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Jorge L. Carro

Joseph V. Hatala

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Jorge L. Carro*
Joseph V. Hatala**

I. INTRODUCTION

Indisputably, childhood sexual abuse is one of the most heinous crimes that can be committed against another human being. This is accentuated by the fact that a blood relationship exists between the victimizer and the victim. This form of sexual abuse is not only penalized in the criminal codes of every nation, but it also receives universal religious condemnation.[1]

Three recurrent themes exist in all cases of childhood sexual abuse: (1) the victim's extreme vulnerability due to the personal relationship with the victimizer (parents against children, adults against minors, tutors against pupils, clergy against flock, etc.); (2) the devastating, everlasting and traumatic effects on the victim; and (3) the failure to report the incident(s) to authorities because of incapacity, fear and embarrassment.

Cases of childhood sexual abuse are, even today, rarely reported. The secrecy of the act is not only founded in the above themes, but also may be found in the reluctance of families and society to confront this issue. Recently, a revolution in childhood sexual abuse awareness has emerged due to a barrage of media exposure combined with an extraordinary number of celebrities publicly speaking about and denouncing childhood sexual abuse. With the veil of secrecy pierced, the gates have

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* Professor of Law, University of Cincinnati, College of Law. J.D. University of Havana, M.L.S. Kansas State Teachers College, B.A. Havana Institute.

** B.A. Ashland University, J.D. University of Cincinnati, College of Law, Member of the Ohio Bar.

1. Catholics, Jews and Muslims alike, as well as primitive societies, have addressed the issue of incest taboo. *See* 7 NEW CATHOLIC ENCYCLOPEDIA 419-21 (1967); 8 ENCYCLOPEDIA JUDAICA 1316-18 (1971).

been opened to a flood of exposures, most apparent on radio and television talk shows, and a proliferation of criminal and civil complaints based on childhood sexual abuse.

As a result, decades-old acts of childhood sexual abuse have been brought to life in courtrooms nationwide. Some of the victims have clear, vivid memories of sexual abuses, but have remained silent over the years, never reporting the abuses ("Type I" Complainants). Others, through modern psychology and because of the exposures, have proceeded with litigation premised on supposedly "repressed" memories of sexual abuse, not "actual," vivid memories ("Type II" Complainants). These litigants claim to have selectively forgotten the alleged events associated with the trauma, only to remember them years or decades later. In these Type II cases, the suppressed memory of abuse usually awakens from its slumber deep within the person's mind by the work of a professional purportedly trained in the "recovery" of such memories.[2] Alternatively, a victim may be alerted to the memory by an event reminiscent of the trauma, which reminds the person of the abuse.[3]

The courageous determination of abuse victims with actual, vivid memories creates an auspicious climate for the prevention and eradication of childhood sexual abuse. The situation is different, however, for complainants with "recovered" memories of abuse.

Recovered memory therapy is fraught with dangers that include, among others, inducing the subject to "remember" events that never occurred. This phenomenon is commonly referred to as the creation of a "false memory." These false memories of childhood sexual abuse have destroyed families and reputations, and have created a credibility crisis—a backlash against mental-health practitioners and crusaders against childhood sexual abuse by people who do not know whether to believe a particular abuse occurred.

For several years, federal and state courts nationwide have grappled with a glut of sexual abuse cases brought by "adult children" Type II claimants against their aged parents.[4] Critics of recovered memory

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2. "Recovered memory" therapy is a technique used to "unearth" long-repressed memories of abuse. *See* Richard Ofshe & Ethan Watters, *Making Monsters—Psychotherapy's New Error: Repressed Memory, Multiple Personality and Satanic Abuse*, SOCIETY, Mar. 1993, at 4, 4. Therapists believe that repression is a "powerful psychological defense that causes one to lose all awareness of physically or sexually terrifying events." *Id.*

3. *Id.*

4. As of April 17, 1993, there were 89 pending United States repressed memory cases in which plaintiffs claimed sexual abuse. *False Memory Syndrome Foundation (FMSF), Summary of Legal Survey Data from the False Memory Syndrome Foundation* 7 (Apr. 17, 1993). Throughout the states, there were 199 documented cases where victims made a formal threat to pursue legal action against the accused. *Id.*

therapy attribute this flood of Type II sexual abuse litigation to the controversial book *Courage to Heal* as well as to recovered memory theory and its proponents.[5]

In addition to the frequency of recovered memory litigation, these cases present pervasive procedural problems for courts nationwide. First, an ongoing debate rages in the American psychological, psychiatric, and medical communities regarding the validity of repressed memory syndrome and recovered memory therapy.[6] Recovered memory ther-

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Nearly one-fifth of the persons threatened received a letter demanding money to avoid a lawsuit. *Id.* In addition, over 3050 persons had been accused of Type II sexual abuse as of March 24, 1993. *Id.* The number of accusations has grown to include over 11,000 families nationwide as of April 10, 1994. FALSE MEMORY SYNDROME FOUNDATION NEWSLETTER, Mar. 8, 1994, at 1, 1.

5. ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE (3d ed. 1994). This book, which first edition appeared in 1988, is described as the bible of the incest survivor movement. *Id.* The book is often criticized for encouraging "revenge, anger, fantasies of murder or castration, lawsuits and deathbed confrontations." *See* Elizabeth F. Loftus, *The Reality of Repressed Memories*, 48 AM. PSYCHOLOGIST 518, 525 (1993) (citing H. Wafefield & R. Underwager, *Recovered Memories of Alleged Sexual Abuse: Lawsuits Against Parents*, 10 BEHAVIORAL SCI. & L. 483, 485 (1992)). In reaction to this influential book, four new works appeared in 1994 challenging it: (1) ELIZABETH LOFTUS & KATHERINE KETCHEM, THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE (1994) (presenting in layman's prose the fruits of the authors' research from thousands of books, articles, and letters, as well as hundreds of interviews with accusers and accuseds, lawyers, therapists, psychologists, psychiatrists, criminologists, etc.); (2) RICHARD OFSHE & ETHAN WATTERS, MAKING MONSTERS, FALSE MEMORIES, PSYCHOTHERAPY AND SEXUAL HYSTERIA (1996) (criticizing sexual abuse from Sigmund Freud's times to current events); (3) LENORE TERRE, UNCHAINED MEMORIES: TRUE STORIES OF TRAUMATIC MEMORIES, LOST AND FOUND (1994) (describing her own and others' experiences as child psychiatrists dealing with cases of recovered memories and child sexual abuse); (4) LAWRENCE J. WRIGHT, REMEMBERING SATAN: A CASE OF RECOVERED MEMORY AND THE SHATTERING OF AN AMERICAN FAMILY (1994) (presenting a vivid, detailed account of the tribulations of a father falsely accused of sexually abusing two of his daughters). Most recently, a father falsely accused of sexual abuse by his two adult daughters published a well-researched and compassionate treatment of the subject. MARK PENDERGRAST, VICTIMS OF MEMORY: INCEST ACCUSATIONS AND SHATTERED LIVES (1995). His book has been called "the long-awaited rebuttal to *The Courage to Heal.*" *See id.* (inside jacket cover). For an extensive description and review of all the above-mentioned books, see Frederick Crews, *The Revenge of the Repressed* (pts. 1 & 2), N.Y. REV. BOOKS, Nov. 17, 1994, at 54, N.Y. REV. BOOKS, Dec. 1, 1994, at 49.

6. *See* Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185, 1202-05 (1992) (discussing the use of memory retrieval in litigation); Elizabeth F. Loftus, *You Must Remember This . . . Or Do You? How Real Are*

apy critics cite the lack of any scientific evidence that validates the recoverability of repressed memories.[7] Richard Ofshe has written:

> The substantive controversy turns on the validity of the concept of repression, the central mechanism of the theory .... If repression is a valid concept, clients could be recovering long hidden memories of abuse. If invalid, repression is nothing more than a pseudo-scientific smoke screen for treatment techniques that create false memories .... [T]he existence of repression has never been empirically demonstrated. Sixty years of experiments ... have failed to produce any evidence of its existence.[8]

The American Medical Association (AMA), American Psychiatric Association (APA) and American Psychological Association have all cautioned against the use and acceptance of recovered memory therapy. The AMA issued a position statement on recovered memory therapy, stating: "'The AMA considers recovered memories, the technique of discovering childhood sexual abuse to be of uncertain authenticity, which should be subject to external verification. The use of recovered memories is fraught with problems of potential misapplications.'"[9] They also recognized that most controversial are those memories that surface only in therapy and those from either infancy or late childhood, including adolescence.[10]

Similarly, the Board of Trustees of the American Psychiatric Association, on December 12, 1993, stated its position on recovered memories as follows:

> 'It is not known how to distinguish, with complete accuracy, memories based on true events from those derived from other sources' .... [C]hild sexual abuse is a 'risk factor for many classes of psychiatric disorders' ... and ... the coping mechanisms 'can result in a lack of conscious awareness of the abuse .... Conscious thoughts and feelings stemming from the abuse may emerge at a later date.' ... 'There is no completely accurate way of determining the validity of reports (of sexual abuse) in the absence of corroborating information.' ... 'The retrieval and recounting of a memory can modify the form of the memory, which may influence the content and the conviction about the veracity of the memory in the future.' ... 'Memories can be significantly influenced by questioning ... and it has also been shown that repeated questioning may lead individuals to report "memories" of events that never occurred.'[11]

Repressed Memories?, WASH. POST, June 23, 1993, at C1 (discussing validity of repressed memories); Jim Browning, *Recalling Abuse: 'False Memory Syndrome' Is Little More Than an Excuse for Denying Sexual Trauma*, VANCOUVER SUN, May 27, 1993, at A13 (discussing the recall of sexual abuse); Ofshe & Watters, *supra* note 2, at 4 (presenting the definitive account of the reality of recovered memories).

7. Elizabeth F. Loftus, *supra* note 5, at 525-26.

8. Ofshe & Watters, *supra* note 2, at 5.

9. *Id.* (quoting the AMA).

10. *Id.* at 4.

11. Tom Genoni, Jr., 18 SKEPTICAL INQUIRER 342 (Summer 1994) (quoting from the statement of the American Psychiatric Association).

In its statement, the APA also addresses the question of impartiality, by calling its members to maintain an "emphatic, nonjudgmental, neutral" stance towards reported memories of sexual abuse.[12] It also addresses competence, by warning that therapists without proper training in many areas of care may cause further psychiatric problems for a patient.[13]

Moreover, a conference organized by the American Association of Sex Educators, Counselors and Therapists (AASECT) addressed memories of sexual abuse, where the AASECT president stated that therapists "should police [them]selves and train [them]selves to become part of the solution, rather than being part of the problem, which we currently really are."[14]

Despite this controversy in repressed memory theory's native fields, many courts and legislatures accept the theory of memory repression as if it were the law of gravity.[15] Courts often leave the scientific decision of whether recovered memories can or did occur to a scientifically uneducated jury. Such a jury must rely on information given by experts in professions typically opposed to such memories. These courts have all but accepted without speculation the concept of repressed memory. Additionally, these courts have disregarded state statutes of limitations, using a discovery rule exception or other legal theory to permit an adult to sue an alleged perpetrator years after the alleged abuse.

Strong political currents are often at the base of the problem. The United States has become a victim-oriented society.[16] A "culturally sensitive" movement has forged new paths in the law.[17] Sexual abuse too has

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12. *Id.* at 342.

13. *Id.* at 343.

14. *See* Rick McDonough, *Professor Sees Shift Toward Skepticism About Recovered Memories*, THE COURIER J., May 15, 1994, at B9.

15. *See infra* note 48 and accompanying text.

16. Dr. Fred Frankel, Professor of Psychology at Harvard Medical School, commenting on politically correct feminists and sexual abuse, said, "It's part of the feminist victim-ology theory . . . . [T]he notion of repression meshes very well with the perspective that women are major victims of abuse by men." Sharon Churcher, *The Feminist Police Tearing Fathers and Daughters Apart*, MAIL ON SUNDAY, Nov. 28, 1993, at 37.

