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THE DISCOVERY RULE: ALLOWING ADULT SURVIVORS OF CHILDHOOD SEXUAL ABUSE THE OPPORTUNITY FOR REDRESS

INTRODUCTION

She was sexually abused almost daily from the age of four to twenty-four by her next-door neighbor, the father of her best friend.¹ He told her repeatedly that the sexual abuse was "for her benefit and that she should not tell anyone else because it was their secret."² Her childhood was consumed by psychological debilitations, such as eating disorders, outbursts of rage, substance and alcohol abuse, and thoughts of suicide³. She

¹ See Plaintiffs Affidavit, *Anonymous v. Anonymous*, 154 Misc. 2d 46, 584 N.Y.S.2d 713 (Sup. Ct. Suffolk County 1992) (No. 91-23118), for a detailed account of the sexual abuse the victim had endured.

Once when I was playing in the . . . yard, I fell on the sprinkler head and cut a gash on my knee. [The abuser] took me upstairs to his daughter's bedroom. I felt faint. He put his hand into my shirt and then inside my underpants. After a while, he took me to the hospital, where I had to get seven stitches. . . . I also remember recurring forms of abuse. For example, defendant used to swim up under me in his pool and put his finger inside my bathing suit and into my vagina. Sometimes, he put his hand inside my shirt and squeezed my nipples so hard that it hurt. Instances like this occurred almost daily.

Plaintiffs Affidavit at 3.

² *Anonymous v. Anonymous*, 154 Misc. 2d 46, 584 N.Y.S.2d 713 (N.Y. Sup. Ct. Suffolk County 1992); see Affidavit of Dr. Grassian at 5, *Anonymous v. Anonymous*, 154 Misc. 2d 46, 584 N.Y.S.2d 713 (Sup. Ct. Suffolk County 1992) (No. 91-23118) ("there was a two-fold effect of the duress: during her childhood, the duress directly prevented her from speaking out, and the duress contributed to her lack of any comprehensible memory of the abuse, and thus continued to prevent her from speaking out."). A child who is sexually abused at a young age often is unable to put an end to the abuse simply because the child becomes an adult. "There is no magic age when [a victim of childhood sexual abuse] suddenly becomes responsible for [the victim's] own abuse." ELLEN BASS & LAURA DAVIS, *BEGINNING TO HEAL* 38 (1993). Although an adult, a victim still responds like the "small, powerless child" who was subjected to the sexual abuse initially. *Id.* For additional discussion on why adult survivors of childhood sexual abuse cannot terminate the abuse after becoming an adult, see *infra* note 135 and accompanying text.

³ BASS & DAVIS, *supra* note 2, at 3; *Anonymous*, 154 Misc. 2d at 49, 584 N.Y.S.2d at 717.

blamed herself for the abuse and was unable to form friendships or trust others. She "feared physical contact; found it terrifying to be with other people, and feared intimacy and sexual contact."⁴ She often suffered from black-outs, nightmares and flashbacks and for many years repressed the memories of the abuse. Because she could not recall the acts of sexual abuse, she was unable to understand the source of her psychological traumas.⁵

Finally, during therapy at the age of twenty-eight, she realized the reason for her suffering and brought an action for personal injuries against the abuser.⁶ The Suffolk County Supreme Court held, however, that the statute of limitations barred her from bringing a civil claim against him.⁷ As in previous sexual abuse cases brought by adult survivors, New York law enabled the abuser to use the statute of limitations as a shield from liability for sexually abusing children. New York is one of the minority of states that has yet to recognize the inequities resulting from a strict application of the statute of limitations in cases of childhood sexual abuse.⁸

Childhood sexual abuse claims instituted by adult survivors introduce a formidable challenge to the legal system. Traditionally, the time within which an action must be commenced is computed from the time the cause of action accrued—the date of the injury—or, in cases of childhood sexual abuse, the date of the abuse.⁹ Many children subjected to re-

⁴ *Anonymous*, 154 Misc. 2d at 49, 584 N.Y.S.2d at 717.

⁵ *Id.* at 50, 584 N.Y.S.2d at 718.

⁶ *Id.* at 47, 584 N.Y.S.2d at 716.

⁷ *Id.* at 50, 584 N.Y.S.2d at 718. The court held that unless the victim could show that she was insane under N.Y. CIV. PRAC. L. & R. 208 (McKinney 1990), or could show that equitable estoppel barred the defendant from asserting the defense of the statute of limitations, pursuant to N.Y. GEN. OBLIG. LAW § 17-103(4)(b) (McKinney 1989), the victim could not institute a civil action against her abuser because the statute of limitations had run. *Anonymous*, 154 Misc.2d at 56, 584 N.Y.S.2d at 722. The court ordered a fact-finding hearing on those issues, but the parties settled before the hearing took place. Telephone Interview with Ellen Gesmer, Attorney for Plaintiff (Oct. 19, 1994).

⁸ See *infra* note 87 for a survey of states that, unlike New York, toll the statute of limitations for adult survivors of childhood sexual abuse until the victim has discovered either that the abuse occurred or that the injuries were caused by the abuse. For purposes of this Note, the phrase "childhood sexual abuse" means any nonconsensual and unwanted sexual contact between an adult and a minor child. A minor child is any person under the age of 18.

⁹ See, e.g., N.Y. CIV. PRAC. L. & R. 203(a) ("The time within which an action

peated acts of sexual abuse suffer physically, psychologically and emotionally, often repressing the episodes of sexual abuse in order to avoid dealing with the pain and trauma caused by the abuse.¹⁰ The statutory bar precludes many adult survivors of childhood sexual abuse from instituting civil suits simply because they have not yet "discovered" either that the sexual abuse occurred or that the sexual abuse was the cause of their psychological turmoil.¹¹

The traditional purposes upon which statutes of limitations are based cannot justify their use in the context of childhood sexual abuse. Statutes of limitations are imbedded in the judicial system, yet their specific goals are not easily discernible. "[C]ourt opinions offer meritorious but broad generalizations that have been carried forward from nineteenth century decisions and have provided little guidance" in determining the purposes of limitations periods.¹²

Accepted policy reasons for the statutory time periods are the dual goals of preserving evidence for trial and preventing stale claims.¹³ Because the typical tort victim is aware of his injury and its cause upon its happening, he is expected to promptly bring suit. This expectation rests on the view that defendants should be assured that after a given period they will not be required to defend against old claims, whether meritorious or not. The defendant is therefore relieved of the burden of defending against stale claims in which vital evidence may no longer be available. Although these justifications may be sound in ordinary tort cases, they are unjust in childhood sexual abuse cases.¹⁴

Recently, a number of jurisdictions enacted legislation that

must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed." Civil actions to recover damages for personal injury must be commenced within three years. N.Y. CIV. PRAC. L. & R. 214(5).

¹⁰ For a discussion of the psychological impact of childhood sexual abuse, see *infra* notes 45-67 and accompanying text.

¹¹ See *infra* notes 45-67 and accompanying text for a discussion of the nature of the injuries that childhood sexual abuse causes.

¹² CALVIN W. CORMAN, LIMITATIONS OF ACTIONS 5-6 (1991).

¹³ See generally W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS (5th ed. 1984).

¹⁴ See *infra* notes 173-88 and accompanying text for a discussion of the reasons the traditional purposes of the statute of limitations are not applicable in the context of childhood sexual abuse.

permits the tolling of the civil statute of limitations until the victim of childhood sexual abuse discovers or reasonably should have discovered the cause of action.¹⁵ These jurisdictions developed a "discovery rule" to allow a plaintiff to sue for latent harm that she could not have discovered within the normal statute of limitations.¹⁶ The Supreme Court first applied the discovery rule to a tort cause of action in *Urie v. Thompson*,¹⁷ where the Court held that a plaintiff's cause of action for negligent exposure to silicosis disease accrued not at the time of exposure, but when he realized he had contracted the disease.¹⁸ Since *Urie*, New York has extended the discovery rule to various torts including fraud,¹⁹ medical malpractice,²⁰ injury caused by the latent effects of exposure to any substance,²¹ for example, Agent Orange,²² and actions for breach of warranty of agency.²³ These applications of the discovery

¹⁵ See *infra* note 87.

¹⁶ For a discussion of the development and application of the discovery rule, see *infra* notes 82-138 and accompanying text.

¹⁷ 337 U.S. 163 (1949).

¹⁸ *Id.* at 168-72. Under traditional statutes of limitation, this cause of action would have accrued at the "time of the last exposure to the causative conditions" and the plaintiff's claim would have been time-barred. Russell G. Donaldson, Annotation, *Running of Limitations Against Action for Civil Damages for Sexual Abuse of Child*, 9 A.L.R.5th 321 (1993).

¹⁹ N.Y. CIV. PRAC. L. & R. 213(8) ("an action based on fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it."); see also N.Y. CIV. PRAC. L. & R. 214(7) (applying the discovery rule to marriage annulment actions based on fraud).

²⁰ N.Y. CIV. PRAC. L. & R. 214-a ("where the action [for medical, dental or podiatric malpractice] is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery . . . of facts which would reasonably lead to such discovery").

²¹ N.Y. CIV. PRAC. L. & R. 214-c(2) ("an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, . . . shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff").

²² N.Y. CIV. PRAC. L. & R. § 214-b ("an action to recover damages for personal injury caused by contact with or exposure to phenoxy herbicides while serving as a member of the armed forces . . . may be commenced within two years of the date of the discovery of such injury, or within two years from the date when through the exercise of reasonable diligence the cause of such injury should have been discovered").

²³ N.Y. CIV. PRAC. L. & R. 206(b) ("Where an injury results from the representation by a person that he is an agent with authority to execute a contract in

rule prevent the inequities that otherwise would result if a plaintiff could not have discovered the cause of action within the normal time frame.

Despite the numerous extensions of the discovery rule, New York has refused to apply the discovery rule to cases of childhood sexual abuse.²⁴ The statute of limitations in sexual abuse cases, therefore, begins to run on the last day of the victim's sexual abuse. New York modifies the harshness of the limitations period only when the victim is insane or a minor when the sexual abuse occurs.²⁵ The accommodation however, is quite limited; the infancy toll gives the victim three years after reaching the age of majority to file suit.²⁶ The statute of limitations thus permits an adult survivor of childhood sexual abuse to institute a civil claim against her abuser only until she is twenty-one years old. Additionally, the insanity toll applies only if the victim suffers from "an overall inability to function in society."²⁷ The Second Circuit has held that victims of sexual abuse who suffer from Post-Traumatic Stress Disorder, a debilitating psychological syndrome frequently diagnosed in survivors of sexual abuse, are not insane within the meaning of the toll.²⁸ Further, to benefit from either the

behalf of a principal, the time within which an action to recover damages for breach of warranty of authority . . . shall be computed from the time the person injured discovered the facts constituting lack of authority.").

