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# Adult Survivors of Childhood Sexual Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule

Adults have more power than children . . . . Children are essentially a captive population, totally dependent upon their parents or other adults for their basic needs. Thus they will do whatever they perceive to be necessary to preserve a relationship with their caretakers . . . . [T]he final choice in the matter of sexual relations between adults and children rests with the adult.<sup>1</sup>

## I. INTRODUCTION

The disturbing phenomenon of childhood sexual abuse<sup>2</sup> in this country has long been downplayed, ignored, and even denied.<sup>3</sup> However, millions of American women, as well as men, have been its victims,<sup>4</sup> and the number of cases reported each year is on the rise.<sup>5</sup> For the most part, the

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1. JUDITH L. HERMAN, *FATHER-DAUGHTER INCEST* 27 (1980).

2. For purposes of this Comment, "childhood sexual abuse" is broadly defined as any kind of exploitative sexual contact, attempted sexual contact, or sexual interaction between a child under the age of 18 and any adult, including a parent, stepparent, guardian, or other person in a position of trust and authority. An expansive definition of childhood sexual abuse is adopted to protect all children from any harmful contact by adults seeking sexual gratification.

This Comment uses the term "childhood sexual abuse" in place of the term "incest." The word "incest" implies a fear of in-breeding among closely related individuals rather than accurately depicting the full range of physical and psychological effects of childhood sexual abuse. Alan Rosenfeld, *The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy*, 12 HARV. WOMEN'S L.J. 206, 206 n.2 (1989).

3. JEFFREY J. HAUGAARD & N. DICKON REPUCCI, *THE SEXUAL ABUSE OF CHILDREN: A COMPREHENSIVE GUIDE TO CURRENT KNOWLEDGE AND INTERVENTION STRATEGIES* 2-3 (1988).

4. In this Comment the victim of childhood sexual abuse will be referred to as a female. This reference serves solely a literary function and is not intended to imply that sexual victimization of males is less disturbing or damaging than abuse of females or that men are less deserving of civil remedies.

5. Tina M. Whitehead, *Application of The Delayed Discovery Rule: The Only Hope*

steps taken by courts and legislatures to remedy this social crisis have been inadequate.<sup>6</sup> Current laws are ineffective at punishing child sex offenders and deterring future abuse, and they provide victims with little relief or support. In response to this, an increasing number of survivors of childhood sexual abuse have taken matters into their own hands by filing civil lawsuits against their abusers, seeking monetary compensation for their injuries.<sup>7</sup>

Unfortunately, victims of childhood sexual abuse are often unable to file lawsuits until many years after the abuse has ended.<sup>8</sup> Children who are sexually abused often suffer severe psychological and emotional damage that may not become manifest until adulthood.<sup>9</sup> Others develop an arsenal of defense mechanisms and may repress memory of the abuse for an extended period of time.<sup>10</sup>

Because of the frequent delay in filing a cause of action, state statutes of limitations pose serious procedural obstacles to recovery.<sup>11</sup> Preclusion of their claims by the statute of limitations effectively denies adult survivors of childhood sexual abuse the only compensatory remedy avail-

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*for Justice for Sexual Abuse Survivors*, 16 LAW & PSYCHOL. REV. 153, 154 n.4 (1992) (noting an overwhelming increase in the number of childhood sexual abuse cases reported annually between 1976 and 1986). For a statistical picture of the childhood sexual abuse problem, see *infra* notes 25-27 and accompanying text.

6. HERMAN, *supra* note 1, at 164-67 (discussing the inadequacy of criminal penalties in deterring childhood sexual abuse). For further discussion on this topic, see *infra* notes 55-63 and accompanying text.

7. Carol L. Mithers, *Incest and the Law*, N.Y. TIMES, Oct. 21, 1990, § 6 (Magazine), at 44 (reporting that a growing number of survivors of childhood sexual abuse have filed civil lawsuits against their abusers in the past decade). For a discussion of the multiple benefits an adult survivor of childhood sexual abuse derives from filing a civil lawsuit, see *infra* notes 66-70 and accompanying text.

8. Kelli L. Nabors, *The Statute of Limitations: A Procedural Stumbling Block in Civil Incestuous Abuse Suits*, 14 LAW & PSYCHOL. REV. 153, 159 (1990) (reporting that it often takes several years of therapy before a survivor of childhood sexual abuse is able to file a civil lawsuit against her abuser). For a discussion of how childhood sexual abuse impairs an adult survivor's ability to timely file a civil lawsuit, see *infra* notes 45-54 and accompanying text.

9. See generally DAVID FINKELHOR, A SOURCEBOOK ON CHILD SEXUAL ABUSE 144-64 (1986) (reviewing the empirical literature on both the initial and long-term effects of childhood sexual abuse on the survivor). For further discussion of the long term emotional and psychological consequences of childhood sexual abuse, see *infra* notes 40-44 and accompanying text.

10. For a discussion of the phenomenon of "repression" or "memory loss" among adult survivors of childhood sexual abuse, see *infra* notes 45-47 and accompanying text.

11. Statutes of limitations are legislatively mandated time limits which restrict the period during which civil suits may be filed after the date of injury. RESTATEMENT (SECOND) OF TORTS § 899 (1977). For a more detailed discussion of statutes of limitations, see *infra* notes 73-81 and accompanying text.

able for the injuries they suffered as a result of their childhood victimization.

Recently, a number of courts have recognized the harsh consequences of a strict application of the statute of limitations and have applied the delayed discovery rule, a common law equitable exception to strict adherence to the time bar that statute of limitations present.<sup>12</sup> The discovery rule tolls the statute of limitations until the plaintiff knows, or reasonably should have known, of her injury. However, judicial expansion of the rule into the area of childhood sexual abuse has been inconsistent and erratic.<sup>13</sup>

This Comment analyzes the dynamics of childhood sexual abuse and its damaging effects on its victims. It argues that survivors of childhood sexual abuse currently lack an adequate legal remedy for the harm they experience. Part II of this Comment addresses the dynamics and devastating psychological consequences of childhood sexual abuse.<sup>14</sup> Part III explores the legal measures courts are taking in response to the childhood sexual abuse problem.<sup>15</sup> Part IV focuses on the policy considerations behind statutes of limitations and traces the history of the discovery rule.<sup>16</sup> Part V surveys the conflicting approaches courts take in applying the discovery rule to childhood sexual abuse cases.<sup>17</sup> Part VI explores the legislative response to the statute of limitations problem in civil childhood sexual abuse cases and proposes a legislative solution for future legislation.<sup>18</sup> Finally, this Comment concludes that because courts have failed to uniformly apply the discovery rule in an equitable fashion, uniform legislation must be introduced so that justice will be served for all victims of childhood sexual abuse.

## II. THE NATURE AND EFFECTS OF CHILDHOOD SEXUAL ABUSE

Historically, society has responded to charges of childhood sexual abuse with skepticism and disbelief.<sup>19</sup> Leading scholars in the fields of

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12. See, e.g., *Hammer v. Hammer*, 418 N.W.2d 23 (Wis. Ct. App. 1987). For further discussion of this case, see *infra* notes 180-86 and accompanying text. For a detailed discussion of the discovery rule, see *infra* notes 111-15 and accompanying text.

13. For a discussion of the judicial application of the discovery rule to childhood sexual abuse cases, see *infra* notes 124-213 and accompanying text.

14. See *infra* text accompanying notes 19-54.

15. See *infra* text accompanying notes 55-72.

16. See *infra* text accompanying notes 73-123.

17. See *infra* text accompanying notes 124-213.

18. See *infra* text accompanying notes 214-79.

19. HAUGAARD & REPPUCCI, *supra* note 3, at 148-51. Prior to the 1960s, children's

psychology<sup>20</sup> and law<sup>21</sup> pioneered a tradition of discounting such reports as fantasies and falsehoods. For much of the twentieth century, American society refused to acknowledge the prevalence and severity of childhood sexual abuse.<sup>22</sup>

In the 1970s, public awareness about the sexual victimization of children began to increase, largely due to the efforts of feminists and child advocates.<sup>23</sup> In the past decade, growing concern over the childhood sexual abuse problem has sparked extensive debate and research into the scope, impact, and treatment of this social malady.<sup>24</sup>

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reports of sexual abuse were rarely believed when denied by the alleged perpetrator. *Id.* at 149. Until recently, the public has held a firm belief that childhood sexual abuse is extremely uncommon and that children's reports of sexual encounters with adults are untrustworthy. HERMAN, *supra* note 1, at 22.

20. *Id.* at 9-11. Early in his career, Sigmund Freud theorized that the origin of every case of female hysteria (the most common female neurosis of Freud's time) was childhood sexual trauma. *Id.* at 9. However, unwilling to accept what his conclusions implied about the behavior of respected family men, Freud repudiated his theory a year after publishing it. *Id.* at 9-10. He determined that his patients had been lying, and their numerous reports of sexual assaults were untrue. *Id.* at 10. Freud concluded that the reports of sexual abuse were fantasies, which he attributed to his patients' own incestuous wishes. *Id.*

21. *Id.* at 11 (citing JOHN H. WIGMORE, TREATISE ON EVIDENCE (1934)). John Henry Wigmore established a doctrine discrediting women and children who complained of sexual abuse. *Id.* In his famous treatise, "Wigmore warned that women and girls were predisposed to bring false accusations against men of good character, and that these accusations might convince unsuspecting judges and juries." *Id.*

22. DIANA E.H. RUSSELL, THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN 3-9 (1986). The author documents a long history among researchers in the fields of psychology and social anthropology of discounting and even ignoring the experiences of sexually abused children. *Id.*

A recent example of society's continued reluctance to acknowledge the reality of childhood sexual abuse involves the public's negative reaction to allegations of sexual abuse made against the popular music star, Michael Jackson. See Cathleen McGuigan et al., *Michael's World*, NEWSWEEK, Sept. 6, 1993, at 35, 35; Amy Wallace and Jim Newton, *Allred Calls Jackson's Accuser 'Courageous'*, L.A. TIMES, Sept. 3, 1993, at B1. Throughout the pendency of the police investigation conducted by the Los Angeles Police Department, the public at large rallied to Jackson's defense assuming that his world-wide popularity and youth-targeted philanthropy preclude him from being a potential child abuser. See PEOPLE, Sept. 27, 1993, at 4, 4 (letters to the editor). Whether or not the allegations made against Michael Jackson are true, the American public's immediate and overwhelming support of Michael Jackson demonstrates that society is more inclined to discredit children and ignore allegations of sexual abuse than to accept the reality that hundreds of thousands of children are sexually abused each year.

23. RUSSELL, *supra* note 22, at 4-5. Feminist scholars helped society to recognize and condemn the widespread sexual victimization of women and raised public awareness regarding pornography, rape, and incest. *Id.*; see also HAUGARRD & REPUCCI, *supra* note 3, at 3 (citing FINKELHOR, *supra* note 9, at 15).

24. See HAUGARRD & REPUCCI, *supra* note 3, at 3-5 (describing the recent explo-

The statistics on childhood sexual abuse are startling. Recent studies estimate that millions of women in this country have been sexually abused,<sup>25</sup> and at least 200,000 new cases are reported each year.<sup>26</sup> Experts believe that as many as one in three American females and one in six males are sexually abused during childhood.<sup>27</sup>

#### A. Dynamics of Childhood Sexual Abuse

The most prevalent myth about child sexual abuse is that its perpetrators are strangers who appear from the shadows in search of young victims.<sup>28</sup> However, in reality, sexual abuse is most frequently committed by family members or other adults who occupy positions of trust and authority in relation to the child.<sup>29</sup> Typically, the abuser will exploit the power imbalance inherent in adult-child relationships to dominate the child.<sup>30</sup> Child abusers often initiate and maintain sexual access to the

sion of interest in and concern about child sexual abuse among psychologists, social workers, lawyers, legislators, the media, and medical and mental health professionals).

25. Mithers, *supra* note 7, at 44 (reporting that an estimated 12 to 15 million women in this country were sexually abused during childhood).

26. BILLIE W. DZIECH & JUDGE CHARLES B. SCHUDSON, ON TRIAL: AMERICA'S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN 1 (1989). In 1984, more than 200,000 cases of child sexual abuse were reported to authorities. *Id.* In 1991, more than 120,00 children in Los Angeles County alone were sexually or physically abused, representing an eleven percent increase from the previous year. Anne C. Roark, *More Children Are Victims of Violence, Studies Find*, L.A. TIMES, Nov. 5, 1992, at A1.

27. KATHLEEN C. FALLER, UNDERSTANDING CHILD SEXUAL MALTREATMENT 13 (1990); DZIECH & SCHUDSON, *supra* note 26, at 1.

28. Kee MacFarlane, *Sexual Abuse of Children*, in THE VICTIMIZATION OF WOMEN 81, 86 (Jane R. Chapman & Margaret Gates eds., 1978). The author points out that by alerting children to beware of strangers offering rides or candy, adults address only a small percentage of the actual population that poses a sexual threat to children. *Id.* In reality, "[C]hild abusers look and act pretty much like everybody else. Many of them are men and women with jobs and families, liked by their coworkers and neighbors and respected in their communities . . . ." JOHN CREWDSON, BY SILENCE BETRAYED 55 (1988).

29. HERMAN, *supra* note 1, at 7. The most common child sexual abusers are fathers, stepfathers, uncles, cousins, family friends, and neighbors. *Id.* Furthermore, the closer the relationship of the abuser to the child, the less likely the child will report the abuse and the greater the likelihood that it will continue. SANDRA BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST 12 (1978).

30. See MacFarlane, *supra* note 28, at 88. Children are susceptible targets since they are in subordinate positions and have been conditioned to comply with authority. *Id.* Thus, "[c]hildren by their very nature make ideal victims of sexual exploitation." *Id.*

child through an atmosphere of secrecy and shame.<sup>31</sup> Although the child victim often senses that what is happening is not right, the child will often tell no one about the relationship, thereby allowing the victimization to continue for a significant period of time.<sup>32</sup>

Many factors combine to keep the sexually abusive relationship intact. In many cases, the sexual activity, although inappropriate, may be the child's only perceived source of love, attention, and affection.<sup>33</sup> Some victims receive tangible rewards such as money or gifts in exchange for submitting to the adults' wishes.<sup>34</sup> Frequently, the perpetrator frightens the child into maintaining the secrecy with threats of harm or other negative consequences.<sup>35</sup> In light of these conditions, child victims often are unable to disengage themselves from the abuse, and they are slowly conditioned into a pattern of submission and silence which allows the abuse to continue over an extended period of time.<sup>36</sup> Such behavior often causes the child to develop feelings of helplessness and guilt or responsibility for having let the abuse go on for so long, which in turn, further prevent the child from breaking the silence.<sup>37</sup>

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31. Jocelyn B. Lamm, Note, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189, 2192 (1991) (citing BUTLER, *supra* note 29, at 30-31). Because the perpetrator is commonly known and trusted by the child, the sexual encounters are rarely associated with violence or threat of force. MacFarlane, *supra* note 28, at 88. "Rarely is it necessary to intimidate a child who already is trusting and open to the adults in his or her family environment." BUTLER, *supra* note 29, at 29.

32. BUTLER, *supra* note 29, at 30-31. "These children submerge their true feelings, distrust their perceptions, and deny their own reality. They tell no one about the relationship and behave as though nothing is happening." *Id.* at 30.