17. According to Charles Krauthhammer, the Lorena Bobbitt and Menendez brothers' trials are indicative of how society has warmed to claims of sexual abuse. *See* Charles Krauthhammer, *Everybody Claims to be the Victim*, CINCINNATI ENQUIRER, Feb. 7, 1994, at A10. In each case, the defendants admitted the alleged maiming or murders, but were not found guilty because of—at least in part—the novel defense of sexual abuse. *Id.* In the case of Susan Smith, who confessed to the murder of her two children, perhaps the key element in determining her sentence of life in prison

become starkly political.[18] To question the issue of alleged childhood sexual abuse, real or imagined, is to trudge upon a politically correct mine field.[19]

This phenomenon is not strange to American society. Two hundred years ago in Salem, Massachusetts, innocents were accused, tried, and convicted of being "witches" based on social mores and then-existing religious and political zealotry.[20] The child accusers complained of specters,[21] in the form of the accused, descending upon them at night, torturing and molesting them.[22] The innocents were imprisoned, tried, convicted, sent to Witches' Hill, and then hung.[23] Convictions were based only upon uncorroborated[24] verbal accusation—no different from the recovered memory testimony of today.[25]

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instead of capital punishment was the fact, aired at the sentencing hearing, that her step-father sexually abused her in her teen years. *See* Jack Hitts, *Susan Smith's Judgment Day; A Liberal Asks Whose Guilt Would be Extinguished by her Death*, WASH. POST, June 25, 1995, at C05.

18. Another commentator noted that civil sexual abuse lawsuits enable "[i]ncest survivors, without having to rely on a district attorney to respond, to call both perpetrators and society to account for the harm caused by this all too prevalent practice rooted in patriarchal domination." Ofshe & Watters, *supra* note 2, at 5; *see also* Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 585 (1993) (discussing a mass tort model to illustrate the harm of incest). Further, at the New York Radical Feminist Conference, social worker Florence Rush stated,

> Sexual abuse of children is permitted because it is an unspoken, but prominent factor in socializing and preparing the female to accept a subordinate role: to feel guilty, ashamed, and then to tolerate, through fear, the power exercised over her by men . . . . [T]he females early sexual experiences prepare her to submit later in life to adult forms of sexual abuse heaped on her by her boyfriend, her lover, her husband. In short, the sexual abuse of female children is a process of education that prepares them to become the wives and mothers of America.

ELEANOR GOLDSTEIN & KEVIN FARMER, TRUE STORIES OF FALSE MEMORIES 169-70 (1993).

19. *See* Ofshe & Watters, *supra* note 2, at 5.

20. PAUL BOYER & STEPHEN NISSENBAUM, SALEM POSSESSED: THE SOCIAL ORIGINS OF WITCHCRAFT 181-85 (1974).

21. Specters were intangible spirits purportedly assuming the shape of the accused and committing the criminal acts. *Id.* at 11, 16. The actual crime was in the compact between the witch and the devil, the former permitting the latter to assume his or her human form or perform certain acts. *Id.* at 11. Proving these private and secret transactions was exceptionally difficult. *Id.*

22. *See generally* KENNETH SILVERMAN, THE LIFE AND TIMES OF COTTON MATHER (1982).

23. BOYER & NISSENBAUM, *supra* note 20, at 7-9.

24. Physicians subjected the accused to "exhaustive and conscientious" bodily examinations in search of evidence of guilt of witchcraft. *Id.* at 13.

25. No evidence, of course, existed manifesting the guilt of the accused witch. *Id.* at 11, 15. "For although witchcraft was indisputably a crime according to . . . the statutes of Massachusetts, it was . . . the most maddening and frustrating crime imag-

The Salem witch trials ended only after the Massachusetts legislature passed a bill that forbade the use of spectral evidence alone as proof of guilt.[26] The evil that gripped Salem Village in the late seventeenth century seems incomprehensible to us today. The events during those years, although true, are a forgotten footnote in American history, but truth nonetheless.[27] Over the years, this nation has, at times, unwittingly revisited Salem. Examples are the Red Scare of the 1920s,[28] Japanese internment camps of the 1940s,[29] the McCarthy era of the 1950s,[30] Alien and Sedition Acts,[31] the anti-Masonic hysteria during the 1820s and early 1830s,[32] the persecution of Mormons during the 1840s and 1850s,[33] and the repression of anarchists after the haymarket Riot of 1886.[34] Unfortunately, the hallmark of a "witch hunt" is the fact that it is only after innocents are persecuted that reasonable minds understand it as such.

With the onslaught of recovered memory cases, this nation may be descending into yet another witch hunt. This one is more analogous to Salem than any in its interim; parents, priests, and neighbors are being accused of such heinous crimes as ritualistic abuse, fetal sacrifice, murder, animal sacrifice, and sexual molestation.[35] Like the Salem Village experience, it is the word of the accuser alone, sometimes "verified" by a therapist, that supports the accuser's "spectral" memories of the crime.[36]

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inable . . . because the evil deeds on which the indictments rested were not physically perpetrated by the witches . . . , but by intangible spirits who could at times assume their shape." *Id.* at 11.

26. *Id.* at 20.

27. *See generally* CHARLES UPHAM, SALEM WITCHCRAFT (1971).

28. *See generally* DON E. CARLETON, RED SCARE! (1985).

29. *See generally* ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS (1993).

30. *See generally* RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE (1990).

31. *See generally* JAMES M. SMITH, FREEDOM FETTERS (1966).

32. ALICIA FELT TYLER, FREEDOM'S FERMENT 351-58 (1944).

33. LEONARD J. ARRINGTON & DAVIS BITTON, THE MORMON EXPERIENCE 44-64 (1979).

34. JOHN ARTHUR GARRATY, THE NEW COMMONWEALTH 166-70 (1968). One author referred to these periods as "pathological periods" in American history. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 450-51 n.2 (1985).

35. *See* Kenneth V. Lanning, INVESTIGATOR'S GUIDE TO ALLEGATIONS OF "RITUAL" CHILD ABUSE, Federal Bureau of Investigation Report, Jan. 1992. *See generally* Ofshe & Watters, *supra* note 2.

36. *See generally* Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution about Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 128 (1993) (discussing the controversy sur-

This Article will concern itself with the propriety of altering statutes of limitations to permit filing recovered memory lawsuits, in light of traditional statute of limitations jurisprudence. Accordingly, the authors suggest that it is time to return to traditional statute of limitations jurisprudence, having seen the damage done by ignoring the limitations period. Part II explores the current controversy between the medical profession, the legislatures, and the courts over recovered memory theory.[37] Part III examines the traditional role that statutes of limitations have occupied in American jurisprudence and the judicially created "discovery rule" exception.[38] Part IV surveys sexual abuse cases involving "repressed memories" of sexual abuse, and cases in which the plaintiff failed to understand the causal relationship between known sexual abuse and latent psychological harm.[39] Part V examines alternative avenues of relief for adults who are falsely accused of sexually abusing children.[40]

II. THE CONTROVERSY: THE SCIENTISTS, THE LEGISLATURES, AND THE COURTS

When a person possessing recovered memories of sexual abuse decides to file a lawsuit, "psycho-science" and the law collide. The result is analogous to forcing a square peg into a round hole. The law is compelled to accommodate decades-old abuse claims that undoubtedly would have been weeded out by statutes of limitations in earlier days. Meanwhile, the psychological and psychiatric communities must bring their own inexact science to the bar to explain the debate over recovered memories to a culturally sensitive jury. Even more troubling is that in Type II cases, no judicial, psychological or psychiatric mechanism exists to distinguish false claims of sexual abuse from those that are true.[41] Some commentators and courts have suggested that some form of corroborative proof of the abuse is necessary to proceed in court under a repressed memory theory when the traditional statute of limitations has expired. Proponents of repressed memory theory argue that

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rounding memory repression).

37. *See infra* notes 41-53.

38. *See infra* notes 54-85.

39. *See infra* notes 86-187.

40. *See infra* notes 188-213.

41. Seymour Halleck, *The Use of Psychiatric Diagnoses in the Legal Process; Task Force Report of the American Psychiatric Association*, 20 BULL. AM. ACAD. OF PSYCHIATRY AND L. 481, 495 (1992). Many former accusers have already retracted their accusations by saying that the repressed memories were either false, or the product of a memory implanted or created by an unscrupulous therapist. *See generally* Tom McNamee, *When Memory Lies: Bernardin Case Heightens Debate over Repression*, CHI. SUN-TIMES, Mar. 6, 1994, at 1 (discussing the collapse of a well-known abuse case and the resulting skepticism surrounding repressed memory evidence).

requiring proof of the act, which may have occurred some twenty years earlier, is unreasonable, and a majority of courts agree.[42] For example, a Michigan appellate court rejected outright the notion that proof of abuse was a threshold barrier to pursuing a recovered memory claim.[43] Thus, unlike traditional judicial mechanisms used to weed out meritless claims, repressed memory plaintiffs are more than likely guaranteed a trial or a lucrative settlement.[44]

However, unlike "psycho-scientifically" questionable recovered memories, scientific evidence exists demonstrating that false memories can be created.[45] Jean Piaget once said of memory, "Suggestion is a potent dis-

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42. BASS & DAVIS, *supra* note 5, at 22. The book's readers are told: "You may think you don't have memories, but often as you begin to talk about what you do remember, there emerges a constellation of feelings, reactions and recollections that add up to substantial information. To say 'I was abused,' you don't need the kind of recall that would stand up in the court of law." *Id.*

43. *See* Lemmerman v. Fealk, 507 N.W.2d 226 (Mich. Ct. App. 1993), *rev'd*, 449 Mich. 56 (1995) (expressly rejecting corroborative evidence requirement for sexual abuse claim); McCollum v. D'Arcy, 638 A.2d 797 (N.H. 1994) (refusing to require independent corroborative evidence of sexual abuse). A growing number of courts, however, are requiring plaintiffs to present corroborative evidence to support and substantiate the otherwise naked allegation of abuse. *See* Meiers-Post v. Schafer, 427 N.W.2d 606 (Mich. Ct. App. 1988); *see also* Olsen v. Hooley, 865 P.2d 1345 (Utah 1993).

44. For example, one plaintiff sued her father alleging that he sexually abused her during 1964. *See* Anonymous v. Anonymous, Case No. 293313 (Cuyahoga County, Ohio, complaint filed on Dec. 2, 1992) (on file with the author). The plaintiff alleged she "repressed" her memory of the abuse until entering psychotherapy in "early 1989." *Id.* The plaintiff successfully defended the defendant's motion to dismiss on grounds that (1) the four-year statute of limitations for intentional infliction of emotional distress claim was tolled until plaintiff discovered the abuse in early 1989 (giving her until "early 1992" to file her claim); and (2) plaintiff had "repressed" all memory of the events until "early 1989." *Id.* After discovery, it was clear that plaintiff had recalled the incidents of abuse in September 1988, placing her outside the limitations period for sexual abuse. *Id.* Plaintiff then, however, successfully defeated defendant's motion for summary judgment by arguing that while the abuse was discovered in September 1988, the revelation rendered her mentally incompetent to file her claim in a timely manner. *Id.* Neither the complaint nor plaintiff's briefs were verified by an affidavit. *Id.* In short, the court permitted the plaintiff to present her own uncorroborated facts to circumvent and avoid the statute of limitations defense. *Id.* The court dismissed the plaintiff's case without prejudice, leaving her one year from the date of dismissal to refile the complaint. *Id.*

45. *See* Harold I. Lief, *Psychiatry's New Challenge: Defining an Appropriate Therapeutic Role When Child Abuse is Suspected*, PSYCHIATRIC NEWS, Aug. 21, 1992 ("There has been a recent increase in the number of 'therapists' who encourage people to 'remember' events that never happened and to accuse parents falsely, often decades after the alleged events took place . . . . In seeking to expose abuses, mis-

ruption of the truth," and suggestion seems to be the culprit in cases of recovered memories.[46] While ethical norms have deterred scientists from implanting false memories of sexual abuse, nearly every other memory has been shown capable of being implanted into a subject's mind. The subject thereafter believes the implanted, but false memory, to be true.[47]

Given the undisputed fact that no evidence exists to support repressed memory theory,[48] courts should be hesitant to entertain repressed memory cases. Courts have not been hesitant, however, and plaintiffs continue to file sexual abuse claims based on questionable psycho-scientific theory at an alarming rate.[49] Commentators across the country have concluded that a new witch hunt is under way in America. This time the hunt targets America's aged parents, who often lack the drive and finances to rebut allegations of sexual abuse that may be twenty or more years old.[50]

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guided therapists in many cases help invent them."); Elizabeth F. Loftus, *You Must Remember This . . . . . Or Do You? How Real Are Repressed Memories?* WASH. POST, June 27, 1993, at C1, C2 (illustrating the "post-event information often becoming incorporated into memory, supplementing and altering a person's recollection").