²⁴ For a discussion on New York County Supreme Court's refusal to apply the discovery rule to cases brought by victim's of childhood sexual abuse, see Richard F. Hans Jr., *The Survey of New York Practice*, 66 ST. JOHN'S L. REV. 223, 235-42 (1992-93).

²⁵ N.Y. CIV. PRAC. L. & R. 208 ("If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues . . . the time within which the action must be commenced shall be extended to three years after the disability ceases. . . . The time within which the action must be commenced shall not be extended by this provision beyond ten years after the cause of action accrues.").

²⁶ *Id.*

²⁷ *McCarthy v. Volkswagen of Am., Inc.*, 78 A.D.2d 849, 432 N.Y.S.2d 722 (2d Dep't 1980) (holding that plaintiff's personal injury action was time-barred because during the period of supposed insanity he attended college, had a part-time job and managed his affairs sufficiently), *aff'd*, 55 N.Y.2d 543, 435 N.E.2d 1072, 450 N.Y.S.2d 457 (1982).

²⁸ *Smith v. Smith*, 830 F.2d 11 (2d Cir. 1987) (holding that a 32-year-old who sought to recover for personal injuries resulting from sexual abuse inflicted by her father when she was 12 years old could not benefit from the insanity toll because although she suffered from Post-Traumatic Stress Disorder, her debilitation was not within Civil Practice Law's definition of insanity). See *infra* note 53 and ac-

infancy or insanity toll, a plaintiff must commence litigation no later than ten years after the cause of action accrues.²⁹

The doctrine of equitable estoppel also does not furnish a viable means for adult survivors of sexual abuse to toll the statute of limitations.³⁰ Under this doctrine, the victim must show that "some unconscionable conduct on the defendant's part, *other than the alleged abuse itself*, prevent[ed] the timely filing of the cause of action."³¹ Since it is the nature of the injuries that prevents a victim from timely filing suit in sexual abuse cases, this exception to New York's statute of limitations does not aid the majority of adult survivors of childhood sexual abuse.

This Note argues that New York should apply the discovery rule to cases of childhood sexual abuse. Part I discusses the prevalence and psychological impact of childhood sexual abuse and the debate on the validity of repressed memories. Part II examines the legal obstacles that bar adult survivors of childhood sexual abuse from bringing civil claims. This Part considers the discovery rule as a means of tolling the statute of limitations in childhood sexual abuse cases to permit the victim a day in court. Part III then investigates the New York courts' refusal to follow the example of other states that apply the discovery rule in cases of childhood sexual abuse. This section also analyzes cases in which New York courts have reasoned that the legislature should adopt the discovery rule. Next, Part III examines a proposed bill first introduced by the New York State Senate in 1991, and reintroduced in 1993 and 1995, that would apply the discovery rule to cases of childhood

companying text (discussing Post-Traumatic Stress Disorder).

²⁹ N.Y. CIV. PRAC. L. & R. 208. For example, if a child were sexually abused until he or she was seven years old or younger, the victim would not be able to file a civil suit against the abuser. Although the infancy toll would allow the victim to sue until he or she turns 21, the 10 year cap imposed upon § 208 would prevent this group of victims from being able to benefit from this provision.

³⁰ N.Y. GEN. OBLIG. § 17-103(4)(b) ("This section . . . does not affect the power of the court to find that by reason of conduct of the party to be charged it is inequitable to permit him to interpose the defense of the statute of limitation."); see also *Doe v. Roe*, 192 A.D.2d 1089, 1090 596 N.Y.S.2d 620, 621 (4th Dep't 1993) (holding that defendant was not equitably estopped from asserting the statute of limitations defense in an action for sexual abuse because plaintiff failed to establish that defendant's conduct caused her to "forego commencing timely action, or that she was justified in relying on his conduct or misrepresentations").

³¹ Donaldson, *supra* note 18, at 331.

sexual abuse.³² This Part questions New York's refusal to adopt this rule in these cases, particularly in light of New York's long history of applying the discovery rule in other areas of the law. Finally, this Note concludes that the discovery rule is proper in childhood sexual abuse cases and, therefore, that New York should adopt the proposed bill.

I. THE PREVALENCE AND PSYCHOLOGICAL IMPACT OF CHILDHOOD SEXUAL ABUSE

A. *The Prevalence and Nature of Childhood Sexual Abuse*

The statistics on childhood sexual abuse are overwhelming. Experts indicate that as many as one in three women and one in four men were sexually abused as children.³³ Every year, as many as 200,000 to 300,000 children are sexually abused in the United States.³⁴ Researchers agree that, due to underreporting, the incidence of childhood sexual abuse is higher than these studies reveal.³⁵

Studies of childhood sexual abuse reveal both the nature of

³² N.Y.S. 5461, 213th Sess. (1991); N.Y.S. 1017, 214th Sess. (1993); N.Y.S. 3552, 215th Sess. (1995).

³³ Leslie Miller, *Sexual Abuse Survivors Find Strength to Speak in Numbers*, USA TODAY, Aug. 27, 1992, at 6D; see also DAVID FINKELHOR, CHILD SEXUAL ABUSE, NEW THEORY AND RESEARCH 89 (1984) (asserting that "virtually all surveys have shown sexual abuse to occur to well over one in ten of girls") [hereinafter NEW THEORY]; DAVID FINKELHOR ET AL., A SOURCEBOOK ON CHILD SEXUAL ABUSE 19 (1986) (studies of various populations have indicated that 36% to 62% of females and 3% to 31% of males have been sexually abused as children) [hereinafter "SOURCEBOOK"]. Widespread underreporting and various definitions of sexual abuse may cause the disparity in reporting and make it "impossible to accurately measure the prevalence of child sexual abuse." 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, 1249 (1991).

³⁴ James W. Harshaw III, Comment, *Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation*, 50 OHIO ST. L.J. 753, 754 (1989).

³⁵ Julie S. Silberg, Comment, *Memory Repression: Should it Toll the Statutory Limitations Period in Child Sexual Abuse Cases?*, 39 WAYNE L. REV. 1589, 1592 (1993); see also FINKELHOR ET AL., SOURCEBOOK, *supra* note 33, at 48 (four reasons are suggested for underreporting: (1) experiences are blocked and not accessible to retrieval; (2) experiences are partly forgotten and only retrievable with proper prompting; (3) experiences are in memory, but not defined according to terms surveys use; and (4) experiences are in memory, but are not volunteered due to embarrassment or other conscious withholding).

the sexual abuse and the character of the injuries the abuse produces. Both often prevent the victim from acknowledging the abuse or making a connection between the abuse and the resulting injuries. By their nature abusive sexual relationships "depend on concealment, emotional blackmail, threats, and an imbalance of power for their sustenance."³⁶ Underlying a child's inability to disclose the abuse is "[t]he threat, the violation of essential boundaries, the absence of safety and a sense of security, the secret shame, [and] the burden of maintaining a facade of family cohesion."³⁷ Additionally, the child's age, naiveté and lack of information severely diminish the child's ability to resist sexual abuse.³⁸ In instances where the child knows the abuser, the familiarity and trust the child feels toward the abuser further undermine the child's power to avoid the abuse.³⁹ Finally, most children are too embarrassed or frightened to tell their parents or other adults about the abuse. This forced secrecy contributes to a sense of isolation and stigma that often consumes the victim's childhood.⁴⁰

The burden of carrying the secret of the sexual abuse overwhelms the child victim.⁴¹ The adult's natural domination and coercion surpass the child's ability to tell anyone. The child begins to believe she is responsible for the abuse⁴² and is convinced that if she exposes the secret her family will fall apart: for example, her mother will not believe her or may suffer from a nervous breakdown; her parents will get divorced; or she will be sent to a foster home.⁴³ As a result, a child victim learns to "internalize [her] injuries and . . . enters adulthood with [her]

³⁶ Thomas, *supra* note 33, at 1249 (footnote omitted).

³⁷ JEROME KROLL, PTSD/BORDERLINES IN THERAPY: FINDING THE BALANCE 190 (1993).

³⁸ FINKELHOR, NEW THEORY, *supra* note 33, at 61; *see also* DOUGLAS J. BESHAROV, RECOGNIZING CHILD ABUSE 94 (1990) ("Aside from being naive, compliant to an adult authority, and susceptible to bribes and promises of rewards . . . victims are often threatened with dire consequences to themselves, the abuser or the rest of the family should they disclose the abuse.").

³⁹ FINKELHOR, NEW THEORY, *supra* note 33, at 61.

⁴⁰ FINKELHOR, NEW THEORY, *supra* note 33, at 93.

⁴¹ Camille W. Cook & Pamela K. Millsaps, *Redressing Wrongs of the Blamelessly Ignorant Survivors of Incest*, 26 U. RICH. L. REV. 1, 6-10 (1991).

⁴² As one adult survivor of childhood sexual abuse stated, "I know I was only five years old, but I was an extremely intelligent five-year-old. I should have been able to figure out a way to escape." BASS & DAVIS, *supra* note 1, at 35.

⁴³ Cook & Millsaps, *supra* note 41, at 8.

secret hidden not only from everyone around [her], but from [herself] as well."⁴⁴

B. *The Psychological Impact of Childhood Sexual Abuse*

The impact of sexual abuse varies from case to case, depending on the child's age and the frequency and the aggressive or sadistic nature of the abuse.⁴⁵ The most consistently reported effects are depression,⁴⁶ guilt and shame,⁴⁷ self-mutilation and suicidal behavior,⁴⁸ eating disorders and sleep disturbances,⁴⁹ drug or alcohol abuse,⁵⁰ inability to form intimate relationships,⁵¹ tendencies toward promiscuity or prostitution,⁵² and a vulnerability toward re-victimization.⁵³

The concept that individuals respond to anxiety-evoking situations with various physical and psychological mechanisms has been researched extensively and is largely accepted in the medical field.⁵⁴ In 1914, Walter Cannon described the body's

⁴⁴ Cook & Millsaps, *supra* note 41, at 9-10.

⁴⁵ Carolyn B. Handler, *Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle*, 15 FORDHAM URB. L.J. 709, 716 (1986-87). Additionally, a study conducted by Herman, Russell & Trocki in 1986 suggested that the severity of the psychological reactions to the sexual abuse depend on the degree of violence, the duration of the abuse and the age difference between the victim and the abuser. The study found that "violent, prolonged or intrusive abuse or abuse by a primary caretaker represents stressors that are beyond the adaptive capacities of all but the most exceptional children and that will regularly produce a long-lasting traumatic syndrome." KROLL, *supra* note 37, at 54.

