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The Ohio Supreme Court Sets the Statute of Limitations and Adopts the Discovery Rule for Childhood Sexual Abuse Actions: Now It Is Time for Legislative Action

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**THE OHIO SUPREME COURT SETS THE STATUTE OF
LIMITATIONS AND ADOPTS THE DISCOVERY RULE FOR
CHILDHOOD SEXUAL ABUSE ACTIONS: NOW IT IS TIME
FOR LEGISLATIVE ACTION!**

- I. INTRODUCTION 499
- II. BACKGROUND OF CHILDHOOD SEXUAL ABUSE 501
- III. EFFECTS OF CHILDHOOD SEXUAL ABUSE 503
 - A. *General Physical and Psychological Effects* 503
 - B. *Memory Repression* 506
- IV. RECOVERED MEMORIES 507
- V. OHIO'S CHILDHOOD SEXUAL ABUSE STATUTE OF
LIMITATIONS 510
 - A. *Background of Statute of Limitations* 510
 - B. *The Doe Decision* 511
- VI. OHIO'S ADOPTION OF THE DISCOVERY RULE 514
 - A. *Traditional Application in Civil Actions* 514
 - B. *Application to Childhood Sexual Abuse Actions* 515
 - 1. *Background* 515
 - 2. *The Ault Decision* 516
 - 3. *Ault and Type II Cases* 518
 - 4. *The Illogic of Ault* 519
- VII. THE FUNCTION OF STATUTES OF LIMITATIONS 521
 - A. *Traditional Rationale* 521
 - B. *A Proposed Statute of Limitations* 521
- VIII. CONCLUSION 527

I. INTRODUCTION

Historically, society has closed its eyes and ears whenever the words, child sexual abuse, were mentioned. During the past few years, however, adult survivors of childhood sexual abuse began speaking out against their abusers, thus awakening America's consciousness. This once taboo subject is now often the topic of media news and television programs. This increased media attention has forced society to acknowledge the severity of child sexual abuse.

Americans now recognize that the once taboo subject of child sexual abuse is a fact of life which society must seek to address.¹

An increasing number of adult survivors of childhood sexual abuse have initiated civil actions for damages against their abusers. These claims are difficult to prosecute because the traumatic nature of child sexual abuse often prevents the victim² from confronting her abuser until many years after the abuse has ended.³ Traditionally, Ohio courts took a conservative approach toward civil claims of childhood sexual abuse and refused to apply the discovery rule to such claims. As a result, short statute of limitations prevented plaintiffs from prosecuting their claims.

How long may an adult survivor of childhood sexual abuse wait before bringing a civil claim for damages against her abuser? In 1994, the Ohio Supreme Court began answering this question. The court addressed the running of the statute of limitations for civil actions involving adult claims of childhood sexual abuse in two cases of first impression: *Doe v. First United Methodist Church*⁴ and *Ault v. Jasko*.⁵ In *Doe*, the Ohio Supreme Court recognized a one year statute of limitation period for initiating a claim of childhood sexual abuse. Just five months later, in *Ault*, the court adopted the discovery rule to allow the tolling of the statute of limitations until the victim "discovers" that she was sexually abused as a child.⁶

This Note discusses the issue of childhood sexual abuse and challenges the appropriateness of Ohio's current statute of limitations for prosecuting a civil claim of childhood sexual abuse. Part II of this Note describes the problem of child sexual abuse in our society. Part III examines the short—and long—term effects of childhood sexual abuse, particularly memory repression. Part IV reviews the theory of recovered memories and the associated problems with reliability. Part V addresses Ohio's governing statute of limitations for civil claims of childhood sexual abuse. Part VI reviews the history of the discovery rule in Ohio and its application to claims of childhood sexual abuse. Part VII examines the function of statute of limitations and proposes a new eight-year statute of limitations for childhood sexual abuse actions in Ohio. Finally, Part VIII concludes that a longer statute of limitations is now more appropriate than

¹Nina Darnton et al., *The Plain of the Last Taboo: For Many Survivors of Incest, Struggling with Suppressed Memories is the Hardest Battle of All*, NEWSWEEK, Oct. 7, 1991, at 70.

²For purposes of this article, "victim" includes all alleged victims, (male and female), of childhood sexual abuse. However, because there are proportionally many more female victims than male victims, this article uses the female pronoun when referring to victims of childhood sexual abuse.

³Russell G. Donaldson, J.D., Annotation, *Running of Limitations Against Action for Civil Damages for Sexual Abuse of Child*, 9 A.L.R. 5th 321 (1993).

⁴629 N.E.2d 402 (Ohio 1994).

⁵637 N.E.2d 870 (Ohio 1994).

⁶*Id.*

the discovery rule because of the reliability problems associated with recovered memories.

II. BACKGROUND OF CHILDHOOD SEXUAL ABUSE

Statistics on the number of victims of childhood sexual abuse⁷ are alarming even by conservative estimates. Although statistics vary according to different studies,⁸ recent surveys estimate that as many as one in three girls and one in every four to seven boys are sexually abused before they turn eighteen years old.⁹ The minimum estimates on the incidence of child sexual abuse are fifteen percent for girls and five percent for boys.¹⁰ Additionally, most cases of child sexual abuse involve a male perpetrator and a female victim.¹¹ Children are often sexually abused by someone they know and trust.¹² Rather than strangers, the abusers are often "neighbors, family friends, uncles, cousins, stepfathers, and fathers,"¹³ with most instances of child sexual abuse occurring between fathers and daughters.¹⁴

⁷The definition of child sexual abuse varies according to studies; for purposes of this note, child sexual abuse is defined as "any kind of exploitative sexual contact, attempted sexual contact, or sexual interaction between a child under the age of 18 and any adult, including a parent, stepparent, guardian, or other person in a position of trust and authority." Gregory G. Gordon, Comment, *Adult Survivors of Childhood Sexual Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule*, 20 PEPP. L. REV. 1359, n.2 (1993).

⁸These statistics vary according to each survey's definition of child sexual abuse and the manner in which the questions are asked.

⁹Leslie Miller, *Sexual Abuse Survivors Find Strength to Speak in Numbers*, USA TODAY, Aug. 27, 1992, at 6D. This study defined childhood sexual abuse as "someone older, in a position of trust, using a child for his or her own sexual satisfaction. Intercourse need not be involved; it may be exhibitionism or fondling." *Id.* Other surveys estimate that one in three girls and one in ten boys are sexually abused as children. Irene Wielawski, *Unlocking the Secrets of Memory*, LOS ANGELES TIMES, Oct. 3, 1991, at A1. A 1985 *Los Angeles Times* poll of 2627 adults, conducted by psychologist David Finkelhor, found that 27 percent of the women and 16 percent of the men said that they were sexually abused as children. *Id.*

¹⁰CHRISTOPHER BAGLEY & KATHLEEN KING, *CHILD SEXUAL ABUSE: A SEARCH FOR HEALING* 70 (1990).

¹¹Ann Marie Hagen, Note, *Tolling the Statute of Limitations For Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355, 358 (1991).

¹²BEVERLY GOMEZ-SCHWARTZ ET AL., *CHILD SEXUAL ABUSE, THE INITIAL EFFECTS* 62-3 (1990). A study by the Family Crisis Program showed that 96 percent of the perpetrators of childhood sexual abuse were men "who had some prior relationship with the child." *Id.*

¹³JUDITH LEWIS HERMAN & LISA HIRSCHMAN, *FATHER-DAUGHTER INCEST* 7 (1981). The results of the Family Crisis Program study of child sexual abuse offenders showed the following: 19 percent were natural parents; 22 percent were related to the victim; 40 percent functioned in a parental role; 47 percent lived in the same home as the victim; 33 percent were nonfamily members; 3 percent were strangers. GOMEZ-SCHWARTZ, *supra* note 12, at 62-3.

While the vast majority of cases of sexual abuse are unreported, the number of reported cases of childhood sexual abuse is also rising dramatically.¹⁵ In 1990, the nation's child protective agencies recorded 375,000 complaints of sexual abuse, increasing 450 percent from the 83,000 complaints logged in 1986.¹⁶ Moreover, the National Committee to Prevent Child Abuse has documented annually more than 200,000 cases of child sexual abuse.¹⁷ Actual numbers, however, are probably much higher because of the many cases of childhood sexual abuse that go unreported. Although the statistics vary, there is no doubt that childhood sexual abuse is a national problem requiring immediate social and legal attention.