46. Anastasia Toufexis, *When Can Memories Be Trusted*, TIME, Oct. 28, 1991, at 86. Piaget wrote that for years he recounted the memory of how his nurse foiled an attempt to kidnap him at age two from his carriage. *Id.* Years later, the retired nurse admitted she had fabricated the story to impress her employers. *Id.* Piaget had heard the story so often that he not only remembered the event, but created his own memory of the events that supposedly took place the day of his "kidnapping." *Id.*

47. Loftus, *supra* note 45, at C1.

48. This is true in light of the growing number of former psychotherapy patients who have retracted earlier accusations of child sexual or ritual abuse, saying overzealous therapists implanted and caused the false memory. *See* Joe Dirck, *True Memory or Another Abuse*, CLEV. PLAIN DEALER, Nov. 14, 1993, at 1B; Ambrose Evans-Pritchard, *Feverish Epidemic of Sex Abuse Therapy*, WASH. TIMES, Dec. 14, 1993, at A17 (comparing recovered memories of past abuse to "voodoo"); Anne Mullens, *Woman Knows She Erred in Accusing Mother of Abuse*, VANCOUVER SUN, Nov. 26, 1992, at A11; Betsy Rubiner, *Women Retract Allegations of Abuse*, DES MOINES REGISTER, Nov. 21, 1993, at 3 ("people who retract allegations of childhood abuse they say were falsely incubated by ill-trained therapists"); Mark Smith, *Haunted Dreams: Real or Implanted?/Woman Says Therapy Begat Visions*, HOUS. CHRON., Sept. 12, 1993, at A1 (discussing suit against therapists for implanting false memories).

49. Because of the flood of litigation resulting from Illinois' blanket discovery rule permitting "repressed memory" lawsuits and the recent events surrounding Cardinal Joseph Bernardin, *see infra* notes 51-52, Illinois amended its statute of limitations, opting for a statute of repose, which cut off claims discovered by the adult-child survivor after reaching age 35. *Illinois Considers Limit on Sex Suits*, N.Y. TIMES, Mar. 27, 1994, § 1, at 25. However, the statute was almost immediately superseded. *See infra* note 56.

50. "What's happening maybe [sic] a new kind of psychological witch hunt against which the accused has no good defense." Joan Beck, *Memory of Abuse, True or Not, Means Pain for All Involved*, CHI. TRIB., Dec. 2, 1993, at 31; *see also* John Taylor,

Repressed memory cases present another problem. Do those falsely accused of sexual abuse have any recourse against the accuser, or the therapist as a third party, for suing upon the implanted or false memory?[51] An allegation of sexual abuse is powerful and potentially devastating. Such accusations should be asserted only after serious, thorough consideration of all events and circumstances. Allowing individuals, such as Steven Cook in the case of Cardinal Bernardin,[52] to make baseless accusations is dangerous and destructive. The reputations of both the accused and those who truly have been abused and who remember the abuse vividly without the aid of a therapist will be hurt by false accusations. It is an invitation to revisit Salem Village.[53]

It is too late to stem the tide of state courts and legislatures rapidly adopting procedural rules allowing repressed memory lawsuits. The word is out, however, the public is skeptical, and the professional communities have severely undermined the believability of recovered memory therapy through their own cautious and skeptical position statements. It is the courts that must now catch up to the truth. In fact, some courts have begun adjudicating cases in which the former accusers or accuseds are suing professionals for planting or inducing recovered memories.

The Lost Daughter; How one American family got caught up in today's witches' brew of sexual abuse, the Sybil syndrome, and the perverse ministrations of the therapy police, ESQUIRE, Mar. 1994, at 76. "Every society, regardless of how technologically advanced and culturally sophisticated, is susceptible to mass hysteria." *Id.* at 80.

51. In 1994, Steven Cook charged that members of the Catholic Church, including the esteemed Cardinal Joseph Bernardin, sexually abused him. *See* Howard Wilkinson, *Bernardin Out of Sex Suit*, CINCINNATI ENQUIRER, Mar. 1, 1994, at A1. The abuse memories were allegedly repressed and then uncovered in therapy. *Id.* The victim recounted, in graphic detail, how Cardinal Bernardin had forced him to submit to anal intercourse and to other perverse, imaginative acts. *Id.* Cook then retracted the allegations, saying they were false and unreliable. *Id.* Cook said, "Since I cannot be sure my memories of abuse by the Cardinal are accurate, I cannot proceed in good conscience." *Id.*

52. *See supra* note 51.

53. The Salem Village witch hunt ended when Minister Cotton Mather convinced the Massachusetts legislature that only "empirically verifiable and logically relevant" evidence should be admissible at trial. BOYER & NISSENBAUM, *supra* note 20, at 11. Mather stated, "It were better that ten suspected witches escape, than one innocent person should be condemned." *Id.* at 10 (quoting COTTON MATHER, CASES OF CONSCIOUS CONCERNING EVIL SPIRITS PERSONATING MEN 66 (1693)).

III. STATUTES OF LIMITATIONS AND THE DISCOVERY RULE EXCEPTION

Almost every state permitting an adult survivor of childhood sexual abuse to sue the alleged perpetrator decades after the abuse has done so through modification of the statute of limitations. At least twenty-four state legislatures have amended their statutes of limitations or implemented a statute of repose to permit victims having repressed memories of sexual abuse to sue decades after the alleged event.[54] One federal district court and nine states have refused to toll the statute of limitations for "victims" claiming to have repressed all memory of the sexual abuse or claiming to have an inability to comprehend the causal relationship between known sexual abuse and latent psychological problems.[55] At least one state, Illinois, has tried to repeal its previously approved extension of this type of statute.[56] It is necessary to examine statute of

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54. *See* ALASKA STAT. § 09.10.14(b)(1) (Supp. 1993); ARK. CODE ANN. § 16-56-130(a) (Michie 1993); CAL. CIV. CODE § 340.1(a) (Deering 1993); CONN. GEN. STAT. ANN. § 52-577 (West 1993); FLA. STAT. ANN. § 95.11(7) (West Supp. 1992); ILL. REV. STAT. ch. 110, para. 13-202.2 (Supp. 1990); IOWA CODE § 614.8A (1990); KAN. STAT. ANN. § 60-523 (1993); ME. REV. STAT. ANN. tit. 14, § 752-C (West Supp. 1993); MICH. COMP. LAWS § 600.5851 (1987); MINN. STAT. ANN. § 541-073 (West Supp. 1996); MO. ANN. STAT. § 537.046 (Vernon Supp. 1996); MONT. CODE ANN. § 27-2-216(1) (1993); NEV. REV. STAT. § 11.215 (1991); N.J. STAT. ANN. § 24-6113-1(5)(c) (West 1993); OKLA. STAT. ANN. tit. 12, § 95(b) (West Supp. 1996); OR. REV. STAT. § 12.117 (Supp. 1992); R.I. GEN. LAWS § 9-1-51 (Supp. 1993); S.D. CODIFIED LAWS ANN. § 26-10-25 (1992); UTAH CODE ANN. § 78-12-25.1 (Supp. 1993); VT. STAT. ANN. tit. 12, § 560 (Supp. 1993); VA. CODE ANN. § 8.01-249 (Michie 1993); WASH. REV. CODE ANN. § 4.16.340(B)(2) (West Supp. 1996); WIS. STAT. § 893.587 (1992).

55. *See* Rigazio v. Archdiocese of Louisville, 853 S.W.2d 295, 296-97 (Ky. Ct. App. 1993); Bowser v. Guttendorf, 541 A.2d 377, 379-80 (Pa. Super. Ct. 1988) (due to absence of statutory 'delayed discovery,' equitable tolling would have been only possibility); *see also* Farris v. Compton, 802 F. Supp. 487 (D.C. 1992); Cassidy v. Smith, 817 P.2d 555 (Colo. Ct. App. 1991); Lindabury v. Lindabury, 552 So. 2d 1117 (Fla. Dist. Ct. App. 1989), *dismissed by* 560 So. 2d 233 (Fla. 1990) (by action of statute, FLA. STAT. ANN. § 95.11 (West Supp. 1992)); ABC & XYZ v. Archdiocese of St. Paul and Minneapolis, 513 N.W.2d 482, 486-87 (Minn. Ct. App. 1994), *superseded by statute*, MINN. STAT. § 541.073(2)(a) (1992); Burpee v. Burpee, 578 N.Y.S.2d 357, 360 (N.Y. Sup. Ct. 1991); Doe v. Doe, 1994 WL 79555 (Ohio Ct. App. 1994), *rev'd by* Doe v. Doe, 639 N.E.2d 432 (Ohio 1994); Doe v. First United Methodist Church, 629 N.E.2d 402, 408-09 (Ohio 1994); Lovelace v. Keohane, 831 P.2d 624, 630 (Okla. 1992); Seto v. Willits, 638 A.2d 258, 259 (Pa. Super. Ct. 1994); Tyson v. Tyson, 727 P.2d 226, 229-30 (Wash. 1986), *superseded by statute*, WASH. REV. CODE § 4.16.340(1) (1991). *But see* Anonymous v. Anonymous, 584 N.Y.S.2d 713, 720 (N.Y. Sup. Ct. 1992) (questioning *Burpee's* reasoning that repressed memory does not constitute mental incapacity under New York discovery statute, remanding case to determine if plaintiff's repressed memories were sufficient to qualify under mental capacity tolling exception).

56. The Illinois legislature has tried to roll back the extension by introducing a bill in its Senate that would reinstate the 35-year limitation. *See Illinois Considers Limit on Sex Suits*, N.Y. TIMES, Mar. 27, 1994, at A25. State Senator Ed Petka stated that rolling back the previously unlimited time period was a direct response to the Cardi-

limitations theory in order to understand the dangers encountered by altering statute of limitations periods to permit delayed filing of recovered memory lawsuits.

A. Policy Considerations Underlying Statutes of Limitations

Statutes of limitations are used to deny a "plaintiff relief if sufficient time has elapsed between the accrual of the right of action (the event) and commencement of the [law] suit."[57] Limitations periods are usually legislative enactments that will destroy a remedy or right of action unless it is enforced within the time prescribed by the particular statute.[58] Statutes of limitations have been described as both "reasonable and arbitrary," seeking to achieve finality for defendants while protecting courts from stale or fraudulent claims.[59]

Statutes of limitations preserve judicial integrity and are fundamental to the concept of a well-ordered judicial system.[60] Their existence has been traced as far back as 1623.[61] Furthermore, in 1879 the United States Supreme Court stated:

> Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence.[62]

Despite the potential for unfairness to certain plaintiffs, and despite the arbitrary nature by which the time limit cuts off claims, statutes of

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nal Bernardin case, *see supra* note 51, which demonstrated a need to protect people from lawsuits based on psychological quackery. *Id.* The State Senate Judiciary Committee voted 6 to 2 to advance the bill. *Id.* The Senate passed the bill but it was later defeated in the House. Telephone interview with Ed Petka, Illinois State Senator (Oct. 6, 1995).

57. Mitchell A. Lowenthal et al., *Project, Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1014-15 (1980).

58. Susan D. Glimcher, *Statutes of Limitation and the Discovery Rule in Latent Injury Claims: An Exception or the Law?*, 43 U. PITT. L. REV. 501, 512-13 (1982).

59. Nancy F. Meloy, *Statutes of Limitations in Product Liability Actions: The Discovery Rule of* Franzen v. Deere & Co., 69 IOWA L. REV. 1127, 1127-28 (1984).

60. *Id.*

61. *See* Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965, 971 (1988) (citing England's Limitations Act of 1623 as the first enacted statute of limitations).

62. Wood v. Carpemer, 101 U.S. 135, 139 (1879).

limitations have survived for centuries because of the important policy purposes they serve.