⁴⁶ Ann M. Hagen, Note, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355, 359 (1991); *see also* Handler, *supra* note 45, at 716; Silberg, *supra* note 35, at 1593.

⁴⁷ Hagen, *supra* note 46, at 359; *see also* Silberg, *supra* note 35, at 1593.

⁴⁸ Hagen, *supra* note 46, at 359; Handler, *supra* note 45, at 716; Silberg, *supra* note 35, at 1593. A study conducted by Carmen, Rilker & Mills in 1984 showed that sexually abused individuals have a higher rate of suicide attempts and assaultive behavior than individuals with no history of sexual abuse. KROLL, *supra* note 37, at 37.

⁴⁹ KROLL, *supra* note 37, at 52-53; Handler, *supra* note 45, at 716-17.

⁵⁰ KROLL, *supra* note 37, at 52; Hagen, *supra* note 46, at 359; Handler, *supra* note 45, at 717.

⁵¹ FINKELHOR, NEW THEORY, *supra* note 33, at 15; Hagen, *supra* note 46, at 360; Handler, *supra* note 45 at 717.

⁵² FINKELHOR, NEW THEORY, *supra* note 33, at 189; Hagen, *supra* note 46, at 360; Handler, *supra* note 45, at 717.

⁵³ Handler, *supra* note 45, at 717.

⁵⁴ CHESTER B. SCRIGNAR, POST-TRAUMATIC STRESS DISORDER, DIAGNOSIS, TREAT-

innate reaction to stress as "fight or flight."⁵⁵ As one researcher explains, "[w]hen a living organism [is] confronted with a threat to its physical integrity," physiological reactions, such as "increased heart rate and cardiac output, increased respiration, dilation of the arteries," occur as a means of preparing for flight or fight as an adaptation for survival.⁵⁶ Consistent with the phenomenon of "fight or flight," victims of childhood sexual abuse develop various coping mechanisms to survive the resulting trauma.⁵⁷ Many victims suffer from Post-Traumatic Stress Disorder ("PTSD"), a clinically diagnosed mental disorder in which the victim represses psychologically unacceptable experiences until a later period when he or she might be able to cope with them.⁵⁸ A recent study found that forty-three percent of sexually abused children develop PTSD.⁵⁹ Other studies have reported the number of sexually

MENT, AND LEGAL ISSUES 8-10 (1984).

⁵⁵ *Id.* at 6.

⁵⁶ Bruce Perry, *Neurobiological Sequelae of Childhood Trauma: PTSD in Children*, in CATECHOLAMINE FUNCTION IN POSTTRAUMATIC STRESS DISORDER: EMERGING CONCEPTS 237-38 (M. Michele Murburg ed., 1994). Humans have developed various responses to enable them to survive danger. "When an individual is exposed to real or perceived danger, a series of complex, interactive neurophysiological reactions occur in the brain, the ANS [autonomic nervous system], the hypothalamic-pituitary-adrenocortical (HPA) axis and the immune system." *Id.*

⁵⁷ Cook & Millsaps, *supra* note 41, at 10.

⁵⁸ Cook & Millsaps, *supra* note 41, at 10; Handler, *supra* note 45, at 717. The American Psychological Association defines the three stages of Post-Traumatic Stress Disorder (hereinafter "PTSD") in the *Diagnostic and Statistical Manual of Mental Disorders*: first, the victim begins to re-experience the abuse through flashbacks and nightmares; second, the victim develops coping mechanisms to avoid these images. At this stage the victim may experience dissociative episodes in which repression may occur. Third, the victim displays the persistent symptoms resulting from the abuse, such as self-hatred, sleep difficulties, anxiety, hyperactivity and interpersonal manipulateness. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* § 309.89, at 248 (3d rev. ed. 1987) [hereinafter "DSM-III-R"]; KROLL, *supra* note 37, at 188-89. PTSD was originally associated with war veterans but has recently been observed in a high percentage of rape victims, sexual abuse victims, survivors of natural disasters and witnesses to violence. Perry, *supra* note 56, at 234. For a discussion on classifying sexual abuse survivors with PTSD with a distinct diagnostic category of "Post-Incest Syndrome," see 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, 2192-95 (1991).

⁵⁹ The study examined 98 children admitted to a psychiatric inpatient unit for short-term psychiatric care and based its PTSD diagnoses on information obtained from clinical interviews and observation of the children's behavior and emotions. Balkozar S. Adam et al., *PTSD in Physically and Sexually Abused Psychiatrically*

abused children with PTSD as ranging from 20.7% to 66.0%.⁶⁰ The Center for the Study of Childhood Trauma has found that in almost all cases, victims of childhood sexual abuse suffering from PTSD "do not understand their symptoms as being related to their . . . trauma, and often . . . cognitive recall of the trauma is not present."⁶¹

Victims of childhood sexual abuse may develop additional coping mechanisms, such as repression, blocking, compartmentalization or denial of the memories of the abuse, and, in some instances, multiple personality disorder.⁶² The victim learns to "shut off" the pain by dissociation or accommodation.⁶³ Dissociation allows the child to separate herself from the abuse by

Hospitalized Children, 23 CHILD PSYCHIATRY & HUM. DEV. 3, 4-5 (1992).

⁶⁰ Deblinger and associates studied hospitalized children and found that 20.7% of the sexually abused children satisfied the criteria for PTSD. Esther Deblinger et al., *Post-Traumatic Stress in Sexually Abused, Physically Abused, and Nonabused Children*, 13 CHILD ABUSE & NEGLECT 403-08, 405 (1989). McCleer and associates studied 31 children who had been sexually abused and found that 48.4% met the DSM-III-R criteria for PTSD. Susan V. McCleer et al., *Post-Traumatic Stress Disorder in Sexually Abused Children*, 27 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 650, 652 (1988). Craine and associates studied 105 state hospital patients and found that 66.0% of the sexually abused patients met the DSM-III-R criteria for PTSD. KROLL, *supra* note 37, at 39.

⁶¹ Perry, *supra* note 56, at 236.

⁶² Cook & Millsaps, *supra* note 41, at 3. Dr. Gannon lists six defense strategies that sexually abused children use to protect themselves from "the overwhelming reality of the abuse." These strategies are denial, repression, turning against the self, identification with the abuser, sublimation and compulsive rituals. J. PATRICK GANNON, SOUL SURVIVORS 73 (1989). Repression is

the pushing down out of conscious awareness the memories, reflections, and thoughts that are too overwhelmingly negative for the conscious mind to handle. . . . Repression is responsible for the lack of memories that many adult survivors [have] . . . The repression of old memories will gradually lift when [the victim] feel[s] psychologically safe enough to face them and the feelings connected to them.

Id. at 74. Denial is "[r]efusing to accept the existence of a thought, feeling, or behavior . . . the child . . . can certainly deny that [the abuse] affects them, or they can minimize how bad it might have been." Denial and repression together make the events of sexual abuse "seemingly disappear behind a curtain of fog." *Id.* at 73.

⁶³ Dissociation is defined as a "mental process that separates the mind and body, resulting in a disconnection between physical sensation and conscious experience. This usually occurs during intensely painful, stimulating or terrifying episodes of abuse." GANNON, *supra* note 62, at 74. One author defines accommodation as a five-step syndrome: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, conflicted and unconvincing disclosure, and (5) retraction. For a more detailed summary of the stages of accommodation, see Hagen, *supra* note 46, at 361 n.46.

altering her state of consciousness "as if looking on from a distance at the child suffering the abuse."⁶⁴ Another consequence of internalizing the traumatic emotions experienced during sexual abuse is the psychological repression of all memories of the abuse.⁶⁵ One study of PTSD describes this phenomenon as follows:

Given the immaturity of most of the victims at the time of the abuse, the traumatic nature of the abuse, the disturbed environmental matrix in which abuse usually occurs, and the layers of successive life experiences further colored by being filtered through the consciousness of an already traumatized child, it is not surprising that distortions, in the form of amnesias, partial and merged memories, and misperceptions of the significance of events, occur.⁶⁶

The childhood need for secrecy, as well as the various coping mechanisms utilized to survive the abuse are the forces underlying the adult survivor's failure to act timely in pursuing civil legal remedies within the statutory period. The means victims use to survive sexual abuse as a child are the same means that prevent the adult survivor of sexual abuse from confronting the abuse, dealing with it effectively, and beginning finally to lead a healthy, psychologically sound life.⁶⁷

C. *The Validity of Repressed Memories*

The validity of repressed memories has spurred a heated debate within the fields of medicine, psychology and law. The American Psychological Association's 1993 annual convention centered its discussion on the validity of recovered memories of childhood sexual abuse.⁶⁸ Psychologists, psychiatrists and other mental health experts are split in opinion as to whether "the sudden surge in recovered memories stems from better thera-

⁶⁴ Lamm, *supra* note 58, at 2194. When a child, helpless against the abuser and the sexual abuse, has to endure the frightening and intimidating events, she must psychologically "alter the perception and significance of the reality . . . through depersonalization and dissociation" in order to survive. KROLL, *supra* note 37, at 189.

⁶⁵ Hagen, *supra* note 46, at 362.

⁶⁶ KROLL, *supra* note 37, at 32.

⁶⁷ See Lamm, *supra* note 58, at 2193.

⁶⁸ Shari Roan, *In the Mind's Eye?: Battle Rages over Whether Repressed Memories Are a Key to Long-Forgotten Evils or a Pandora's Box of False Accusations*, L.A. TIMES, Aug. 25, 1993, at E1.

peutic techniques or a horrible abuse of therapeutic power.⁷⁶³

On one side of the debate are those who believe that memories are unreliable sources of information. Elizabeth Loftus, a psychologist and expert on memory, reports that memory is "inherently sketchy, reconstructive, and unlocalized."⁷⁷⁰ The human mind is not capable of retrieving memories intact; memories are tainted with "personal vicissitudes."⁷⁷¹ Loftus charges that the techniques many clinicians use, such as suggestive questioning and truth serum, can "create false memories in [the] vulnerable minds" of individuals who are seeking psychological help.⁷⁷² Motivated by the public hysteria about sexual abuse, some mental health professionals, lawyers and members of the media have exacerbated the problem of false claims.⁷⁷³

Conversely, many professionals believe in the validity of recovered memories. Sigmund Freud first developed the theory of repressed memories in the 1890s.⁷⁷⁴ Freud concluded that "emotions have the power to block memory"⁷⁷⁵ and that "re-

⁶³ Glenn Kessler, *Repressed Memories: A Legal-Psychological Tangle*, NEWSDAY, Nov. 28, 1993, at 7.