Because of the traumatic nature and lasting effects of sexual abuse, the child often does not report the acts of abuse. A child is powerless and unable to defend herself against acts of sexual abuse by an adult.¹⁸ This power imbalance makes it impossible for a child to refuse the sexual advances of the adult.¹⁹ Furthermore, when the abuser is a father, the victim is even more powerless because a child is totally dependent on her parents for care.²⁰ Thus, if a father insists on having sexual relations with his daughter, the daughter will comply out of necessity to preserve the caretaker relationship between her and her father.²¹ The parent's mere authority over the child is enough to compel her to obey and to remain silent.²²

A child usually remains silent regarding the sexual abuse because she is afraid of the consequences of telling someone. Frequently, the abusers warn the victims not to tell anyone about the sexual encounters or threaten the victims

¹⁴Julie Schwartz Silberg, Comment, *Memory Repression: Should It Toll the Statutory Limitations Period in Child Sexual Abuse Cases?*, 39 WAYNE L. REV. 1589, 1592 (1993). Father-daughter incest is the most commonly reported type of incest. HERMAN & HIRSCHMAN, *supra* note 13, at 4.

¹⁵A study conducted by Diana E. H. Russell "found that out of six hundred and forty-eight cases of disclosed sexual abuse, only thirty were reported to law enforcement authorities." Silberg, *supra* note 14, at 1592. (citing DIANA E. H. RUSSELL, *THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN* 85 (1986)).

¹⁶Darnton, *supra* note 1, at 70-1.

¹⁷Miriam Horn, *Memories Lost and Found*, U.S. NEWS & WORLD REP., Nov. 29, 1993, at 56.

¹⁸HERMAN & HIRSCHMAN, *supra* note 13, at 97.

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*

²²*Id.*

with consequences, including bodily harm.²³ In the case of father-daughter sexual abuse, the daughter may be concerned with breaking up her family, sending her father to jail, or being blamed for the sexual activity.²⁴ Other victims fail to report the abuse because they are afraid that persons may blame them or not believe them.²⁵ In other instances, victims remain silent because they either have repressed their memories of the abuse or have failed to recognize that they are victims of sexual abuse.²⁶

III. EFFECTS OF CHILDHOOD SEXUAL ABUSE

A. General Physical and Psychological Effects

Victims of childhood sexual abuse suffer from both initial and long-term psychological effects.²⁷ Regardless of whether the sexual encounter is "brutal or tender, painful or pleasurable," it is always destructive to the child.²⁸ The sexual offender not only violates the child's body but also the child's mind and spirit.²⁹ Different circumstances surrounding childhood sexual abuse influence the trauma and effects suffered by the victim.³⁰ Scientific trends indicate that long-term effects are greater when the abuse is more frequent and longer lasting.³¹ Additional factors that affect the child's reaction include the age of

²³HERMAN & HIRSCHMAN, *supra* note 13, at 58. See *Stewart v. Kennedy*, No. C-920152, 1994 Ohio LEXIS 2296, (Ohio Ct. App. 1993), *rev'd* 639 N.E.2d 790 (Ohio 1994). Survivor of childhood sexual abuse stated that her perpetrators "threatened her, implicitly and explicitly, never to reveal the incidents of the abuse." *Id.*

²⁴HERMAN & HIRSCHMAN, *supra* note 13, at 50. See also Silberg, *supra* note 14, at 1593; Gary Hood, Note, *The Statute of Limitations Barrier in Civil Suits Brought by Adult Survivors of Child Sexual Abuse: A Simple Solution*, 94 U. ILL. L. REV. 417, 421 (1994).

²⁵DIANA H. RUSSELL, *THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN* 88 (1986).

²⁶Silberg, *supra* note 14, at 1592.

²⁷DAVID FINKELHOR ET AL., *A SOURCEBOOK ON CHILD SEXUAL ABUSE* 143 (1986). Clinical research indicates that childhood sexual abuse may play a role in the development of emotional and physical problems, ranging from initial effects during childhood to long term effects lasting throughout adulthood. *Id.*

²⁸HERMAN & HIRSCHMAN, *supra* note 13, at 4.

²⁹BAGLEY & KING, *supra* note 10, at 55.

³⁰FINKELHOR ET AL., *supra* note 27, at 165. Speculation based on clinical studies by N. A. Groth and K. MacFarlane indicated that the trauma associated with childhood sexual abuse is greater for the victim when the sexual abuse continues for a long period of time, occurs with a close relative, involves penetration, accompanies aggression, or involves participation by the child. *Id.* Additionally, the trauma may be greater when the parents are unsupportive in reacting to disclosure of the abuse and when the child is older and aware of the "cultural taboos that have been violated." *Id.*

³¹*Id.* at 165-67.

the child, the child's relationship to the perpetrator, the use of force, and the reaction of the family to disclosure of the abuse.³²

Although the effects of childhood sexual abuse vary among victims and according to the circumstances surrounding the abuse, researchers have noted common characteristics among victims. During childhood, initial effects of sexual abuse include fear, anxiety, guilt, shame, depression, low self-esteem, and inappropriate sexual behavior.³³ As adults, survivors of childhood sexual abuse continue to experience the emotional effects that they endured during childhood, but the consequences are more severe.³⁴

Depression is the most common symptom reported among adult survivors.³⁵ Other long-term effects include drug and alcohol abuse, eating disorders, and sexual dysfunction.³⁶ Adults who were sexually victimized as children have difficulty trusting others, forming interpersonal relationships, and are more likely to attempt suicide.³⁷ Perhaps the most frightening discovery is that sexually abused children are likely to continue the sexually abusive cycle in their adult lives by victimizing their own children.³⁸

Although many victims never forget that they were sexually abused, some victims block the sexual encounters from their conscious memory. Sexual abuse poses an immediate threat to the physical well-being of the child and can cause

³²*Id.* at 167-75.

The preponderance of studies indicate that abuse by fathers or stepfathers has a more negative impact than abuse by other perpetrators. Presence of force seems clearly to result in more trauma for the victim. In addition, when the perpetrators are males rather than females, and adults rather than teenagers, the effects of sexual abuse appear to be more disturbing. When families are unsupportive of the victims, and/or victims are removed from their homes, the prognosis also has been shown to be worse.

Id. at 175.

³³*Id.* at 144-52.

³⁴Hagen, *supra* note 11, at 359.

³⁵FINKELHOR ET AL., *supra* note 27, at 152.

³⁶*Id.* at 155-62.

Adult women victimized as children are more likely to manifest depression, self-destructive behavior, anxiety, feelings of isolation and stigma, poor self-esteem, a tendency toward revictimization, and substance abuse. Difficulty in trusting others and sexual maladjustment, such as sexual dysphoria, sexual dysfunction, impaired sexual self-esteem, and avoidance of or abstention from sexual activity has also been reported by empirical researchers.

Id. at 162.

³⁷*Id.* at 152-57.

³⁸JEAN RENVOIZE, *INCEST: A FAMILY PATTERN* 90 (1982). There is a strong tendency among child sexual abuse survivors either to abuse their own children or to allow others to do so, thus continuing the child sexual abuse cycle. *Id.*

debilitating psychological effects that last for years.³⁹ During childhood, victims experience confusion, terror, and pain at the hands of someone they often know, love, and trust.⁴⁰ As a result of this physical and emotional trauma, children are forced to adopt drastic self-protective measures, (i.e., defense mechanisms),⁴¹ including denial, dissociation, and repression.⁴²

To enable her to function and survive, the child may never divulge her shameful secrets or may block them altogether from her consciousness.⁴³ While the victim may not be able to physically escape the sexual abuse, psychological defense mechanisms allow the victim to block conscious awareness and memory of the abuse and to rationalize that the sexual encounter did not occur or was not abusive.⁴⁴ Defense mechanisms provide a short-term means for the child victim to cope with the traumatic nature of the sexual abuse, but the effects of the abuse last a lifetime.