As Justice Holmes stated, limitations periods are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[63] In short, statutes of limitations seek to protect courts, juries, and defendants from problems inherent in the prosecution of "ancient" claims.[64]

For courts and juries, statutes of limitations seek to bar litigation of stale claims.[65] Statutes of limitations encourage the prompt prosecution of claims, thereby eliminating the threat that courts and juries will have to wade through a complex chain of causation that neither may be competent to determine.[66] Furthermore, the limitations period ensures that questions of fact will be decided on the basis of fresh evidence, thereby increasing the likelihood that both courts and juries will resolve factual issues fairly and accurately.[67]

For defendants, statutes of limitations provide protection against having to litigate claims that may have arisen decades before.[68] Stale claims make it difficult for defendants to present a viable defense, as witnesses may be dead, alibis hard to verify, and physical evidence lost.[69] It is security against the distant threat of liability that is of paramount importance for the defendant because statutes of limitations allow the defendant to rely on known liabilities in planning future economic activity.[70]

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63. Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944). In O'Stricker v. Jim Walter Corp., 447 N.E.2d 727 (Ohio 1983), the Ohio Supreme Court stated, "The rationale underlying statutes of limitations is fourfold: to ensure fairness to a defendant; to encourage prompt prosecution of causes of actions; to suppress stale and fraudulent claims; and to avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases." *Id.* at 731.

64. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) (hereinafter *Developments*).

65. *See* Tyson v. Tyson, 727 P.2d 226, 227 (Wash. 1986). "A number of evidentiary problems arise from stale claims," including the loss of live witnesses, physical evidence, and "the [fact that] evidence which is available becomes less trustworthy as witnesses' memories fade or are colored by intervening events and experiences." *Id.* at 227-28.

66. *Developments*, *supra* note 64, at 1185-86.

67. *See Tyson*, 727 P.2d at 228. "Old claims are more likely to be spurious than new ones. 'With the passing of time, minor grievances may fade away, but they may grow to outlandish proportions too.'" *Id.* (citing Ruth v. Dight, 453 P.2d 631, 665 (Wash. 1969)).

68. Meloy, *supra* note 59, at 1127.

69. *Tyson*, 727 P.2d at 227-28.

70. Meloy, *supra* note 59, at 1127. "[T]here should come a point beyond which [defendants] need not concern themselves with the arousal of dormant issues."

In some circumstances, to prevent manifest injustice, courts have imposed a discovery rule exception which allows stale claims to proceed despite the fact that they were initiated outside of the limitations period. Application of the discovery rule exception, however, has been used cautiously and only when one or more of the policy considerations underlying the statute have been present.

B. The Discovery Rule Exception

Many courts across the country have used the discovery rule exception, or another legal tool, to permit the filing of sexual abuse lawsuits twenty, thirty, forty or more years after the alleged abuse, based upon recovered memory theory.[71]

A typical statute of limitations requires an action for personal injury, such as intentional sexual abuse, to be filed within one to three years from the date of the event.[72] Only when principles of equity or exceptional circumstances exist do fundamental considerations of fairness require that an exception be made to the statute of limitations.[73] Prob-

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Glimcher, *supra* note 58, at 513.

71. *See infra* Part III discussing statutes of limitations and application of the delayed discovery rule. In the following cases, courts have tolled the applicable statute of limitations for plaintiffs claiming to have had a repressed memory of sexual abuse: Borawick v. Shay, No. 5:92-CV-00033, 1992 U.S. Dist. LEXIS 21201 (D. Conn. Nov. 17, 1992); Johnson v. Johnson, 766 F. Supp. 662 (N.D. Ill. 1991); Hoult v. Hoult, 792 F. Supp. 143 (D. Mass. 1992); Carlson v. Rice, 832 F. Supp. 17 (D. Me. 1993); Sinclair v. Brill, 815 F. Supp. 44 (D.N.H. 1993); Ulibarri v. Gerstenberger, 871 P.2d 698 (Ariz. Ct. App. 1993); Fager v. Hundt, 610 N.E.2d 246 (Ind. 1993); Phillips v. Johnson, 590 N.E.2d 4 (Ill. App. Ct. 1992); Callahan v. State, 464 N.W.2d 268 (Iowa 1990); Lemmerman v. Fealk, 534 N.W.2d 695 (Mich. 1995); K.E. v. Hoffman, 452 N.W.2d 509 (Minn. Ct. App. 1990); Cosgriffe v. Cosgriffe, 864 P.2d 776 (Mont. 1993); Petersen v. Bruen, 792 P.2d 18 (Nev. 1990); McCollum v. D'Arcy, 638 A.2d 797 (N.H. 1994); Jones v. Jones, 576 A.2d 316 (N.J. Super. Ct. App. Div. 1990); Anonymous v. Anonymous, 584 N.Y.S.2d 713 (N.Y. Sup. Ct. 1992) (*but see* Burpee v. Burpee, 578 N.Y.S.2d 359 (N.Y. Sup. Ct. 1991) (refusing to toll statute of limitations for repressed memory case)); Osland v. Osland, 442 N.W.2d 907 (N.D. 1989); Ault v. Jasko, No. 92CA005344, 1993 Ohio App. LEXIS 1203 (Feb. 24, 1993), *aff'd*, 637 N.E.2d 870 (Ohio 1994); Olsen v. Hooley, 865 P.2d 1345 (Utah 1993); Hammer v. Hammer, 418 N.W.2d 23 (Wis. Ct. App. 1987); *see also* Byrne v. Bercker, 501 N.W.2d 402 (Wis. 1988) (narrowing the *Hammer* holding).

72. Francis E. McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 FORUM 416, 438-40 (1981) (presenting a state-by-state case survey of the limitations of actions).

73. *Developments*, *supra* note 64, at 1203-05, 1213-19.

lems arise, however, "when a personal injury does not occur immediately, or is not apparent at the time of the tortious conduct," leaving plaintiffs "blamelessly ignorant"[74] of their causes of action until after the expiration of the limitations period.[75] Rather than barring plaintiffs' claims, courts counteract the potential injustice by applying the discovery rule.[76]

The discovery rule exception delays accrual of a plaintiff's cause of action until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the alleged injury.[77] Historically, the discovery rule has been applied to claims of medical malpractice, toxic torts, legal malpractice, workers' compensation, and product liability.[78]

The discovery rule exception has achieved such wide acceptance that with the exception of a "few ossified judges," "[v]irtually all commentators and the vast majority of courts" advocate its use.[79] Application of the discovery rule exception is not without parameters, however. The discovery rule has been limited to cases where, in balancing the equities, (1) the plaintiff would be severely and unfairly prejudiced by barring his/her claim,[80] and (2) some form of physical evidence corroborating the injury exists to diminish the likelihood that the claim is stale or

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74. Author Susan Glimcher uses this phrase to refer to people who have difficulty recognizing immediately the physical results of tortious conduct. *See* Glimcher, *supra* note 58, at 523.

75. *Id.* at 501.

76. *Id.* at 502.

77. *See* Green, *supra* note 61, at 976. Courts use at least four separate formulations to determine the accrual date of a cause of action under the discovery rule, including: (1) discovery of the injury in fact (*see, e.g.*, Locke v. Johns-Manville Corp., 275 S.E.2d 900 (Va. 1981)); (2) discovery of the injury and its cause (*see, e.g.*, Andersen v. Shook, 333 N.W.2d 708 (N.D. 1983)); (3) the discovery of the injury in fact, the cause, and the availability of a legal remedy (*see, e.g.*, Rose v. A.C. & S., Inc., 796 F.2d 294 (9th Cir. 1986)); and (4) discovery of the injury in fact, the cause, and plaintiff's appreciation of the wrongfulness of the defendant's conduct (*see, e.g.*, Daly v. Derrick, 281 Cal. Rptr. 709 (Ct. App. 1991)).

78. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-68 (5th ed. 1984).

79. Green, *supra* note 61, at 977-78.

80. One commentator distinguished traditional tort claims (e.g. a car accident or streetcar accident) from complex toxic tort claims where exposure to a toxic substance does not manifest itself until years later. *Id.* at 972-76. With the car accident, a "snapshot" tort, the plaintiff will be adequately protected by strict application of the statute of limitations' time period because the injury immediately follows defendant's tortious conduct. *Id.* at 972. The accrual period is therefore readily ascertained. *Id.* However, with respect to toxic torts, the injury is not readily ascertained and may not manifest itself until decades later. *Id.* at 972-73. Here, the delayed discovery rule counterbalances the unfairness that "blamelessly ignorant" plaintiffs would suffer if knowledge of the inherently unknowable injury is imputed to them. *Id.* at 972.

fraudulent.[81] With respect to the existence of physically corroborating evidence, one court noted:

> Because of the availability and trustworthiness of objective verifiable evidence in [medical malpractice and toxic tort] cases, the claims were neither speculative nor incapable of proof. Since the evidentiary problems which the statute of limitations is designed to prevent did not exist or were reduced, it was reasonable to extend the period for bringing the actions.[82]

Thus, despite abrogating the limitations period, the court found that the policies underlying the statute of limitations were nonetheless spared, insofar as the risk of stale and fraudulent claims was minimized by the existence of independent corroborative evidence.

Despite practical considerations involved in applying the discovery rule exception, courts have permitted plaintiffs to sue defendants for alleged sexual abuse premised upon recently recovered memories, or upon delayed psychological trauma or harm caused by abuse.[83] This has been accomplished, for the most part, without any requirement that the plaintiff produce corroborative evidence to substantiate the ancient claim.[84] The discovery rule has been the primary tool through which courts have permitted plaintiffs to sue upon previously unknown claims, long after the date on which the abuse may have occurred.[85]

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81. *See* Tyson v. Tyson, 727 P.2d 226, 227-28 (Wash. 1986).

82. *Id.* at 228.

83. *See supra* notes 35 and 36.

84. *See, e.g.*, Lemmerman v. Fealk, 507 N.W.2d 226, 229 (Mich. Ct. App. 1993), *rev'd*, 534 N.W.2d 695 (Mich. 1995) ("We find it illogical to require corroborative evidence under the delayed discovery rule."). In a surprise ruling, the Michigan Supreme Court reversed, however, stating: "Alleged repression of memory of childhood sexual abuse does not warrant invocation of Michigan's discovery rule or insanity disability grace period to toll applicable tort statutes of limitations." 534 N.W.2d at 696; *see also* Osland v. Osland, 442 N.W.2d 907, 909 (N.D. 1989) (refusing to require corroborative evidence to support ancient sexual abuse claims). *But see* Meiers-Post v. Schafer, 427 N.W.2d 606, 610 (Mich. Ct. App. 1988) (repressed memory of sexual abuse must be corroborated by physical evidence); Petersen v. Bruen, 792 P.2d 18 (Nev. 1990) (repressed memory of sexual abuse claim must be demonstrated by clear and convincing evidence that the alleged abuse occurred); Olsen v. Hooley, 865 P.2d 1345 (Utah 1993) (repressed memory of sexual abuse must be proved by corroborating evidence).

85. *See* Fager v. Hundt, 610 N.E.2d 246 (Ind. 1993). In *Fager*, the Indiana Supreme Court rejected application of the discovery rule to ancient claims of sexual abuse premised on repressed memories. *Id.* at 249-51. Instead, according to the court, such plaintiffs must prove facts amounting to fraudulent concealment, estopping the defendant from asserting the statute of limitations defense "when he has, either by deception or by a violation of [parental] duty, concealed from plaintiff material facts there-

IV. REPRESSED MEMORIES, PSYCHOLOGICAL INJURIES, AND THE DISCOVERY RULE EXCEPTION: CASE SURVEYS

In the seminal case of *Tyson v. Tyson*,[86] the Washington Supreme Court refused to apply the discovery rule exception to toll the statute of limitations for a plaintiff claiming to have "repressed" her memory of childhood sexual abuse.[87]

The *Tyson* court explained that lawsuits premised on recovered memories are susceptible to the very dangers against which statutes of limitation were enacted to protect.[88] The court cited three primary grounds for barring the plaintiff's claims. First, the court stated:

> As time passes, evidence becomes less available . . . . Physical evidence is also more likely to be lost when a claim is stale, either because it has been misplaced, or because its significance was not comprehended at the time of the alleged wrong . . . . Thus, stale claims present major evidentiary problems which can seriously undermine the courts' ability to determine the facts.[89]

Second, the court explained that application of the discovery rule exception was inappropriate when the only existing evidence of the claim was the plaintiff's own subjective memories.[90] The court stated that the discovery rule should be applied only when corroborative evidence makes it "substantially certain that the facts can be fairly determined even though considerable time has passed since the alleged events occurred."[91]

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by preventing the plaintiff from discovering a potential cause of action." *Id.* at 251.