⁷⁰ Frederick Crews, *The Revenge of the Repressed*, N.Y. REV. OF BOOKS, Nov. 17, 1994, at 54, 55.

⁷¹ Sidney Callahan, *Memory Can Play Tricks*, COMMONWEAL, Dec. 17, 1993, at 6; see also Crews, *supra* note 70 at 55. Frederick Crews argues:

The very idea of repression and its unraveling is an embryonic romance about a hidden mystery, an arduous journey, and a gratifyingly neat denouement that can ascribe our otherwise drab shortcomings and pains to deep necessity. When that romance is fleshed out by a gifted storyteller who also bears impressive credentials as an expert on the mind, most in our culture will be disinclined to put up intellectual resistance.

Id.

⁷² Elizabeth F. Loftus, *Untested Claims Damage the Constitution*, A.B.A. J., Sept. 1994, at 43; see also ELIZABETH LOFTUS & KATHERINE KETCHAM, *THE MYTH OF REPRESSED MEMORY* 20-30 (1994). The authors criticize the book *The Courage to Heal* by Ellen Bass and Laura Davis, claiming that "The Incest Survivors' Aftereffects Checklist" on the first page of the book encourages readers to compare "their own experience with the questions intended to reveal abuse." Women allegedly begin searching for memories of the sexual abuse and their "[t]herapists insisted that their current pain was so severe that only repressed memories of traumatic abuse could explain it." *Id.* at 22-23. The women, wanting "so desperately to get better. . . . g[iv]e themselves up to therapy, surrendering their will, their reason, their control." *Id.* at 230.

⁷³ KROLL, *supra* note 37, at 34.

⁷⁴ LENORE TERR, *UNCHAINED MEMORIES: TRUE STORIES OF TRAUMATIC MEMORIES, LOST AND FOUND* 6 (1994).

⁷⁵ LOFTUS & KETCHAM, *supra* note 72, at 49.

pressed memories influence behavior, thinking, and emotions, and produce mental symptoms."⁷⁶ Most clinicians accept Freud's theory of repression.⁷⁷ Lenore Terr, a psychiatrist and expert on memory, criticized Loftus's experiments on memory, stating: "What comes from the memory lab does not apply well to the perceptions, storage, and retrieval of such things as childhood murders, rapes, or kidnappings. Trauma sets up new rules for memory."⁷⁸ Judie Alpert, professor of applied psychology at New York University, asserts "[t]here is absolutely no question that some people have repressed some memories of early abuse that are just too painful to remember In their 20s and 30s some event triggers early memories, and slowly they return."⁷⁹

The debate regarding the validity of repressed memories should not prevent the discovery rule from bringing relief to those adult survivors of sexual abuse who have meritorious claims. The argument that no adult survivor of childhood sexual abuse should have access to redress because of the potential for false claims is misguided. The justice system is capable of handling false claims; it does so every day. Credibility is the special province of the fact-finder. If the possibility of false claims were a basis for restricting access to court, virtually all civil claims would never be heard. Because opponents of the doctrine of repressed memory focus most of their objections on inadequate therapeutic techniques, the American Psychological Association should set up guidelines regarding techniques used in therapy and "therapists [must] acquaint themselves with what is actually known about memory."⁸⁰ Rather than foreclosing all civil suits against abusers by adult survivors, safeguards against therapeutic abuses are needed. Additionally, higher standards should be adopted for expert testimony, and therapists' claims that they did not implant the memories of sexual abuse should be strictly examined.⁸¹

⁷⁶ TERR, *supra* note 74, at 6. Freud argued that childhood sexual abuse accounts for repression. *Id.*

⁷⁷ TERR, *supra* note 74, at 6.

⁷⁸ Crews, *supra* note 70, at 55.

⁷⁹ Leon Jaroff, *Lies of the Mind*, TIME, Nov. 29, 1993, at 55.

⁸⁰ Frederick Crews, *The Revenge of the Repressed: Part II*, N.Y. REV. OF BOOKS, Dec. 1, 1994, at 52 (Mark Pendergrast, author of *Victims of Memory*, offers various recommendations "to address the real problem child [sexual] abuse").

⁸¹ *Id.* For example, California requires the attorney for the plaintiff in civil

II. LEGAL OBSTACLES AND THE DISCOVERY RULE

The traditional statute of limitations bars most adult survivors of childhood sexual abuse from bringing civil claims. Generally, the statute of limitations begins to run when a cause of action first accrues, which is usually the date of the injury.⁸² Because the unique psychological reactions stemming from childhood sexual abuse prevent adult survivors from acknowledging and understanding their injuries, victims often are unable to bring their cases to court within the time-frame prescribed by the statute of limitations.⁸³ The exceptional nature of the injuries of child sexual abuse requires a flexible application of the statute of limitations.

The harshness of traditional statutes of limitations has led many courts and legislatures to adopt the discovery rule. This rule allows an adult survivor of childhood sexual abuse to toll the statute of limitations until he or she knows, or, through the exercise of reasonable diligence, should have known of the injury and its cause.⁸⁴ The U.S. Supreme Court condoned the use of the discovery rule in *Urie v. Thompson*,⁸⁵ a negligence case where the defendant had exposed an employee to silicosis disease. The Court stated: "We do not think the humane legislative plan intended such consequences [barring the employee from recovery because he did not discover the disease yet] to attach to *blameless ignorance*. . . . [C]onsequently the afflicted

actions for recovery of damages suffered as a result of childhood sexual abuse to execute a certificate of merit in which the attorney and a licensed mental health practitioner set forth various facts supporting the claim. The attorney must conclude, after reviewing the facts of the case and consulting with at least one licensed mental health practitioner, that there is "reasonable and meritorious cause for filing the action." CAL. CIV. PRO. CODE § 340.1(e) (West Supp. 1995). The mental health practitioner must not have treated the plaintiff and must conclude that there is a "reasonable basis to believe that the plaintiff had been subject to childhood sexual abuse." *Id.* Additionally, the defendant may not be served until the court "has reviewed the certificates of merit" and has found, *in camera*, that there is "reasonable and meritorious cause for the filing of the action." *Id.* Finally, a certificate of corroborative fact, in which the attorney must "set forth in clear and concise terms the nature and substance of the corroborative fact" is required. *Id.* Violating this section may be "grounds for discipline against the attorney." *Id.*

⁸² Hagen, *supra* note 46, at 364.

⁸³ Lamm, *supra* note 58, at 2189.

⁸⁴ RESTATEMENT (SECOND) OF TORTS § 899 cmt. e (1979).

⁸⁵ 337 U.S. 163 (1949).

employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves."⁸⁶ Although state application of the discovery rule has varied widely, twenty-nine states and the District of Columbia have extended the discovery rule to cases of childhood sexual abuse.⁸⁷ In states that have applied the discovery rule to childhood sexual abuse, the statute of limitations does not begin to run until the victim has discovered the cause and fact of the injury.⁸⁸

To date, a majority of states recognize the inequities of

⁸⁶ *Id.* at 170.

⁸⁷ See ALASKA STAT. § .09.10.140(b) (1990); ARK. CODE ANN. § 16-56-130 (Michie Supp. 1993); CAL. CIV. PROC. CODE § 340.1(a) (West Supp. 1993); COLO. REV. STAT. §§ 13-80-103.7(1) (Supp. 1994) & 13-80-108 (1987 & Supp. 1994); FLA. STAT. ANN. § 95.11(7) (West Supp. 1994); ILL. REV. STAT. ch. 735 para. 5/13-202.2 (1993 & Supp. 1994); IOWA CODE ANN. § 614.8A (West Supp. 1994); KAN. STAT. ANN. § 60-523(a) (Supp. 1994); ME. REV. STAT. ANN. tit. 14, § 752-C (West Supp. 1993); MASS. GEN. LAWS ANN. ch. 260 § 4C (West Supp. 1994); MINN. STAT. ANN. § 541.073(2) (West Supp. 1994); MO. ANN. STAT. § 537.046(2) (Vernon Supp. 1994); MONT. CODE ANN. § 27-2-216(1)(b) (1993); NEV. REV. STAT. § 11.215 (1991); N.J. STAT. ANN. § 2A: 61B-1 (West Supp. 1994); N.M. STAT. ANN. § 37-1-30 (Michie Supp. 1994); OKLA. STAT. ANN. tit. 12, § 95 (West Supp. 1994); OR. REV. STAT. § 12.117 (1993); R.I. GEN. LAWS § 9-1-51 (Supp. 1992); S.D. CODIFIED LAWS ANN. § 26-10-25 (1994); UTAH CODE ANN. § 78-12-25.1 (Supp. 1992); VT. STAT. ANN. tit. 12, § 522(a) (Supp. 1993); VA. CODE ANN. § 8.01-2.49(6) (Michie 1992 & Supp. 1994); WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1994). In addition to legislation, a number of state courts have adopted a similar stance in their case law. See *Farris v. Compton*, 652 A.2d 49 (D.C. 1994) (holding that where a plaintiff has alleged the total repression of recollection of childhood sexual abuse, her claim does not accrue until the date that she recovered the memory to the extent that she knew, or reasonably should have known of some injury and its cause); *Meiers-Post v. Schafer*, 427 N.W.2d 606 (Mich. Ct. App. 1987) (holding that the three-year period of limitations, applicable to a student's claim for damages resulting from a teacher's sexual abuse, would be tolled if student could demonstrate that she had psychologically repressed the memory of facts upon which the claim was predicated); *McCollum v. D'Arcy*, 638 A.2d 797 (N.H. 1994) (holding that the discovery rule tolled a 50 year-old daughter's claim of sexual abuse against her parents despite the lack of corroborating evidence of the sexual abuse); *Osland v. Osland*, 442 N.W.2d 907 (N.D. 1989) (holding that the discovery rule extended the limitations period in which a daughter could bring an action against her father based on sexual abuse); *Ault v. Jasko*, 637 N.E.2d 870 (Ohio 1994) (holding that the discovery rule applies to toll the statute of limitations where a victim of childhood sexual abuse represses the memory of that abuse); *L.C. v. A.K.D.*, No. 05-92-02867-CV, 1994 WL 59968 (Tex. Ct. App. Mar. 1, 1994) (holding that the application of the discovery rule is justified where the plaintiff presents objective evidence of having been sexually abused during minority and thereafter continuously suppressed the memory of the abuse as a result of the wrongful act).