Childhood sexual abuse victims often prefer to believe that the sexual abuse never occurred. Through denial, many victims refuse to accept that they were harmed by the abuse.⁴⁵ Additionally, victims may dissociate the sexual abuse by "unconsciously withdrawing all emotions from the otherwise intensely emotional abuse."⁴⁶ Dissociation describes the fragmentation of consciousness where the victim's mind detaches itself from the traumatic experience as it is occurring.⁴⁷ Dissociation allows the child to anesthetize her body and deny the physical sensations of the sexual trauma.⁴⁸ Utilization of denial and dissociation allows the victim to "lose" her memory of the abuse.

³⁹Gary M. Emsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 CRIM. L. & CRIMINOLOGY 129, 129-30 (1993).

The pathological environment of childhood abuse forces the development of extraordinary capacities, both creative and destructive. It fosters the development of abnormal states of consciousness in which the ordinary relations of body and mind, reality and imagination, knowledge and memory, no longer hold. These altered states of consciousness permit the elaboration array of symptoms, both somatic and psychological.

JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 96 (1992).

⁴⁰Karen A. Olio, *Memory Retrieval In the Treatment of Adult Survivors of Sexual Abuse*, 19 TRANSACTIONAL ANALYSIS J. 93, 94 (1989).

⁴¹*Id.*

⁴²Hood, *supra* note 24, at 422. *See also* Gordon, *supra* note 7, at 1366.

⁴³Hood, *supra* note 24 at 422.

⁴⁴HERMAN, *supra* note 39, at 102.

⁴⁵Hood, *supra* note 24, at 422.

⁴⁶*Id.* at 423.

⁴⁷Horn, *supra* note 17, at 54.

⁴⁸Olio, *supra* note 40, at 94.

B. Memory Repression

A child may repress all memory of sexual abuse.⁴⁹ Repression is the process where a person who experiences a traumatic event "buries the memory deep in the recesses of her mind in order to avoid the stress or anxiety associated with that memory."⁵⁰ Through repression, the victim's mind pushes the unacceptable experience into the unconscious.⁵¹ Consciously aware of the abuse as it occurred, the victim subsequently represses the memory to enable her to function normally in life. Although a repressed memory is not readily accessible by conscious thought, some mental health professionals theorize that the memory remains intact in the mind and is retrievable when triggered by an event, which may occur many years after the abuse.⁵²

Most researchers agree that victims who experience traumatic events, such as childhood sexual abuse, can repress all memory of the events. How this occurs, however, remains a scientific mystery. Memory repression can result from either extreme physical injury or "mental shock."⁵³ Studies indicate that 18 to 59% of sexual abuse victims repress some or all memories of the abuse for a period of time.⁵⁴ A recent follow-up study of childhood sexual abuse victims, conducted by Linda Meyer Williams of the Family Violence Research Laboratory at the University of New Hampshire, found that of the 200 children treated for sexual abuse in the early 1970s, more than one-third of the victims had no memory of the abuse twenty years later.⁵⁵ While studies such as the one

⁴⁹Scientists recognize that under certain circumstances a child is more likely to repress her memories of the sexual abuse. A child who is sexually abused at an early age is more likely to repress her memory of the abuse than a child who is sexually abused at an older age. Ernsdorff & Loftus, *supra* note 39, at 137. Furthermore, a child is more likely to repress her memory of the abuse when it is particularly violent or intrusive or when the sexual abuse occurs over a long period of time. *Id.*

⁵⁰Ernsdorff & Loftus, *supra* note 39, at 132. The theory of memory repression was first addressed by Sigmund Freud. Freud theorized that the conscious mind represses anxiety provoking ideas. Nancy Wartik, *A Question of Abuse*, AMERICAN HEALTH: FITNESS OF BODY AND MIND, May 1993, at 64. Based on his early work with women, Freud concluded that many of the women were abused as children and that their repressed memories of the abuse were causing their emotional problems. *Id.* When his colleagues questioned his theory, Freud changed his position on repression by saying that the women's memories of sexual abuse were fantasies. *Id.*

⁵¹Ernsdorff & Loftus, *supra* note 39, at 133.

⁵²*Id.* at 132.

⁵³*Id.* at 133.

⁵⁴Horn, *supra* note 17, at 56.

⁵⁵*Id.* Furthermore, Judith Herman's 1987 study found that two-thirds of the women attending incest survivor groups experienced "partial or complete memory lapses" at some time after the sexual abuse. Minouche Kandel & Eric Kandel, *Flights of Memory*, DISCOVER, May 1994, at 34. A USC study of 450 sexual abuse victims indicated that nearly 60 percent experienced some "amnesia" regarding the sexual encounters. Wartik, *supra* note 50, at 65.

conducted by Williams support the theory that a victim may repress all memory of the childhood abuse, little evidence is available to support the theory that a victim can accurately recover the once repressed memory.

IV. RECOVERED MEMORIES

Although a victim may never remember repressed incidents of childhood sexual abuse, some victims apparently recover these memories. These victims usually recover the memories when they are adults, years after the abuse has ended. Some researchers believe that once the victim is removed from the traumatic environment her memory may spontaneously resurface either "gradually in fragments" or "suddenly in vivid flashbacks."⁵⁶ Memory fragments often consist of "stirrings" and "flickers" where the victim recovers the memory little by little.⁵⁷ When repressed memories return as flashbacks, the victim vividly relives the traumatic experience as if it were currently happening.⁵⁸ Furthermore, the recovered memory is usually preceded by a "triggering" event. Such triggering events include "giving birth, breaking an addiction, engaging in sexual intercourse, recalling the feel of a couch, encountering a particular scent, seeing a light fixture similar to one in a childhood bedroom . . . and hearing or reading stories of other sexual abuse victims."⁵⁹ While some victims' memories resurface naturally or spontaneously, other victims do not recover memories of the childhood sexual abuse until they receive therapy or counseling for other psychological problems.

Medical and psychological professionals are divided over the issue of whether a person can accurately recover a repressed memory. Generally, the reliability of recovered memories is questioned for two key reasons. First, the memory process is dynamic rather than static. Second, there is very little empirical and scientific data to support the reliability of recovered memories.

"The idea that memory preserves an exact record which can be retrieved in its original entirety does not hold up under study."⁶⁰ Studies indicate that a person's original memory is constantly and permanently altered by intervening circumstances and experiences and may incorporate information from outside sources into past memories.⁶¹ Studies show that the three stages

⁵⁶Kandel & Kandel, *supra* note 55, at 34.

⁵⁷Darnton, *supra* note 1, at 71.

⁵⁸Olio, *supra* note 40, at 97. "[F]lashbacks involve a wide range of sensory experiences, including physical sensations (e.g., someone grabbing her), visual images (e.g., shadowy figures emerging or previously neutral sights becoming frightening), or auditory phenomena (e.g., someone whispering, heavy breathing, the sound of footsteps)." *Id.*

⁵⁹Silberg, *supra* note 14, at 1596.

⁶⁰Olio, *supra* note 40, at 95.

⁶¹*Id.*

of memory—perception, retention, and retrieval—are "susceptible to influence and suggestion."⁶² While studies indicate that all memory is continually reconstructed and updated,⁶³ the question of whether repressed memories are more susceptible to updating than conscious memories has not been fully answered.⁶⁴ Lack of empirical data to refute the theory that repressed memories, like standard memories, are reconstructed and updated leads one to believe that some recovered memories are not an accurate and reliable remembrance of a childhood experience. The reliability of recovered memories is questioned further when the victim allegedly recovers the memories of childhood sexual abuse through external pressure, such as psychotherapy.

Unlike a survivor who has lived with the memory that she was sexually abused as a child, a survivor who recovers memories through counseling usually either has no initial memory of the abuse or only has a vague feeling that something is wrong. Moreover, the reliability of childhood sexual abuse memories recovered through psychotherapy is questioned for several reasons. First, memory is susceptible to suggestion and implantation by the treating therapist; second, therapists do not follow uniform guidelines when treating a patient; third, few clinical studies support recovered memories; and finally, the memory's accuracy is not the primary concern of the therapist.