33. MacFarlane, *supra* note 28, at 88-89. Children are "sensual beings who may respond willingly to intimate and gentle contact which they may associate with feelings of being loved, cherished, and cared for." *Id.* at 88. For some children, the sexual abuse "represents the first time they experience what they perceive to be recognition of special attention from the parent or parent figure. As is the case with some battered children, even negative, painful, or distasteful attention is better than none at all." *Id.* at 88-89.

34. BUTLER, *supra* note 29, at 29-30.

35. HERMAN, *supra* note 1, at 88. Many children are warned not to report the sexual abuse and are threatened with severe consequences if they do. *Id.* These consequences could include: parental divorce, mental suffering by the non-guilty parent, incarceration of the guilty parent, the child being punished and sent away from home, and physical harm. *Id.*

36. BUTLER, *supra* note 29, at 33. For example, a woman gave the following reason for keeping silent: "Nobody would have believed me. Daddy was a big executive . . . I never felt anyone would believe a kid saying anything like that. I didn't feel I had anyplace to turn and just waited for the day I turned sixteen so I could leave all of them behind me." *Id.*

37. A 15-year-old survivor of sexual abuse stated:

I used to get extra things from Daddy for being nice to him. He told me

*B. The Psychological Injuries of Childhood Sexual Abuse*

The damaging effects of childhood sexual abuse can be significant both initially and long-term.<sup>38</sup> During childhood, the consequences of sexual abuse include feelings of anger, guilt, shame, low self-esteem, and depression.<sup>39</sup> In the long term, adult survivors of childhood sexual abuse continue to experience emotional effects similar to those endured as children; however, the consequences for adults are often more serious.<sup>40</sup> Adults who were sexually victimized during childhood often experience sexual dysfunction, chronic depression, and have difficulty forming intimate personal relationships.<sup>41</sup> Adult survivors are also more likely to abuse alcohol or drugs, attempt suicide,<sup>42</sup> or suffer from an eating dis-

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never to tell anybody and he would keep on giving me things, like extra spending money. I was only nine when he started, and I liked getting those presents. I didn't like what I had to do to get them, but it was the only spending money I ever got. He never hurt me, and it didn't take too long, so I would just not let myself think it was happening at all. After a while I started to worry all the time and was afraid of anybody finding out. But I had let it go on for so many years without telling anyone, I was afraid people would think it was my fault. So I never told.

*Id.* at 30.

38. See FINKELHOR, *supra* note 9, at 143. The literature maintains that childhood sexual abuse can play an important role in the development of serious emotional, physical, sexual, and social problems. *Id.* at 143-44. Adult survivors commonly display signs of depression, anxiety, and low self-esteem in addition to engaging in self-destructive behaviors such as drug and alcohol abuse, eating disorders, and suicide. *Id.* at 144-64.

39. *Id.* at 149-50.

40. Ann Marie Hagen, Note, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355, 359 (1991).

41. HERMAN, *supra* note 1, at 93. In her study of 40 female survivors of childhood sexual abuse, Dr. Judith Herman concluded that 60% experienced major depression symptoms during their adult lives. *Id.* at 99. Moreover, 55% of the women suffered from sexual dysfunction including impairment of sexual enjoyment. *Id.* at 93. The study concluded that each of these percentages was higher for the group of adult survivors of sexual abuse than for the comparison group. *Id.*

42. *Id.* at 93, 99. Dr. Herman's study finds that 38% of the women who were sexually abused as children attempted suicide. *Id.* at 99. In addition, 20% were either alcohol or drug dependent at some point in their life. *Id.* These percentages were all consistently higher among sexually abused women in comparison to the control group of non-sexually abused women. *Id.* at 93.

Women who were sexually abused as children have also been targeted as a high risk group for contracting the HIV virus, which can lead to AIDS. The increased risk factor can possibly be explained by the disproportionately high rate of sexual pro-



order.<sup>43</sup> Furthermore, adults who were sexually abused as children have a strong tendency to perpetuate the cycle of abuse by victimizing their own children.<sup>44</sup>

Many survivors of childhood sexual abuse do not realize the harmful consequences of the abuse until years after the abuse has ended.<sup>45</sup> Child victims often develop a combination of coping mechanisms that enable them to withstand the emotional trauma they experience.<sup>46</sup> Behavioral responses such as denial, dissociation, repression, and amnesia are vital to the child's survival during the period of abuse.<sup>47</sup> Usually, the child continues to employ these defense mechanisms well into adulthood.

Experts have found these psychological and emotional reactions to be so strikingly common among sexually abused children they have labeled this collective response "Post-Incest Syndrome."<sup>48</sup> Post-Incest Syndrome may prevent the survivor from initiating a cause of action by causing her to minimize or deny the effects of the abuse almost completely so that

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misculty and drug abuse among adult survivors of childhood sexual abuse. See FINKELHOR, *supra* note 9, at 160-61 (reporting that an increase in the level of sexual behavior or activity among victims is a common long-term effect of childhood sexual abuse).

43. For example, Carmen, a survivor of childhood sexual abuse, stated:

My weight still is the central physical manifestation of my incest experiences. All that extra flesh is the separation I need between myself and my sexual feelings. I don't trust my feelings, and if I can keep myself fat and unattractive, I don't need to deal with them at all. My weight also is the source of my power and protection against feeling small and vulnerable, like I was as a skinny little kid of eleven.

BUTLER, *supra* note 29, at 21-22.

See also FINKELHOR, *supra* note 9, at 155 (finding support in the literature for the proposition that eating disorders may be a more common long-term effect of childhood sexual abuse than is currently acknowledged).

44. See JEAN RENVOIZE, *INCEST: A FAMILY PATTERN* 90 (1982) (demonstrating that survivors of childhood sexual abuse have a strong tendency to either abuse their own children, or permit others to do so, thus perpetuating the cycle of abuse).

45. Mithers, *supra* note 7, at 44.

46. See Lamm, *supra* note 31, at 2193.

47. Rosenfeld, *supra* note 2, at 208. The severity of these responses is often affected by such factors as the age of the child when the abuse began, the length of time that the abuse continued, and the level of violence used during the abuse. *Id.* at 208-09.

48. *Id.* A critical component of the Post-Incest Syndrome is Post-Traumatic Stress Disorder (PTSD). *Id.* at 209. PTSD is a clinically diagnosed disorder where the memory of a psychologically unacceptable experience is partially or completely repressed due to the survivor's inability to cope with the trauma. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* § 309.89, at 247 (3d ed. rev. 1987) [hereinafter DSM-III-R] ("The essential feature of this disorder is the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience.").

she is unable to connect the sexual abuse with any later consequences.<sup>49</sup> Typically, it is only through a triggering event such as psychotherapy that a survivor is able to overcome the psychological layers of repression to discover the causal connection between her present injuries and the past abuse.<sup>50</sup> Unfortunately, such a breakthrough is usually not achieved until years after the time period prescribed by the statute of limitations has expired, thus barring any chance of recovery.<sup>51</sup>

Furthermore, even if a survivor can make the causal connection, Post-Incest Syndrome typically will impair the survivor's ability to confront the painful memories of the past abuse and work towards recovery.<sup>52</sup> A survivor cannot recall the traumatic events without having to re-experience them with the same intensity as when they originally occurred.<sup>53</sup> As a result, adult victims will "persistently avoid any situation, such as initiating a lawsuit, that is likely to force them to recall and, therefore, to re-experience the traumas."<sup>54</sup>

### III. THE LEGAL RESPONSE TO CHILDHOOD SEXUAL ABUSE

Traditionally, the legal response to childhood sexual abuse has been limited to criminal prosecution.<sup>55</sup> However, the criminal justice system has been ineffective in deterring childhood sexual abuse for several reasons.<sup>56</sup> First, the majority of childhood sexual abuse victims rarely report the crime to the proper authorities.<sup>57</sup> As a result, criminal charges

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49. Rosenfeld, *supra* note 2, at 210. A survivor of childhood sexual abuse experiencing Post-Incest Syndrome may subconsciously repress all memory of the traumatic events and thus fail to identify the causal relationship between the unremembered abuse and her existing physical and psychological problems. Camille W. Cook & Pamela K. Millsaps, *Redressing Wrongs of the Blamelessly Ignorant Survivor of Incest*, 26 U. RICH. L. REV. 1, 5 (1991).

50. Lamm, *supra* note 31, at 2195.

51. Rosenfeld, *supra* note 2, at 210-11.

52. See Nabors, *supra* note 8, at 159 (describing how PTSD significantly limits a survivor's ability to pursue a legal cause of action against her abuser).

53. Rosenfeld, *supra* note 2, at 210.

54. *Id.* See also DSM-III-R, *supra* note 48, at 248 ("The person commonly makes deliberate efforts to avoid thoughts or feelings about the traumatic event and about activities or situations that arouse recollections of it.").

55. Lamm, *supra* note 31, at 2195.

56. See HERMAN, *supra* note 1, at 163-68. In situations involving intra-family abuse, fathers often persuade daughters to remain silent by describing the possible criminal punishments he will suffer if the secret is revealed. *Id.* at 163. In these cases, the criminal justice system actually serves to perpetuate rather than deter the problem of childhood sexual abuse. *Id.*

57. BUTLER, *supra* note 29, at 12-13. "It is estimated that anywhere from fifty to

are not filed and criminal proceedings are never initiated against most child abuse offenders.<sup>58</sup> Second, most criminal statutes of limitations for child sexual abuse expire within five years after the crime's commission.<sup>59</sup> By the time most incidents of abuse are reported, the statutory period has expired and the accused offender cannot be brought to justice.<sup>60</sup> Finally, sexual abuse is a difficult crime to prosecute,<sup>61</sup> and the probability that the accused will be convicted is slight.<sup>62</sup> The criminal justice system, therefore, is unable to provide adequate relief for victims of childhood sexual abuse.<sup>63</sup>

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ninety percent of all sexual assaults upon children remain unreported." *Id.* In Judith Herman's study of 40 victims of childhood sexual abuse, only three (7.5%) filed charges with the police. HERMAN, *supra* note 1, at 164. For further discussion regarding why a child may refrain from reporting the abusive conduct and make no attempt at breaking the silence, see *supra* notes 33-37 and accompanying text.

58. HERMAN, *supra* note 1, at 164.

59. See Mithers, *supra* note 7, at 44. See generally, Jessica E. Mindlin, *Child Sexual Abuse and Criminal Statutes of Limitation: A Model For Reform*, 65 WASH. L. REV. 189 (1990) (discussing the statutes of limitation problem in criminal child sexual abuse cases).

60. Mithers, *supra* note 7, at 44.

61. Petersen v. Bruen, 792 P.2d 18, 22 (Nev. 1990). Justice Steffen of the Nevada Supreme Court, commenting on the complexity of criminal prosecutions for child sexual abuse remarked:

[T]he issue evokes a plethora of problems stemming from such factors as the age of child-victims, lack of witnesses, frequent lack of physical evidence, victim defense mechanisms, prosecutorial inexperience, imprecise and controversial investigative and therapy methodology, parental responses and involvement, tension between an accused's right of confrontation and compounding the extent and duration of trauma to the child-victim, hysteria, length and adversarial nature of judicial proceedings, and fear.

*Id.*

62. See Mithers, *supra* note 7, at 44; see also HERMAN, *supra* note 1, at 164-65. Herman argues that the low rate of conviction results because a defendant benefits from greater legal protection than the child who accuses him. *Id.* at 164. She notes that the defendant is given the right to be considered innocent until proven guilty, to confront his accuser in a public trial, and to cross-examine any witness testifying against him. *Id.* She argues that these judicial safeguards put the defendant at an enormous advantage where often the only witness for the prosecution is a child. *Id.* at 164-65. In addition, most young victims simply do not possess the emotional strength necessary to endure a lengthy criminal investigation and trial. *Id.* at 165. Herman notes that the child victim must often endure bullying cross-examination by the defense attorney and, in cases of intra-family abuse, tremendous pressure from the defendant and other family members to recant or change their story. *Id.* at 165-66. Herman points out, "In reality, false denials of incest are vastly more common than false complaints." *Id.* at 166.

63. HERMAN, *supra* note 1, at 168. In regards to intra-family abuse, the author comments:

The laws as written are rarely enforced and, when enforced, rarely benefit the child. The threat of punishment does little to inhibit incestuous fathers,

In response, during the 1980s, a number of adult survivors of childhood sexual abuse began to demand accountability from their abusers in a different way.<sup>64</sup> They filed personal injury lawsuits in hopes of receiving monetary compensation for the damages inflicted upon them during childhood.<sup>65</sup>

Civil remedies provide multiple benefits for the adult survivor of childhood sexual abuse. In addition to punishing the offenders and deterring future abuse,<sup>66</sup> a civil damages award can provide the plaintiff with compensation for lost wages and the costs of long-term psychotherapy.<sup>67</sup> Plaintiffs will also benefit emotionally from the opportunity to break their silence and publicly place the blame for the abuse on the appropriate individual, the defendant.<sup>68</sup> Regardless of whether the survivor is

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and the fact of punishment does nothing to rehabilitate them. In effect, the justice system serves to uphold and protect the authority of the father, no matter how abusive.

*Id.*

64. See Mithers, *supra* note 7, at 44.

65. *Id.* Courts have refused to recognize a separate tort for child sexual abuse. See *St. Michelle v. Robinson*, 759 P.2d 467, 471 (Wash. Ct. App. 1988) (contending that a separate cause of action for child abuse is unnecessary and that traditional tort doctrines are sufficient). Instead, plaintiffs in civil abuse suits must base their claims on traditional tort theories such as battery, assault, intentional infliction of emotional distress, and negligent infliction of emotional distress. See Margaret J. Allen, Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U. L. REV. 609, 618-28 (1983).

66. Victims of childhood sexual abuse may recover punitive damages from their abusers. See, e.g., *Elkington v. Foust*, 618 P.2d 37 (Utah 1980) (awarding plaintiff \$30,000 in punitive damages). Punitive damages serve the dual purpose of punishing the defendant as well as deterring him and others from committing similar acts in the future. *Zhadan v. Downtown L.A. Motors*, 136 Cal. Rptr. 132, 140 (Ct. App. 1976) ("[T]he purpose of punitive damages [is] to punish the defendant and make an example of [her/him]."). In California, the jury can award punitive damages upon a proper showing by the plaintiff that the defendant's conduct was malicious. CAL. CIV. CODE § 3294 (West 1982). Malice is defined by statute as "conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard for the rights or safety of others." *Id.* § 3294(c)(1).

67. See Mithers, *supra* note 7, at 58. An increase in the number of civil actions filed by survivors of childhood sexual abuse also benefits all of society by increasing public awareness of the problem and by breaking the silence surrounding sexual abuse which only serves to perpetuate the problem. Lamm, *supra* note 31, at 2195.