⁸⁸ Hagen, *supra* note 46, at 365.

applying the traditional statute of limitations to cases of childhood sexual abuse and in response apply the discovery rule to such cases. Courts have not applied the discovery rule uniformly: some only do so if there is verifiable evidence that the sexual abuse actually occurred;⁸⁹ some require that the victim actually repress all memories of the abuse;⁹⁰ and some allow use of the discovery rule whether the victim blocked the memories of the abuse or simply did not understand the nexus between the sexual abuse and the injuries incurred by it.⁹¹

⁸⁹ Only Michigan and Texas require independent corroborating evidence of the alleged sexual abuse before an adult survivor can toll the statute of limitations. *Meiers-Post v. Schafer*, 427 N.W.2d 606 (Mich. Ct. App. 1988) (holding that the three-year period of limitations, applicable to a student's claim for damages resulting from a teacher's sexual abuse, would be tolled if student could demonstrate that she had psychologically repressed the memory of the facts upon which the claim was predicated); *L.C. v. A.K.D.*, No. 05-92-02867-CV, 1994 WL 59968 (Tex. Ct. App. Mar. 1, 1994) (holding that the application of the discovery rule is justified where the plaintiff presents objective evidence of having been sexually abused during minority and therefore, continuously suppressed the memory of the abuse as a result of the wrongful act). See also *infra* notes 102-12 and accompanying text for a discussion of the development of the discovery rule in Nevada.

⁹⁰ Arkansas, Ohio and Utah require the victim to repress all memories of the sexual abuse to toll the statute of limitations. *ARK. CODE ANN. § 16-56-130* (Michie Supp. 1993) ("any civil action based on sexual abuse which occurred when the injured person was a minor, but is not discovered until the injured person reaches the age of majority, shall be brought within three (3) years from the time of discovery of the sexual abuse by the injured party."); *UTAH CODE ANN. § 78-12-25.1* (Supp. 1992) ("A person shall file a civil action for intentional or negligent sexual abuse suffered as a child . . . within four years after discovery of the sexual abuse"). Ohio adopted this stance in case law. *Ault v. Jasko*, 637 N.E.2d 870 (Ohio 1994) (holding that the discovery rule applies to toll the statute of limitations where a victim of childhood sexual abuse represses the memory of the abuse). The District of Columbia does not specifically limit the scope of the discovery rule to cases of total repression, yet adopted the rule in this context. See *Farris v. Compton*, 652 A.2d 49 (D.C. 1994) (holding that where a plaintiff has alleged the total repression of recollection of childhood sexual abuse, her claim does not accrue until the date she recovered the memory to the extent that she knew, or reasonably should have known of some injury and its cause. See also *infra* notes 113-29 and accompanying text for a discussion of the development of the discovery rule in Illinois and California.

⁹¹ Most states that apply the discovery rule to cases of childhood sexual abuse permit the tolling of the statute of limitations until the plaintiff "discovers" the connection between the sexual abuse and the psychological harm it caused. See *ALASKA STAT. § 09.10.140(b)* (1990); *CAL. CIV. PROC. CODE § 340.1(a)* (West Supp. 1993); *COLO. REV. STAT. §§ 13-80-103.7(1)* (Supp. 1994) & 13-80-108 (1997 & Supp. 1994); *FLA. STAT. ANN. § 95.11(7)* (West Supp. 1994); *ILL. REV. STAT. ch. 735 para. 5/13-202.2* (1993 & Supp. 1994); *IOWA CODE ANN. § 614.8A* (West Supp. 1994); *KAN. STAT. ANN. § 60-523(a)* (Supp. 1994); *ME. REV. STAT. ANN. tit. 14, § 752-C* (West Supp. 1993); *MASS. GEN. LAWS ANN. ch. 260 § 4C* (West Supp. 1994); *MINN.*

A. Corroborating Evidence of the Occurrence of Abuse

Only Michigan and Texas require some sort of evidence proving that the abuse actually occurred before allowing adult survivors of childhood sexual abuse to use the discovery rule to toll the statute of limitations. The Court of Appeals of Michigan held that in order to toll the statute of limitations for sexual abuse, the plaintiff must not only demonstrate that she has repressed all memories of the abuse, but also bring forth corroborating evidence that the abuse occurred.⁹² The court relied upon the rules set forth in California⁹³ and Washington⁹⁴ which have since been overturned by subsequent state legislation.⁹⁵

One of the first courts to address the extension of the discovery rule to cases of childhood sexual abuse was the Washington Supreme Court in *Tyson v. Tyson*.⁹⁶ The court held that it was improper to apply the discovery rule in cases where an adult survivor of childhood sexual abuse recalled events that were repressed from her consciousness if no means

STAT. ANN. § 541.073(2) (West Supp. 1994); MO. ANN. STAT. § 537.046(2) (Vernon Supp. 1994); MONT. CODE ANN. § 27-2-216(1)(b) (1993); N.J. STAT. ANN. § 2A: 61B-1 (West Supp. 1994); N.M. STAT. ANN. § 37-1-30 (Michie Supp. 1994); OKLA. STAT. ANN. tit. 12, § 95 (West Supp. 1994); OR. REV. STAT. § 12.117 (1993); R.I. GEN. LAWS § 9-1-51 (Supp. 1992); S.D. CODIFIED LAWS ANN. § 26-10-25 (1994); UTAH CODE ANN. § 78-12-25.1 (Supp. 1992); VT. STAT. ANN. tit. 12, § 522(a) (Supp. 1993); VA. CODE ANN. § 8.01-2.49(6) (Michie 1992 & Supp. 1994); WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1994). New Hampshire and North Dakota adopted the "nexus" rule in case law. *McCollum v. D'Arcy*, 638 A.2d 797 (N.H. 1994) (holding that the discovery rule tolled a 50 year-old daughter's claim of sexual abuse against her parents despite the lack of corroborating evidence of the sexual abuse); *Osland v. Osland*, 442 N.W.2d 907 (N.D. 1989) (holding that the discovery rule extended the limitations period in which a daughter could bring an action against her father based on sexual abuse). See also *infra* notes 131-38 and accompanying text for a discussion of the development of the discovery rule in Wisconsin.

⁹² *Meiers-Post v. Schafer*, 427 N.W.2d 606, 609 (Mich. Ct. App. 1988).

⁹³ *DeRose v. Carswell*, 242 Cal. Rptr. 368 (Cal. Ct. App. 1987).

⁹⁴ *Tyson v. Tyson*, 727 P.2d 226 (Wash. 1986).

⁹⁵ See *supra* notes 121-29 for a discussion of the development of the discovery rule in California and 96-102 for a discussion of the development of the discovery rule in Washington.

⁹⁶ 727 P.2d 226 (1986), *superseded by statute*, WASH. REV. CODE ANN. § 4.16.340 (West 1988 & Supp. 1993).

of independently verifying her allegations existed.⁹⁷ In *Tyson*, the victim was sexually abused from the age of three until the age of eleven. She was so overwhelmed by the abuse that she repressed its memory. When she entered therapy at age twenty-six to address the emotional turmoil she had been experiencing, she became aware of the sexual abuse she had endured and the psychological toll it had taken on her mental health.⁹⁸ The court held that application of the discovery rule to cases of childhood sexual abuse would be appropriate only if the plaintiff presented evidence that substantially corroborated the events alleged. A lack of empirical evidence would make it too difficult for the court to determine the truth of the allegations.⁹⁹ Therefore, absent objective evidence of sexual abuse, the discovery rule would not apply.¹⁰⁰

In 1988, however, the Washington State Legislature overrode the court's decision and amended the statute of limitations specifically to allow cases of childhood sexual abuse to benefit from the discovery rule without requiring independent evidence that the sexual abuse occurred.¹⁰¹ In stating "[i]t is still the legislature's intention that *Tyson* . . . be reversed," the Washington Legislature found that victims of childhood sexual abuse "may repress the memory of the abuse or be unable to connect the abuse to any injury until after the statute of limitations has run."¹⁰²

Like Washington, Nevada too required corroborating evidence of sexual abuse to toll the statute of limitations. In *Petersen v. Bruen*,¹⁰³ the Nevada Supreme Court held that

⁹⁷ 727 P.2d at 229-30.

⁹⁸ *Id.* at 227.

⁹⁹ *Id.* at 229-30.

¹⁰⁰ *Id.* See *infra* note 178 and accompanying text for a discussion of the dissenting opinion.

¹⁰¹ WASH. REV. CODE ANN. § 4.16.340. The statute allows actions based on childhood sexual abuse to be commenced "[w]ithin three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or [w]ithin three years of the time the victim discovered that the act caused the injury for which the claim is brought."

¹⁰² WASH. REV. CODE ANN. § 4.16.340 (Historical and Statutory Notes, citing 1991 Wash. Laws, ch. 212).

¹⁰³ 792 P.2d 18 (Nev. 1990) (superseded by statute, NEV. REV. STAT. § 11.215 (1991), which allows civil actions based on child sexual abuse to be commenced within 10 years after the plaintiff "discovers or reasonably should have discovered that his injury was caused by the sexual abuse").

"no existing statute 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."¹⁰⁴ In *Petersen*, the victim was sexually abused from the age of seven until the age of fifteen. The Big Brothers program had assigned the abuser to be the victim's "big brother."¹⁰⁵ The abuser not only "exploited [a] relationship of trust" by sexually molesting his assigned "little brother," but also "memorialized his depravity by taking photographs of [the victim] before, during and after [his] sexual trysts with his victim."¹⁰⁶

At age nineteen, when the victim began psychotherapy for help with psychological and emotional problems, he began to understand the causal connection between the sexual acts his abuser imposed upon him and his emotional scars. Until therapy, the victim had repressed the eight years of sexual abuse.¹⁰⁷ After these memories resurfaced, the victim brought a civil action against his abuser and filed criminal charges. The abuser was convicted of sexual assault, attempted sexual assault, lewdness with a child under the age of fourteen, use of a minor in producing pornography and possession of child pornography.¹⁰⁸ Despite the abuser's criminal conviction, the district court dismissed the victim's civil action, which sought damages for personal injuries, on the ground that it was time-barred. The Nevada Supreme Court reversed that decision with a very narrow holding that demanded "clear and convincing evidence" that the victim has in fact been abused.¹⁰⁹ The court stated, "[a]bsent such evidence [in this case, photographs], a cause of action based upon allegations of CSA will be subject to the regular two-year period of limitations."¹¹⁰

The Nevada court's decision is of little use to the majority

¹⁰⁴ *Petersen*, 792 P.2d at 24-25.