86. 727 P.2d 226 (Wash. 1986). In *Tyson*, the plaintiff began to recall memories of sexual abuse after visits to her therapist. *Id.* at 227. The alleged acts of abuse occurred while plaintiff was between the ages of 3 and 11. *Id.* Washington's statute of limitations for personal injury required that the plaintiff file the complaint within three years of the injury or harm. *Id.* (citing WASH. REV. CODE § 4.16.080(2)). The accrual period was tolled until plaintiff reached majority at 18 years of age. *Id.* The defendant moved for summary judgment, contending that the plaintiff's claim was barred by the statute of limitations since the plaintiff was 26 when the claim was filed. *Id.* The trial court certified the matter to the Washington Supreme Court to determine whether the discovery rule, which tolls the statute of limitations until the plaintiff discovers or reasonably should have discovered a cause of action, applied in this case. *Id.* at 226-27.

87. *Id.* at 229-30.

88. *Id.* at 227.

89. *Id.* at 227-28.

90. *Id.* at 229.

91. *Id.* The court rejected the plaintiff's contention that evidence existed to corroborate her claim. *Id.* The court found that as opposed to legitimate medical diagnosis, "no empirical, verifiable evidence exists of the occurrences and resulting harm which plaintiff alleges. [Plaintiff's] claim rests on a subjective assertion that wrongful acts occurred and that injuries resulted." *Id.*

Third, the *Tyson* court found that psychiatric testimony was inherently subjective, failing to add corroboration to the plaintiff's claim.[92] The court stated that eyewitness and psychological testimony of events that allegedly transpired decades prior to the lawsuit were susceptible to errors in recall and trustworthiness.[93] Skeptical of psychiatry and its corroborative value, the court added that psychologists could not reduce the subjectivity of plaintiff's abuse claims because psychology and psychiatry are "imprecise disciplines."[94]

The *Tyson* court exposed the many difficulties that courts across the country would soon experience in their own jurisdictions when litigating recovered memory cases. Namely, the court found that across-the-board application of the discovery rule would: (1) undermine, and perhaps eliminate, the statute of limitations defense, (2) compel courts to rely on less than scientific evidence, a junk science of sorts, that could not afford the certainty and precision a factfinder demands for fair and accurate disposition of a case, and (3) prevent courts from being able to weed out stale or fraudulent claims as there is no judicial, psychological, or psychiatric mechanism that can be relied on in distinguishing false claims of sexual abuse from true ones.[95] The *Tyson* decision was quickly reversed by statutory enactment.[96]

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92. *Id.*

93. *Id.*

94. *Id.* The court stated that the "psychoanalytic process can even lead to a distortion of the truth of events in the subject's past life. The analyst's reactions and interpretations may influence the subject's memories about them . . . . Thus, the distance between historical truth and psychoanalytic 'truth' is quite a gulf." *Id.*

95. *Id.* at 227-30. The Cardinal Joseph Bernardin case highlights this aspect of the *Tyson* court's decision. *See* Tom McNamee, *Bernardin 'Vindicated'; Cardinal Dropped From Suit; Accuser Says Memory Unreliable*, CHI. SUN-TIMES, Mar. 1, 1994, at 1. The court permitted Steven Cook to sue Cardinal Joseph Bernardin for sexual abuse decades after the alleged abuse occurred. *Id.* Cook's memories were elicited by a therapist during a hypnotic session. These "memories" were supposedly authenticated by a second therapist and by a lie detector test. Cook's attorney filed a lawsuit based on these memories. *Id.* Cook later retracted the allegations, withdrew the lawsuit, and claimed the "memories" were false, inaccurate and unreliable. *Id.* As the *Tyson* court implied, if two therapists, an attorney, and a lie detector test could not determine the validity of the claims, how can we expect judges and lay jurors to accomplish the task? *See* Carol Ness & Stephanie Salter, *Therapists Split; Are Recovered Memories of Abuse Real or False? Decisions Fall to the Courts*, CHI. TRIB., Mar. 27, 1994, at 12; *Tyson*, 727 P.2d 226 (Wash. 1986).

96. *See* WASH. REV. CODE ANN. § 4.16.340 (West 1988) (incorporating discovery rule exception for alleged adult survivors of childhood sexual abuse without requiring corroborating evidence).

In *Hammer v. Hammer*,[97] a Wisconsin appellate court sharply departed from *Tyson*, holding that the statute of limitations for incestuous abuse would not begin accruing until the victim discovered, or in the exercise of reasonable diligence should have discovered, the fact and cause of the injury.[98] In *Hammer*, the plaintiff claimed that while she always remembered the sexual abuse, she did not know her present psychological problems were caused by that abuse.[99]

Applying the discovery rule, the *Hammer* court balanced the policies underlying the statute of limitations against the inequities resulting from barring the plaintiff's claim.[100] The court stated that "'the injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions.'"[101] The *Hammer* court was not as concerned with the policies supporting strict adherence to the statute of limitations as they were with the gravity and outrageousness of the plaintiff's allegations.[102] The court stated:

> The policy justification for applying the statute of limitations to protect defendants from "the threat of liability for deeds in the past" is unpersuasive in incestuous abuse cases. Victims of incest have been harmed because of a "most egregious violation of the parent/child relationship." To protect the parent at the expense of the child works an "intolerable perversion of justice."[103]

Realizing the breadth of its holding, the court added that the statute of limitations defense was not "effectively eliminated" by its decision because plaintiffs "who negligently or purposefully fail to file a timely claim" within the proscribed limitations period after remembering the alleged abuse would still be barred.[104]

An outgrowth—and, perhaps, a significant flaw—of the *Hammer* decision is that plaintiffs may now have two separate causes of action accruing at separate points in time.[105] For example, a child may first sue the

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97. 418 N.W.2d 23 (Wis. Ct. App. 1987).

98. *Id.* at 27.

99. *Id.* at 24. The sexual abuse allegedly occurred on average of three times a week, beginning in 1969 when she was 5 years old and ending in 1978 when she was 15. *Id.*

100. *Id.* at 27.

101. *Id.* (quoting Hansen v. A.H. Robins Co., 335 N.W.2d 578, 582 (Wis. 1983)).

102. *Id.*

103. *Id.* (quoting Margaret J. Allen, Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U. L. REV. 609, 631 (1983)). The court refused to look at the psychological underpinnings of plaintiff's claims, refusing to acknowledge—as the *Tyson* court did—the potential problems that might arise from cases of this nature. *Id.*

104. *Id.*

105. *Id.* at 26. The court noted, "Even though a daughter may know that she has been injured, until such time as she is able to shift the blame for the incestuous abuse to her father, it will be impossible for her to realize that his behavior caused her psychological disorders." *Id.* at 26-27 n.7 (quoting Margaret J. Allen, Comment,

defendant for the physical manifestations of the injuries suffered at or before reaching the age of majority. Then, the same plaintiff may sue again upon "discovering" the latent emotional or psychological injuries not known or contemplated until years later.[106] The court expressed no opinion as to whether the plaintiff could initially sue the defendant for the physical harm and then, decades later, sue the defendant for latent psychological harm that subsequently arises.

The Wisconsin Supreme Court refused to expand the *Hammer* holding when it decided *Byrne v. Bercker*.[107] In *Byrne*, the court rejected the plaintiff's argument that the Wisconsin statute of limitations for childhood sexual abuse should be tolled until the plaintiff was able to "'shift the blame to her father,' rather than blame herself as most incest victims do."[108]

Rejecting plaintiff's "shifting the blame" argument, the court stated:

> [While] therapists take the position that healing is not possible until the plaintiff undergoes an epiphany which in some mysterious way makes it possible for her to say that she is blameless and the perpetrator is solely to blame . . . we think it is inappropriate to tailor statutes of limitation[s] to therapeutic goals in derogation of the specific test of the statute of limitations.[109]

This rationale seems disingenuous at best. Arguably, the *Hammer* court tailored the statute of limitations to therapeutic goals when it permitted

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Tort Remedies for Incestuous Abuse, 13 GOLDEN GATE U. L. REV. 609, 630 (1983)).

106. In *Hammer*, the plaintiff claimed that while she knew of the abuse in the decades leading up to the lawsuit, her psychological coping mechanisms prohibited her from "being able to perceive or know the existence or nature of her psychological injuries until entering therapy." *Id.* at 24-25.

107. 501 N.W.2d 402 (Wis. 1993).

108. *Id.* at 404 (quoting Hammer v. Hammer, 418 N.W.2d 23, 27 n.7 (Wis. Ct. App. 1987)). In *Byrne*, the plaintiff served her 80-year-old father with a complaint at a nursing home for allegedly incestuously abusing her at intervals between 1940 and 1950. *Id.* at 402. Memories of the sexual abuse were "repressed" until she entered therapy in 1986. *Id.* Initially, she claimed that health care workers at a hospital sexually abused her. *Id.* at 403. The hospital referred her to a psychologist who then elicited memories of the alleged incestuous relationship with her father. *Id.*

109. *Id.* at 406. Interestingly, the Wisconsin Supreme Court denied review of Hammer v. Hammer, 418 N.W.2d 23 (Wis. Ct. App. 1987), *rev. denied*, 428 N.W.2d 552 (Wis. 1988), in essence sanctioning other psychological phenomena such as "repression," "dissociation," and "great shame," but refused to acknowledge the "shifting the blame" phenomenon, another "psychological defense mechanism." Further, WISC. STAT. ANN. § 893.587 (West Supp. 1995) codified the *Hammer* holding. *See Byrne*, 501 N.W.2d at 406 (deviating from the previously enacted statute of limitations). Wisconsin courts appear to have become the final arbiter of what are acceptable psychological theories capable of tolling the Wisconsin statute of limitations.

the plaintiff to sue for latent psychological harm decades after the alleged sexual abuse.[110]

Undoubtedly, *Tyson v. Tyson* and *Hammer v. Hammer* represented the foundation for the 1990s new sexual abuse jurisprudence. What followed was an attempt by American courts to distinguish *Hammer* cases from *Tyson* cases. A dichotomy resulted in which courts distinguished *Hammer* cases, where the plaintiff claimed to have known about the sexual abuse at or before majority but did not realize that other physical and psychological problems were caused by the abuse (Type I cases), from *Tyson* type cases, where the plaintiff alleged that she repressed the memory of the sexual abuse until shortly before filing the lawsuit (Type II cases).[111]

A. The Type I Plaintiff

Only a minority of courts permit Type I plaintiffs to sue the alleged abuser decades after the abuse occurred.[112] Several other states have

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110. In addition, for therapists and adult survivors of childhood incest, the courtroom is part of the therapy and recovery process. Thus, deviation from traditional statute of limitations jurisprudence is necessary to complete the therapeutic process for many alleged survivors of incest. *See* Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 584-85 (1993) ("For the victim of intrafamilial sexual abuse, a tort suit offers the opportunity to be the court's central concern rather than merely a peripheral subject of the defendant's criminal conduct. It offers the victim the opportunity to tell of her suffering, be believed by a jury, and vindicate her experiences through an award of damages.").

111. *See, e.g.*, Messina v. Bonner, 813 F. Supp. 346 (E.D. Penn. 1991) (example of Type I case); Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988) (example of Type II case); *see also* Anne M. Hagen, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355, 373 (1991) (discussing the two types of plaintiffs); Jocelyn B. Lamm, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 YALE L. J. 2189 (1991) (same).