"[H]undreds of studies during the past 20 years have demonstrated the ease with which memory can be distorted by suggestion, misinformation, and leading questions."⁶⁵ Similar studies indicate that a therapist may implant memories of childhood sexual abuse into a patient's mind. A person seeking counseling for "depression, eating disorders, marital difficulties, or other

⁶²Ault v. Jasko, 637 N.E.2d 870, 875 (Ohio 1994) (Wright, J., dissenting). The retrieval stage is especially susceptible to "new inputs and suggestive questioning." *Id.* See also Ernsdorff & Loftus, *supra* note 39, at 155-58. Standard memories consist of three phases: perception, retention, and retrieval. *Id.* During the perception phase, the person experiences an event and commits it to memory. *Id.* at 156. The accuracy of the memory is influenced by factors including: "time of exposure, familiarity with the subject, and stressfulness of the event." *Id.*

The retention phase is the time period after the experience during which the memory is stored. Ernsdorff & Loftus, *supra* note 39, at 156. During retention, the person is exposed to new information that may influence her recollection of the past experience. *Id.* Studies indicate that this "misinformation effect," which can be induced, produces erroneous memories. *Id.* Furthermore, "as time passes, memory becomes increasingly malleable and susceptible to new information." *Id.* at 157.

Finally, the last phase consists of the retrieval of the memory. Experiments indicate that memory retrieval is influenced by external factors including: "the environment in which the memory is retrieved, [the] expectations created in the subject's mind, the techniques used to retrieve the memory, and [the] persons present." *Id.* at 158. Thus, while little is known about recovered memories, there is considerable scientific data indicating that standard memories may be altered from their original state.

⁶³Olio, *supra* note 40, at 95.

⁶⁴*Id.*

⁶⁵Elizabeth F. Loftus & Laura A. Rosenwald, *Buried Memories Shattered Lives*, 79 A.B.A.J. 70, 73 (Nov. 1993).

common problems" may emerge from therapy believing that she was sexually abused as a child because her therapist informs her that her symptoms indicate that she was sexually abused as a child and that she has repressed memories of the abuse.⁶⁶ Furthermore, the environment surrounding the patient's recovered memory also may influence the accuracy of the memory. Expectations created by attending counseling in group therapy or with a childhood sexual abuse specialist may cause the patient to create false memories of abuse, because the patient wants to experience a "break through" and please her therapist.⁶⁷

The reliability of recovered memories is also questioned because therapists do not follow uniform guidelines. Therapists use a variety of techniques to help patients retrieve repressed memories, including drug therapy, hypnosis, and dream analysis.⁶⁸ If a patient does not remember what happened to her, some therapists will encourage her to "guess" or "tell a story" to help her regain her memory.⁶⁹ While researchers have scientifically demonstrated that a patient's memory is susceptible to suggestion through these types of methods, recovered memory therapists have produced only anecdotal reports to support their practices and the reliability of the recovered memories.⁷⁰

Additionally, recovered memories of childhood sexual abuse may not be accurate because the accuracy of the memory is usually not the primary concern of the therapist. Psychotherapy is a healing technique; it is not a search for the truth.⁷¹ The therapist's primary concern is the patient's rehabilitation and psychological healing. If the therapist can rehabilitate the patient by helping her recall a repressed memory, the therapist will encourage the patient

⁶⁶Leon Jaroff, *Lies of the Mind; Repressed-Memory Therapy is Harming Patients, Devastating Families and Intensifying a Backlash Against Mental-Health Practitioners*, TIME, Nov. 29, 1993, at 52. A therapist may influence the patient's memory by telling her that her symptoms are common among victims of childhood sexual abuse and that she may have repressed her memory because of the traumatic nature of the abuse. Ernsdorff & Loftus, *supra* note 39, at 158-59. See, e.g., *Ault v. Jasko*, 687 N.E.2d 870 (Ohio 1994). In that case, the victim sought professional help for depression and anxiety. *Id.* at 877 (Wright, J., dissenting). "Her treatment included therapy and medication from a social worker, a psychologist and a psychiatrist." *Id.* Through this therapy, the plaintiff allegedly recovered repressed memories of the childhood sexual abuse by her father. *Id.*

⁶⁷Ernsdorff & Loftus, *supra* note 39, at 158-59.

⁶⁸*Ault*, 637 N.E.2d at 876. In one Ohio case, a therapist, on over one hundred and forty-one occasions, injected a patient with sodium pentothal and subsequently interviewed her to help discover repressed traumatic events hidden in her subconscious. *Joyce-Couch v. DeSilva*, 602 N.E.2d 286, 288-89 (Ohio App. 1991). During the interviews, the therapist learned that the patient was sexually abused as a child by her mother. *Id.*

⁶⁹Olio, *supra* note 40, at 95.

⁷⁰Loftus & Rosenwald, *supra* note 65, at 73.

⁷¹*Id.* at 71.

to recall that memory regardless of whether it is fact or fantasy.⁷² Thus, while a therapist may help a patient recover a memory of childhood sexual abuse, the recovered memory may not be accurate.⁷³ Moreover, false recollections of sexual abuse have serious repercussions in the litigation context.

V. OHIO'S CHILDHOOD SEXUAL ABUSE STATUTE OF LIMITATIONS

A. Background of Statute of Limitations

"Statutes of limitations are legislatively mandated time limits within which civil actions must be brought."⁷⁴ The time period during which a plaintiff must bring a civil action is determined by the "nature of the demand and the ground of the action."⁷⁵ Section 2305.03 of the Ohio Revised Code states that a claimant may commence a civil action, unless the statute prescribes a different limitation, "only within the period prescribed in sections 2305.03 to 2305.22, inclusive."⁷⁶ Absent legal or equitable grounds for tolling the statute, a claim is barred if the plaintiff does not commence the action within the specified time period after the cause of action arises.⁷⁷

The statute of limitations for a civil claim commences to run when a cause of action accrues.⁷⁸ Generally, a cause of action accrues at the moment the defendant's wrongful conduct injures the plaintiff, "if the injury, however

⁷² Ault, 637 N.E.2d at 876-77.

⁷³ During the past few years, people claiming to be victims of false accusations of child sexual abuse began fighting back against recovered memory therapy. The False Memory Syndrome Foundation, which was co-founded in 1992 by Pamela Freyd, works to publicize the problems associated with recovered memory therapy and to help the victims of recovered memory therapy. Jaroff, *supra* note 66, at 55. False claims of childhood sexual abuse also appear to be rising. In its first two years, the False Memory Syndrome Foundation has heard from more than 13,000 people who claim to be victims of false accusations of child sexual abuse and more than 160 former patients of recovered memory therapists who have since recanted their allegations of abuse. Mark Hansen, *More False Memory Suits Likely: Critics Buoyed by Father's Verdict Against Daughter's Psychotherapists*, 80 A.B.A.J. 36, 36-7 (Aug. 1994).

Furthermore, false accusations of child sexual abuse has resulted in both former patients and persons who the patients accused of child sexual abuse, suing therapists. In a recent California case, a jury awarded \$500,000 to a father who sued two psychotherapists for implanting false memories of childhood sexual abuse into his daughter's mind. *Id.* at 36. In *Joyce-Couch v. DeSilva*, 602 N.E.2d 286 (Ohio App. 1991), the Clermont County Court of Appeals upheld a malpractice award to a patient against her therapist for improper recovered memory therapy.

⁷⁴ Gordon, *supra* note 7, at 1370 n.73 (citing RESTATEMENT (SECOND) OF TORTS § 899 (1977)).

⁷⁵ 66 OHIO JUR. 3D *Limitations and Laches* § 16 (1986).

⁷⁶ OHIO REV. CODE § 2305.03 (1993).