68. Lamm, *supra* note 31, at 2195. However, despite the potential benefits a victim may derive from pursuing a civil claim, survivors of childhood sexual abuse who seek legal redress from the courts are certain to face a disturbing and traumatic experience. *Id.* at 2196. "They are forced to relate and thus re-experience the victim-

successful, a civil suit provides the plaintiff an opportunity "to reveal what for so long could not be said and to stand up to someone against whom she was once so powerless."<sup>69</sup> Finally, by requiring child sexual abusers to compensate their victims for the harm they have inflicted, "society will be sending a loud and clear message that it will no longer tolerate this behavior."<sup>70</sup> However, only a few plaintiffs who bring civil actions have the opportunity to tell their sides of their stories. The majority of child abuse cases are summarily dismissed before any evidence is presented because they typically are not filed within the time period allotted by the statute of limitations.<sup>71</sup> Consequently, adult survivors of childhood sexual abuse are denied their day in court and left without an adequate legal remedy.<sup>72</sup>

#### IV. STATUTES OF LIMITATIONS AND THE DELAYED DISCOVERY DOCTRINE

Statutes of limitations are legislatively mandated time limits within which civil actions must be brought.<sup>73</sup> All jurisdictions have enacted statutes of limitations setting the time period in which a plaintiff may file a civil suit.<sup>74</sup> The actual length of a particular statutory time limit varies with the given jurisdiction and the type of action involved.<sup>75</sup> The statutory time period begins to run against the plaintiff when the cause of action accrues.<sup>76</sup> Generally, a cause of action accrues on the date the plaintiff could have first maintained a suit.<sup>77</sup> In the typical personal injury tort case, the accrual date will coincide with the date of injury.<sup>78</sup>

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ization they experienced as children, and to confront the hostile attitudes of the defendant, his attorney, and perhaps even the judge or jury." *Id.*

69. Mithers, *supra* note 7, at 58. Consider the following statement made by a woman who recently filed a civil suit against her father for sexual abuse: "For me, a victory would be more emotional than financial . . . . Whether I win or lose, I'll have taken my power back from him. I guess I'll have stood up for the little girl inside." *Id.*

70. Rosenfeld, *supra* note 2, at 219.

71. Mithers, *supra* note 7, at 44.

72. *Id.*

73. RESTATEMENT (SECOND) OF TORTS § 899 (1977).

74. Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1179 (1950) [hereinafter *Developments*].

75. *See id.*

76. RESTATEMENT, *supra* note 73, § 899 cmt. c.

77. *Raymond v. Eli Lilly & Co.*, 371 A.2d 170, 172 (N.H. 1977). "There are at least four points at which a tort cause of action may accrue: (1) [w]hen the defendant breaches his duty; (2) when the plaintiff suffers harm; (3) when the plaintiff becomes aware of his injury; and (4) when the plaintiff discovers the causal relationship between his harm and the defendant's misconduct." *Id.*

78. *Id.*; *See also Developments, supra* note 74, at 1200 (stating that where there is a delay between any of the four events, the choice of accrual becomes more complex).

The statutes of limitations governing the types of claims typically asserted by adult survivors against their abusers range from one to three years.<sup>79</sup> Although most jurisdictions toll the time period until the plaintiff reaches the age of majority,<sup>80</sup> the psychological effects of the abuse typically prevent the adult survivor of childhood sexual abuse from overcoming barrier the statute of limitations poses.<sup>81</sup>

#### A. Policy Rationale Behind Statutes of Limitations

Traditionally, courts have stated three different policy reasons in support of strict application of statutes of limitations.<sup>82</sup> The first is a desire to promote accurate fact finding by expediting cases to trial before any evidence is lost, and while witnesses' memories are fresh and reliable.<sup>83</sup> A second rationale for statutes of limitations is fairness to the defendant.<sup>84</sup> A time should come when a potential defendant should be able to continue his life without the fear of defending against stale claims.<sup>85</sup> Finally, statutes of limitations discourage plaintiffs from "sleeping on their rights" and induce them to act with diligence.<sup>86</sup>

79. See, e.g., *Baily v. Lewis*, 763 F. Supp. 802, 804 (E.D. Pa. 1991) (two-year statute of limitations); *DeRose v. Carswell*, 242 Cal. Rptr. 368, 370 (Ct. App. 1987) (one-year statute of limitations); *Petersen v. Bruen*, 792 P.2d 18, 25 (Nev. 1990) (two-year statute of limitations); *Lovelace v. Keohane*, 831 P.2d 624, 625 (Okla. 1992) (two-year statute of limitations); *Tyson v. Tyson*, 727 P.2d 226, 227 (Wash. 1986) (three-year statute of limitations).

80. *Developments, supra* note 74, at 1229-30.

81. For a discussion of how the psychological effects of childhood sexual abuse and "Post-Incest Syndrome" impair the survivor's ability to timely file a civil suit, see *supra* notes 45-54 and accompanying text.

82. See *Developments, supra* note 74, at 1185.

83. See *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (Statutes of limitation "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."); *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944) ("Statutes of limitation . . . 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.")

84. *Developments, supra* note 74, at 1185.

85. *Id.* (after a period of time a potential defendant "ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations"); *Order of R.R. Telegraphers*, 321 U.S. at 348 ("[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them.")

86. See *United States v. Kubrick*, 444 U.S. at 123 (1979) (declaring that the purpose of the statute of limitations is to require the reasonably diligent presentation of

Unfortunately, even though courts toll the statute of limitations until the victim reaches the age of majority, most survivors of childhood sexual abuse do not, or cannot, discover the injuries within one to three years after reaching that age.<sup>87</sup> Therefore, survivors of childhood sexual abuse need judicial relief from the unfairness which results from a strict application of the statute of limitations. An exception to the rule seems appropriate in light of the fact that the traditional rationales which prompt statutes of limitations are inapplicable to childhood sexual abuse cases.

### *B. Policy Not Applicable in Civil Childhood Sexual Abuse Cases*

The belief that statutes of limitations ensure that causes of action are adjudicated while the evidence is fresh and reliable does not apply in childhood sexual abuse cases.<sup>88</sup> In most jurisdictions, the statute of limitations is tolled until the child victim reaches the age of majority, usually eighteen.<sup>89</sup> Since most childhood sexual abuse occurs when the child is under the age of thirteen,<sup>90</sup> the evidence will already be old and memories will already have faded by the time the statute begins to run when the child reaches the age of majority.<sup>91</sup> Therefore, extending the time period will have little impact on the reliability of the evidence, and the policy interest in having fresh evidence is not served.<sup>92</sup>

Modern rules of evidence also undermine the evidentiary function of statutes of limitations. The rules of evidence function primarily to exclude evidence that is untrustworthy or poses a high risk of undue prejudice.<sup>93</sup> These rules alone provide the defendant with sufficient protec-

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tort claims against the defendant).

87. The psychological and emotional disorders commonly labelled as "Post-Incest Syndrome" typically frustrate the survivor's ability to recognize the nature and extent of the injuries she has suffered and prevents her from bringing suit. For a further discussion of these effects, see *supra* notes 48-54 and accompanying text.

88. Rosenfeld, *supra* note 2, at 211-12.

89. See *supra* text accompanying note 80.

90. HERMAN, *supra* note 1, at 83.

91. Rosenfeld, *supra* note 2, at 211-12.

92. *Id.* The Nevada Supreme Court stated that a sexual abuse victim should not be "sacrificed for a policy disfavoring stale claims or the disturbance of abusers who have grown accustomed to living free of concern over an eventual day of reckoning." *Petersen v. Bruen*, 792 P.2d 18, 23 (Nev. 1990).

93. Denise M. DeRose, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191, 218 (1985). For example, the Federal Rules of Evidence exclude many out-of-court statements when offered to prove the truth of the matter asserted on the basis that such evidence is potentially unreliable. FED. R. EVID. 801, 802. The Federal Rules of Evidence also authorize the trial court to exclude relevant evidence that it finds unduly prejudicial on the grounds that it will do more harm than good to the truth-finding

tion against the admission of stale and unreliable evidence at trial.<sup>94</sup>

Protecting the defendant's interest in repose, or safety from litigation, is also an inadequate justification for strict application of the statute of limitations in a childhood sexual abuse case.<sup>95</sup> Children who are sexually victimized will continue to suffer from the emotional and psychological consequences of that abuse for the rest of their lives.<sup>96</sup> Providing the perpetrator repose from fear of an impending lawsuit is unjust and illogical when his acts will have a lifelong, negative impact on the victimized child.<sup>97</sup> Clearly, the deterrent value of civil suits is extremely important given the scope of the child sexual abuse problem in our society. The public's interest in providing the adult survivor with adequate compensation far outweighs the defendant's right to repose.<sup>98</sup>

The third policy justification for statutes of limitations, discouraging plaintiffs from sleeping on their rights, is also seriously flawed.<sup>99</sup> A survivor of childhood sexual abuse should not be penalized for a supposed lack of diligence when the survivor's delay in initiating the civil suit is actually a direct result of the abuse caused by the defendant.<sup>100</sup> Current law creates a system that achieves an absurd and inherently unjust result: the likelihood of prosecution decreases as the abuse gets more severe and traumatic.<sup>101</sup>

Support for strict application of the statute of limitations is also based upon the fear that the lack of such limitation may result in a substantial increase in the filing of fraudulent claims.<sup>102</sup> Although the risk of

process. FED. R. EVID. 403.

94. DeRose, *supra* note 93, at 219 ("The function and effect of the modern rules of evidence supplant the evidentiary function of date-of-injury accrual.")

95. Nabors, *supra* note 8, at 161-62.

96. See *supra* notes 40-44 and accompanying text.

97. DeRose, *supra* note 93, at 217 (stating that there is no public benefit derived from protecting child sex offenders from the consequences of their actions, even years after the acts were committed).

98. *Id.*

99. *Id.*

100. Rosenfeld, *supra* note 2, at 212.

101. *Id.* Rosenfeld makes this additional point:

Current law has an unconscionable effect in that it rewards abusers when their actions cause the victim to be severely traumatized, thereby decreasing the survivor's ability to sue, by providing a shield from liability. A rational and well-thought-out social policy would create a system in which the likelihood of prosecution increases as the abuse gets more severe and traumatic.

*Id.*

102. See Hagen, *supra* note 40, at 376.



fraudulent claims is of genuine judicial concern, this threat is significantly mitigated in the context of childhood sexual abuse.<sup>103</sup> There is no evidence to support the view that the number of meritless claims will increase if the statute of limitations is tolled through application of an exception to the general rule.<sup>104</sup> First, many potential plaintiffs are already discouraged from filing suits due to the highly emotional and disturbing issues involved.<sup>105</sup> In addition, court rules and procedures have already been implemented to protect defendants from fraudulent claims.<sup>106</sup>

Ultimately, society must decide whether to protect the justice system, and the accused, from stale or meritless claims, or to ensure that victims of childhood sexual abuse can seek redress for their injuries.<sup>107</sup> Statutes of limitation serve no rational purpose in civil cases filed by adult survivors of childhood sexual abuse. Their only effect is to deny this particular class of claimants the opportunity to hold their abusers accountable and to recover the monetary compensation to which they are properly entitled. Therefore, if a survivor of childhood sexual abuse is ever to be afforded the opportunity to recover damages, an exception to the harshness and inflexibility of statutes of limitation must be established.

### C. *The Delayed Discovery Rule*

The courts have consistently refused to apply traditional equitable theories such as estoppel,<sup>108</sup> fraud,<sup>109</sup> and insanity<sup>110</sup> to toll the statute

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103. *Id.*

104. *Id.*

105. Mithers, *supra* note 7, at 58. Many adult survivors of childhood sexual abuse choose not to bring suit against their abusers even when an exception to the statute of limitations is made available. *Id.* Eliana Gil, a therapist in California, estimates that about 50% of her patients decide not to sue because of the aggressive and adversarial nature of the legal system. *Id.*

106. Rule 11 of the Federal Rules of Civil Procedure, designed to sanction attorneys who file frivolous claims, is one example of a rule that protects defendants from the filing of fraudulent claims. *See* FED. R. CIV. P. 11. Rule 11 requires all filings in federal court to be signed by an attorney attesting that the claim is being made after a reasonable inquiry and in good faith. *Id.* Another deterrent against the filing of groundless actions is the tort of malicious prosecution. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 120, at 889-896 (5th ed. 1984) [hereinafter PROSSER & KEETON].

107. Mithers, *supra* note 7, at 62. Attorney Shari Karney asks whether it is more important that "we save our judicial system from the possibility that there might be some misuse of this ability to sue later, or that virtually everyone who's a victim of sexual abuse will never even get a chance?" *Id.*

108. *See, e.g.,* Smith v. Smith, 830 F.2d 11, 12 (2d Cir. 1987) (rejecting the plaintiff's attempt to toll the statute of limitations on the basis of equitable estoppel); DeRose v. Carswell, 242 Cal. Rptr. 368, 377 (Ct. App. 1987) (rejecting the plaintiff's argument

of limitations in claims filed by adult survivors of childhood sexual abuse. As a result, in recent years adult survivors of childhood sexual abuse have relied most often upon delayed discovery to bypass strict application of the statute of limitations.<sup>111</sup> The delayed discovery rule provides that the statute of limitations does not begin to run until the plaintiff discovers or, by the exercise of reasonable diligence, should have discovered her cause of action.<sup>112</sup> Grounded in principles of fundamental fairness,<sup>113</sup> the rule was formulated to avoid the unjust result that occurs when the statute of limitations period expires before the plaintiff is made aware of any basis for a cause of action.<sup>114</sup> The dis-

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that claim was timely filed under the doctrine of equitable estoppel); *Hoffman v. Hoffman*, 556 N.Y.S.2d 608, 608-09 (App. Div. 1990) (holding that the defendant was not estopped from raising the statute of limitations as defense to plaintiff's action). See generally *Rosenfeld*, *supra* note 2, for further discussion of the equitable estoppel theory and civil childhood sexual abuse cases.

109. See, e.g., *E.W. and D.W. v. D.C.H.*, 754 P.2d 817, 821 (Mont. 1988) (statute of limitations not tolled on grounds of fraudulent concealment where the plaintiff, upon reaching majority, recognized the illegality of the act); *Snyder v. Boy Scouts of Am., Inc.*, 253 Cal. Rptr. 156, 158-59 (Ct. App. 1988) (same).

110. For examples of cases refusing to apply the insanity exception, see *Smith v. Smith*, 830 F.2d 11, 12 (2d Cir. 1987); *DeRose v. Carswell*, 242 Cal. Rptr. 368, 378 (Cal. Ct. App. 1987); *Hoffman v. Hoffman*, 556 N.Y.S.2d 608, 608 (App. Div. 1990). Cf. *Meiers-Post v. Schafer*, 427 N.W.2d 606, 610 (Mich. Ct. App. 1988) (holding that the insanity exception tolled the statute of limitations if the plaintiff could prove she repressed memories of sexual abuse and if there was corroborating evidence for the plaintiff's testimony that the abuse occurred).

111. See, e.g., *Doe v. Doe*, 973 F.2d 237 (4th Cir. 1992); *Hildebrand v. Hildebrand*, 736 F. Supp. 1512 (S.D. Ind. 1990); *Hoult v. Hoult*, 792 F. Supp. 143 (D. Mass. 1992); *Evans v. Eckelman*, 265 Cal. Rptr. 605 (Ct. App. 1990); *Lindabury v. Lindabury*, 552 So. 2d 1117 (Fla. Dist. Ct. App. 1989); *Meiers-Post v. Shafer*, 427 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); *Lovelace v. Keohane*, 831 P.2d 624 (Okla. 1992); *Hammer v. Hammer*, 418 N.W.2d 23 (Wis. Ct. App. 1987).

112. See RESTATEMENT, *supra* note 73, § 899 cmt. e. "A statute must be construed as not intended to start to run until the plaintiff has in fact discovered the fact that he has suffered injury or by exercise of reasonable diligence should have discovered it." *Id.*

113. See *Tyson v. Tyson*, 727 P.2d 226, 231 (Wash. 1986) (en banc) (Pearson, J., dissenting) (stating that "fundamental fairness . . . has always been the linchpin of the discovery rule").