¹⁰⁵ *Id.* at 19. Big Brothers/Big Sisters, Inc. of New York City declares that "A Big Brother/Big Sister is a special friend whose influence on a child's development can be powerful. In the relationship, the adult serves to guide and lend a helping hand to a child in need of a positive role model." BIG BROTHERS/BIG SISTERS, INC. OF NEW YORK CITY, ONE FAMILY: INFORMATION FOR VOLUNTEERS.

¹⁰⁶ *Petersen*, 792 P.2d at 19.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 25.

¹¹⁰ *Id.*

of adult survivors of childhood sexual abuse. Most survivors do not have photographs that demonstrate, by clear and convincing evidence, that the abuse has occurred. The Supreme Court of Nevada acknowledged that "proof of discovery in these types of cases must depend in large measure on an inexact science dealing with the psyche, [and] an anticipated conflict of expert opinion will add a further dimension and obstacle to the victim's attempt to reach first base."¹¹¹ Yet in issuing such a narrow holding, the court further precluded adult survivors of sexual abuse from ever reaching "first base." As with Washington, Nevada's legislature recognized the inequities of requiring verifiable evidence and enacted legislation overturning the requirement.¹¹²

B. *When the Victim Represses All Memories of the Abuse*

Currently, Arkansas, Ohio and Utah allow adult survivors of childhood sexual abuse to toll the statute of limitations only if the victim repressed all memories of the abuse. The landmark repressed memory case is *Johnson v. Johnson*,¹¹³ in which the U.S. District Court for the Northern District of Illinois held that the discovery rule was applicable only to adult survivors of childhood sexual abuse who have no conscious memory of the acts of abuse.¹¹⁴ In *Johnson*, the victim's father sexually abused her from the time she was three years old until she was approximately thirteen years old.¹¹⁵ She was diagnosed with Multiple Personality Disorder when she sought the help of a therapist at age thirty-two. Until she entered therapy she could not remember the sexual abuse.¹¹⁶ The court distinguished between cases in which the plaintiff knew

¹¹¹ *Id.* at 24.

¹¹² See NEV. REV. STAT. § 11.215 (1991).

¹¹³ 701 F. Supp. 1363 (N.D. Ill. 1988), *summ. judg. granted*, 766 F. Supp. 662 (N.D. Ill. 1991), *superseded by revised statute*, ILL. REV. STAT. ch. 735 para. 5/13-202.2 (1993 & Supp. 1994) ("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.").

¹¹⁴ *Johnson*, 701 F. Supp. at 1369.

¹¹⁵ *Id.* at 1363.

¹¹⁶ *Id.* at 1366 (quoting the affidavit of the victim's therapist).

that the abuse occurred but was not aware that the psychological injuries were caused by the sexual abuse, and cases in which the plaintiff repressed all memories of the sexual abuse.¹¹⁷ The court held that the discovery rule was applicable to the latter,¹¹⁸ reasoning that limiting the scope of the discovery rule to such cases "will give the substantive law room to develop."¹¹⁹ As in Washington, the legislature disagreed with the court. In 1991, the Illinois legislature amended its Code of Civil Procedure to provide adult survivors of childhood sexual abuse the benefit of the discovery rule in both types of cases.¹²⁰

The California Court of Appeals also has held that the discovery rule can be applied only in cases where a victim repressed all memories of sexual abuse.¹²¹ In *Mary D. v. John D.*, a father sexually abused his daughter from infancy until she was approximately five years old. The victim's father repeatedly told her to not tell anyone. This secrecy and duress, as well as the dependency by the victim on the abuser, caused the victim to dissociate the acts of abuse, to deny her memories and finally to repress them.¹²² When the victim was twenty-three years old, she began to experience flashbacks while participating in group therapy sessions "of being manually penetrated and masturbated by her father when she was an infant and when she was about two or three years old."¹²³ She immediately filed a civil suit against her father.

Building on its earlier precedent, the California court limited the use of the discovery rule to cases where the victim represses the memory of the abuse.¹²⁴ The court discussed *DeRose v. Carswell*,¹²⁵ where it had refused to apply the discovery rule to cases of childhood sexual abuse when the victim was aware of the abuse at the time it occurred, but was unable to causally connect the abuse with the psychological effects it

¹¹⁷ *Id.* at 1367.

¹¹⁸ *Id.* at 1730.

¹¹⁹ *Id.* at 1730.

¹²⁰ See ILL. REV. STAT. ch. 735 para. 5/13-202.2 (1993 & Supp. 1994).

¹²¹ *Mary D. v. John D.*, 264 Cal. Rptr. 633 (Ct. App. 1989).

¹²² *Id.* at 634.

¹²³ *Id.* at 635.

¹²⁴ *Id.* at 638.

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

created.¹²⁶ The *Mary D.* court reasoned that it would be unfair to hold a victim of childhood sexual abuse who had repressed memories of the acts of abuse to the statute of limitations. The discovery rule would continue to not apply to a victim who was aware of the acts of the abuse but was not aware of the connection between those acts and her psychological injuries.¹²⁷

California has since enacted legislation that rejects the holding of *DeRose* by allowing the application of the discovery rule to cases in which a victim represses all memories of the sexual abuse *and* in cases in which the victim is unaware of the connection between the sexual abuse and the resulting psychological injuries.¹²⁸ The California Code of Civil Procedure, amended in 1991, now allows adult survivors of childhood sexual abuse to commence a civil action "within three years of the date the plaintiff discovers or reasonably should have discovered that the psychological injury or illness occurring after the age of majority was caused by the sexual abuse."¹²⁹

C. *When the Victim Is Unaware of the Nexus Between the Sexual Abuse and the Harm.*

Most states that apply the discovery rule to cases of childhood sexual abuse have allowed its application in cases where the victim was aware of the childhood assaults within the statutory period of limitations, but was unaware of the connection between those acts and her psychological injuries. These states recognize the unique nature of childhood sexual abuse and its consequential harms, which, unlike traditional tort injuries, do not occur simultaneously.¹³⁰ For example, in

¹²⁶ *Id.* at 372.

¹²⁷ *Mary D.*, 264 Cal. Rptr. at 635.

¹²⁸ CAL. CIV. PROC. CODE § 340.1 (West Supp. 1993).

¹²⁹ *Id.*

¹³⁰ Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965, 972-974 (1988). The author lists two factors that distinguish toxic tort litigation from the "snapshot" tort litigation in which the harm and the plaintiff's injury occur simultaneously: a lengthy latency period of the injuries and an uncertainty regarding the causal relationship between the harm and the injury. Both are present in cases of childhood sexual abuse; thus, these cases also are fundamentally different from the ordinary "snapshot" tort.

Hammer v. Hammer,¹³¹ the Wisconsin Court of Appeals held as a matter of law that a cause of action for sexual abuse does not accrue until the victim discovers, or in the exercise of reasonable diligence should have discovered, the fact and cause of the injury.¹³²

In *Hammer*, the victim was sexually abused by her father from the age of five through the age of fifteen. The father sexually abused his daughter an average of three times a week and continually told her that she was to blame for its occurrence.¹³³ The sexual abuse led to "psychological distress, including great shame, embarrassment, guilt, self-blame, denial, depression, and dissociation from her experiences."¹³⁴ The victim's psychological counselor explained the victim's lack of awareness about the injurious nature of the sexual abuse:

(1) it was of such a long duration and frequency that it had been perceived by her as natural behavior; (2) [her abuser] had imposed isolation and secrecy on her; (3) the abuse had a depersonalizing effects which had made her think of herself as an object to be used rather than as a person with rights; (4) she had been told by her father that the conduct was normal and his right, and (5) the abuse by an authority figure on whom she was dependent had made her distrustful of other authority figures who might have helped her.¹³⁵

The court stressed that the policy reasons behind the statute of limitations are not persuasive in sexual abuse cases because of the unique nature of its harm and therefore held that the discovery rule applies to cases of childhood sexual abuse.¹³⁶

States vary in their application of the discovery rule to cases of childhood sexual abuse. While some states are restrictive, requiring verifiable evidence before adult survivors of childhood sexual abuse can use the discovery rule, most states are quite flexible, allowing adult survivors of childhood sexual abuse to toll the statute of limitations until they either discover that the abuse occurred, or they appreciate the nexus be-

¹³¹ *Hammer v. Hammer*, 418 N.W.2d 23 (Wis. Ct. App. 1987).

¹³² *Id.* at 25.

¹³³ *Id.* at 24.

¹³⁴ *Id.*

¹³⁵ *Id.* at 25.

¹³⁶ *Id.* at 27; see *infra* notes 176-91 and accompanying text for a discussion of the policies underlying statutes of limitations.

tween the abuse and their psychological injuries.¹³⁷ To date, the majority of states have applied some form of the discovery rule to cases of childhood sexual abuse. New York falls within the minority of states that have denied adult survivors of childhood sexual abuse access to the courts in filing civil claims against their abusers.¹³⁸

III. NEW YORK'S RESPONSE TO THE DISCOVERY RULE

Traditionally, New York has been hostile to the discovery rule.¹³⁹ New York courts often have adhered stubbornly to the "strict accrual" rule in which the statute of limitations begins to run when the cause of action accrues, even though the plaintiff may be unaware of the cause of action.¹⁴⁰ The New York Court of Appeals consistently refuses to recognize the discovery rule, except under circumstances where the legislature has expressly provided for its application.¹⁴¹ Beginning in 1981, with the adoption of the discovery rule for cases in which Vietnam veterans were injured as a result of exposure to Agent Orange, the New York legislature finally recognized the discovery rule for causes of action in which the victim was "blamelessly ignorant" of his or her injury and its cause.¹⁴² New York remains reluctant, however, to apply the discovery rule to cases of childhood sexual abuse.

¹³⁷ See *supra* notes 89-91.

¹³⁸ See *infra* notes 143-58.

¹³⁹ See *Anonymous v. Anonymous*, 154 Misc. 2d 46, 56, 584 N.Y.S.2d 713, 723 (Sup. Ct. Suffolk County 1992) (the court recognized the judiciary's deference to the legislature regarding tolling the statute of limitations pending actual discovery of the injury, but stated that "[p]erhaps the time is ripe for legislative adoption of a new discovery of the injury rule with respect to injury caused in sexual abuse cases in the State of New York").

¹⁴⁰ N.Y. CIV. PRAC. L. & R. 203(a).

¹⁴¹ Hans, *supra* note 24, at 237-38.

¹⁴² Ch. 266 § 1 [1981] N.Y. LAWS 466.