⁷⁷ *Id.*

⁷⁸ 66 OHIO JUR. 3D *Limitations and Laches* § 63 (1986).

slight, is complete at the time of the act."⁷⁹ Absent legislative definition, the judiciary determines when the cause of action accrues.⁸⁰ Furthermore, statutes of limitations are tolled in certain situations. For example, if the person entitled to bring an action is a minor (i.e., less than eighteen years of age) when the cause of action accrues, that person may bring her claim within its respective statutory time period after she reaches the age of majority.⁸¹ Similarly, statutes of limitations are tolled during the time period that the person entitled to bring a claim is of "unsound mind."⁸²

In Ohio, a cause of action for childhood sexual abuse is governed by the one-year statute of limitations for assault and battery.⁸³ Section 2305.111 of the Ohio Revised Code, *Actions for Assault or Battery*, states that a cause of action for assault and battery accrues on the date the alleged assault and battery occurred unless the plaintiff does not know the identity of the perpetrator at that time.⁸⁴ The Ohio Supreme Court first recognized that the statute of limitations for assault and battery applies to claims based on acts of childhood sexual abuse in *Doe v. First United Methodist Church*, a case which did not involve repressed memory.⁸⁵

B. The Doe Decision

In *Doe*, a twenty-five year old man brought a cause of action for childhood sexual abuse against his former high school choir director.⁸⁶ The plaintiff alleged that while he was a high school student, the choir director initiated two hundred to three hundred homosexual contacts with him without his con-

⁷⁹*Id.*

⁸⁰*O'Stricker v. Jim Walter Corp.*, 447 N.E.2d 727, 730 (Ohio 1983).

⁸¹Ohio Rev. Code § 2305.16 (1993).

⁸²*Id.*

⁸³*Doe v. First United Methodist Church*, 629 N.E.2d 402, 407 (Ohio 1994).

⁸⁴Ohio Rev. Code § 2305.111 (1994). Section 2305.111 of the Ohio Revised Code, *Actions for Assault or Battery*, states the following:

An action for assault or battery shall be brought within one year after the cause of the action accrues. For the purposes of this section, a cause of action for assault or battery accrues upon the later of the following:

- (A) The date on which the alleged assault or battery occurred;
- (B) If the plaintiff did not know the identity of the person who allegedly committed the assault or battery on the date which it allegedly occurred, the earlier of the following dates:
 - (1) The date on which the plaintiff learns the identity of that person;
 - (2) The date on which, by exercise of reasonable diligence, he should have learned the identity of that person.

Id.

⁸⁵*Id.* at 537.

⁸⁶629 N.E.2d 402, 404 (Ohio 1994).

sent.⁸⁷ After graduating from high school, the plaintiff became preoccupied with his sexual identity, experienced "severe emotional trauma," and suffered from depression, guilt, anxiety, and anger.⁸⁸ About five years later, when the plaintiff was twenty-three years old, he sought psychological counseling to help him cope with his emotional problems.⁸⁹ At his first consultation, the plaintiff told his psychologist that he was sexually abused while attending high school.⁹⁰

The *Doe* plaintiff was twenty-five when he filed a complaint in July of 1991, seeking recovery against his alleged abuser for battery, negligence, and intentional infliction of emotional distress.⁹¹ The acts of sexual abuse on which the plaintiff's action was predicated allegedly occurred between 1981 and 1984 when the plaintiff was a teenager.⁹² The defendant moved for summary judgment arguing that the plaintiff's claim was time barred by the one-year statute of limitations, which began to run on July 7, 1984, the plaintiff's eighteenth birthday.⁹³ The trial court granted the defendant's summary judgment motion and held that all of the plaintiff's claims based on sexual abuse were time barred.⁹⁴ On appeal, the Lorain County Court of Appeals affirmed the trial court's judgment.⁹⁵ The Ohio Supreme Court affirmed with the following holding:

[A] minor who is the victim of sexual abuse has one year from the date he or she reaches the age of majority to assert any claims against the perpetrator arising from the sexual abuse where the victim knows the identity of the perpetrator and is fully aware of the fact that a battery has occurred.⁹⁶

In reaching this conclusion, the Ohio Supreme Court first recognized that the statute of limitations for assault and battery governs all claims based on acts of sexual abuse.⁹⁷ The court reasoned that a plaintiff's claim of childhood sexual abuse is governed by the statute of limitations for assault and battery regardless of whether his complaint is based on a theory of battery, negligence,

⁸⁷*Id.* at 405.

⁸⁸*Id.* at 408.

⁸⁹*Id.*

⁹⁰*Id.* at 408.

⁹¹*Doe*, 629 N.E.2d at 404.

⁹²*Id.*

⁹³*Id.* at 405.

⁹⁴*Id.*

⁹⁵*Id.* at 406.

⁹⁶*Doe*, 629 N.E.2d at 409.

⁹⁷*Id.* at 407.

or intentional infliction of emotional distress.⁹⁸ "A person is subject to liability for battery when he acts intending to cause a harmful or offensive contact and when a harmful contact results."⁹⁹ The court followed its reasoning in *Love v. Port Clinton*¹⁰⁰ that "[w]here the essential character of an alleged tort is an intentional, offensive touching, the statute of limitations for assault and battery governs even if the touching is pled as an act of negligence."¹⁰¹ Because a cause of action for childhood sexual abuse is predicated upon intentional acts of offensive conduct (i.e., acts of sexual battery), the statute of limitations for assault and battery controls.¹⁰²

The basis for the *Doe* decision was that when the victim reached the age of majority, he knew that the choir director had sexually abused him. The court recognized that although the victim may not have discovered the magnitude of his psychological injuries until he went for counseling, the statute of limitations still commenced when the victim turned eighteen knowing that he had been sexually abused.¹⁰³ The court reasoned that "[n]othing in law, or in fact" precluded the victim from asserting a claim during the time period of one year from majority.¹⁰⁴ The court, however, qualified its holding by noting that this claim of sexual abuse did not involve a child of tender years, incest, memory repression, or psychological disability.¹⁰⁵

⁹⁸*Id.*

⁹⁹*Love v. Port Clinton*, 524 N.E.2d 166, 167 (Ohio 1988). (citing RESTATEMENT (SECOND) OF TORTS § 13 (1965)).

¹⁰⁰524 N.E.2d 166 (Ohio 1988).

¹⁰¹*Doe*, 629 N.E.2d at 407.

¹⁰²*Id.*

¹⁰³*Id.* at 408.

¹⁰⁴*Id.*

¹⁰⁵*Id.* 410. In reaching its decision in *Doe*, the Ohio Supreme Court stated that "the case at bar does not involve any impediment which might have precluded appellant from asserting his claim in a timely fashion." *Doe*, 629 N.E.2d at 410. Implicitly, the court recognized that in childhood sexual abuse cases involving a child of tender years, incest, repressed memory, or psychological disability, impediments may preclude a plaintiff from asserting her claim in a timely fashion.

As previously noted, the effects of childhood sexual abuse can be both physically and mentally devastating to the victim. Although a victim knows that she was sexually abused, the surrounding circumstances or the physical or emotional effects of childhood sexual abuse may prevent her from confronting her perpetrator and filing a claim. This is especially true if the perpetrator is her father. The *Doe* court appears to have taken this into account by noting that this case did not involve incest or a child of tender years. *Id.* According to the facts in *Doe*, the victim sought counseling to help him deal with his psychological problems that were directly caused by the childhood sexual abuse. While the time period for the statute of limitations was running, the victim was suffering from severe emotional trauma, including depression, guilt, and anxiety. *Id.* at 404-08. Query whether the Ohio Supreme Court would have reached the same decision if the plaintiff

VI. OHIO'S ADOPTION OF THE DISCOVERY RULE

A. *Traditional Application in Civil Actions*

The discovery rule provides that a "cause of action does not arise until the plaintiff knows or, by the exercise of reasonable diligence should have known, that he or she has been injured by the conduct of [the] defendant."¹⁰⁶ The rationale for the discovery rule is justice and fairness. Application of the discovery rule "eases the unconscionable result to innocent victims who by exercising even the highest degree of care could not have discovered" their injury.¹⁰⁷ Allowing the "discovery" of the injury to trigger the statute of limitations gives the injured plaintiff time to seek a remedy on the merits of the claim without unduly prejudicing the defendant.¹⁰⁸

The United States Supreme Court first applied the discovery rule in 1949 in the landmark case of *Urie v. Thompson*.¹⁰⁹ The *Urie* Court held that in a worker's negligence claim against his employer for exposing him to the disease of silicosis, the injury occurred "only when the accumulated effects of the deleterious substance" manifested themselves (i.e., when the worker discovered he had the disease).¹¹⁰ Twenty-three years after *Urie*, the Ohio Supreme Court applied the discovery rule in *Melnyk v. Cleveland Clinic*,¹¹¹ a medical malpractice case.

