant factor in some  
39 cases of delayed reporting of childhood sexual abuse was a failure to act by  
40 adults when the child told them about the abuse. They also suggest that it is  
41 not legally or historically correct to attach all blame for abuse to individual  
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9 abusers or institutions. The experiences of victims presented to the courts in  
10 the period 1999-2006 indicate that parents, teachers, gardaí and other  
11 members of society were involved in creating and sustaining a culture of  
12 silencing around child sexual abuse that existed not only during the period of  
13 abuse, but for decades afterwards. If Irish society is serious about reducing  
14 the incidence of child sexual abuse in society, the burden is on the  
15 community to create a climate of safety and transparency, in which the abuse  
16 of children is not tolerated, and in which children are supported in reporting.

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28 Furthermore, the delay cases suggest that law cannot be trusted to produce a  
29 complete picture of the past. Rather, they point to law's discursive power to  
30 produce new subjectivities at odds with victims' accounts, to perpetuate  
31 stereotypes about victims of sexual violence, and to produce versions of  
32 history that erase certain experiences and exonerate society from any  
33 complicity in the abuse of children. If we are to work towards developing a  
34 common ethical memory of the past that is the converse of political amnesia  
35 (Pine, 2011: 15), we must remain alert to law's paradoxical character: its  
36 capacity to provide valuable information about our past on the one hand, and  
37 its tendency to minimise and distort important elements of our history of  
38 child sexual abuse on the other.  
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## Notes

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<sup>1</sup> Smart (2000) asks this question in relation to the discursive struggle over the meaning of childhood, the innocence of girls and the discovery of venereal diseases in children's homes in early 20<sup>th</sup> century England.

<sup>2</sup> A trial in due course of law is guaranteed under Article 38.1 of the Constitution.

<sup>3</sup> Sections 28(1) and 28(6) of the Residential Institutions Redress Act 2002.

<sup>4</sup> General Scheme of a Retention of Records Bill 2015.

<sup>5</sup> Section 41 of the Youth Justice and Criminal Evidence Act 1999.

<sup>6</sup> Section 7 of the Criminal Law (Rape) (Amendment) Act 1990 (Ireland); *R v Makanjuola* [1995] 3 All ER 730 (England and Wales).

<sup>7</sup> Parts III and IV, No.12 of Criminal Evidence Act 1992; In England and Wales these were introduced by sections 23-30 of the Youth Justice and Criminal Evidence Act 1999.

<sup>8</sup> This case employed the closely-related concept of inhibition.

<sup>9</sup> See *FC v Judge Kirby and the DPP* [2005] IEHC 445; *BC v Judge Kirby and the DPP* [2005] IEHC 446.

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<sup>10</sup> *JC v DPP* (6 July 2000, unreported, Supreme Court); *PO'C v DPP* [2000] 3 IR 8.

## References

American Psychiatric Association (2013) *Diagnostic and Statistical Manual of Mental Disorders*. Washington D.C.: American Psychiatric Publishing.

Brown W (2001) *Politics Out of History*. Woodstock: Princeton University Press.

Buckley S (2013) *The Cruelty Man: Child welfare, the NSPCC and the State in Ireland 1889-1956*. Manchester: Manchester University Press.

Burgess AW and Holmstrom L (1974) Rape Trauma Syndrome. *The American Journal of Psychiatry* 131: 981-986.

Carolan M (2006) DPP seeks legal decision on delayed complaints of sex abuse. *The Irish Times* Tuesday January 24.

Chunn DE (2002) Secrets and Lies: The Criminalization of Incest and the (re)formation of the 'Private' in British Columbia, 1890-1940. In: McLaren J, Menzies R and Chunn DE (eds) *Regulating Lives. Historical Essays on the States, Society, the Individual, and the Law*. Vancouver: UBC Press, pp. 120-144.

Conroy B (2005) Clarifying the Law on Delayed Prosecutions for Sexual Offences. 10(6) *Bar Review* 214.