A. *New York Courts' Refusal to Apply the Discovery Rule to Childhood Sexual Abuse Cases*

*Bassile v. Covenant House*¹⁴³ is a recent case that illustrates New York courts' animosity towards application of the discovery rule to cases of childhood sexual abuse. In *Bassile*, the New York County Supreme Court refused to apply the discovery rule to a claim brought by an adult who was sexually abused during childhood. The victim was a resident of Covenant House, a not-for-profit corporation that provided housing and counselling to troubled youth "who, for a variety of reasons, ended up alone and friendless on the harsh streets of [New York] City."¹⁴⁴ The alleged abuser, Father Frank Ritter, was a Roman Catholic priest and the President of Covenant House. The victim had sought counselling and advice from Father Ritter, but instead had received "truly horrifying exploitation."¹⁴⁵ Father Ritter allegedly had engaged in sexual contact with the victim, causing the victim to suffer extreme emotional and psychological damage. Although the court recognized that the "special nature of sexual abuse and the psychological processes that it causes" make sexual abuse a perfect candidate for the discovery rule, it stated that the Court of Appeals has consistently "made it plain that it regards departures from [the strict accrual] rule in particular categories of wrong to be a subject for resolution by the Legislature."¹⁴⁶

Likewise, in *Schmidt v. Bishop*,¹⁴⁷ the U.S. District Court for the Southern District of New York held that the statute of limitations precluded a victim of sexual abuse from instituting a civil claim against her abuser because "there is no authority for the adoption of [the discovery] rule in childhood sexual abuse cases in New York."¹⁴⁸ The victim's parents had brought her to a pastor for spiritual guidance. The abuser then initiated sexual contact with the victim and told her that God

¹⁴³ 152 Misc. 2d 88, 575 N.Y.S.2d 233 (Sup. Ct. N.Y. County 1991).

¹⁴⁴ *Id.* at 89, 515 N.Y.S.2d at 234.

¹⁴⁵ *Id.* at 90, 515 N.Y.S.2d at 235.

¹⁴⁶ *Id.* at 91, 515 N.Y.S.2d at 236.

¹⁴⁷ 779 F. Supp. 321 (S.D.N.Y. 1991).

¹⁴⁸ *Id.* at 329.

approved of their special relationship.¹⁴⁹ Because of the victim's age and dependence on the abuser, and because of the abuser's religious position, the victim believed nothing was wrong with the abuser's conduct. The sexual abuse continued from the time the victim was twelve years old until she was twenty-eight, at which time she entered psychotherapy and finally "began to understand that the contact with [the abuser] was wrong, that he sexually abused [her,] and that [she] suffered severe damage as a result of that abuse."¹⁵⁰ While recognizing that victims of childhood sexual abuse often do not realize that they have been abused or understand the extent of their injuries until years later, the court still "decline[d] to invent a delayed discovery doctrine for this case."¹⁵¹

Finally, the Nassau County Supreme Court also refused to extend the application of the discovery rule to cases of childhood sexual abuse in *Burpee v. Burpee*.¹⁵² In *Burpee*, a father sexually abused his daughter from the age of eight to eleven. Because of her age and her relationship with her abuser, the victim did not inform anyone of the abuse. As she later testified, "When this activity began, I was scared and confused. Being a child, I was ignorant as to how to protect myself. Due to my father's horrible conduct, I suppressed these events."¹⁵³ When the victim was twenty-six years old, she sought the help of a therapist to aid her in dealing with various psychological problems that, unbeknownst to her at the time, stemmed from the sexual abuse to which she was subjected as a child.¹⁵⁴ During a session in which her father was present, he admitted that the sexual abuse had occurred. Finally understanding the basis of her psychological pain, the victim brought an action for personal injuries against her abuser.¹⁵⁵

The court barred the victim's claim, reasoning that although sexually abusing children "call[s] for the severest con-

¹⁴⁹ *Id.* at 324.

¹⁵⁰ *Id.* at 324; see *supra* note 135 and accompanying text for reasons why a victim of childhood sexual abuse may not understand the nexus between the sexual abuse and her psychological injuries.

¹⁵¹ *Schmidt*, 779 F. Supp. at 329.

¹⁵² 152 Misc. 2d 466, 578 N.Y.S.2d 359 (Sup. Ct. Nassau County 1991).

¹⁵³ *Id.* at 467, 578 N.Y.S.2d at 360.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 468, 578 N.Y.S.2d at 360.

demnation by all right-thinking persons of compassion," the court "is nevertheless required to determine this matter in accordance with the law of the State of New York as contained in its statutes and judicial precedents."¹⁵⁶ The court was concerned that its decision reflected insensitivity to the plight of childhood sexual abuse, but explained:

[t]hat [a child sexual abuser] can so successfully avoid liability for alleged misconduct is abhorrent not only to the victim but to those who strongly feel that law should never honor what they see as form over what they feel is substance. This feeling is understood by the Court, but law, not feelings, must govern us—or there will be no law at all.¹⁵⁷

Although expressing empathy for adult survivors of childhood sexual abuse, judges in New York have continued to cling to the traditional statute of limitations and to defer their power to change the law to the legislature. New York, so often legislatively progressive, is uncharacteristically lagging in this area of the law. Unless the legislature enacts legislation that allows the application of the discovery rule to cases of childhood sexual abuse, courts will surely follow the pattern pursued in toxic torts cases. That is, the courts will continue to adhere to the "strict accrual" rule until the legislature enacts superseding law.¹⁵⁸ It therefore is incumbent upon the legislature to further amend the Civil Practice Law and Rules ("CPLR") and apply the discovery rule to cases of childhood sexual abuse.

B. *The Proposed Bill*

The New York State Senate recently introduced a bill that would amend New York's CPLR to provide a discovery rule for victims of childhood sexual abuse.¹⁵⁹ The proposed amendment provides that a victim of sexual abuse may bring a claim

¹⁵⁶ *Id.*

¹⁵⁷ *Burpee*, 152 Misc. 2d at 471, 578 N.Y.S.2d at 362.

¹⁵⁸ Before the enactment of Civil Practice Law and Rules section 214, New York courts refused to adopt the discovery rule for latent diseases. See N.Y. CIV. PRAC. L. & R. 214-c commentary (McKinney 1990); Steven L. White, *Toward a Time-of-Discovery Rule for the Statute of Limitations in Latent Injury Cases in New York State*, 13 FORDHAM URB. L.J. 113 (1984-85).

¹⁵⁹ N.Y.S. 5461, 213th Sess. (1991).

"within five years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the childhood sexual abuse or exploitation, whichever period expires later."¹⁶⁰ The bill has been referred to the codes committee but to date no action has been taken. Although the bill was re-introduced in 1993,¹⁶¹ the committee still has not acted upon it. State Senator David A. Paterson, who first introduced the bill, re-introduced the bill yet again in 1995.¹⁶²

The rationale underlying the adoption of the discovery rule in these cases is that victims should not be foreclosed from judicial remedies before they know of their injury and can discover its cause.¹⁶³ This view outweighs any policy that the statute of limitations may serve.¹⁶⁴ The discovery rule attempts to solve the dilemma of maintaining a cause of action when the wrongful act and injury do not occur simultaneously or when the victim is incapable of discovering the injury within the statutory period.¹⁶⁵

This same rationale underlies the New York legislature's extension of the discovery rule to various tort causes of action.¹⁶⁶ The enactment of New York's CPLR section 214-b, which applied the discovery rule to cases where Vietnam veterans were injured as a result of exposure to Agent Orange, was the beginning of a series of extensions of New York's discovery rule. The legislative findings affixed to the amendment of New York's CPLR stated: "An exception to the general period of limitation rule is required when the pathological effect of an injury occurs without perceptible trauma, and the victim is *blamelessly ignorant* of the cause of the injury."¹⁶⁷ Based up-

¹⁶⁰ *Id.*

¹⁶¹ N.Y.S. 1017, 214th Sess. (1993).

¹⁶² N.Y.S. 3522, 215th Sess. (1995).

¹⁶³ *Petersen v. Bruen*, 792 P.2d 18, 20 (Nev. 1990).

¹⁶⁴ See *infra* notes 173-88 and accompanying text for policy arguments against applying the discovery rule to cases of childhood sexual abuse.

¹⁶⁵ Handler, *supra* note 48, at 712.

¹⁶⁶ See Governor's Memorandum on Approval of ch. 682 N.Y. Laws (July 30, 1986), reprinted in [1986] N.Y. Laws 3183 ("This bill . . . repeals that archaic rule [which commences the three-year time period for suit on the date that the injury occurs] and replaces it with a fair and simple rule which permits a person to discover his or her injury before the statutory time period for suit begins to run.").

¹⁶⁷ Ch. 266 § 1 [1981] N.Y. LAWS 466 (emphasis added).

on the same reasoning, New York further amended the CPLR and applied the discovery rule to victims of toxic torts.¹⁶⁸ Additionally, the New York legislature has extended the discovery rule to fraud,¹⁶⁹ medical malpractice¹⁷⁰ and actions for breach of warranty of agency.¹⁷¹ The rationale underlying the application of the discovery rule to these tort actions applies equally to cases of childhood sexual abuse.

Similar to victims of toxic torts, fraud, medical malpractice and breach of warranty of agency, victims of childhood sexual abuse are "blamelessly ignorant" of the cause of action and the connection between the abuse and their injuries. The "dormant nature" of the injuries stemming from childhood sexual abuse is identical to that "suffered by one who has inhaled a toxic substance but has failed to manifest symptoms of a disease until years after the exposure occurred."¹⁷²

C. New York's Legislature Should Apply the Discovery Rule to Cases of Childhood Sexual Abuse

Policy arguments that support the doctrine of statute of limitations are outweighed by adult survivors' right of access to New York courts. Scholars maintain that "[t]he fundamental reason why a claim will lapse with time, a principle accepted everywhere, is the wish to finalise matters once and for all."¹⁷³ Those who oppose the application of the discovery rule to cases of childhood sexual abuse argue that there is a lack of

¹⁶⁸ N.Y. CIV. PRAC. L. & R. 214-c.

¹⁶⁹ N.Y. CIV. PRAC. L. & R. 213(8) ("an action based upon fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it"); *see also* N.Y. CIV. PRAC. L. & R. § 214(7) (applying the discovery rule to actions to annul a marriage based on fraud).

¹⁷⁰ N.Y. CIV. PRAC. L. & R. 214-a ("where the action [for medical, dental or podiatric malpractice] is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery of facts which would reasonably lead to such discovery").