112. *See supra* notes 97-106 and accompanying text (discussing Hammer v. Hammer); *see, e.g.*, Doe v. LaBrosse, 588 A.2d 605 (R.I. 1991). In addition, the Nevada Supreme Court has issued a broad holding that could allow a Type I plaintiff to sue upon discovering the psychological impact of known abuse that occurred decades earlier. Petersen v. Bruen, 792 P.2d 18 (Nev. 1990). For jurisdictions that prohibit Type I plaintiffs from suing, see Derose v. Carswell, 242 Cal. Rptr. 368 (Ct. App. 1987); Franke v. Geyer, 568 N.E.2d 931 (Ill. Ct. App. 1991); E.W. v. D.C.H., 754 P.2d 817 (Mont. 1988); Lovelace v. Keohane, 831 P.2d 624 (Okla. 1992); Doe v. Coffee County Bd. of Educ., 852 S.W.2d 899 (Tenn. Ct. App. 1992); Whatcott v. Whatcott, 790 P.2d 578 (Utah Ct. App. 1990). *But see* Cassidy v. Smith, 817 P.2d 555 (Colo. Ct. App. 1991); ABC & XYZ v. The Archdiocese of St. Paul and Minneapolis, 513 N.W.2d 482 (Minn. Ct. App. 1994); Doe v. First United Methodist Church, 629 N.E.2d 402 (Ohio 1994); E.J.M. v. Archdiocese of Philadelphia, 622 A.2d 1388 (Penn. 1993).

enacted statutory provisions that might also embrace a Type I plaintiff's facts.[113]

In *ABC & XYZ v. The Archdiocese of St. Paul and Minneapolis*,[114] a Minnesota court rejected the *Hammer/Daly* approach, finding that the plaintiff's subjective discovery that known abuse caused latent psychological injuries was too open-ended a standard for application of the discovery rule.[115] Thus, the court found as a matter of law that the plaintiff knew or should have known that her relationship with the defendant was abusive.[116] Rejecting the subjectivity of plaintiff's claim, the court stated:

> It is unreasonable to suggest that ABC never realized the true nature of this abusive relationship even though she had known the relationship was wrong from the outset . . . . To recognize a subjective standard and allow this case to go to trial would open the floodgates to suits long since time-barred.[117]

In a similar case, *E.J.M. v. Archdiocese of Philadelphia*,[118] the plaintiff also remembered the abuse, but claimed he was not aware of the psychological effects of the abuse.[119] The court stated that it is in the rare battery case that a plaintiff cannot discern the totality of the damage.[120] The court stated, "Inclusion of plaintiff's mental incapacity as a factor to be considered in determining the reasonableness of plaintiff's diligence runs counter to [the reasonable person standard]."[121]

Other courts have found different grounds for denying the Type I plaintiff access to the courtroom long after the alleged abuse. In *E.W. v.*

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113. *See* ALASKA STAT. ANN. § 09.10.140 (1994) (tolling statute of limitations for adult survivors of incest until discovery of the fact and cause of the injury or condition); *see also* WASH. REV. CODE ANN. § 4.16.340(B) (West Supp. 1996) (tolling statute of limitations until victim knew or had reason to know); MINN. STAT. ANN. § 541.073, subd. 2(a) (West Supp. 1996) (same). *But see* ABC & XYZ, 513 N.W.2d 482 (rejecting statutory construction to permit Type I plaintiff to sue).

114. 513 N.W.2d 482 (Minn. Ct. App. 1994).

115. *Id.* at 486. ABC always remembered the abuse but claimed that as a result of the relationship she felt "exploited," "depressed," and viewed making love with her husband as something "dirty." *Id.* at 485. She claimed that it was not until after entering therapy that "she was able to recognize that she had been a victim of abuse." *Id.*

116. *Id.* at 486-87.

117. *Id.* at 487.

118. 622 A.2d 1388 (Penn. 1993).

119. *Id.* at 1388-89.

120. *Id.* at 1394.

121. *Id.* (quoting Barren by Barren v. United States, 839 F.2d 987, 994 (3d Cir. 1988)).

D.C.H.,[122] the Montana Supreme Court refused to toll the statute of limitations, finding that the Type I plaintiff's knowledge of the abuse was sufficient as a matter of law to require that plaintiff inquire into the cause of the injury.[123] The court stated that to allow a Type I plaintiff who fails to inquire into the cause of an injury to avoid the time bar "'under the guise of "discovery" would hopelessly demolish the protection afforded defendants by the statute.'"[124] Thus, in Montana, a Type I plaintiff is charged with knowledge of the psychological effects of abuse and will be barred from suing the abuser unless the suit is filed within the applicable statutory limitations period.[125]

In *Messina v. Bonner*,[126] a federal district court applying Pennsylvania law looked to the policies underlying the statute of limitations to determine whether the discovery rule was available to a Type I plaintiff.[127] The court rejected application of the discovery rule, stating that "[i]f such an open-ended discovery rule were applied, suits could be maintained against defendants who would not only be much older and more infirm than plaintiffs, but who would also more likely be dead."[128] The *Messina* court commented, "Psychology has, since the time of Freud, been in the business of exploring and finding subjective reality. Courts, on the other hand, are in the business of trying to find objective reality."[129]

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122. 754 P.2d 817 (Mont. 1988).

123. *Id.* at 820. In *E.W.*, the plaintiff claimed that since she "did not associate her psychological problems" with the known abuse, the statute of limitations should have been tolled until the "causal relationship" was discovered. *Id.* at 817-18.

124. *Id.* at 820 (quoting Much v. Storm Ruger & Co., 502 F. Supp. 743, 745-46 (D. Mont. 1980)).

125. *Id.* at 820-21. Similarly, in Bowser v. Guttendorf, 541 A.2d 377 (Pa. Super. Ct. 1988), the Pennsylvania court held that a Type I plaintiff, upon learning of the abuse, "must investigate the situation and ascertain who might be legally culpable." *Id.* at 380. This is true irrespective of whether the plaintiff is aware that someone may be legally responsible for plaintiff's injury. *Id.* For a similar holding, see Hildebrand v. Hildebrand, 736 F. Supp. 1512, 1521 (S.D. Ind. 1990) (holding that Type I plaintiffs are on notice that they have been harmed and have a duty to investigate whether they have a cause of action).

126. 813 F. Supp. 346 (E.D. Pa. 1993).

127. *Id.* at 348-49.

128. *Id.* at 349. The court further stated, "In a case like this, where over two decades have passed since the alleged misconduct began, it is easy to imagine how witnesses could be deceased or become unavailable, memories could fade to black, or tangible evidence simply disappear." *Id.*

129. *Id.* at 351. The court colorfully added:

> [C]ases like this call upon courts to re-enact *Rashomon*. As in the great Japanese drama, the characters here all recite their stories with evident sincerity. But is it possible for courts in these cases to get to the truth any more than was possible in the classic Japanese play? The [plaintiffs] firmly believe that these horrid acts occurred, but to what extent could the images depicted

Recent decisions such as *Messina* indicate that courts are viewing Type I cases and their psychotherapeutic underpinnings with increasing skepticism. Courts are again returning to policies underlying statutes of limitations to stop this flood of litigation.

The common thread running through decisions rejecting the Type I plaintiff's claim rests, in part, on the "snapshot" theory underlying the statute of limitations.[130] If courts permit a Type I sexual abuse plaintiff to sue, the same logic would permit a minor involved in a traumatic car accident to sue thirty or forty years later.[131] In *Fager v. Hundt*,[132] the Indiana Supreme Court refused to apply the discovery rule to a Type I plaintiff for this very reason.[133] The *Fager* court found that if the sexually abused minor could sue years later for the abuse, then "a middle-aged claimant, suddenly learning that he had been involved as an infant in an automobile accident, could attempt to invoke the discovery rule to assert an action seeking damages for a permanent medical condition allegedly resulting."[134]

If this were permitted, statutes of limitations would be completely obviated in cases of ordinary injuries to children whose developmental limitations impaired or precluded their capacity to discover that an injury resulted from another person's tortious act.[135]

From *Tyson* to *Hammer* to *Messina*, courts have come full circle with respect to Type I plaintiffs within a six-year time frame.[136] In *Hammer*, the Wisconsin court proclaimed that allowing the statute of limitations to protect the adult sexual abuser at the expense of the child worked "an intolerable perversion of justice."[137] Several years later, in *Messina*, a

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> be refractions of resonant suggestions of others? [The defendant] denies that any such acts occurred, but is this the result of age, the death of gray cells, or more than a little psychological "denial?"

Id.

130. *See* Green, *supra* note 61, at 972.

131. *See* Fager v. Hundt, 610 N.E.2d 246, 251 (Ind. 1993).

132. 610 N.E.2d 246 (Ind. 1993).

133. *Id.* at 250-51. The same conclusion would be equally applicable to the Type I plaintiff. *See id.*

134. *Id.* at 251.

135. *Id.* However, the court permitted the Type I plaintiff to sue under the doctrine of fraudulent concealment. *Id.* The court stated that "the fraudulent concealment exception does not establish a new date for commencement of the statute of limitations, but rather creates an equitable exception" to the statute of limitations. *Id.*

136. *See supra* notes 86-129 and accompanying text.

137. Hammer v. Hammer, 418 N.W.2d 23, 27 (Wis. Ct. App. 1987).

Pennsylvania district court asked, "Is there any reason to suppose that courts are better equipped to determine these questions than Sigmund Freud?"[138]

B. The Type II Plaintiff

The Type II plaintiff is generally characterized as having "repressed" all memory of the sexual abuse until shortly before filing the lawsuit.[139] Only a handful of courts have refused to toll the statute of limitations for Type II recovered memory cases.[140]

The Type II plaintiff proves the "best fit" for discovery rule application since she alleges complete memory "repression." Put another away, contrary to a Type I plaintiff who has always remembered the abuse, the Type II plaintiff is "blamelessly ignorant" of the abuse until a point in time usually after the statute of limitations period has expired. Courts have frequently held that barring an unknown claim is inequitable and prejudicial to plaintiffs.[141]

In *Johnson v. Johnson*, the plaintiff alleged that she "repressed" all memory of sexual abuse that had occurred twenty years earlier while she was a minor.[142] The court found that the plaintiff was "blamelessly ignorant" of the abuse and could not be held to the limitations period for bringing an action.[143] Seized by the gross allegations of the plaintiff's complaint, the court found that problems of proof are not the gravamen of discovery rule application; rather, the severity of the crime or tort alleged is the governing factor.[144] The court then held that plaintiff's

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138. Messina v. Bonner, 813 F. Supp. 346, 350 (E.D. Pa. 1993).

139. This is the prototypical "repressed memory" lawsuit. *See, e.g.*, Carlson v. Rice, 836 F. Supp. 17 (D. Me. 1993); Sinclair v. Brill, 815 F. Supp. 44 (D.N.H. 1993); Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988); Ulibarri v. Gerstenberger, 871 P.2d 698 (Ariz. Ct. App. 1993); Fager v. Hundt, 610 N.E.2d 246 (Ind. 1993); Meiers-Post v. Schafer, 727 N.W.2d 606 (Mich. Ct. App. 1988); Petersen v. Bruen, 792 P.2d 18 (Nev. 1990); Osland v. Osland, 442 N.W.2d 907 (N.D. 1989); McCollum v. D'Arcy, No. 92-601, 1989 N.J. LEXIS 73 (Mar. 15, 1994); Ault v. Jasko, 637 N.E.2d 870 (Ohio Ct. App. 1993); Tyson v. Tyson, 727 P.2d 226 (Wash. 1986).

140. *See* Farris v. Compton, 802 F. Supp. 487 (D.D.C. 1992); Baily v. Lewis, 763 F. Supp. 802 (E.D. Pa. 1991); Lindabury v. Lindabury, 552 So.2d 1117 (Fla. Dist. Ct. App. 1989); Rigazio v. Archdiocese of Louisville, 853 S.W.2d 295 (Ky. Ct. App. 1993); Anonymous v. Anonymous, 584 N.Y.S.2d 713 (N.Y. Sup. Ct. 1992); Tyson v. Tyson, 727 P.2d 226 (Wash. 1986).

141. *See Johnson*, 701 F. Supp. at 1369-70.

142. *Id.* at 1364-65. Plaintiff alleged that the "suppression of these memories was a self-protecting measure which prevented Plaintiff from knowing, recognizing, and understanding the nature of her injuries and the fact of their causal relationship to Defendant's . . . sexual abuse." *Id.*

143. *Id.* at 1369-70.