114. *Hammer v. Hammer*, 418 N.W. 2d 23, 26 (Wis. Ct. App. 1987), see also *Petersen v. Bruen*, 792 P.2d 18, 20 (Nev. 1990). "The rationale behind the discovery rule is that the policies served by statutes of limitation do not outweigh the equities reflected in the proposition that plaintiffs should not be foreclosed from judicial remedies before they know that they have been injured and can discover the cause

covery rule recognizes that in cases involving latent harm, "the injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions."<sup>115</sup>

The evolution of the discovery rule can be traced back to the United States Supreme Court's decision in *Urie v. Thompson*.<sup>116</sup> In *Urie*, the plaintiff contracted silicosis as a result of inhaling silica dust throughout his thirty-year career as a railroad fireman.<sup>117</sup> Although strict application of the statute of limitations would have precluded the plaintiff's bringing suit, the Court held that the plaintiff's action was not barred by the limitations period.<sup>118</sup> The Court concluded that because of the plaintiff's "blameless ignorance" of his injury, his claim did not accrue until his condition became manifest and was diagnosed.<sup>119</sup> While *Urie* involved a latent occupational disease, courts have since extended application of the discovery rule to medical malpractice,<sup>120</sup> other areas of professional malpractice,<sup>121</sup> products liability,<sup>122</sup> and other tort cases.<sup>123</sup>

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of their injuries." *Id.*

115. *Hammer*, 418 N.W.2d at 27 (quoting *Hansen v. A.H. Robins Co.*, 335 N.W.2d 578, 582 (Wis. 1983)).

116. 337 U.S. 163 (1949).

117. *Id.* at 165-66. The plaintiff was first exposed to the silica dust in 1910 and was diagnosed with silicosis and forced to discontinue work in 1940. *Id.*

118. *Id.* at 170-71. In 1941, the plaintiff filed a claim under the Federal Employer's Liability Act (FELA) which has a three year statute of limitations period. *Id.* at 165, 167. Under a strict application of the three year statute of limitations, any claim filed by the plaintiff after 1913 would have been time barred and subject to dismissal by the court.

119. *Id.* at 170-71. The Court reasoned that the plaintiff's failure to have his condition diagnosed, even though no symptoms had appeared, did not constitute a waiver of his rights to pursue a claim. *Id.* at 169. The Court felt the Legislature did not intend to bar the claim of a blamelessly ignorant plaintiff. *Id.* at 170.

120. PROSSER & KEETON, *supra* note 106, § 30 at 166 & n.18. *See, e.g.*, *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962) (incompatible blood transfusion); *Bussineau v. President and Director of Georgetown College*, 518 A.2d 423 (D.C. 1986) (medical malpractice claim); *Grey v. Silver Bow County*, 425 P.2d 819 (Mont. 1967) (surgical infection); *Oliver v. Kaiser Community Health Found.*, 449 N.E.2d 438 (Ohio 1983) (misdiagnosis); *Neilsen v. Barberton Citizens Hosp.*, 446 N.E.2d 209, (Ohio Ct. App. 1982) (doctor left surgical needle inside patient's body).

121. PROSSER & KEETON, *supra* note 106, § 30 at 167 & nn.20-22; *see, e.g.*, *Moonie v. Lynch*, 64 Cal. Rptr. 55 (Ct. App. 1967) (accountant malpractice); *Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192 (D.C. 1984) (architect malpractice); *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988) (attorney malpractice).

122. PROSSER & KEETON, *supra* note 106, § 30 at 167 & n.23; *see, e.g.*, *Yustick v. Eli Lilly & Co.*, 573 F. Supp. 1558 (E.D. Mich. 1983) (oral contraceptive); *Bennett v. Dow Chem. Co.*, 713 P.2d 992 (Mont. 1986) (manufacturer of herbicide chemicals); *Hansen v. A.H. Robins, Inc.*, 335 N.W.2d 578 (Wis. 1983) (intrauterine device).

123. PROSSER & KEETON, *supra* note 106, § 30 at 167 & n.24; *see, e.g.*, *Cain v. State Farm Mut. Auto. Ins. Co.*, 132 Cal. Rptr. 860 (Ct. App. 1976) (invasion of privacy); *Sears, Roebuck & Co. v. Ulman*, 412 A.2d 1240 (Md. 1980) (libel).

## V. APPLICATION OF THE DISCOVERY RULE TO CIVIL CHILDHOOD SEXUAL ABUSE CASES

The rationale behind the discovery rule is equally applicable to claims filed by adult survivors of childhood sexual abuse.<sup>124</sup> Many of the injuries that result from childhood sexual abuse do not manifest themselves until the child reaches adulthood.<sup>125</sup> Children who suffer from Post-Incest Syndrome often experience debilitating psychological effects from the abuse that inhibit their ability to recognize the full nature and extent of the damage they have suffered.<sup>126</sup> Others may completely repress all memory of the abuse, thus preventing discovery of a legal cause of action.<sup>127</sup> As a result, many potential claimants remain "blamelessly ignorant" of their right to sue for years after the abuse has ended.

Courts have responded differently to adult survivors' attempts to toll the statute of limitations through application of the discovery rule. Many jurisdictions construe the statute literally and flatly reject application of the discovery rule in childhood sexual abuse cases.<sup>128</sup> Other courts have responded favorably to the notion that the discovery rule is appropriate in civil sexual abuse cases, but they disagree as to how and when to apply the doctrine.<sup>129</sup>

### A. *Courts that Reject Application of the Discovery Rule in Civil Childhood Sexual Abuse Cases*

Initially, courts rejected application of the discovery rule to childhood sexual abuse cases and dismissed claims filed after the statute of limitations expired.<sup>130</sup> An adult survivor of childhood sexual abuse first made the discovery rule argument in *Tyson v. Tyson*.<sup>131</sup> The survivor, at the age of twenty-six, brought suit against her father, alleging that he sexual-

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124. See Lamm, *supra* note 31, at 2198. In fact, the author comments that survivors of childhood sexual abuse have even more convincing arguments for the application of the discovery rule to their cases than do other tort plaintiffs. *Id.*

125. See *supra* notes 40-44 and accompanying text.

126. See *supra* notes 48-51 and accompanying text.

127. See *supra* notes 52-54 and accompanying text.

128. See *infra* notes 130-42 and accompanying text.

129. See *infra* notes 143-213 and accompanying text.

130. See, e.g., *DeRose v. Carswell*, 242 Cal. Rptr. 368 (Ct. App. 1987); *Tyson v. Tyson*, 727 P.2d 226 (Wash. 1986).

131. 727 P.2d at 227.

ly abused her from the time she was three years old until she was eleven.<sup>132</sup> She claimed that she had repressed all memory of the prior abuse until beginning psychotherapy at age twenty-five, thus resulting in her delayed claim.<sup>133</sup>

The Washington Supreme Court rejected Tyson's argument and refused to apply the discovery rule to childhood sexual abuse claims in the absence of objective, verifiable evidence that the alleged abuse actually occurred.<sup>134</sup> The court was primarily concerned with the serious evidentiary problems associated with litigating claims based on events remembered years after the limitations period had expired.<sup>135</sup> The majority also determined that the availability of expert testimony by treating psychologists or psychiatrists would not lessen the subjectivity of the plaintiff's claim due to the imprecise nature of such disciplines.<sup>136</sup> In reaching this conclusion, the *Tyson* court relied primarily on a single law review article<sup>137</sup> that calls into question the subjective and unscientific nature of both psychology and psychiatry.<sup>138</sup> Ultimately, the court refused to ap-

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132. *Id.*

133. *Id.* The Washington statute of limitations required that Tyson file her claim within three years after accrual of the action. The state's disability statute tolled the statute of limitations until age eighteen. Because Tyson waited more than eight years following her eighteenth birthday before filing her claim, the statute of limitations barred her action. *Id.*

134. *Id.* at 228. In deciding not to apply the discovery rule, the court distinguished childhood sexual abuse cases from medical malpractice actions. The court reasoned:

In prior cases where we have applied the discovery rule, there was objective, verifiable evidence of the original wrongful act and the resulting physical injury. This increased the possibility that the fact finder would be able to determine the truth despite the passage of time, and thus diminished the danger of stale claims.

*Id.*

135. *Id.* at 228-29. The court stated that "stale claims present major evidentiary problems which can seriously undermine the courts' ability to determine the facts. By precluding stale claims, statutes of limitation increase the likelihood that courts will resolve factual issues fairly and accurately." *Id.* at 228.

136. The majority explained, "Unlike the biological sciences, their methods of investigation are primarily subjective and most of their findings are not based on physically observable evidence." *Id.* at 229. However, a dissenting justice vehemently argued, "For the majority to imply that we should no longer welcome psychiatric testimony in Washington courtrooms is to suggest that this court 'disinvent the wheel.'" *Id.* at 233 (Pearson, J., dissenting) (citing *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983)).

137. Marianne Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331 (1985).

138. Based upon the law review article, the majority in *Tyson* expressed the belief that psychoanalysis can lead to a distortion of the truth in its effort to reconstruct what really happened to the victim. *Tyson*, 727 P.2d at 229. The court reasoned that "[w]hile psychoanalysis is certainly of great assistance in treating an individual's emotional problems, the trier of fact in legal proceedings cannot assume that it will

ply the discovery rule, concluding that the risk of prejudice to the defendant outweighed the unfairness of dismissing Tyson's claim.<sup>139</sup> In 1988, two years after the Washington Supreme Court's decision in *Tyson*, the Washington state legislature enacted legislation to provide for the tolling of the statute of limitations through the discovery rule in sexual abuse cases.<sup>140</sup>

Several courts have relied upon the *Tyson* decision in reaching a similar result.<sup>141</sup> In fact, a considerable number of courts still refuse to apply the discovery rule, thereby denying adult survivors any chance to bypass a strict application of the statute of limitations.<sup>142</sup>

### B. Courts That Have Adopted the Discovery Rule in Childhood Sexual Abuse Cases

Other courts, having recognized the unique type of harm suffered by this class of plaintiffs, acknowledge the need for an exception to strict application of the statute of limitations. These courts apply the discovery rule in civil suits filed by adult survivors of child sexual abuse.<sup>143</sup> How-

produce an accurate account of events in the individual's past." *Id.*

139. *Id.* at 229-30.

140. WASH. REV. CODE ANN. § 4.16.340(1) (West 1992) (amending WASH. REV. CODE ANN. § 4.16.340). See *infra* note 233 for the partial text of Washington's amended statute.

141. Cases citing *Tyson* before the enactment of the Washington legislation include *DeRose v. Carswell*, 242 Cal. Rptr. 368, 374 (Ct. App. 1987); *E.W. v. D.C.H.*, 754 P.2d 817, 820 (Mont. 1988); *Kaiser v. Milliman*, 747 P.2d 1130, 1131 (Wash. Ct. App. 1988); *Raymond v. Ingram*, 737 P.2d 314, 317 (Wash. Ct. App. 1987). Cases citing *Tyson* after it was superseded by the Washington state legislature include *Baily v. Lewis*, 763 F. Supp. 802, 806 (E.D. Pa. 1991); *Hildebrand v. Hildebrand*, 736 F. Supp. 1512, 1520 (S.D. Ind. 1990); *Mary D. v. John D.*, 264 Cal. Rptr. 633, 637 (Ct. App. 1989); *Lindabury v. Lindabury*, 552 So. 2d 1117, 1120 (Fla. Dist. Ct. App. 1989); *Osland v. Osland*, 442 N.W.2d 907, 909 (N.D. 1989); *Lovelace v. Keohane*, 831 P.2d 624, 629 (Okla. 1992).

142. See *Sex Abuse Suit Time-Barred Despite Plaintiff's Repression*, LAWYERS ALERT, April 27, 1992, at 9 (reporting a counter-trend among courts to strictly enforce the statute of limitations in sexual abuse claims); see, e.g., *Doe v. Doe*, 973 F.2d 237 (4th Cir. 1992); *Baily v. Lewis*, 763 F. Supp. 802 (E.D. Pa. 1991); *Lindabury v. Lindabury*, 552 So. 2d 1117 (Fla. Dist. Ct. App. 1989); *Burpee v. Burpee*, 578 N.Y.S.2d 359 (Sup. Ct. 1991); *Lovelace v. Keohane*, 831 P.2d 624 (Okla. 1992); *Bowser v. Guttendorf*, 541 A.2d 377 (Pa. Super. Ct. 1988); *Doe v. R.D.*, 417 S.E.2d 541 (S.C. 1992); *Whatcott v. Whatcott*, 790 P.2d 578 (Utah Ct. App. 1990); *Kaiser v. Milliman*, 747 P.2d 1130 (Wash. Ct. App. 1988).

143. See *Petersen v. Bruen*, 792 P.2d 18, 24 (Nev. 1990). In *Petersen*, the Nevada Supreme Court stated:

ever, the availability of the discovery rule does not guarantee its application in any one particular case. The courts have not applied the rule uniformly, and there is a split of authority over the types of cases in which application of the discovery rule is appropriate.<sup>144</sup>

Courts are generally confronted by two types of cases when considering whether the discovery rule should apply to childhood sexual abuse.<sup>145</sup> Type one cases are those in which the plaintiff, at or before the age of majority, knew she was sexually abused as a child but is unaware of the causal connection between the past sexual abuse and her physical and emotional problems.<sup>146</sup> Type two cases involve plaintiffs who have completely repressed all memory or recollection of the sexual abuse until shortly before filing the suit.<sup>147</sup> Courts have generally denied recovery to plaintiffs in type one cases,<sup>148</sup> with a few exceptions.<sup>149</sup> Conversely, courts deciding type two cases have consistently allowed plaintiffs to recover.<sup>150</sup>

### 1. Type One Cases: Plaintiffs Who Have Conscious Memory of the Childhood Sexual Abuse

In type one cases, courts examine the victim's ability to understand the wrongful nature of the sexual abuse and to discover the essential facts

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Unlike almost all other complainants subjected to statutes of limitation, child victims of sexual abuse suffer from a form of personal intrusion on their mental and emotional makeup that interferes with normal emotional and personality development . . . . And, although physical trauma and injury present in other torts may result in a gradual physical deterioration with concomitant emotional distress, such actions usually are not complicated by the stigma, fear and depression associated with [childhood sexual abuse].

*Id.* (footnotes omitted).

144. See *infra* notes 151-213 and accompanying text.

145. *Johnson v. Johnson*, 701 F. Supp. 1363, 1367 (N.D. Ill. 1988).

146. *Id.*

147. *Id.*

148. Type one cases in which courts have refused to apply the discovery rule include *Snyder v. Boy Scouts of Am., Inc.*, 253 Cal. Rptr. 156 (Ct. App. 1988); *DeRose v. Carswell*, 242 Cal. Rptr. 368 (Ct. App. 1987); *E.W. v. D.C.H.*, 754 P.2d 817 (Mont. 1988); *Raymond v. Ingram*, 737 P.2d 314 (Wash. Ct. App. 1987). For a discussion of these cases, see *infra* notes 151-76, and accompanying text.

149. Type one cases in which the courts have applied the discovery rule include *Osland v. Osland*, 442 N.W.2d 907 (N.D. 1989); *Hammer v. Hammer*, 418 N.W.2d 623 (Wis. Ct. App. 1987). For a discussion of these cases, see *infra* notes 177-86 and accompanying text.