¹⁷¹ N.Y. CIV. PRAC. L. & R. 206(b) ("Where an injury results from the representation by a person that he is an agent with authority to execute a contract in behalf of a principal, the time within which an action to recover damages for breach of warranty of authority . . . shall be computed from the time the person injured discovered the facts constituting lack of authority.").

¹⁷² Hans, *supra* note 24, at 241.

¹⁷³ TIME-BARRED ACTIONS at xiii (Francesco Berlingieri ed., 1993).

evidence due to the time lapse involved. Additionally, critics argue that the function of the statute of limitations is to prevent stale claims. Arguments against applying the discovery rule to cases of childhood sexual abuse, however, are easily overcome by the interests of those who are sexually abused as children.

Opponents of applying the discovery rule to cases of childhood sexual abuse argue that often corroboration is impossible and that physical evidence is non-existent because the abuse occurred so long ago.¹⁷⁴ Opponents further suggest that the unreliable nature of memories, coupled with the lack of evidence due to the time lapse involved, make it difficult for juries to "weigh the credibility of victim and accused," because they must "rely on revelations from psychotherapy. . . . [which] may not be a reliable source of facts."¹⁷⁵

Yet studies have shown that repressed memories are often trustworthy. Judith Herman, an associate clinical professor of psychiatry at Harvard Medical School, conducted a study in which 79% of fifty-three women in group therapy were able to obtain independent corroboration of their memories of childhood sexual abuse.¹⁷⁶ Additionally, studies of documented cases of sexual abuse illustrate that memories of abuse commonly are confined within the child's subconscious. A study at the University of New Hampshire's Family Violence Research Laboratory found that of 200 children treated for sexual abuse, one in three did not remember the incidents that were documented in their hospital records twenty years earlier.¹⁷⁷

Evidentiary problems should never outweigh a victim's opportunity to sue. As in any case, the fact-finder must weigh the credibility of the parties. Also, "[b]ecause the statute [of limitations] is automatically tolled until the child reaches the age of majority, the evidence is already old when the statute begins to run."¹⁷⁸ Fundamental fairness requires that victims

¹⁷⁴ Roan, *supra* note 68 at E6.

¹⁷⁵ Elizabeth F. Loftus & Laura A. Rosenwald, *Buried Memories Shattered Lives*, A.B.A. J., Nov. 1993, at 71.

¹⁷⁶ The women were able to verify with photographs, abuser's confessions or other evidence that the sexual abuse had, indeed, occurred. Laura A. Kiernan, *Are Repressed Memories Reliable?: Court Decision in Abuse Case Puts State in National Debate*, NEW HAMPSHIRE WKLY, Apr. 24, 1994, at 1.

¹⁷⁷ *Id.*

¹⁷⁸ Gary Hood, Note, *The Statute of Limitations Barrier in Civil Suits Brought*

have an opportunity to prove that sexual abuse occurred, and that repression or an unawareness of the causal connection between the abuse and the harm prevented the victim from bringing suit within the conventional limitations period.¹⁷⁹

The prevention of stale claims also has been thought to preclude the discovery rule from applying to cases of childhood sexual abuse.¹⁸⁰ For example, the Montana Supreme Court held that the discovery rule did not apply to a case in which an adult was unaware of the causal relationship between her injuries and the sexual abuse that had occurred when she was five to eight years old.¹⁸¹ The court refused to apply the discovery rule based on its assertion that the victim knew of the abuse when the abuse occurred. According to the court, the policy underlying the statute of limitations—namely the prevention of stale claims—outweighed the victim's lack of awareness as to

By Adult Survivors of Childhood Sexual Abuse: A Simple Solution, 1994 U. ILL. L. REV. 417, 436 (1994); see also *Tyson v. Tyson*, 727 P.2d 226, 230-37 (Wash. 1986) (dissenting opinion) (if the plaintiff brought suit within the statutory period, at age 21, the evidence would have been 10 years old. Rather, she filed suit at age 26; therefore, the evidence was 15 years old. In holding the statute of limitations barred plaintiff's suit, the majority relied on the policy argument that old evidence is unreliable. The dissent observed, "even if 'objective, verifiable evidence' were an overriding concern in this context, evidence which is now fifteen years old rather than ten years old is not logically so much less 'verifiable' that it warrants the harsh result of foreclosing a potentially meritorious claim." *Id.* at 232 (dissenting opinion)).

¹⁷⁹ *Lindabury v. Lindabury*, 552 So. 2d 1117, 1118-21 (Fla. Dist. Ct. App. 1989) (dissenting opinion) (the majority opinion held that the statute of limitations was not tolled until an adult survivor of childhood sexual abuse "rediscovered" repressed memories of the abuse), superseded by FLA. STAT. ANN. § 95.11 (7) (West Supp. 1994), ("An action founded on alleged [sexual] abuse . . . may be commenced . . . within 4 years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the abuse."). Defense attorneys have advocated the practice of hearings prior to trial where debate on the validity of repressed memories can be heard. But many in the legal field maintain that "judging the weight of the evidence should be left to a jury." Kiernan, *supra* note 176.

¹⁸⁰ "One of the most ingrained policies stems from the belief that with the passage of time, the defendant's right to repose supplants the plaintiff's right to a remedy." Handler, *supra* note 48, at 720. But see *Hammer v. Hammer*, 418 N.W.2d 23, 27 (Wis. Ct. App. 1987) ("The injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions." (quoting *Hansen v. A.H. Robins Co.*, 335 N.W.2d 578, 582 (Wis. 1983)).

¹⁸¹ *E.W. v. D.C.H.*, 754 P.2d 817 (Mont. 1988) (actions based on childhood sexual abuse must be commenced no later than "3 years after the plaintiff discovers or reasonably should have discovered that the injury was caused by the act of childhood sexual abuse"), superseded by statute, MONT. CODE ANN. § 27-2-216 (1991).

the causal connection between her injuries and the abuse.¹⁸² A few years later, the Montana legislature superseded this decision by statute.¹⁸³ Montana now allows a victim of childhood sexual abuse to commence a civil action within three years from the time she realizes the causal connection between the injuries and the abuse.

The statute of limitations encourages plaintiffs to file timely suits and is "designed to give an injured party a reasonable length of time in which to assert a claim. . . . The presumption is that one who has a legitimate claim will be diligent in enforcing it."¹⁸⁴ Although it is in the interest of society to dissuade plaintiffs from unreasonable delay in asserting their rights, "[i]deally, . . . a statute of limitations achieves a balance between the right to a remedy and the value of repose."¹⁸⁵ Even if traditionally the presumption that legitimate plaintiffs will file timely suits is proper, in cases of childhood sexual abuse that presumption is inappropriate. In these circumstances it is unfair to conclude that a plaintiff has "slept on his or her rights" if he or she was not aware of the harm or injury within the traditional limitations period.¹⁸⁶

In contrast to these weakened statute of limitations policy concerns, powerful policy arguments support tolling the statute of limitations so that victims of childhood sexual abuse can bring civil suits against their abusers. If victims of childhood sexual abuse can recover monetary damages for the harm the abuse caused, many survivors can afford to continue psycholog-

¹⁸² *E.W.*, 754 P.2d at 820.

¹⁸³ MONT. CODE ANN. § 27-2-216 (1991).

¹⁸⁴ Susan D. Glimcher, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?*, 43 U. PITT. L. REV. 501, 512-13 (1992).

¹⁸⁵ *Id.* at 514.

¹⁸⁶ *Id.*; W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 30, at 166 & n.13 (5th ed. 1984).

Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted. . . . For substantially similar reasons, it has always heretofore been accepted, as a sort of legal 'axiom,' that a statute of limitations does not begin to run against a cause of action before the cause exists, i.e., before a judicial remedy is available to the plaintiff.

Id. (quoting *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952) (dissenting opinion)). The policy question thus becomes: "if a plaintiff cannot discover an injury or its cause, even when exercising diligence, should the law nevertheless bar an action in the interest of preserving repose and promoting efficiency?" Glimcher, *supra* note 184, at 514.

ical counseling. Counseling aids survivors in learning to deal effectively with the psychological problems that resulted from the abuse. By remembering the abuse, and instituting legal action, the victim finally may be able to accept not only that the sexual abuse did occur, but also that the memories may never be fully complete. Additionally, these suits will increase the public's awareness of the long-term debilitating effects of childhood sexual abuse, and also may serve as a deterrent.¹⁸⁷ Shielding from liability a defendant accused of sexually abusing children does not outweigh the victim's right to seek redress for the abuser's "intentional actions [that] have caused the victim a lifetime of repercussions."¹⁸⁸

CONCLUSION

The number of sexually abused children is astonishing and dismaying.¹⁸⁹ Instead of living the carefree lives children ought to be able to enjoy, sexually abused children manifest severe physical, psychological and emotional problems. Sexually abused children are tormented by feelings of fear and helplessness. The overt and implied threats from the abuser burden the children with guilt and shame. In response, they develop various psychological problems, such as low self-esteem, depression, eating disorders and sleep disturbances. Additionally, many sexually abused children develop mechanisms to block the pain of the abuse, such as dissociation, repression and denial. Some sexually abused children repress all memories of the sexual abuse. Other such children grow up never realizing that their suffering is a result of the sexual abuse.

Already, thirty states have recognized the inequities that result from applying traditional statutes of limitations to cases of childhood sexual abuse. It is simply outrageous to deny adult survivors of childhood sexual abuse a day in court when the abuse itself causes the latent injuries that prevent them from filing suit within the limitations period. New York, however, has allowed the sexual abusers' right to repose to out-

¹⁸⁷ Hagen, *supra* note 46, at 374.

¹⁸⁸ Hood, *supra* note 178 at 437.

¹⁸⁹ See *supra* notes 33-35 and accompanying text for a discussion on the prevalence of childhood sexual abuse.

weigh the sexually abused victims' right to redress. New York selectively has recognized the idea that victims should not be foreclosed from judicial remedies before they are aware of their injury and its cause. Thus, New York's refusal to enact the discovery rule for adult survivors of sexual abuse is bewildering given its application of the discovery rule to medical malpractice, injury caused by Agent Orange, and latent diseases.

The proposed legislation would remove the barrier created by the traditional statute of limitations, thus allowing victims of childhood sexual abuse to institute civil claims against their abusers. The New York legislature must seize the opportunity to enact the discovery rule for victims of childhood sexual abuse. It now is incumbent upon the legislature to enact the proposed amendment into law to prevent people who sexually abuse children from using the statute of limitations as a shield from liability. New York must prevent the inequities resulting from the traditional statute of limitations in cases of childhood sexual abuse and recognize the manifest injustice of barring the claims of victims of childhood sexual abuse before they realize such a claim even exists.

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