144. *Id.* The court stated that it would be a "'cruel hoax to deny a widow and 4

cause of action would not accrue until plaintiff knew, or should have known, of her injury and its wrongful cause.[145] While the *Johnson* court acknowledged that the defendant would have had difficulty disproving the events alleged, it did not require the plaintiff to present corroborative evidence to substantiate the claim.[146]

In *Ault v. Jasko*,[147] however, the Ohio Supreme Court sought to justify application of the discovery rule within the traditional statute of limitations framework.[148] In *Ault*, the plaintiff alleged complete repression of memories of sexual abuse.[149] In accepting plaintiff's argument that the discovery rule should apply, the court found that the four policy goals advanced by the statute of limitations would still be met.[150] First, the court stated that application of the discovery rule to the defendant was in fact "fair" because the defendant could still offer circumstantial evidence to rebut the plaintiff's claims.[151] Second, the court found that the statute of limitations could not enhance the promptness of claims unless the plaintiff in fact knew she had a claim.[152] Third, the court found that the risk of stale and fraudulent claims was not worth denying "[p]laintiffs with valid claims . . . the opportunity to prove that repression of memory precluded them from bringing their claims within the statute of limitations period."[153] Finally, the court found that while the defendant would experience problems with proof, this burden was a minor defect outweighed by the need for remedy of the injury.[154]

The *Ault* court's attempt to justify application of the discovery rule within this context fails inasmuch as it relies on the outrageousness of

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minor children an opportunity to test the case on the merits because the widow failed to decipher . . . [a] medical term.'" *Id.* (quoting Fure v. Sherman Hosp., 380 N.E.2d 1376, 1386 (Ill. Ct. App. 1978)).

145. *Id.* at 1370.

146. *Id.* at 1369-70.

147. 637 N.E.2d 870 (Ohio 1994).

148. *Id.* at 871-73.

149. *Id.* at 871. According to the plaintiff, she was molested by her father when she was 12, but the memory was repressed until she reached age 20. *Id.* Defendant moved to dismiss on grounds that the one-year statute of limitations began to run when plaintiff reached 18, the age of majority. *Id.* at 870. Plaintiff contended that since she filed her claim within one year of discovery the abuse, the statute of limitations had not run. *Id.* at 871.

150. *Id.* at 871-73.

151. *Id.* at 872.

152. *Id.* at 872-73.

153. *Id.* at 873.

154. *Id.*

the alleged acts to justify tolling the statute of limitations.[155] Moreover, conceding that problems of proof exist, application of the discovery rule harms not only the defendant, but the court and jury alike who are a necessary part of this equation. If courts like *Ault* are balancing the equities, they must consider all of the factors, including the potential for fraud upon the court, the defendant's difficulty in defending the case, and the jury's ability to fairly and accurately determine the facts.[156] When no independent, physically corroborating facts exist to substantiate such claims, who wins may be determined only by who hires the best attorney(s) and expert witness(es). This is why an increasing number of courts have answered the "proof problem" by requiring that Type II plaintiffs present corroborative evidence of their allegations.[157]

In *Meiers-Post v. Schafer*,[158] the Michigan Court of Appeals weighed the consequences of accepting uncorroborated Type II claims of sexual abuse.[159] The court admitted that "[t]he issue which so troubled the Washington Supreme Court [in *Tyson*]" was not present in *Meiers-Post* because the defendant corroborated the plaintiff's memories by admitting that he committed the sexual acts.[160] Thus, the court held that the Michigan statute of limitations would be tolled under the insanity clause when "(a) plaintiff can make out a case that she had repressed the memory of the facts upon which her claim is predicated . . . and (b) there is corroboration for plaintiff's testimony that the sexual assault occurred."[161]

As the plaintiff's claims were corroborated by independent, objectively verifiable evidence, the court remanded the case to the lower court for further proceedings.[162] The *Meiers-Post* court, however, offered no opinion on what type of corroborative evidence would satisfy the second part of their holding.

In a recent Michigan appellate decision, *Lemmerman v. Fealk*,[163] the court rejected the *Meiers-Post* holding and held that a Type II plaintiff could sue without independent corroborating evidence.[164] Contrary to both *Meiers-Post* and *Nicolette v. Carey*,[165] the plaintiff in *Lemmerman*

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155. *See supra* note 149 and accompanying text.

156. *See Ault*, 637 N.E.2d at 870-73.

157. *See, e.g.*, Meiers-Post v. Shafer, 427 N.W.2d 606 (Mich. Ct. App. 1988).

158. 427 N.W.2d 606 (Mich. Ct. App. 1988).

159. *Id.* at 607-10.

160. *Id.* at 610.

161. *Id.*

162. *Id.* The court commented that requiring corroborative evidence "strikes a fair balance between the risk of stale claims and the unfairness of precluding justifiable causes of action." *Id.*

163. 507 N.W.2d 226 (Mich. Ct. App. 1993).

164. *Id.* at 229.

165. 751 F. Supp. 695 (W.D. Mich. 1990). *Meiers-Post* was followed by Nicolette v.

offered no corroborative evidence of the sexual abuse.[166] The court found it "illogical to require corroborating evidence under the delayed discovery rule . . . [where f]undamental fairness, not availability of objective evidence, has been the 'linchpin of the discovery rule.'"[167] Thus, in the first true challenge to the *Meiers-Post* holding, the Michigan Court of Appeals acquiesced to the outrageousness of plaintiff's allegations of sexual abuse, thereby permitting the case to proceed without any corroborative evidence.[168]

However, in a Utah case, *Olsen v. Hooley*,[169] the plaintiffs sued the defendant for sexual abuse that had been "repressed" for twelve years.[170] Skeptical of repressed memory theory, the court held:

> [B]ecause of concerns about the reliability of memory in general to events that occurred long ago, apart from repression, and the difficulty of defending against claims of revived memories of sexual abuse, we think it necessary to require that a plaintiff who alleges repression of memory as a basis of tolling the statute of limitations produce corroborating evidence in support of the allegation of abuse.[171]

For the *Olsen* court, corroborative evidence included "evidence that a defendant committed similar acts against other persons or evidence of contemporaneous physical manifestations of the abuse."[172]

Carey, 751 F. Supp. 695 (W.D. Mich. 1990), in which the court held that a Type I plaintiff could sue after producing independent corroborative evidence of the sexual abuse in the form of a letter signed by the defendant. *Id.* at 699-700.

166. *Lemmerman*, 507 N.W.2d at 229.

167. *Id.* (quoting Tyson v. Tyson, 727 P.2d 226, 231 (Wash. 1986) (Pearson, J., dissenting)).

168. *Id.* at 229-30. The court stated, "We believe that plaintiff's claims should not be sacrificed in favor of a policy discouraging stale claims." *Id.* at 230. The Michigan Supreme Court later reversed the appellate court. 534 N.W.2d 695, 704 (Mich. 1995).

169. 865 P.2d 1345 (Utah 1993).

170. *Id.* at 1346. The plaintiff allegedly suffered from dissociation causing memory repression and unbearable stress combined with violent emotions caused by the trauma. *Id.*

171. *Id.* at 1350. In addition, the court stated, "Because of the dearth of empirical scientific evidence regarding the authenticity and reliability of revived memories, . . . the inherent reliability and admissibility of expert witness testimony regarding memory repression and revival may be an issue that will have to be reached at trial." *Id.* (internal citation omitted).

172. *Id.* In a similar Type II case, Conrad v. Dray, No. 05-92-02867-CV, 1994 WL 59968 (Tex. Ct. App. Mar. 1, 1994), a Texas appellate court also required corroborative evidence to substantiate the Type II claim. However, the court held that expert testimony regarding plaintiff's "repression" and post traumatic stress disorder would satisfy the corroborating requirement. *Id.* at *7-8.

Nevada courts have responded still differently to Type II claims. In *Petersen v. Bruen*,[173] the Nevada Supreme Court recognized the grave problems that might arise from the unqualified application of the discovery rule to Type II claims.[174] The court held that "no existing statute of limitations applies to bar the action of an adult survivor of CSA [childhood sexual abuse] when it is shown by clear and convincing evidence that the plaintiff has in fact been sexually abused during minority by the named defendant."[175] The court stated that when abuse has been satisfactorily proven, there is "no compelling need or policy which justifies the intervention of a period of limitations to eliminate the right of CSA victims to seek recovery against their abusers."[176]

The *Petersen* decision offers perhaps the best compromise for this very difficult issue: How can meritless claims of "false memories" be eliminated from courtrooms, while permitting meritorious claims to proceed? While the express language of *Petersen* eliminates the statute of limitations for victims of childhood sexual abuse, it protects wary defendants, courts and juries from therapeutically induced, uncorroborated "false memories" of sexual abuse claims. The *Petersen* decision would allow the *Meiers-Post* plaintiff to proceed, while eliminating the threat of repeating the Cardinal Bernardin affair.[177]

In addition, *Petersen* seems broad enough to permit the Type I plaintiff to sue as well. This may be the greatest paradox involved in the new age of sexual abuse litigation: the Type I plaintiff, who at least remembers the abuse, is prohibited from suing in a majority of states while the Type II plaintiff, whose entire case rests upon the scientifically questionable theory of "memory repression," is allowed to sue in a majority of states. If courts are to be vigilant with respect to the outrageousness of childhood sexual abuse, then these same courts must be equally vigilant in permitting the Type I plaintiff to sue. Childhood sexual abuse is abhorrent and there is *no* compelling reason for barring a plaintiff's sexual abuse claim because of the statute of limitations when the claim is adequately proven by independent corroborative evidence.

On the other hand, New York courts have remained steadfast in their refusal to permit both Type I and Type II plaintiffs from suing.[178] In

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173. 792 P.2d 18 (Nev. 1990).

174. *Id.* In doing so, the court considered the policy rationales in support of and against the discovery rule. *Id.* at 20.

175. *Id.* at 24-25.

176. *Id.* at 23.

177. *See supra* notes 51-52 and accompanying text.

178. *See, e.g.*, Smith v. Smith, 830 F.2d 11 (2d Cir. 1987); Overall v. Klotz, 846 F. Supp. 297 (S.D.N.Y. 1994); Bassile v. Covenant House, 575 N.Y.S.2d 233 (N.Y. Sup. Ct. 1993); Anonymous v. Anonymous, 584 N.Y.S.2d 713 (N.Y. Sup. Ct. 1992); Burpee v. Burpee, 578 N.Y.S.2d 359 (N.Y. Sup. Ct. 1991).

New York, in order to toll the statute of limitations for sexual abuse, a plaintiff must prove that she was legally insane, demonstrating an overall inability to protect her legal rights and an inability to function in society during the tolling period.[179] Thus, in New York, a Type II plaintiff cannot sue even if the defendant subsequently admits to committing the acts.[180]

However, in *Anonymous v. Anonymous*,[181] a Type I plaintiff sued her next-door neighbor, complaining that he sexually abused her from 1967 through 1987.[182] While the court found "mere repression . . . insufficient to toll the Statute of Limitations," the court stated that repression might be "one of a bundle of claimed injuries, the totality of which, if established, would indicate an overall inability to function in society."[183] The court remanded the case to the trial court for an *in camera* hearing to determine the truthfulness of the allegations and decide whether the limitations period should be tolled.[184]

While a majority of courts permit the Type II plaintiff to sue based on memory repression, there is by no means a consensus approach to these unique cases. For some courts, mere allegation of memory repression automatically tolls the statute of limitations accrual date.[185] Other courts require the plaintiff to present some form of corroborative evidence to substantiate the ancient claim.[186] But even among courts that require corroborative evidence, there is dispute as to what constitutes physically corroborating evidence so as to justify tolling the statute of limitations.[187]

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179. *See Burpee*, 578 N.Y.S.2d at 360-61. Furthermore, the plaintiff "must demonstrate *inter alia* that she suffered not merely from a neurosis [that caused repression] but was beyond question 'overall mentally disabled.'" *Id.* at 362.

180. *Id.* "New York does not follow the proposition that the mere claim or even proof of an admission by the defendant will warrant avoidance of the time limit fixed by a [s]tatute of [l]imitations." *Id.*

181. 584 N.Y.S.2d 713 (N.Y. Sup. Ct. 1992).

182. *Id.* at 716.

183. *Id.* at 720-21.

184. *Id.* at 721-22.

185. *See* Farris v. Compton, 652 A.2d 49, 63 (D.C. 1994); McCollum v. Darcy, 138 A.2d 797, 798 (N.H. 1994).

186. *See e.g.*, Meiers-Post v. Schafer, 427 N.W.2d 606 (Mich. Ct. App. 1988).

187. *See* Petersen v. Bruen, 792 P.2d 18, 23-24 (Nev. 1990) (holding that "[n]o existing statute of limitations applies to bar the action of an adult survivor of CSA when it is shown by clear and convincing evidence that the plaintiff has in fact been abused during minority by the named defendant."); Nicolette v. Carey, 751 F. Supp. 695 (W.D. Mich. 1990) (letter admitting to abuse sufficient corroborative evidence for

Clearly, if courts are concerned that innocent persons are being stigmatized as pedophiles and sued in open court, more must be done to eliminate the likelihood that lawsuits premised on "false memories" are being filed in American courtrooms.