150. See, e.g., *Johnson v. Johnson*, 701 F. Supp. 1363 (N.D. Ill. 1988); *Mary D. v. John D.* 264 Cal. Rptr. 633 (Ct. App. 1989); *Jones v. Jones*, 576 A.2d 316 (N.J. Super. Ct. App. Div. 1990). For further discussion of these cases, see *infra* notes 187-213 and accompanying text.

underlying her cause of action.<sup>151</sup> Courts opposed to application of the discovery rule in these cases reject the notion that a plaintiff must achieve such discovery as would give complete knowledge of her legal rights before the cause of action accrues.<sup>152</sup> Rather, these courts hold that upon reaching the age of majority, the victim's awareness of psychological injuries associated with the prior sexual abuse is sufficient to commence the running of the statute of limitations.<sup>153</sup>

A typical example of courts' responses to type one cases can be found in the decision of the California Court of Appeal in *DeRose v. Carswell*.<sup>154</sup> In *DeRose*, the plaintiff charged that her stepgrandfather had sexually abused her between the ages of four and eleven.<sup>155</sup> The plaintiff did not maintain that she had forgotten the events, that she had repressed any memory of the acts of abuse.<sup>156</sup> However, she claimed that she was unable to realize the causal connection between the abuse and her subsequent emotional injuries until after the statute of limitations had expired.<sup>157</sup>

151. See *E.W. v. D.C.H.*, 754 P.2d at 820-21 (denying recovery because the plaintiff knew since childhood that she had been sexually abused).

152. *Id.* at 820; see *infra* note 176 and accompanying text.

153. See *DeRose v. Carswell*, 242 Cal. Rptr. 368, 373 (Ct. App. 1987); *Raymond v. Ingram*, 737 P.2d 314, 317 (Wash. Ct. App. 1987).

154. 242 Cal. Rptr. 368 (Ct. App. 1987).

155. *Id.* at 369. Under California law, the limitations period applicable to *DeRose's* claim was one year, yet her cause of action did not accrue until she reached the age of majority. *Id.* at 370 (citing CAL. CIV. PROC. CODE §§ 340(3), 340(a) (West 1992)). Thus, the statute of limitations began to run in 1980, when she reached the age of eighteen. *DeRose* filed her complaint in 1986, four years and ten months after the statute of limitations had expired. *Id.* at 369-70.

156. *Id.* at 372. Both at trial and on appeal, *DeRose* maintained that she was aware of the incidents that took place when she was a child. *Id.* She alleged in her complaint:

[T]hat the assaults "were all committed against plaintiff's will and without her consent" and that "[a]t the times of said sexual molestation, plaintiff felt great fear and acceded to defendant's acts due to her perceptions of his greater size and strength and his ability and intent to carry out his threats of harm."

*Id.* at 371.

157. *Id.* In her complaint, *DeRose* alleged that "Carswell's acts caused her to develop 'psychological mechanisms' and 'psychological illnesses' which 'prevented her from knowing, recognizing and understanding the nature or extent of her injuries . . . and the causal relationship between her present injuries and defendant's past acts.'" *Id.* at 371-72. *DeRose* maintained that she did not begin to make the connection between her present injuries and the earlier misconduct until after she commenced psychologi-



The California appellate court refused, as a matter of law, to apply the discovery rule and affirmed the lower court's dismissal of the case.<sup>158</sup> The court concluded that "[s]ince DeRose was aware of the alleged sexual assaults, and since she suffered cognizable harm at the time, California's delayed discovery rule does not apply."<sup>159</sup> However, the court noted in dictum that had DeRose alleged that she had repressed her memories of the sexual abuse, she might have been able to invoke the discovery rule.<sup>160</sup>

The Washington Court of Appeals reached a similar result in *Raymond v. Ingram*.<sup>161</sup> In *Raymond*, the plaintiff brought an action against her paternal grandparents alleging that her grandfather sexually abused her while her grandmother negligently allowed the abuse to occur.<sup>162</sup> She alleged that the abuse occurred from the time she was four until the time she was seventeen, but she did not bring the cause of action until she was already past the age of majority.<sup>163</sup> The plaintiff admitted that, prior to therapy, she had remembered some events of past sexual abuse by her grandfather and recalled that as a child she had experienced mental anguish associated with the abuse.<sup>164</sup> However, she claimed that she did

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cal therapy. *Id.* at 372.

158. *Id.*; see also *Marsha V. v. Gardner*, 281 Cal. Rptr. 473 (Ct. App. 1991). In *Marsha V.*, the plaintiff filed a cause of action against her stepfather, alleging that he had sexually abused her from the time she was eight years old until she was seventeen years old. *Id.* at 474. Although the plaintiff was consciously aware of the prior acts of abuse, she maintained that her discovery of "ongoing deep-seated psychological injuries and the causal link between those injuries and [respondent's] misconduct was delayed." *Id.* at 476.

Relying on *DeRose*, the court held that the discovery rule was inapplicable, thus barring the plaintiff's claim. *Id.* However, a dissenting justice remarked:

[I]t is neither wise nor fair to slam the courthouse door in the face of child sex abuse victims who have been so traumatized by this experience that it takes years for them to comprehend they have been injured, or to awaken to the wrongfulness of a parental figure's behavior with them, or to uncover the true cause of their ongoing psychological misery.

*Id.* at 485 (Johnson, J., dissenting).

159. *DeRose*, 242 Cal. Rptr. at 373 (citations omitted). The court reasoned that the discovery rule applies only when a plaintiff is unable to discover all of the facts essential to her cause of action. *Id.* at 371. Because DeRose remembered the alleged sexual assaults and suffered cognizable harm at the time, her cause of action began to accrue when she reached the age of majority. *Id.* at 373.

160. *Id.* at 371. Furthermore, the court limited its inquiry to the allegations in DeRose's complaint, and refused to decide whether a plaintiff who alleges recent recollection of prior acts of sexual abuse is entitled to apply the discovery rule. *Id.* at 371 n.1.

161. 737 P.2d 314 (Wash. Ct. App. 1987).

162. *Id.* at 315.

163. *Id.*

164. *Id.* at 317. The plaintiff stated that as a child she would get a stomachache if

not understand the extent and cause of her current emotional and psychological injuries until she began therapy shortly before filing suit.<sup>165</sup> The court rejected the plaintiff's discovery rule argument and held that the statute of limitations barred the claim.<sup>166</sup> The court reasoned, "It does not matter that Raymond had not discovered the causal connection to all her injuries, because when Raymond reached the age of majority she knew that she had substantial damages associated with the sexual abuse."<sup>167</sup>

The Supreme Court of Montana in *E.W. v. D.C.H.*<sup>168</sup> also refused to apply the discovery rule in a type one case where the plaintiff was aware the sexual abuse had occurred.<sup>169</sup> At the age of thirty-four, the plaintiff filed a claim alleging that her step-uncle sexually abused her for a period of seven years during her childhood.<sup>170</sup> As a result, the plaintiff experienced emotional and physical disorders as a young adult.<sup>171</sup> Although she always knew she had been sexually abused,<sup>172</sup> she did not associate

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she had to stay with her grandparents. *Id.* at 315.

165. *Id.* at 317. The plaintiff asserted that her cause of action did not accrue until she began therapy and realized that her insomnia and stomach problems were the result of the earlier sexual abuse. *Id.* at 316. The defendants responded that "though Raymond may not have known the causal connection of all of her injuries until Raymond's therapy, Raymond knew that the sexual abuse had caused injury." *Id.* at 316-17.

166. *Id.* at 317.

167. *Id.* The plaintiff might have been successful in her argument had she alleged that she repressed all memory of the sexual abuse. See Cook & Millsaps, *supra* note 49, at 36.

168. 754 P.2d 817 (Mont. 1988).

169. *Id.* at 820; see also *Boswer v. Guttendorf*, 541 A.2d 377 (Pa. 1988). In *Boswer*, the plaintiff filed a cause of action against her former foster parents alleging that her foster father sexually abused her while she resided in the foster parents' home. *Id.* at 378-79. The court declined to apply the discovery rule in the case because the plaintiff remembered the prior acts of abuse and should have been aware of the salient facts underlying her claim. *Id.* at 380. The court, in barring the claim, concluded that the plaintiff "has not set forth allegations to demonstrate what facts rendered it unreasonable to expect her to discover her injury when it occurred." *Id.*

170. *Id.* at 817. The first instance of sexual fondling was alleged to have occurred when the plaintiff was five years old. The plaintiff alleged that it continued on a regular basis for four years. *Id.* at 818. At the age of nine, the defendant allegedly forced the plaintiff to engage in sexual intercourse and the attacks continued for three and a half years. *Id.*

171. *Id.*

172. Following her parents' discovery of the abuse, medical examinations confirmed the sexual activity. *Id.* However, the examining physician was not consulted about possible psychological effects of the abuse and the matter was never addressed. *Id.*

her psychological and physical problems with the prior abuse.<sup>173</sup> In 1986, after psychiatric counseling indicated a possible causal connection between her continuing emotional problems and the childhood sexual assaults, the plaintiff filed her cause of action maintaining that the statute of limitations was tolled pursuant to the discovery rule.<sup>174</sup> The court disagreed and refused to extend the discovery rule to sexual abuse cases where the plaintiff "consistently acknowledged that she 'always knew' she had been molested as a child and that she has suffered from psychological problems since late adolescence."<sup>175</sup> The court concluded that the plaintiff, upon reaching the age of majority in 1973, had more than sufficient knowledge to bring a cause of action, and her failure to fully understand her legal rights was not sufficient to toll the statute of limitation.<sup>176</sup>

Although courts generally deny recovery to plaintiffs who allege they had factual knowledge of the abuse during the statute of limitations period, a few courts have reached the opposite result and apply the discovery rule to type one cases.<sup>177</sup> These courts acknowledge that the psychological effects of the sexual abuse can render plaintiffs unable to fully discover both the extent and the cause of their emotional injuries.<sup>178</sup> Courts favoring the discovery rule in type one cases conclude that the cause of action does not accrue until the plaintiff discovers both the fact and cause of the injury and can fully comprehend her legal rights.<sup>179</sup>

For example, the Wisconsin Court of Appeals applied the discovery

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173. *Id.*

174. *Id.* The plaintiff asserted that "the statute of limitations was tolled pursuant to the discovery rule because her injuries had not fully manifested, she was not aware of her legal rights, and she was not aware of the causal relationship between her injuries and the molestation until she received therapy in 1983." *Id.*

175. *Id.* at 820.

176. *Id.* The court reasoned:

The law does not contemplate such discovery as would give complete knowledge before the cause of action accrues. Rather, the discovery doctrine only tolls the running of the statutory clock until such time as the plaintiff, in the exercise of reasonable care and diligence, should have been aware of the wrongful act and injury.

*Id.* (citations omitted).

177. *See, e.g.,* *Osland v. Osland*, 442 N.W.2d 907 (N.D. 1989); *Hammer v. Hammer*, 418 N.W.2d 23 (Wis. Ct. App. 1987), *review denied*, 428 N.W.2d 552 (Wis. 1988).

178. *See, e.g.,* *Hammer*, 418 N.W.2d at 26 n.7. "[E]ven 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.* (quoting *Allen*, *supra* note 65, at 630). The court went on to state, "As with discovery of injury, discovery of cause can take years." *Id.*

179. *Id.* at 26-27.

doctrine to a type one case in *Hammer v. Hammer*.<sup>180</sup> In *Hammer*, the plaintiff alleged that she was sexually abused by her father, on the average of three times a week, beginning when she was five years old and ending when she was fifteen.<sup>181</sup> Ten years after the abuse ended, the plaintiff filed suit against her father; however, she never maintained that she had forgotten or repressed any memories of the sexual abuse she experienced.<sup>182</sup> The plaintiff claimed that because of the psychological trauma caused by the acts of sexual abuse and the various coping mechanisms she developed, she was unable to understand the extent and cause of her injuries until she received psychological counseling as an adult.<sup>183</sup>

The Wisconsin Court of Appeals reversed the lower court's summary judgment ruling for the defendant and applied the discovery rule to the case.<sup>184</sup> The court held that a cause of action will not accrue until the plaintiff discovers both the *fact* and *cause* of the injury.<sup>185</sup> More precisely, the court stated that "a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the fact of injury but also that the injury was probably caused by the defendant's conduct."<sup>186</sup> By incorporating both the discovery of injury and the discovery of causation in its decision, the court, in

180. 418 N.W.2d 23 (Wis. Ct. App. 1987).

181. *Id.* at 24. At the age of fifteen, the plaintiff reported the abuse to her mother. However, her parents denied such conduct ever took place and trivialized the matter. The plaintiff's father managed to convince her that she was not injured and that she was to blame for her problems as well as the family's problems. *Id.* at 24-25.

182. *Id.* at 24.

183. *Id.* at 25. The plaintiff's psychological counselor stated in his affidavit:

[A]s a normal post-traumatic stress reaction, Laura had developed denial and suppression coping mechanisms. Because she had failed to understand or appreciate the abusive nature of her father's acts she had been unable to discover their psychological damage. The danger of her father subjecting her younger sister to the same type of abuse stimulated her awareness and delayed feelings about what had transpired years before.

*Id.*

184. *Id.* at 27.

185. *Id.* at 26. The court rejected the defendant's argument that because the plaintiff suffered harm at the time of the sexual abuse and was aware of such harm, her cause of action accrued at the time of injury. *Id.* at 27.

186. *Id.* at 26 (quoting *Borello v. U.S. Oil Co.*, 388 N.W.2d 140, 146 (Wis. 1986)). The court further stated, "[A] cause of action does not necessarily accrue when the first manifestations of injury occur. The claimant has leeway to not start an action until she knows more about the injury and its probable cause." *Id.* at 27.

effect, determined that the discovery rule applies in both type one and type two cases.

## 2. Type Two Cases: Plaintiffs Who Have Repressed Memories of the Childhood Sexual Abuse

Courts have consistently favored application of the discovery rule in type two cases.<sup>187</sup> In contrast with the type one plaintiff, the type two plaintiff has no conscious memory of the past sexual abuse because of the psychological defenses and coping mechanisms she has developed to withstand the childhood sexual trauma.<sup>188</sup> Recognition by the courts that "repression" or "memory loss" is a bona fide and common psychological response among survivors of childhood sexual abuse has led to greater support for application of the discovery rule to type two cases.<sup>189</sup> Courts have been more sympathetic to the "blameless ignorance" of type two plaintiffs who have experienced total memory loss, as opposed to type one plaintiffs who have actual knowledge of the abuse.<sup>190</sup>

In *Johnson v. Johnson*,<sup>191</sup> a federal district court in Illinois became the first to explicitly define and acknowledge the distinction between type one and type two cases.<sup>192</sup> In *Johnson*, the plaintiff filed suit against her father, alleging that he repeatedly sexually abused her between the ages of three and thirteen.<sup>193</sup> The plaintiff was unaware of her possible claim for approximately twenty years until she began psychotherapy at the age of thirty-two.<sup>194</sup> The plaintiff maintains that she suppressed all memories of the abuse and remained blamelessly ignorant of the causal connection between her father's acts and the injuries she suffered.<sup>195</sup> The court classified the case as type two and held that the discovery rule applied.<sup>196</sup>

Although the court did not expressly reject application of the discov-

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187. See *infra* notes 191-213 for a discussion of the cases.

188. *Johnson v. Johnson*, 701 F. Supp. 1363, 1367 (N.D. Ill. 1988).