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Conway V (2014) *Policing Twentieth Century Ireland. A History of An Garda Síochána*. London: Routledge.

Commission to Inquire into Child Abuse (2009) *Final Report*. Dublin: Stationery Office.

Commission of Investigation (2009) *Report into the Catholic Archdiocese of Dublin*. Dublin: Stationery Office.

Commission of Investigation (2010) *Report into Cloyne Archdiocese*. Dublin: Stationery Office.

Department of Justice, Equality and Law Reform (2005) *Report of the Ferns Inquiry*. Dublin: Stationery Office.

Ellison L (2005) Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases. *International Journal of Evidence and Proof* 9(4): 239-268.

Ellison L and Munro V (2009a) Reacting to rape: exploring mock jurors' assessments of complainant credibility. *British Journal of Criminology* 49(2): 202-219.

Ellison L and Munro V (2009b) Turning Mirrors Into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials. *British Journal of Criminology* 49(3): 363-383.

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Ferriter D (2009) Report by Dr Diarmuid Ferriter, St Patrick's College, DCU, in Commission to Inquire into Child Abuse, *Final Report*. Dublin: Stationery Office.

Ferriter D (2009) *Occasions of Sin*. London: Profile Books.

Gilfus ME (1999) The price of the ticket: A survivor-centered appraisal of trauma theory. *Violence Against Women* 5: 1238-1257.

Gavey N and Schmidt J (2011) Trauma of Rape" Discourse: A Double- Edged Template for Everyday Understandings of the Impact of Rape? *Violence Against Women* 17(4): 433-456.

Haaken J (1998) *Pillar of Salt: Gender, Memory and the Perils of Looking Back*. New Brunswick: Rutgers University Press.

Hanly C, Healy D, Scriver S and Rape Crisis Network Ireland, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Dublin: The Liffey Press, 2009).

Holohan C (2011) *In Plain Sight: Responding to the Ferns, Ryan, Murphy and Cloyne Reports*. Dublin: Amnesty International Ireland.

Irwin-Zarecka I (1994) *Frames of Remembrance: The Dynamics of Collective Memory*. New Brunswick: Transaction.

Keenan M (2012) *Child Sexual Abuse and the Catholic Church: Gender, Power, and Organizational Culture*. New York: Oxford University Press.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10 Kitzinger J (1997) Who are you kidding? Children, power and the struggle  
11 against sexual abuse. In: James A and Prout A (eds) *Constructing and*  
12 *Reconstructing Childhood*. Basingstoke: The Falmer Press, pp. 165–189.

13  
14  
15  
16 Mahoney MR (1994) Victimization or Oppression? Women's Lives, Violence  
17 and Agency. In Fineman, MA and Mykitiuk, R (eds) *The Public Nature of*  
18 *Private Violence*. New York: Routledge, pp 59-92.

19  
20  
21  
22 Maguire M (2007) The Carrigan Committee and Child Sexual Abuse in  
23 Twentieth-century Ireland. *New Hibernia Review* 11(2): pp. 79-100.

24  
25  
26  
27 O'Malley T (2009) *The Criminal Process*. Dublin: Round Hall.

28  
29  
30 Pine E (2010) *The Politics of Irish Memory: Performing Remembrance in*  
31 *Contemporary Irish Culture*. Basingstoke: Palgrave.

32  
33  
34 Powell F, Geoghegan M, Scanlon M and Swirak K (2013) The Irish Charity  
35 Myth, Child Abuse and Human Rights: Contextualising the Ryan Report into  
36 Care Institutions. *British Journal of Social Work* 43: 7-23.

37  
38  
39  
40 Raitt F and Zeedyk S (2000) *The Implicit Relation of Psychology and Law:*  
41 *Women and Syndrome Evidence*. London: Routledge.