In *Melnyk*, the Court held that when a physician negligently leaves metallic forceps and a sponge inside a patient's body during surgery, the running of the statute of limitations governing a claim is "tolled until the patient discovers, or by the exercise of reasonable diligence should have discovered, the negligent act."¹¹² Since 1972, the Ohio Supreme Court has applied the discovery rule in cases involving asbestos injuries,¹¹³ medical malpractice,¹¹⁴ legal

alleged that the psychological effects of childhood sexual abuse amounted to a "psychological disability" which prevented him from bringing his claim in a timely fashion.

¹⁰⁶*Ault v. Jasko*, 637 N.E.2d 870, 871 (Ohio 1994).

¹⁰⁷*Oliver v. Kaiser Community Health Found.*, 449 N.E.2d 438, 441 (Ohio 1983).

¹⁰⁸*Id.*

¹⁰⁹337 U.S. 163 (1949).

¹¹⁰*Id.* at 170.

¹¹¹290 N.E.2d 916 (Ohio 1972).

¹¹²*Id.*

¹¹³*O'Stricker v. Jim Walter Corp.*, 447 N.E.2d 727 (Ohio 1983). In this case involving asbestos related injuries, the court held that when an injury is not readily apparent, the cause of action accrues when the plaintiff knows or in the "exercise of reasonable diligence should have known" that he has been injured. *Id.* at 727-33.

¹¹⁴*Oliver v. Kaiser Community Health Found.*, 449 N.E.2d 438 (Ohio 1983). "Cause of action for medical malpractice accrues and the statute of limitations commences to run when the patient discovers, or in exercise of reasonable care and diligence should

malpractice,¹¹⁵ DES-injuries,¹¹⁶ and hospital negligence.¹¹⁷ Most recently, in *Ault v. Jasko*, the Ohio Supreme Court expanded application of the discovery rule "to toll the statute of limitations where a victim of childhood sexual abuse represses memories of that abuse until a later time."¹¹⁸

B. Application to Childhood Sexual Abuse Actions

1. Background

Generally, the plaintiff's argument for application of the discovery rule in a claim of childhood sexual abuse is that "to maintain functional sanity," the victim "literally and excusably" repressed all or critical aspects of the abuse.¹¹⁹ The plaintiff argues that the court should apply the discovery rule and treat her as if she had never known about the abuse until her conscious awareness of it was restored either by a spontaneous triggering mechanism or by psychotherapy.¹²⁰ In determining whether to apply the discovery rule to civil claims of childhood sexual abuse, courts have divided the cases into two types: Type I and Type II. In a Type I case, the victim alleges that she repressed all memory of the childhood sexual abuse until shortly before she filed the claim, which is usually well after the statute of limitations has expired.¹²¹ In a Type II case, the victim alleges that although she was aware of the sexual abuse before she reached the age of majority, she was unaware of the causal connection between the sexual abuse and her current physical and psychological problems.¹²² Courts across the country have been more willing to apply the discovery rule to Type I cases than Type II cases.¹²³

have discovered, the resulting injury." *Id.* at 443-44. See also *Allenius v. Thomas*, 538 N.E.2d 93 (Ohio 1989).

¹¹⁵*Skidmore & Hall v. Rottman*, 450 N.E.2d 684 (Ohio 1983). A "cause of action for legal malpractice accrues and the statute of limitations commences to run when the client discovers, or, in the exercise of reasonable care and diligence should have discovered, the resulting injury." *Id.*

¹¹⁶*Burgess v. Eli Lilly & Co.*, 609 N.E.2d 140 (Ohio 1993). Cause of action for DES-related injuries accrues when the patient is informed by "competent medical authority" that she has been injured by DES or where in the exercise of reasonable diligence she should have known that she was injured. *Id.*

¹¹⁷*Browning v. Burt*, 613 N.E.2d 993 (Ohio 1993) *cert. denied sub nom. St. Elizabeth Medical Ctr. v. Browning*, 114 S. Ct. 1054 (1994).

¹¹⁸*Ault v. Jasko*, 637 N.E.2d 870 (Ohio 1994).

¹¹⁹*Donaldson*, *supra* note 3, at 332.

¹²⁰*Id.*

¹²¹*Johnson v. Johnson*, 701 F.Supp 1363, 1367 (N.D. Ill. 1988).

¹²²*Id.*

¹²³For discussions on how courts have nationally applied the discovery rule in Type I and Type II cases, see generally *Gordon*, *supra* note 7; *Hagen*, *supra* note 11; *Hood*, *supra*

The Ohio Supreme Court first recognized the special circumstances of childhood sexual abuse cases and the need to toll the statute of limitations in *State v. Hensley*,¹²⁴ a criminal prosecution for acts of child sexual abuse. In that decision rendered in 1991, the court held that the corpus delicti of crimes involving child abuse or neglect is discovered when a responsible adult "has knowledge of both the act and the criminal nature of the act."¹²⁵ The *Hensley* court reasoned that the state has a strong interest in protecting children of tender years, especially from acts of sexual abuse.¹²⁶ Moreover, the court recognized that a childhood sexual abuse victim often internalizes the abuse and blames herself and that the "mental and emotional" anguish of the childhood sexual abuse may prevent her from speaking freely about the abuse.¹²⁷ In 1994, the court applied similar reasoning and adopted the discovery rule to toll the statute of limitations in civil claims of childhood sexual abuse.

2. The *Ault* Decision

In *Ault v. Jasko*,¹²⁸ a twenty-nine year old woman brought a civil action for damages against her father for acts of childhood sexual abuse that allegedly commenced when she was twelve years old. The plaintiff filed her claim on October 22, 1991, within one year after she allegedly verified that her father had sexually abused her as a child.¹²⁹ The plaintiff alleged that she recovered memories of sexual abuse through psychotherapy when she sought professional help for depression and anxiety.¹³⁰ She alleged that she repressed all memory of the sexual abuse until she was twenty-nine years old.¹³¹

At the trial level, the defendant moved to dismiss the complaint and "asserted that any cause of action was barred by the statute of limitations."¹³² In response, the plaintiff "contended that her cause of action did not accrue

note 24; Gregory G. Sarno, J.D., Annotation, *Emotional or Psychological "Blocking" or Repression As Tolling Running of Statute of Limitations*, 11 A.L.R. 5th 588 (1993).

¹²⁴571 N.E.2d 711 (Ohio 1991).

¹²⁵*Id.* at 716. The court reasoned that its objective was "to strike a proper balance between the need to place some restrictions on the time period within which a criminal case may be brought, and the need to ensure that those who abuse children do not escape criminal responsibility for their actions." *Id.* at 714.

¹²⁶*Id.*

¹²⁷*Id.*

¹²⁸637 N.E.2d 870 (Ohio 1994).

¹²⁹*Id.* at 871.

¹³⁰*Id.* at 875 (Wright, J., dissenting).

¹³¹*Id.* at 871.

¹³²*Ault v. Jasko*, No. C.A. 92CA005344, 1993 Ohio App. LEXIS 1203, at *2 (Ohio Ct. App. Feb. 24, 1993), *aff'd* 637 N.E.2d 870 (Ohio 1994).

until October, 1990, when, through therapy, she was able to recall that she had been sexually abused and that her father was responsible for the abuse.¹³³ The trial court held that the plaintiff's action was barred by the statute of limitations and dismissed the complaint.¹³⁴ On appeal, the Lorain County Court of Appeals reversed the trial court's judgment.¹³⁵ The Ohio Supreme Court affirmed the court of appeal's judgment and held the following:

[T]he discovery rule applies in Ohio to toll the statute of limitations where a victim of childhood sexual abuse represses memories of that abuse until a later time. The one-year statute of limitations period for sexual abuse in Ohio begins to run when the victim recalls or otherwise discovers that he or she was sexually abused, or when, through the exercise of reasonable diligence, the victim should have discovered the sexual abuse.¹³⁶

In reaching its decision, the Ohio Supreme Court balanced the rights of a plaintiff and the rights of a defendant in a civil sexual abuse action. The court concluded that denying the plaintiff the opportunity to prosecute the claim, for an injury that she was "unaware existed until after the expiration of the statute of limitations," would be a greater injustice than the defendant's burden in having to defend against such claim.¹³⁷ The court reasoned that strict application of the statute of limitations should not preclude a plaintiff with a valid claim from proving that memory repression prevented her from bringing her claim in a timely manner.¹³⁸

In its *Ault* decision, the Ohio Supreme Court did not address the difference between application of the discovery rule in a Type I case (i.e., where the victim repressed all memory of the sexual abuse) and a Type II case (i.e., where the victim was aware of the sexual abuse but unaware of its consequences on her

¹³³*Id.*

¹³⁴*Id.*

¹³⁵*Id.* at 871.