189. Kristin E. Rodgers, *Childhood Sexual Abuse: Perceptions on Tolling The Statute of Limitations*, 8 J. CONTEMP. HEALTH L. & POL'Y 309, 326 (1992).

190. See Lamm, *supra* note 31, at 2202. ("[W]hile total repression of memory renders a civil incest plaintiff so 'blamelessly ignorant' that it would be unfair to time-bar her suit, it is not similarly 'reasonable' for a plaintiff who was aware of the abuse not to have brought her action within the statutory period.")

191. 701 F. Supp. 1363 (N.D. Ill. 1988).

192. *Id.* at 1367.

193. *Id.* at 1364.

194. *Id.* at 1366. At the time, the personal injury statute of limitations in Illinois was two years. *Id.* In addition, Illinois had a statutory disability tolling provision for minors. *Id.* at 1366-67.

195. *Id.* at 1364.

196. *Id.* at 1370.

ery rule to type one cases, the court limited its holding to the particular facts of the case.<sup>197</sup> Furthermore, the plaintiff's complete memory loss appears to have been the controlling factor in the court's analysis.<sup>198</sup>

The Court of Appeal for the Sixth District of California—the same court that decided *DeRose v. Carswell*<sup>199</sup> only two years earlier—applied the delayed discovery rule to a type two case in *Mary D. v. John D.*<sup>200</sup> The plaintiff was twenty-four years old when she brought an action against her father for sexual abuse that occurred until she was five years old.<sup>201</sup> She maintained that she repressed her memories of the abuse and had no conscious memory of it until shortly before filing the action.<sup>202</sup> Despite the plaintiff's failure to present any psychiatric testimony to prove her claim that she completely repressed all memories of the abuse,<sup>203</sup> the court reversed the lower court's grant of summary judgment.

197. *Id.*

198. *Id.* Three years later, the same federal district court reconsidered the case following a new motion for summary judgment filed by the defendant. *Johnson v. Johnson*, 766 F. Supp. 662 (N.D. Ill. 1991). The motion was filed in response to a recent legislative amendment to the Illinois Code of Civil Procedure regarding childhood sexual abuse. See ILL. ANN. STAT. ch. 110, para. 13-202.2 (Smith-Hurd 1992). See *infra* note 222 for the partial text of Illinois' revised statute. In addition to expressly adopting the discovery doctrine, the new piece of legislation incorporated a statute of repose, which barred any claim filed more than twelve years after the date the plaintiff reaches the age of eighteen. ILL. ANN. STAT. ch. 110, para. 13-202.2 (Smith-Hurd 1992) ("[B]ut in no event may an action for personal injury based on childhood sexual abuse be commenced more than 12 years after the date on which the person abused attains the age of 18 years."). Because the plaintiff in *Johnson* had not filed her claim until after her thirtieth birthday, the court held that her claim was barred under the new statutory scheme. *Johnson*, 766 F. Supp. at 664. The court granted the defendant's motion for summary judgment yet left its reasoning in the prior decision undisturbed. *Id.* at 664-65.

199. 242 Cal. Rptr. 368 (Ct. App. 1987); see *supra* notes 154-60 and accompanying text.

200. 264 Cal. Rptr. 633 (Ct. App. 1989), *reh'g denied*, 800 P.2d 858 (Cal. 1990).

201. *Id.* at 634.

202. *Id.* In her complaint, the plaintiff alleged "that the very nature of the acts and the secrecy and duress by which they were accomplished, coupled with the relationship of dependency and trust between plaintiff and defendant, caused plaintiff to develop various psychological mechanisms including but not limited to denial, repression, and disassociation from the experiences." *Id.*

203. *Id.* at 635. The court noted "were this case in a procedural posture which required plaintiff to present evidence, opinions as to the existence or cause of specific psychological processes such as repression or disassociation would require competent expert opinion testimony." *Id.* at 640.

ment for the defendant.<sup>204</sup> The court concluded:

[T]he doctrine of delayed discovery may be applied in a case where the plaintiff can establish lack of memory of tortious acts due to psychological repression which took place before plaintiff attained the age of majority, and which caused plaintiff to forget the facts of the acts of abuse until a date subsequent to which the complaint is timely filed.<sup>205</sup>

Since 1988, at least one other court has announced a decision applying the discovery doctrine to a type two case involving a plaintiff with repressed memory.<sup>206</sup>

The Supreme Court of Nevada also provided a type two plaintiff with relief from a strict application of the statute of limitations, yet the court did so without applying the discovery doctrine.<sup>207</sup> In *Petersen v. Bruen*, the defendant sexually abused the plaintiff from 1975 to 1983 while they both participated in a "Big Brother" program.<sup>208</sup> The plaintiff filed his cause of action in 1988, claiming to have repressed all memory of the abuse until beginning therapy in 1987.<sup>209</sup>

The Nevada Supreme Court reversed the lower court's dismissal of

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204. *Id.*

205. *Id.* at 639.

206. *See Evans v. Eckelman*, 265 Cal. Rptr. 605 (Ct. App. 1990). In *Evans*, three brothers filed suit in 1987 against their foster parents alleging that their foster father had sexually abused them as children from 1966 to 1968. *Id.* at 606. The plaintiffs claimed they had developed psychological blocking mechanisms which precluded them from acknowledging their injuries and rendered them unable to understand the causal connection between their injuries and the prior abuse until they began therapy. *Id.* at 607. The court concluded that the plaintiffs "must be able to show they remained unaware of, and had no reason to suspect, the wrongfulness of the conduct until a time less than three years before this action was filed." *Id.* at 611. The court granted the plaintiffs leave to amend their complaint because their allegations were not sufficient to trigger the discovery rule. *Id.*

207. *Petersen v. Bruen*, 792 P.2d 18 (Nev. 1990). Although the Nevada state legislature passed a statute in 1991 codifying the use of the discovery rule in childhood sexual abuse cases, the *Petersen* case is indicative of the reluctance among courts to extend application of the discovery rule to assist all survivors of childhood sexual abuse. For the relevant language of the Nevada statute, see *infra* note 228.

208. *Id.* at 19. In addition, the defendant "memorialized his depravity by taking photographs of Petersen before, during and after sexual trysts with his victim." *Id.* Prior to the civil suit, the defendant was convicted of sexual assault, attempted sexual assault, lewdness with a minor under the age of fourteen, use of a minor in producing pornography, and possession of child pornography. *Id.*

209. *Id.* The trial court found that Petersen's claim was barred by a two-year statute of limitations. *Id.* Because Petersen's complaint was filed five years after the last incident of abuse, the trial court granted the defendant's motion to dismiss. *Id.* Petersen appealed the decision, arguing that his action was timely since "he did not discover the nexus between Bruen's behavior and his emotional distress" until he underwent therapy. *Id.*

Petersen's claim but declined to apply the discovery rule to the case.<sup>210</sup> The court reasoned that in cases where clear and convincing proof of childhood sexual abuse exists, the discovery rule was not the proper solution.<sup>211</sup> Rather, the court concluded that "no existing statutes of limitations applies to bar the action of an adult survivor of [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."<sup>212</sup> While the *Petersen* decision was helpful to its particular plaintiff, it is uncertain how helpful this approach will be to plaintiffs in other cases.<sup>213</sup>

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210. *Id.* at 25.

211. *Id.* at 23. The court adamantly rejected application of the discovery rule based upon the following criticisms of the doctrine:

First, . . . the complex of emotions burdening victims may be exacerbated by forcing them to prematurely confront their abusers in order to preserve their prospects for redress. Second, a victim's suffering may be intensified by the realization that his or her failure to timely muster the will or the courage to seek relief from the abuser has left the latter forever immune from civil accountability. Third, it is reasonable to assume that certain victims, when informed of the discovery rule, will add to their inner turmoil by dissembling in order to avoid the bar of the statute. Fourth, under the discovery rule, the CSA victim will be subjected to the ultimate irony of having to demonstrate his or her integrity in claiming the benefit of the rule. The thrust of the action will shift from the actions of the abuser and the injuries of the victim to matters of proof concerning the victim's allegations regarding either the actual date and circumstances of discovery or worse yet, the time when the victim reasonably should have discovered that the abuser's conduct was the source of his or her emotional and mental distress.

*Id.*

212. *Id.* at 24-25. The court noted, "We recognize that injustice may result from our ruling in instances where CSA has occurred but cannot be demonstrated by corroborative evidence that is clear and convincing." *Id.* at 25. However, the court went on to state that "the potential for fraudulent claims is sufficiently great to warrant such a ruling, at least until such time as the legislature may elect to provide a period of limitations directly addressing this specific problem." *Id.*

213. Despite the court's accurate critique of the discovery rule and its valid concern regarding the doctrine's effect on a plaintiff's emotional health, the court's holding will only help those plaintiffs capable of proving their case at the pleading stage. Undoubtedly, most deserving plaintiffs will be unable to meet this exacting burden, and their claims will be prematurely dismissed. In fact, the court stated, "Because CSA will most often occur under circumstances which are difficult to prove, we would encourage the legislature to enact legislation designed to provide the maximum opportunity for justice in these most difficult types of cases." *Id.* (footnote omitted).



## VI. ADOPTING A UNIFORM SOLUTION

This Comment advocates a discovery doctrine which could potentially provide all deserving adult survivors of childhood sexual abuse with a meaningful opportunity to file suit and recover damages from their abusers. However, the current status of the law undermines this objective. Case law governing the application of the discovery rule is inconsistent and ambiguous. While some courts acknowledge the survivor's unique situation and apply the discovery doctrine in civil sexual abuse cases, other courts do not.<sup>214</sup> Furthermore, the fact that the discovery rule is available in certain jurisdictions does not necessarily guarantee its application.<sup>215</sup> Courts continue to categorize and draw distinctions between different types of plaintiffs. This ultimately prevents many deserving plaintiffs from filing a cause of action. Under current law, many courts accept the notion that it may be persuasive for the victim who represses all memory of sexual abuse not to have discovered the abuse earlier. However, the same courts may not find it equally reasonable that a plaintiff aware of the abuse as well as the resulting serious psychological problems would not have discovered the connection between the two.<sup>216</sup> Certainly, a more uniform approach for applying the discovery rule to claims brought by all adult survivors of childhood sexual abuse is desperately needed and long overdue.

### A. Legislative Response

Given the frequency of childhood sexual abuse in this country<sup>217</sup> and its devastating consequences, society has a vital interest in ensuring that state legislatures fully comprehend the nature of the problem and respond accordingly. In order to provide adult survivors of childhood sexual abuse with a meaningful opportunity to bring suit, state legislatures throughout the country must amend their statutes of limitation to require application of the discovery rule in all childhood sexual abuse actions.<sup>218</sup> Legislation expressly providing for a date of discovery excep-

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214. See *supra* notes 130-213 and accompanying text.

215. See *id.*

216. See *supra* notes 143-213 and accompanying text.

217. See *supra* notes 25-27 and accompanying text.

218. Although the discovery rule is an equitable doctrine applied within a court's discretion, this Comment advocates application of the discovery rule through statutory provision. See Cook & Millsaps, *supra* note 49, at 40 (noting that the discovery doctrine can be put into place through case law or statutory provision). A statutory approach would ensure consistent treatment of similarly situated plaintiffs and eliminate the uncertainty and subjectivity associated with judge made decisions.

In fact, many courts have refused to extend application of the discovery rule to

tion would provide both type one and type two adult survivors with an essential and valuable remedy. Absent such legislation, the courts will often deny adult survivors the possibility of recovering civil damages for the injuries inflicted by childhood sexual abuse. To date, most states have not enacted legislation codifying the use of the discovery rule in all civil sexual abuse cases and provide only illusory remedies for the majority of adult survivors of childhood sexual abuse.

### 1. A Survey of State Statutes Currently in Effect

Over the past few years, several states have passed legislation revising the statute of limitations period in which adult survivors of childhood sexual abuse can file civil claims. States such as Alaska,<sup>219</sup> Califor-

sexual abuse cases under the belief that such a determination must be made by the state legislature. *See, e.g.*, *E.W. v. D.C.H.*, 754 P.2d 817, 821 (Mont. 1988) ("While this Court is aware of the horrifying damage inflicted by child molesters, it is not for us to rewrite the statute of limitations to accommodate such claims through judicial fiat. Such a task is properly vested in the legislature."); *Petersen v. Bruen*, 792 P.2d 18, 25 (Nev. 1990) ("Because CSA will most often occur under circumstances which are difficult to prove, we would encourage the legislature to enact legislation designed to provide the maximum opportunity for justice in these most difficult types of cases."); *Burpee v. Burpee*, 578 N.Y.S.2d 359, 363 (N.Y. Sup. Ct. 1991) ("Perhaps it is time for the Legislature to address this important issue, as other states have done, by enacting a special statute affording victims such particular procedural relief."); *Doe v. R.D.*, 417 S.E.2d 541, 543 (S.C. 1992) ("While the result may be appealing, we are without authority to amend our statute. An exception to the plain and unambiguous language of our statute of limitations must come from our legislature.") (footnote omitted).

219. The relevant sections of Alaska's statute read:

(b) An action based on a claim of sexual abuse . . . may be brought more than three years after the plaintiff reaches the age of majority if it is brought under the following circumstances:

- (1) if the claim asserts that the defendant committed one act of sexual abuse on the plaintiff, the plaintiff shall commence the action within three years after the plaintiff discovered or through use of reasonable diligence should have discovered that the act caused the injury or condition;
- (2) if the claim asserts that the defendant committed more than one act of sexual abuse on the plaintiff, the plaintiff shall commence the action within three years after the plaintiff discovered or through use of reasonable diligence should have discovered the effect of the injury or condition attributable to the series of acts; a claim based on an assertion of more than one act of sexual abuse is not limited to plaintiff's first discovery of the relationship between any one of those acts and the injury or condition, but may be based on plaintiff's discovery of the effect of the series of

acts.

ALASKA STAT. § 09.10.140(b) (1992).

220. California's statute reads, in pertinent part:

- (a) In any civil action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever occurs later . . . .
- (d) Every plaintiff 26 years of age or older at the time the action is filed shall file certificates of merit as specified in subdivision (e).
- (e) Certificates of merit shall be executed by the attorney for the plaintiff and by a licensed mental health practitioner selected by the plaintiff . . . .
- (g) A complaint filed pursuant to subdivision (d) may not name the defendant or defendants until the court has reviewed the certificates of merit filed pursuant to subdivision (e) and has found, in camera, based solely on those certificates of merit, that there is reasonable and meritorious cause for the filing of the action. At that time, the complaint may be amended to name the defendant or defendants. The duty to give notice to the defendant or defendants shall not attach until that time.

CAL. CIV. PROC. CODE § 340.1 (West 1992).

221. Colorado's statute states in pertinent part, "any civil action based on a sexual assault or a sexual offense against a child shall be commenced within six years after a disability has been removed for a person under disability . . . or within six years after a cause of action accrues, whichever occurs later, and not thereafter." COLO. REV. STAT. ANN. § 13-80-103.7(1) (West 1992). Colorado law defines accrual as the date when "both the injury and its cause are known or should have been known by the exercise of reasonable diligence." COLO. REV. STAT. ANN. § 13-80-108(1) (West 1992).