V. PROTECTING DEFENDANT FROM FALSE CLAIMS OF SEXUAL ABUSE

Without question, many persons have been falsely accused of sexually abusing their children or other minors since repressed memory therapy became an oft-used psychotherapeutic technique. Within the past two years, accusations have increased at an enormous rate—from 250 accusations reported as of March 1992 to over 11,000 accusations reported as of March 1994.[188]

Despite overwhelming evidence that false accusations of sexual abuse are being made, the already stigmatized accused has little or no remedy upon being vindicated of the charges. If society is to be so vigilant with respect to the adult survivor of incest, the same vigilance should be accorded to those falsely accused of committing incest.

A. Requirement of Independent, Objectively Verifiable Evidence that Establishes Clear and Convincing Proof of the Alleged Sexual Abuse; and Elimination of Statutes of Limitations for Both Type I and Type II Plaintiffs

To eliminate the threat of false or fraudulent sexual abuse claims, courts should require independent and objectively verifiable corroborative evidence to substantiate the alleged abuse. This rule should apply equally to Type I and Type II plaintiffs. The threshold of proof necessary to proceed with such suits must amount to clear and convincing evidence that substantiates the claims.[189] This evidence should be reviewed *in camera* by the trial judge either shortly after the complaint is filed or shortly after the discovery period.[190]

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tolling statute of limitations); Conrad v. Dray, No. 05-92-02867-CV, 1994 WL 59968 (Tex. Ct. App. Mar. 1, 1994) (expert psychiatric testimony could satisfy requirement that "recovered" memory be corroborated).

188. FMS FOUND. NEWSL., Mar. 8, 1994, at 1, 1.

189. *See* Petersen v. Bruen, 792 P.2d 18, 24-25 (Nev. 1990) (holding that the running of the statute of limitations will not bar a suit brought by an adult survivor of childhood sexual abuse when clear and convincing evidence establishes that the abuse occurred).

190. *See* Anonymous v. Anonymous, 584 N.Y.S.2d 713, 721 (N.Y. Sup. Ct. 1992) (requiring fact-finding hearing on the issues prior to deciding whether the statute of limitations was tolled).

Second, if courts are to be truly vigilant with respect to their abhorrence for claims of childhood sexual abuse, they should eliminate the statute of limitations with respect to *all* childhood sexual abuse claims, both Type I and Type II, that are established by clear and convincing proof of the alleged abuse, as Nevada courts have done.[191] One scholar has noted that eliminating statutes of limitations in toxic substances litigation (where there is objective proof of the injury) would serve to enhance the quality of evidence presented at trial. In turn, this would permit the plaintiff to gather additional corroborative proof of the injury, thereby increasing the quality of evidence presented at trial and ensuring that the case is fairly and accurately decided and not arbitrarily dismissed.[192]

Similarly, eliminating statutes of limitations for Type I and Type II plaintiffs will increase the quality and degree of proof in these cases. A plaintiff would not be compelled to quickly file unsubstantiated or false claims of sexual abuse against an alleged abuser simply because a limitations period may expire. Rather, the plaintiff could further investigate the memory, obtain a second therapist's opinion, and elicit information and evidence from persons then living, e.g., doctors, friends, relatives, or even the alleged abuser. This approach would help to achieve a delicate balance between eliminating false claims of abuse and providing the accuser with an unlimited time in which to substantiate her claim, permitting the meritorious claim to proceed to suit.

B. Third-Party Lawsuits Against Therapists

Another way courts and legislatures can diminish the increasing number of false claims of sexual abuse being filed is to permit the falsely accused person to sue the unethical or unscrupulous therapist who elicited the false memory for negligent misdiagnosis.[193] However, a majority of courts hold that a mental health professional owes no duty to a third person for misdiagnosis.[194]

In *Bird v. W.C.W.*, a father who had been cleared of criminal allegations that he sexually abused his child sued the psychologist who misdi-

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191. *See id.*; *see also* Green, *supra* note 61, at 969 (advocating the elimination of statutes of limitations in toxic substances litigation).

192. *See* Green, *supra* note 61, at 989.

193. *See* Elizabeth Loftus & Laura Rosenwald, *Buried Memories/Shattered Lives*, 79 A.B.A. J., Nov. 1993, at 70, 70-73.

194. *See, e.g.*, Bird v. W.C.W., 868 S.W.2d 767 (Tex. 1994).

agnosed his son.[195] The court held that "there is no professional duty running from a psychologist to a third party to not negligently misdiagnose a condition of a patient."[196] The court reasoned that permitting third-party lawsuits against therapists had to be considered "in light of countervailing concerns, including the social utility of eradicating sexual abuse."[197]

However, *Ramona v. Isabella*[198] is considered to be the first case in which the target of a civil sexual abuse claim based on repressed memories subsequently sued the therapist who elicited the memory.[199] In *Ramona*, Gary Ramona's daughter, Holly, visited a therapist for treatment of an eating disorder known as bulimia.[200] Ultimately, the therapist diagnosed Holly as having been sexually abused as a child.[201] The therapist apparently treated Holly with sodium amytol to "recover" the memories.[202] Holly confronted Ramona at his workplace, informing the company that he had sexually abused her.[203] As a result, Gary Ramona lost his $300,000.00 per year job and was ostracized by friends, family, and the Napa Valley community that he had called home for twenty years.[204] In this case, a jury ordered the psychiatrist to pay Holly's parents $500,000.[205] In two earlier cases, one in Pennsylvania and one in Texas, similar awards were granted to parents against psychiatrists.[206] If these cases survive appeal, the collateral effect of the decisions will be to cause therapists to be more cautious in therapy and protect patients and parents alike against the threat of false memories.

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195. *Id.* at 768.

196. *Id.*

197. *Id.* at 769.

198. No. C61898 (Napa County Super. Ct., Apr. 18, 1994).

199. *See* Loftus & Rosenwald, *supra* note 193, at 71.

200. *See* Ramona v. Isabella, No. C61898 (Napa County Super. Ct., Apr. 18, 1994).

201. *See id.*

202. Sodium amytol is a barbiturate. *See* American Society of Hospital Pharmacists, American Hospital Formulary Service, *Barbiturates*, at *2, 17 (Feb. 1991). It is used among other purposes, for hypnosis and pseudomemories. *See* Ofshe & Watters, *supra* note 2. The therapist told Holly Ramona that 80% of those suffering from eating disorders were sexually abused as children. *See* Jane M. Adams, *Napa Trial Tests "Recovered Memory" of Abuse*, SACRAMENTO BEE, Mar. 25, 1994, at B1. Ms. Ramona at first denied the abuse, but after sodium amytol treatment, became convinced that she had memories of sexual abuse. *Id.*

203. *Id.*

204. *See Dad Takes Stand Against Daughter's Therapists; Denies Sex Abuse*, SACRAMENTO BEE, Mar. 26, 1994, at B5.

205. *See* Thom Weidlich, *'False' Memory, Big Award*, NAT. L.J., Jan. 9, 1995, at 49, 49.

206. *See id.*

C. *Uniform Standards of Treatment Based on Generally Accepted and Scientifically Verified Psychiatric or Psychological Techniques*

Any attorney who defends delayed sexual abuse claims premised on repressed memories or delayed discovery of the causal consequences of previously known abuse concentrates on two factors: (1) the therapist and his or her qualifications, and (2) the technique used by the therapist to elicit the memory.[207] With respect to the latter qualification, the novice attorney will learn an entire new vocabulary that includes such concepts as guided imagery, body work, primal therapy, Rolfing, hypnosis, age regression, and psychodrama.[208]

The American Medical Association has rejected many of these unproven therapies and has stated that hypnosis, combined with therapeutic techniques such as age regression,[209] do not enhance a subject's memory with regard to previously repressed or forgotten memories.[210] In fact, the American Medical Association has taken the position that

> there is *no* evidence of increased recollection by means of hypnosis for recall memory of meaningless material or of recognition memory for any types of material. When hypnosis is used for recall of meaningless past events, there is often new information reported. This may include accurate information as well as confabulations and pseudomemories.[211]

The American Medical Association recommends that any therapist using hypnosis should use the following specific safeguards to protect the welfare of the subject and the public: (1) perform a psychological assessment of the patient prior to inducing hypnosis so as to establish what memory the patient has prior to hypnosis, (2) obtain informed consent of

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207. Steven Cook withdrew his case against Cardinal Joseph Bernardin after his therapist and his therapist's qualifications and memory enhancing techniques were challenged by defense attorneys for Cardinal Bernardin. Cook's therapist apparently obtained his therapy degree through mail order via an unaccredited school. See Tom McNamee, *Bernardin 'Vindicated'; Cardinal Dropped From Suit; Accuser Says Memory Unreliable*, CHI. SUN-TIMES, Mar. 1, 1994, at 1; Daniel J. Lehman, *Doubts About Therapist Hurt Case*, CHI. SUN-TIMES, Mar. 1, 1994, at 1; Jan Crawford, *Bernardin's Accuser Has Potential Problem; Validity of Therapist, Hypnosis Session Will Face Challenge*, CHI. SUN-TIMES, Feb. 9, 1994, at 1N; Paul Kenny and Howard Wieder, *Recovered Memory and Statute of Limitations*, N.Y.L.J. June 23, 1995, at 1.

208. *See* Taylor, *supra* note 50, at 81.

209. Age regression theory holds that a patient under hypnosis can revert to and reexperience a traumatic event. *See* Counsel on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 JAMA 1918, 1919 (1985).

210. *Id.* at 1922.

211. *Id.* (emphasis added).

the patient prior to inducing hypnosis and describe the pitfalls of the process that potentially include the creation of pseudomemories, and (3) be a skilled psychiatrist or psychologist who has knowledge of the legal implications of the use of hypnosis.[212] Of these recommendations, requiring that therapists obtain informed consent from the patient is perhaps the best starting point. The informed consent should require that all patients be told that "false memories" can by elicited, or remembered, because of these psychological techniques.

The American Psychological Association, Working Group on Investigation of Memories of Childhood Abuse, recommended to the Board of Directors: that the association will not take sides on the controversy on recovered memories; that it is possible to retrieve a lost memory, and that it is also possible to create a false belief.[213]

Courts across the country should begin to question the validity of the numerous therapy techniques that are used by therapists to elicit memories. Many of these techniques remain scientifically unproven, unsanctioned by both psychiatric and psychological communities, and can cause false memories of early childhood events.

VI. CONCLUSION

A new breed of litigation has erupted in American courts with the acceptance of both Type I and Type II sexual abuse lawsuits. It is too early to tell whether these cases will become a mainstay of American jurisprudence or whether they will eventually fade away as remnants of another witch hunt. Signals have started to appear on the horizon, however, that forecast that the days of the "recovered memory" and its devastating consequences are coming to an end.

The scientific community and professional organizations have started to present strong views that deny or severely question the realities of recovered memory theory. At least one state legislature that enacted extensions or exceptions to previous statutes of limitations laws in childhood sexual abuse cases has tried to rethink its position. Concurrently, some courts have begun to accept lawsuits against professionals by victims, as well as third parties, in falsely recovered memory cases.

Nevertheless, there is still much to be done. Members of the scientific community and professional organizations should continue to expose the unrealities of recovered memories, state legislatures should revive the

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212. *Id.* at 1922-23.

213. *See* Kim Ode, *Task Force Investigates Repressed Memory Issues*, STAR TRIB., Oct. 11, 1993, at 03E. For more details, see American Psychological Association, *News*, APA Panel Addresses Controversy Over Adult Memories of Childhood Sexual Abuse, Nov. 11, 1994.

unsuccessful Illinois example, and courts should either halt the use of discovery exceptions or other legal theories in childhood sexual abuse cases or at least dictate very strict standards on their application.

In childhood sexual abuse cases where clear, actual and vivid memories are present (Type I), the force of the law should descend upon the perpetrators, sternly and firmly. However, in those cases based on recovered memories (Type II), all parties should treat the issue not only soberly but extremely cautiously. Above all, it is not only unwise, but also unnecessary, to subvert the right to due process of law of many innocent people in order to protect the few alleged victims of non-existing crimes.