¹³⁶*Ault v. Jasko*, 637 N.E.2d 870, 873 (Ohio 1994). *Ault* was a five to two decision. Chief Justice Moyer and Justice Wright dissented, basing their objections on problems of reliability and lack of scientific evidence currently associated with repressed memories and recovered memories. *Id.* at 874-77. Justice Wright's primary objection with the majority's adoption of the discovery rule was that it did not distinguish between memories recovered naturally and those recovered through psychotherapy. *Id.* at 875-77. Justice Wright stated that he would not create a "common-law rule of discovery and accrual in cases alleging sexual abuse where the victim claims to have recovered, with the aid of a therapist, a repressed memory of childhood sexual abuse." *Id.* at 877. Furthermore, both Chief Justice Moyer and Justice Wright noted that the Ohio General Assembly is the appropriate body to review all evidence and to determine whether to adopt the discovery rule to civil claims of childhood sexual abuse involving repressed memories. *Id.* at 874-77.

¹³⁷*Ault*, 637 N.E.2d at 872-873.

¹³⁸*Id.*

health). Reading *Ault* and *Doe* together, it would first appear that the court would allow application of the discovery rule in Type I but not Type II cases.

3. *Ault* and Type II Cases

A Type II plaintiff is aware when she reaches the age of majority that she was sexually abused as a child, but she is unaware of the causal connection between the sexual abuse and her current physical and/or psychological injuries. The *Ault* court held that the discovery rule tolls the statute of limitations where the victim of childhood sexual abuse represses memories of the abuse until a later time.¹³⁹ But previously in *Doe*, the court reasoned that the discovery rule does not toll the statute of limitations when the victim knows the sexual abuse occurred and when she knows the identity of the perpetrator upon reaching the age of majority, even though the victim may not have discovered the full extent of her psychological injuries until a later time.¹⁴⁰ Thus, although it would appear that a Type II plaintiff could not prosecute a claim in Ohio because she was aware of the sexual abuse when she reached the age of majority, in cases subsequent to *Ault* and *Doe*, the Ohio Supreme Court implicitly recognized that the discovery rule may apply to Type II cases.

In *Smith v. Rudler*¹⁴¹ and *Stewart v. Kennedy*,¹⁴² for example, the Ohio Supreme Court relied on *Ault* to reverse and remand two previous courts of appeals' decisions which failed to apply the discovery rule to Type II childhood sexual abuse claims. In *Smith*, the plaintiff knew when she turned eighteen in 1982 that her father had sexually abused her as a child.¹⁴³ She knew that "she had been harmed, both physically and mentally, and she knew who and what was responsible for that harm when she reached her majority of eighteen."¹⁴⁴ She did not know, however, the full extent of her harm.¹⁴⁵

The *Smith* plaintiff alleged that she was unaware that she was suffering from emotional disturbances caused by her childhood sexual abuse until she sought counseling in 1990.¹⁴⁶ She did not claim that she repressed her memory of the abuse. Similarly, in *Stewart*, the plaintiff was aware when she reached the age of majority that she had been sexually abused as a child, but she alleged that she did not discover the causal connection between her perpetrators' acts and her psychological injuries until ten years later when she underwent

¹³⁹*Id.*

¹⁴⁰*Doe*, 629 N.E.2d at 408.

¹⁴¹639 N.E.2d 66 (Ohio 1994).

¹⁴²639 N.E.2d 790 (Ohio 1994).

¹⁴³*Smith v. Rudler*, No. 92-A-1753, 1993 Ohio App. LEXIS 3967, at *8 (Ohio Ct. App. 1993), *rev'd* 639 N.E.2d 66 (Ohio 1994).

¹⁴⁴*Id.* at *12.

¹⁴⁵*Id.*

¹⁴⁶*Id.* at *2.

psychotherapy.¹⁴⁷ The *Stewart* plaintiff did not allege that she repressed her memory of the childhood sexual abuse.

The Ohio Supreme Court, therefore, has implicitly but not explicitly held that the statute of limitations is tolled until the victim discovers the causal connection between the childhood sexual abuse and her current physical and psychological injuries. The court reversed and remanded *Smith* and *Stewart* to the trial courts for consideration and application of *Ault*. Based on these two cases, the Ohio Supreme Court implicitly recognized that the discovery rule may apply to Type II childhood sexual abuse cases.

4. The Illogic of *Ault*

As a result of *Ault*, a person of any age, after any lapse of time between the alleged childhood sexual abuse and the recovered memory of such abuse, can sue her alleged abuser in Ohio for monetary damages, regardless of whether the plaintiff recovered the memories naturally or through the help of a psychotherapist.¹⁴⁸ Because recovered memories are fraught with problems of reliability, especially when the plaintiff recovers the memories through psychotherapy,¹⁴⁹ the Ohio Supreme Court should not have adopted a common-law discovery rule for civil claims of childhood sexual abuse.

The Ohio Supreme Court's adoption of the discovery rule is based on the theory that a victim of childhood sexual abuse can accurately recover her repressed memories of the abuse. This theory, however, is not supported by clinical studies nor the medical community. As previously discussed, the theory of recovered memories is not generally accepted by the medical community nor by the psychological community.¹⁵⁰ Indeed, the American

¹⁴⁷*Stewart v. Kennedy*, No. C-920152, 1993 Ohio App. LEXIS 4924, at *4 (Ohio Ct. App., Sept. 22, 1993), *rev'd* 639 N.E.2d 790 (Ohio 1994).

¹⁴⁸*Ault*, 637 N.E.2d at 874-77. *See also Doe v. Doe*, No. C-920809, 1994 Ohio App. LEXIS 1546 (Ohio Ct. App., Mar. 16, 1994), *rev'd* 639 N.E.2d 432 (Ohio 1994). In *Doe*, the plaintiff alleged that her father sexually abused her from the time when she was one year old until she was six years old. *Id.* Furthermore, she alleged that she repressed her memories of the sexual abuse and the identity of the perpetrator until February of 1991, when she allegedly recalled the abuse through psychotherapy. *Id.* The plaintiff was thirty-five when she allegedly recovered the memories of "events alleged to have occurred over thirty-years ago." *Id.* The trial court granted the defendant's motion to dismiss because of the expiration of the statute of limitations. *Id.* The Hamilton County Court of Appeals affirmed the trial court's decision, but the Ohio Supreme Court reversed and remanded the case to the trial court for application of *Ault v. Jasko*. *Doe v. Doe*, 639 N.E.2d 432 (Ohio 1994).

¹⁴⁹*See supra* notes 65-72 and accompanying text.

¹⁵⁰The psychotherapeutic community is divided over the issue of recovered memories.

Although some psychiatrists think shocking experiences really can vanish from consciousness for decades at a time, only to reemerge with crystal clarity years later, others do not. Skeptical scientists say too many accounts of long-past abuse conflict with findings on how we store and recall experience. Most recovered "memories,"

Medical Association ("AMA") has taken the position that "[s]o-called recovered memories of childhood sexual abuse are often unreliable and should not be assumed to be true."¹⁵¹ As further noted by the AMA, "[f]ew cases in which adults make accusations of childhood sexual abuse based on recovered memories can be proved or disproved," and how to distinguish "true memories from imagined events" is not known.¹⁵² Furthermore, the use of recovered memories of childhood sexual abuse is "fraught with problems of potential misapplication,"¹⁵³ especially when the memories are recovered through psychotherapy.¹⁵⁴

In applying the discovery rule to civil claims of childhood sexual abuse, the Ohio Supreme Court overlooked its historical rationale for invoking the discovery rule. Traditionally, the court has applied the discovery rule to cases of medical malpractice, legal malpractice, and latent occupational or product diseases.¹⁵⁵ In those cases, the claims were based on the discovery of "concrete" evidence of tortious conduct where proof was readily apparent.