222. The Illinois statute reads:

- (b) An action for damages for personal injury based on childhood sexual abuse must be commenced within 2 years of the date the person abused discovers or through the use of reasonable diligence should discover that the act of childhood sexual abuse occurred and that the injury was caused by the childhood sexual abuse, but in no event may an action for personal injury based on childhood sexual abuse be commenced more than 12 years after the date on which the person abused attains the age of 18 years.
- (c) If the injury is caused by 2 or more acts of childhood sexual abuse that are part of a continuing series of acts of childhood sexual abuse by the same abuser, then the discovery period under subsection (b) shall be computed from the date the person abused discovers or through the use of reasonable diligence should discover (i) that the last act of childhood sexual abuse in the continuing series occurred and (ii) that the injury was caused by any act of childhood sexual abuse in the continuing series.

ILL. ANN. STAT. ch. 735, para. 5/13-202.2 (Smith-Hurd 1992).

223. Iowa's statute reads:

souri,<sup>226</sup> Montana,<sup>227</sup> Nevada,<sup>228</sup> South Dakota,<sup>229</sup> Utah,<sup>230</sup> Ver-

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An action for damages for injury suffered as a result of sexual abuse which occurred when the injured person was a child, but not discovered until after the injured person is of the age of majority, shall be brought within four years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the sexual abuse.

IOWA CODE ANN. § 614.8A (West 1992).

224. Maine's statute provides: "Actions based upon sexual intercourse or a sexual act . . . with a person under the age of majority must be commenced within 12 years after the cause of action accrues, or within 6 years of the time the person discovers or reasonably should have discovered the harm, whichever occurs later." ME. REV. STAT. ANN. tit. 14, § 752-C (West 1992).

225. Minnesota's statute reads, in pertinent part:

- (2) (a) An action for damages based on personal injury caused by sexual abuse must be commenced within six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse.
- (b) The plaintiff need not establish which act in a continuous series of sexual abuse acts by the defendant caused the injury.
- (c) The knowledge of a parent or guardian may not be imputed to a minor.
- (d) This section does not affect the suspension of the statute of limitations during a period of disability . . . .
- (3) This section applies to an action for damages commenced against a person who caused the plaintiff's personal injury either by (1) committing sexual abuse against the plaintiff, or (2) negligently permitting sexual abuse against the plaintiff to occur.

MINN. STAT. ANN. § 541.073 (West 1993).

226. Missouri's childhood sexual abuse statute reads, in pertinent part:

2. In any civil action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within five years of the date the plaintiff attains the age of eighteen or within three years of the date the plaintiff discovers or reasonably should have discovered that the injury or illness was caused by child sexual abuse, whichever later occurs.

MO. ANN. STAT. § 537.046 (Vernon 1992).

227. The pertinent sections of Montana's statute read:

- (1) An action based on intentional conduct brought by a person for recovery of damages for injury suffered as a result of childhood sexual abuse must be commenced not later than:
  - (a) 3 years after the act of childhood sexual abuse that is alleged to have caused the injury; or
  - (b) 3 years after the plaintiff discovers or reasonably should have discovered that the injury was caused by the act of childhood sexual abuse.

MONT. CODE ANN. § 27-2-216 (1991).

228. Nevada's statute reads, in pertinent part:

mont,<sup>231</sup> Virginia,<sup>232</sup> and Washington<sup>233</sup> have adopted laws expressly

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- (1) An action to recover damages for an injury to a person arising from the sexual abuse of the plaintiff which occurred when the plaintiff was less than 18 years of age must be commenced within three years after the plaintiff:
  - (a) Reaches 18 years of age; or
  - (b) Discovers or reasonably should have discovered that his injury was caused by the sexual abuse, whichever occurs later.

NEV. REV. STAT. ANN. § 11.215 (Michie 1991).

229. South Dakota's statute reads:

Any civil action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within three years of the act alleged to have caused the injury or condition, or three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by the act, whichever period expires later.

S.D. CODIFIED LAWS ANN. § 26-10-25 (1992).

230. Utah's statute provides:

- (2) A person shall file a civil action for intentional or negligent sexual abuse suffered as a child:
  - (a) within four years after the person attains the age of 18 years; or
  - (b) if a person discovers sexual abuse only after attaining the age of 18 years, that person may bring a civil action for such sexual abuse within four years after discovery of the sexual abuse, whichever period expires later.
- (3) The victim need not establish which act in a series of continuing sexual abuse incidents caused the injury complained of . . . .
- (4) The knowledge of a custodial parent or guardian shall not be imputed to a person under the age of 18 years.

UTAH CODE ANN. § 78-12-25.1 (Supp. 1992).

231. Vermont's statute provides:

- (a) A civil action brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within six years of the act alleged to have caused the injury or condition, or six years of the time the victim discovered that the injury or condition was caused by that act, whichever period expires later. The victim need not establish which act in a series of continuing sexual abuse or exploitation incidents caused the injury.
- (b) If a complaint is filed alleging an act of childhood sexual abuse which occurred more than six years prior to the date the action is commenced, the complaint shall immediately be sealed by the clerk of the court. The complaint shall remain sealed until the answer is served or, if the defendant files a motion to dismiss under Rule 12(b) of the Vermont Rules of Civil Procedure, until the court rules on that motion. If the complaint is dismissed, the complaint and any related papers or pleadings shall remain sealed. Any hearing held in connection with the motion to dismiss shall be in camera.

VT. STAT. ANN. tit. 12, § 522 (1991). A related statute provides:

When a person entitled to bring an action for damages as a result of child-

allowing use of the discovery rule in civil actions filed by adult survivors of childhood sexual abuse. Most of the states toll the statutes of limitations until the adult survivor of childhood sexual abuse discovers, or reasonably should discover, the elements of her cause of action. In contrast, other states such as Connecticut<sup>234</sup> do not endorse the discovery rule

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hood sexual abuse is unable to commence the action as a direct result of the damages caused by the sexual abuse, the period during which the person is incapacitated shall not be taken as a part of the time limited for commencement of the action.

VT. STAT. ANN. tit. 12, § 560 (Supp. 1992).

232. Virginia's statute reads in pertinent part:

The cause of action in the actions herein listed shall be deemed to accrue as follows: . . .

- (6) In actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incompetency of the person, when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist. However, no such action may be brought more than ten years after the later of (i) the last act by the same perpetrator which was part of a common scheme or plan of abuse or (ii) removal of the disability of infancy or incompetency . . . .

VA. CODE ANN. § 8.01-249(6) (Michie 1992).

233. Washington's statute reads:

- (1) All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within the later of the following periods:
  - (a) Within three years of the act alleged to have caused the injury or condition;
  - (b) Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or
  - (c) Within three years of the time the victim discovered that the act caused the injury for which the claim is brought:

Provided, that the time limit for commencement of an action under this section is tolled for a child until the child reaches the age of eighteen years.

WASH. REV. CODE ANN. § 4.16.340 (West 1992).

234. CONN. GEN. STAT. ANN. § 52-577d (West 1992). Connecticut's childhood sexual abuse statute provides, "Notwithstanding the provisions of section 52-577, no action to recover damages for personal injury to a minor, including emotional distress, caused by sexual abuse, sexual exploitation or sexual assault may be brought by such person later than seventeen years from the date such person attains the age of majority." *Id.*

but simply extend the statutory period in which a civil childhood sexual abuse claim can be filed.

*a. Tolling vs. Extending the Statute of Limitations*

Legislation tolling the statute of limitations until a plaintiff discovers or reasonably should discover her cause of action is preferable to statutes that merely extend the statute of limitations for a fixed number of years.<sup>235</sup> Arguably, a statute that extends the limitations period may provide plaintiffs with greater protection than a statute that tolls the limitations period until discovery.<sup>236</sup> However, such statutes will have to provide a substantially longer time period than they currently offer if they are to allow victims a sufficient opportunity to file a claim.<sup>237</sup> Furthermore, this approach "ignores the reality that each survivor's revelation of childhood sexual abuse or recognition of the injury is unique, from both an emotional and temporal standpoint, and is therefore inherently irconcilable with a rigid timetable mandated by statute."<sup>238</sup> Because of the unique psychological defense mechanisms which inhibit the victims' abilities to understand the connection between their injuries and the abuse, sexual abuse victims need the added versatility provided by statutes incorporating the discovery rule.

Although the discovery rule approach is preferable, statutes that blend the two approaches provide plaintiffs with the best plausible protection against a statute of limitations defense. For example, the California state legislature extended the limitations period to eight years from the date the victim reaches the age of majority.<sup>239</sup> Thus, the adult survivor of

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235. See Carol W. Napier, Note, *Civil Incest Suits: Getting Beyond the Statute of Limitations*, 68 WASH. U. L.Q. 995, 1019-20 (1990) (noting that a statute adopting the discovery rule rather than a fixed-time limitation provides greater protection for both the plaintiff's and the defendant's interests).

236. *Id.* at 1019. Under a fixed-time limitations statute, any claim filed within the statutory period will be deemed to be timely. In contrast, under the discovery rule approach, there is no guarantee that the plaintiff's claim will survive a statute of limitations defense. The plaintiff must still demonstrate that she acted with reasonable diligence in discovering the elements of her cause of action. *Id.*

237. *Id.* For example, an eight year statute of limitations would not have helped the plaintiff in *Tyson* any more than the existing three-year statute of limitations. *Tyson v. Tyson*, 727 P.2d 226, 227 (Wash. 1986) (holding that claim filed by plaintiff eight years after her eighteenth birthday was barred by the statute of limitations). In addition, a 12-year statute of limitations did not help the plaintiff in *Johnson*. *Johnson v. Johnson*, 766 F. Supp. 662, 664 (N.D. Ill. 1991) (holding that claim filed by plaintiff 18 years after reaching the age of majority was barred by 12-year statutory repose period incorporated into childhood sexual abuse statute).

238. Rebecca L. Thomas, Note, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action*, 26 WAKE FOREST L. REV. 1245, 1284 (1991).

239. CAL. CIV. PROC. CODE § 340.1(a) (West 1992) ("In any civil action for recovery

childhood sexual abuse has until the age of twenty-six to timely file a cause of action.<sup>240</sup> Beyond the age of twenty-six, a claim may be filed up to three years from the time the plaintiff discovers or reasonably should have discovered that any psychological injury or illness was caused by the sexual abuse.<sup>241</sup> By combining both an extended statute of limitations period and a date of discovery tolling provision, California's statutory scheme provides the adult survivor of childhood sexual abuse with an adequate opportunity to timely file a cause of action.<sup>242</sup>

*b. Statutes of repose*

In response to pressure from individuals and lobbyist groups who are opposed to the discovery rule, some state legislatures have included statutes of repose as part of their statutory scheme.<sup>243</sup> Statutes of repose place an outer time limit or cap on a plaintiff's ability to commence a civil action regardless of any tolling provisions that may apply.<sup>244</sup> However, these statutes of repose run counter to the specific objectives served by the discovery rule in civil childhood sexual abuse cases.<sup>245</sup> "[A] statute of repose may still run before a cause of action is fully dis-

of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority.").

240. *Id.*

241. *Id.* ("[T]he time for commencement of the action shall be . . . within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse.").

242. In a jurisdiction with a limitations period extending eight years beyond the age of majority, a survivor who discovers her possible cause of action before reaching age 26 would be allowed a generous time period to cope with her realization and begin the healing process prior to filing her claim. Furthermore, those plaintiffs who do not discover their causes of action until after age 26 will also be accommodated under this approach through the discovery rule clause.

243. *See, e.g.*, ILL. ANN. STAT. ch. 735, para. 13-202.2 (Smith-Hurd 1992) (12-year statute of repose); VA. CODE ANN. § 8.01-249(6) (Michie 1992) (10-year statute of repose).

244. PROSSER & KEETON, *supra* note 106, at 167-68 ("A statute of repose generally begins to run at an earlier date and runs for a longer period of time than the otherwise applicable statute of limitations unaffected by the discovery accrual rule.").

245. *Id.* ("Such statutes . . . generally supplement or override the discovery accrual rule . . . . Statutes of repose by their nature reimpose on some plaintiffs the hardship of having a claim extinguished before it is discovered.").



covered because a statute of repose, like a limitation period, usually begins to run at the date when all elements of the cause of action have accrued.<sup>246</sup> As mentioned in the previous section, sexual abuse victims need the versatility and flexibility that only a tolling provision such as the discovery rule can provide.<sup>247</sup> Therefore, state legislatures must not insert a repose statute in any new child sexual abuse legislation if they sincerely intend to provide adult survivors of childhood sexual abuse with an adequate opportunity to pursue a civil remedy.

*c. Eliminating the type one and type two distinction*

States should also adopt a formulation of the discovery rule which will accommodate all survivors of childhood sexual abuse and overrule the courts' inequitable treatment of type one versus type two plaintiffs.<sup>248</sup> Therefore, legislation should be enacted that eliminates the judiciary's emphasis on whether the victim repressed or remembers the abuse.<sup>249</sup> The limitations period should be tolled until the plaintiff discovers all the elements of her cause of action, including the sexually abusive acts, the physical and emotional injuries suffered, and the causal connection between the two.<sup>250</sup>

Maine's childhood sexual abuse statute is an excellent example of the

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246. See also Cook & Millsaps, *supra* note 49, at 15-16 ("Thus if a state has a statute of repose that could act to bar an incest survivor's action after a specified time period, the application of the discovery doctrine may still not permit the plaintiff to pursue her claims.") (footnotes omitted).

247. See *supra* notes 236-38 and accompanying text.

248. See *supra* notes 146-47 and accompanying text (defining type one and type two cases); see also Hagen, *supra* note 40, at 379 ("In all significant aspects, both categories of plaintiffs are alike. Once a court accepts the Type 1 plaintiff's argument that the coping mechanism of repression results in not being able to identify the current injury and its cause, it is inconsistent to reject the Type 2 plaintiff's argument.").

249. Napier, *supra* note 235, at 1017. Legislation is necessary for the following reason:

[c]ourts tend not to understand that virtually every victim engages in some defense mechanism to protect herself from the horror of the abuse. These defense mechanisms may cause the victim to repress memories of the abuse, keep her from understanding that she has been harmed, or prevent her from understanding the cause of her harm. The rights of the victim are the same, however, regardless of the type of defense mechanism she adopts.

*Id.*

250. *Id.* at 1018. This provision will allow the entire class of adult survivors the opportunity to file a cause of action by applying the discovery rule to toll the statutory period for both type one and type two plaintiffs. See *id.* at 1017-18; see also Hammer v. Hammer, 418 N.W.2d 23 (Wis. Ct. App. 1987) (holding that a cause of action will not accrue until the plaintiff discovers both the fact and cause of the injury).

disparate treatment of type one and type two plaintiffs under many statutes. The Maine law tolls the statute of limitations until "the person discovers or reasonably should have discovered the harm."<sup>251</sup> Because type one plaintiffs claim they knew of the harm when the abuse occurred and also knew that they suffered continuing emotional problems, the type one plaintiff's claim will accrue at the time the abuse occurs.<sup>252</sup> In contrast, the claim held by a type two plaintiff, who suppresses all memory of the abuse, will not accrue until the plaintiff recalls the sexually abusive acts. As a result, this particular formulation of the discovery rule will result in the inequitable treatment of type one and type two plaintiffs. Because this type of legislative formulation will not protect both type one and type two plaintiffs, it should not be adopted or maintained by state legislatures.