42  
43  
44  
45 Ring S (2009) Beyond the Reach of Justice? Complainant Delay Historic Child  
46 Sexual Abuse Cases and the Right to a Fair Trial. *Judicial Studies Institute*  
47 *Journal* 2: 162-203.  
48  
49  
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7  
8  
9  
10 Ring S (2013) Analysing 'Fairness in Context' in Historic Child Sexual Abuse  
11 Prosecutions. *Irish Criminal Law Journal* 23(4): 132-140.

12  
13  
14 Sarat A and Kearns TR (2002) *History, Memory and Law*. Ann Arbor:  
15 University of Michigan Press.

16  
17  
18 Sheehy E, Stubbs J and Tolmie J (1992) Defending Battered Women on Trial:  
19 the Battered Women's Syndrome and its Limitations. *Criminal Law Journal*  
20 16: 369.

21  
22  
23  
24 Smart C (2000) Reconsidering the Recent History of Child Sexual Abuse,  
25 1910-1960. *Journal of Social Policy* 29(1): 55-71.

26  
27  
28 Stefan S (1994) The Protection Racket: Rape Trauma Syndrome, Psychiatric  
29 Labelling, and Law *Northwestern Law Review* 88: 1271-1345.

30  
31  
32 Temkin J and Krahe B (2008) *Sexual assault and the justice gap: A question of*  
33 *attitude*. Oxford: Hart.

34  
35  
36  
37 Temkin J, Gray J.M. and Barrett J (2016) Different Functions of Rape Myth Use  
38 in Court: Findings from a Trial Observation Study. *Feminist Criminology*: 1-22  
39 published online 4 August 2016 DOI: 10.1177/1557085116661627.  
40 Accessed 5 January 2017.

41  
42  
43 Walker L (1984) *The Battered Woman Syndrome*. New York: Springer.

44  
45  
46  
47 Wells C (1994) Battered Women Syndrome and Defences to Homicide:  
48 Where to now? *Legal Studies* 14: 266-276.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10 Woodiwiss J (2014) Beyond a single story: The importance of separating  
11 'harm' from 'wrongfulness' and 'sexual innocence' from 'childhood' in  
12 contemporary narratives of childhood sexual abuse. *Sexualities* 17(1/2): 139-  
13 158.  
14  
15

16  
17  
18 Young A (1998) The Wasteland of the Law. The Wordless Song of the Rape  
19 Victim. *Melbourne University Law Review* 22(2) 442-465.  
20  
21

### 22 **Cases cited**

23  
24 *B v DPP* [1997] 3 IR 140  
25

26  
27 *BC v Judge Kirby and the DPP* [2005] IEHC 446  
28

29 *DPP v JO'C* unreported High Court, 27 July, 2001  
30

31 *FC v Judge Kirby and the DPP* [2005] IEHC 445  
32

33  
34 *JO'C v DPP* [2000] 3 IR 478  
35

36 *JC v DPP* (6 July 2000, unreported), Supreme Court  
37

38  
39 *JL v DPP* [2000] 3 IR 122  
40

41 *PC v DPP* [1999] 2 IR 25  
42

43 *PC v DPP* [2005] IEHC 103  
44

45 *PC v Malone* [2002] 2 IR 560  
46

47 *People (DPP) v Synott* (29 May 1992, unreported), Court of Criminal Appeal  
48

49 *PJC v DPP* [2005] IEHC 98  
50

51  
52 *PO'C v DPP* [2000] 3 IR 87  
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10 *R v Makanjuola* [1995] 3 All ER 730

11 *RC v DPP* [2005] IEHC 97

12 *SA v DPP* [2005] IEHC 262

13 *SF v DPP* [1999] 3 IR 235

14 *SH v DPP* [2006] 3 IR 575

15 *TS v DPP* [2005] 2 IR 595

16  
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23 **Legislation Cited**

24  
25 Criminal Law (Rape) (Amendment) Act 1990

26  
27 Residential Institutions Redress Act 2002

28  
29 Youth Justice and Criminal Evidence Act 1999