Most of the states that have recently passed legislation on this matter have adopted causation-based discovery rules which toll the statute of limitations until a victim of sexual abuse discovers all the elements of her cause of action.<sup>253</sup> For example, Iowa tolls the running of the statute of limitations until the plaintiff discovers "both the injury and the causal relationship between the injury and the sexual abuse."<sup>254</sup> In Colorado, the statute of limitations does not commence until "both the injury

251. See *supra* note 224 for the relevant portions of the statute. The statute contains no reference to recognition of the causal connection between the act and the injury.

252. This will occur despite the type one plaintiff's inability to recognize the causal connection between any psychological or physical injuries and the sexual abuse.

253. See, e.g., ALASKA STAT. § 09.10.140 (1992) ("that the act caused the injury or condition"); CAL. CIV. PROC. CODE § 340.1(a) (West 1992) ("that psychological injury or illness occurring after the age of majority was caused by the sexual abuse"); COLO. REV. STAT. § 13-80-108 (1991) ("both the injury and its cause"); ILL. ANN. STAT. ch. 735, para. 13-202.2 (Smith-Hurd 1992) ("that the act of childhood sexual abuse occurred and that the injury was caused by the childhood sexual abuse"); IOWA CODE ANN. § 614.8A (West 1992) (requiring discovery of "both the injury and the causal relationship between the injury and the sexual abuse."); MINN. STAT. ANN. § 541.073 (West 1993) ("that the injury was caused by the sexual abuse"); MO. ANN. STAT. § 537.046 (Vernon 1992) ("that the injury or illness was caused by child sexual abuse"); MONT. CODE ANN. § 27-2-216 (1991) ("that the injury was caused by the act of childhood sexual abuse"); NEV. REV. STAT. ANN. § 11.215 (Michie 1991) ("that his injury was caused by the sexual abuse"); S.D. CODIFIED LAWS ANN. § 26-10-25 (1992) ("that the injury or condition was caused by the act"); VT. STAT. ANN. tit 12, § 522 (1991) ("that the injury or condition was caused by the act"); WASH. REV. CODE ANN. § 4.16.340 (West 1992) ("that the injury or condition was caused by said act").

254. IOWA CODE ANN. § 614.8A (West 1992); see *supra* note 223 for the relevant text of Iowa's childhood sexual abuse statute.

and its cause are known or should have been known by the exercise of reasonable diligence.<sup>255</sup> These legislative enactments provide an opportunity for the entire class of childhood sexual abuse survivors to bring suit because the discovery exception is applied to both type one and type two plaintiffs.

*d. Pre-trial screening procedure*

A few states have also incorporated a pre-trial judicial screening procedure into their civil childhood sexual abuse legislation.<sup>256</sup> Among the new legislation, a recently amended California statute<sup>257</sup> takes the most comprehensive approach in addressing the rights of both the plaintiff and the defendant. California's new law adopts an initial judicial screening procedure designed to prevent spurious claims from flooding the court system and damaging a defendant's reputation.<sup>258</sup> The law requires every plaintiff twenty-six years of age or older to have his or her attorney consult with a licensed mental health professional and file "certificates of merit" with the court attesting to both a legal and psychological basis for the claim.<sup>259</sup> Furthermore, the plaintiff's complaint cannot disclose the name of the defendant until the court reviews the "certificates of merit"

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255. COLO. REV. STAT. § 13-90-108 (1991); *see supra* note 221 for the partial text of Colorado's statute.

256. *See, e.g.*, CAL. CIV. PROC. CODE § 340.1(e)-(g) (West 1992); VT. STAT. ANN. tit. 12 § 522(b) (1991). Additionally, Virginia's statutory requirement of discovery by a licensed health care professional can be viewed as an informal, pre-trial screening procedure since a qualified third party must first acknowledge the validity of the claim. *See* Thomas, *supra* note 238, at 1285 n.300 (citing VA. CODE ANN. § 8.01-249(6) (1991)). For the partial text of Virginia's statute of limitations, *see supra* note 232.

257. CAL. CIV. PROC. CODE § 340.1 (West 1992); *see supra* note 220 for the partial text of California's childhood sexual abuse statute.

258. *See* CAL. CIV. PROC. CODE § 340.1(e)-(g) (West 1992).

259. California's law provides as follows:

- (e) Certificates of merit shall be executed by the attorney for the plaintiff and by a licensed mental health practitioner selected by the plaintiff declaring . . .
  - (1) That the attorney has reviewed the facts of the case, that the attorney has consulted with at least one licensed mental health practitioner . . . and that the attorney has concluded on the basis of that review and consultation that there is reasonable and meritorious cause for the filing of the action.
  - (2) That the mental health practitioner consulted is licensed to practice . . . has interviewed the plaintiff and is knowledgeable of the relevant facts and issues involved in the particular action, and has concluded . . . that in his or her professional opinion there is a reasonable basis to believe that the plaintiff had been subject to childhood sexual abuse.

CAL. CIV. PROC. CODE § 340.1(e) (West 1992).

and determines that there is "reasonable and meritorious cause for the filing of the action."<sup>260</sup> Thus, the plaintiff's ability to invoke the three-year statute of limitations after discovery hinges on the decision of a single judge after evaluation of the affidavits.<sup>261</sup>

In similar fashion, the state of Vermont has also adopted legislation intended to protect the rights of both the plaintiff and the defendant.<sup>262</sup> The Vermont statute sets the limitations period at six years from the date of the act, or six years from the date the victim discovers that the injury or condition was caused by the act.<sup>263</sup> Furthermore, if the complaint is filed alleging an act of childhood sexual abuse that occurred more than six years prior to the filing of the action, the complaint is immediately sealed by the clerk and remains sealed until an answer is served, or the court has ruled on a motion to dismiss, if any.<sup>264</sup> Any hearing held in connection with the motion to dismiss shall be conducted in camera.<sup>265</sup>

State legislatures, for several good reasons, should not incorporate into their own statutes the added procedural safeguards adopted in California and Vermont. First, there is simply no reason to believe that such a statutory mechanism designed to prevent an onslaught of meritless claims from congesting the court docket and damaging the defendant's reputation is necessary.<sup>266</sup> As discussed earlier, the risk of an increase in the filing of fraudulent claims brought about by the discovery rule is significantly mitigated in this context.<sup>267</sup> Second, these unconventional judicial

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260. See CAL. CIV. PROC. CODE § 340.1(g) (West 1992). The relevant language states:

A complaint filed pursuant to subdivision (d) may not name the defendant or defendants until the court has reviewed the certificates of merit filed pursuant to subdivision (e) and has found, in camera, based solely on those certificates of merit, that there is reasonable and meritorious cause for the filing of the action. At that time, the complaint may be amended to name the defendant or defendants.

*Id.*

261. Norrie Clevenger, Note, *Statute of Limitations: Childhood Victims of Sexual Abuse Bringing Civil Actions Against Their Perpetrators After Attaining the Age of Majority*, 30 J. FAM. L. 447, 468 (1991-92).

262. VT. STAT. ANN. tit. 12, § 522(2) (1991); see *supra* note 231 for the partial text of Vermont's childhood sexual abuse statute.

263. VT. STAT. ANN. tit. 12, § 522(a) (1991).

264. VT. STAT. ANN. tit. 12, § 522(b) (1991).

265. *Id.*

266. See *supra* notes 103-06 and accompanying text for a discussion of why the number of fraudulent claims filed will not increase as a result of tolling the statute of limitations through application of the discovery rule.

267. See *id.*

procedures are undoubtedly detrimental to the interests and rights of adult survivors of childhood sexual abuse. In California and Vermont, adult survivors of sexual abuse hoping to recover for their injuries are unfairly singled out from countless other plaintiffs as being less trustworthy and more inclined to fabricate the stories they are telling.<sup>268</sup> Furthermore, in California, survivors of sexual abuse over the age of twenty-six are unnecessarily and unfairly burdened by a law that requires them to file additional affidavits and documents with the court, attesting to the validity of their claims.<sup>269</sup> Such a requirement significantly increases the cost of filing suit, thus imposing an unfair financial burden on this particular class of plaintiffs. States adopting such procedures fall into the popular trap of becoming overly concerned with protecting the rights of the abuser at the expense of the party who needs protecting more, the victim.

## 2. A Proposed Legislative Response

Within the past several years, the legal system has begun to acknowledge the injustice surrounding strict application of the statute of limitations in civil childhood sexual abuse cases. Several state legislatures have passed laws tolling the statute of limitations until survivors of childhood sexual abuse discover the causal relationship between their injuries and the abusive acts. Legislatures in the remaining states must now act quickly and decisively to enact legislation requiring their courts to apply the discovery rule in childhood sexual abuse cases. The following constitutes a proposed legislative response for states to consider in drafting future legislation:

- (1) In any civil action brought by any person for recovery of damages suffered as a result of an injury or condition caused by childhood sexual abuse, the action shall be commenced within eight years of the date the plaintiff at-

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268. Plaintiffs frequently assert the discovery doctrine in medical malpractice, professional malpractice, and products liability cases without the need for courts to seal transcripts or conduct hearings in camera. *See supra* notes 120-22. Furthermore, defendants in childhood sexual abuse cases are not more deserving, or in greater need, of any special protections than are defendants in other discovery rule cases. The reputations of doctors, attorneys, and even large product manufacturers who must defend against claims filed beyond the expiration of the ordinary statute of limitations period are equally exposed to the risk of being damaged or destroyed by meritless claims. The "blameless ignorance" rationale behind the discovery doctrine is as applicable, without exception or qualification, to childhood sexual abuse cases as it is to medical or professional malpractice cases.

269. Survivors of sexual abuse should not be subjected to any greater filing requirements or restrictions than plaintiffs asserting the discovery rule in other contexts of the law. The adoption of such pre-trial screening procedures appears to be less a product of rational public policy of society's inclination to disbelieve women who file delayed charges than a product of childhood sexual abuse.

tains the age of majority,<sup>270</sup> or within six<sup>271</sup> years of the date the plaintiff discovers, or reasonably should have discovered, both the injury or condition and the causal relationship between the injury or condition and the sexual abuse,<sup>272</sup> whichever occurs later.

- (2) As used in this section, the following terms are defined as:
  - (a) "Childhood sexual abuse," any act committed by the defendant against the plaintiff which act occurred while the plaintiff was under the age of eighteen years and which act would have been a violation of section . . . .<sup>273</sup>
  - (b) "Injury or condition," either a physical injury or condition or a psychological injury or condition. A psychological injury or condition need not be accompanied by a physical injury or condition.<sup>274</sup>
- (3) If the defendant committed more than one act of childhood sexual abuse against the plaintiff, the plaintiff will not be required to prove which specific act caused the injury or condition.<sup>275</sup>
- (4) This section does not affect the suspension of the statute of limitations during a period of disability as otherwise proscribed by the laws of this State.<sup>276</sup>
- (5) The knowledge of a parent or guardian shall not be imputed to a minor.<sup>277</sup>
- (6) For purposes of this section, acts prohibited by statute between a minor and a member or members of the opposite sex also apply to acts between a minor and a member or members of the same sex.<sup>278</sup>

270. See, e.g., CAL. CIV. PROC. CODE § 340.1(a) (West 1992) (8 years); ME. REV. STAT. ANN. tit. 14, § 752-C (West 1992) (12 years).

271. States have adopted various time periods. See, e.g., CAL. CIV. PROC. CODE § 340.1(a) (West 1992) (three years from date of discovery); COLO. REV. STAT. ANN. § 13-80-103.7(1) (West 1992) (six years from date of discovery); IOWA CODE ANN. § 614.8A (West 1992) (four years from date of discovery); MINN. STAT. ANN. § 541.073(a) (West 1993) (six years from date of discovery); UTAH CODE ANN. § 75-12-25.1 (1992) (four years from date of discovery); VT. STAT. ANN. tit 12, § 522 (1991) (six years from date of discovery).

272. See IOWA CODE ANN. § 614.8A (West 1992).

273. Each state should include its own statutory definition of childhood sexual abuse. Establishing a uniform definition of childhood sexual abuse is beyond the scope of this Comment.

274. See, e.g., MO. ANN. STAT. § 537.046.1(2) (Vernon 1992); UTAH CODE ANN. § 75-12-25.1(1)(c) (1992). This provision is included to emphasize the significance of psychological and emotional injuries in addition to those that are physical in nature.

275. See, e.g., MINN. STAT. ANN. § 541.073(2)(b) (West 1993); MONT. CODE ANN. § 27-2-216(2) (1991); UTAH CODE ANN. § 75-12-25.1 (1992); WASH. REV. CODE ANN. § 4.16.340(2) (West 1992).

276. See MINN. STAT. ANN. § 541.073(2)(d) (West 1993).

277. See, e.g., MINN. STAT. ANN. § 541.073(2)(c) (West 1993); UTAH CODE ANN. § 75-12-25.1 (1992); WASH. REV. CODE ANN. § 4.16.340(3) (West 1992).

278. See Thomas, *supra* note 238, at 1293 (included in the author's proposed statute under section 2).

This proposed statute attempts to define childhood sexual abuse and to include psychological and emotional illnesses within its definition of injury. In order to provide survivors of sexual abuse with the protection they deserve, the statute allows an action to be brought anytime within eight years after reaching majority. The statute also incorporates additional flexibility by adding a discovery based tolling provision available to plaintiffs beyond the age of twenty-six. In addition, this proposal seeks to afford the entire class of sexual abuse victims, including both type one and type two plaintiffs, an equal opportunity to reach the merits of their cases. This is accomplished through specific language that tolls the limitations period until the plaintiff discovers both the injury and its causal connection to the past sexual abuse. The responsibility for determining the reasonableness of the plaintiff's discovery is left to the trier of fact.<sup>279</sup> The proposed statute does not follow California's lead in establishing a pre-trial judicial screening procedure. Such a procedure is not only unnecessary, but it adds a significant procedural obstacle impeding the protection of the interests and legal rights of adult survivors of childhood sexual abuse.

## VII. CONCLUSION

Childhood sexual abuse and its damaging effects are a disturbing fact of life for an alarming number of people in our society. Victims suffer serious psychological and physical problems that often persist over the course of their lifetimes. Furthermore, the nature of this wrong often generates a range of complex psychological injuries inherently likely to preclude a victim of sexual abuse from realizing that she has been injured or from knowing what caused her injuries. Often, by the time the adult survivor realizes that her legal rights have been violated, the statute of limitations has already extinguished any viable legal action.

While the legal system cannot undo the egregious harm inflicted on the innocent child victims of sexual abuse, it can provide them with a reasonable opportunity to seek compensation from the perpetrators of the abuse. Permitting the actions of adult survivors of childhood sexual abuse to reach the trier of fact will benefit not only individual plaintiffs but society as a whole by providing an additional deterrent to this conduct. Certainly, "[i]f sexual abuse of young children is a pattern of behavior that we as a society abhor and want to eliminate, there is no justification for maintaining a system of law that prevents survivors from holding their abusers accountable."<sup>280</sup>

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279. See generally Lamm, *supra* note 31, for an extended discussion of the reasonableness standard as applied to childhood sexual abuse cases.

280. Rosenfeld, *supra* note 2, at 219.

The delayed discovery rule that this Comment advocates will provide the adult survivor of childhood sexual abuse with the opportunity to circumvent the statute of limitations and file a cause of action. However, judicial application of the discovery rule has been inconsistent and has achieved inequitable results. Courts have become immersed in legal technicalities to the point of losing touch with the essential issues of fairness and justice. Until a uniform legislative approach to the discovery rule is established, adult survivors of childhood sexual abuse simply will not be guaranteed their day in court.

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