In the medical malpractice case *Melnyk v. Cleveland Clinic*,¹⁵⁶ for example, the court reasoned that application of the discovery rule was appropriate because "proof thereof is generally unsusceptible to error." This is not the case, however, in claims of childhood sexual abuse based on the recovery of repressed memories. Whether a recovered memory is accurate and reliable is often impossible to prove. Proof of a recovered memory is not "unsusceptible to error." For these reasons, the Ohio Supreme Court should not have adopted the discovery rule to toll the statute of limitations in civil claims of childhood sexual abuse, where the plaintiff allegedly repressed all memory of the abuse and later recovered the memory. As a result, the Ohio General Assembly should enact a longer statute of limitations during which a plaintiff can prosecute a claim of childhood sexual abuse and supersede the Ohio Supreme Court's adoption of the discovery rule.

they believe, are subconscious efforts to actually resolve old hurts, in many cases spurred by an increasing number of books, support groups and psychotherapists who see sexual abuse at the root of virtually all psychic pain.

Wartik, *supra* note 50, at 64.

¹⁵¹Brenda C. Coleman, *Recovered Memories of Childhood Sexual Abuse Unreliable*, *AMA Says*, DAILY LEGAL NEWS, June 17, 1994 at 1.

¹⁵²*Id.*

¹⁵³*Id.*

¹⁵⁴*See supra* notes 65-72 and accompanying text.

¹⁵⁵*See supra* notes 112-16 and accompanying text.

¹⁵⁶290 N.E.2d 916, 917 (Ohio 1972). In that case where a physician negligently left a metallic forceps and a surgical sponge in the patient's body, a simple x-ray would easily and conclusively prove whether a person did or did not have metallic forceps and a surgical sponge in her body.

VII. THE FUNCTION OF STATUTES OF LIMITATIONS

A. *Traditional Rationale*

Statutes of limitations balance a plaintiff's right to prosecute a valid claim against the rights of defendants and the courts to be free from dealing with stale claims. Statutes of limitations are designed "to promote justice by preventing surprise through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."¹⁵⁷

The rationale underlying strict application of statutes of limitations, as recognized by the Ohio Supreme Court, is fourfold.¹⁵⁸ The first is "to ensure fairness to the defendant."¹⁵⁹ This rationale is based on the theory that a defendant's right to be free of stale claims will eventually out-weigh the plaintiff's right to prosecute the claim.¹⁶⁰ Second, statutes of limitations are designed "to encourage prompt prosecution of causes of action."¹⁶¹ A plaintiff is required to exercise reasonable diligence in presenting a tort claim against a defendant;¹⁶² statutes of limitations discourage the plaintiff from sleeping on her right to bring such a claim.¹⁶³ Third, statutes of limitations are designed "to suppress stale and fraudulent claims."¹⁶⁴ Finally, statutes of limitations help avoid inconveniences caused by delay, "specifically the difficulties of proof present in older cases," by requiring a plaintiff to initiate her claim when evidence and memories are fresh and available.¹⁶⁵

B. *A Proposed Statute of Limitations*

At least half of the states have adopted specific statutes of limitations for civil claims of childhood sexual abuse.¹⁶⁶ Twenty states have codified some form of

¹⁵⁷Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944).

¹⁵⁸O'Stricker v. Jim Walter Corp., 447 N.E.2d 727, 731 (Ohio 1983).

¹⁵⁹*Id.*

¹⁶⁰Order of R.R. Telegraphers, 321 U.S. at 349.

¹⁶¹O'Stricker, 447 N.E.2d at 731.

¹⁶²United States v. Kubrick, 444 U.S. 111, 123 (1979).

¹⁶³*Id.*

¹⁶⁴O'Stricker, 447 N.E.2d at 731.

¹⁶⁵*Id.* While "affording plaintiffs what the legislature deems a reasonable time to present their claims," statutes of limitations "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." United States v. Kubrick, 444 U.S. at 117.

¹⁶⁶See Gordon, *supra* note 7 (containing a survey of different state statutes regarding civil actions for childhood sexual abuse). See *infra* notes 166-67.

the discovery rule.¹⁶⁷ Five states have statutes of limitations allowing a plaintiff to commence a claim of childhood sexual abuse within a fixed number of years from majority or disability.¹⁶⁸ For those five states, the statutory time period during which a plaintiff may initiate a claim ranges from five to seventeen years.¹⁶⁹ To date, Ohio has not enacted a specific statute of limitations for civil claims of childhood sexual abuse.

An Ohio house bill which was introduced in 1994 and which is currently in committee, would create a statute of limitations for civil claims of childhood sexual abuse.¹⁷⁰ This bill would allow a plaintiff to prosecute an action for childhood sexual abuse within eight years from her eighteenth birthday or five years from when she discovers or reasonably should have discovered that her psychological injury was caused by childhood sexual abuse, whichever date comes later.¹⁷¹ Additionally, the bill would require that a plaintiff commencing

¹⁶⁷ See ALASKA STAT. § 9.10.140(b) (1994); ARK. CODE ANN. § 16-56-130 (Michie 1993); CAL. CIV. PROC. CODE § 340.1 (West Supp. 1995); ILL. REV. STAT. ch. 735, para. 5/13-202.2 (1994); IOWA CODE § 614.8A (1995); KAN. STAT. ANN. § 60-523 (1995); ME. REV. STAT. ANN. tit. 14, § 752-C (West Supp. 1994); MASS. GEN. LAWS ANN. ch. 260, § 4C (West Supp. 1995); MINN. STAT. ANN. § 541.073 (West 1995); MO. ANN. STAT. § 537.046 (Vernon Supp. 1995); MONT. CODE ANN. § 27-2-216 (1993); NEV. REV. STAT. § 11.215 (1993); N.J. REV. STAT. ANN. § 2A:61B-1 (West 1994); N.M. STAT. ANN. § 37-1-30 (Michie Supp. 1995); OKLA. STAT. tit. 12, § 95 (1995); OR. REV. STAT. § 12.117 (1993); S.D. CODIFIED LAWS ANN. § 26-10-25 (1995); VT. STAT. ANN. tit. 12, § 522 (Supp. 1994); VA. CODE ANN. § 8.01-249 (Michie 1995); WASH. REV. CODE § 4.16.340 (1994).

¹⁶⁸ See COLO. REV. STAT. ANN. § 13-80-103.7 (West Supp. 1995) (Plaintiff has six years from when a disability is removed to commence an action for childhood sexual abuse; disabilities include minority, mental disability, and special relationship); CONN. GEN. STAT. ANN. § 52-577d (West 1994) (plaintiff has seventeen years from the age of majority to commence an action for childhood sexual abuse); GA. CODE ANN. § 9-3-33.1 (Supp. 1995) (plaintiff has five years from the age of majority to commence an action for childhood sexual abuse); IDAHO CODE § 6-1704 (1994) (plaintiff has five years from the age of majority to commence an action for childhood sexual abuse); LA. REV. STAT. ANN. § 9:2800.9 (West 1994) (Plaintiff has ten years from the age of majority to commence an action for childhood sexual abuse).

¹⁶⁹ See *supra* note 167.

¹⁷⁰ H.B. 624, 120th Gen. Ass., Reg. Sess., 1993 Ohio H.B. 624. Introduced on February 1, 1994, this bill would prescribe a statute of limitations for a civil action for childhood sexual abuse and would establish conditions for bringing such a claim when the plaintiff is twenty-six years of age or older. *Id.*

¹⁷¹ Section B of the bill provides the following:

A civil action against an alleged perpetrator of childhood sexual abuse that seeks to recover damages for harm suffered by the plaintiff as a result of the childhood sexual abuse shall be brought within the later of eight years after the date of on which the plaintiff becomes eighteen years of age or five years after the date on which the plaintiff discovers or reasonably should have discovered that psychological injury or illness that is present after the age of eighteen was caused by the childhood sexual abuse.

H.B. 624, 120th Gen. Ass., Reg. Sess., 1993 Ohio H.B. 624.

an action after turning twenty-six years of age file with the complaint a certificate of merit executed by her attorney and by a psychiatrist or psychologist.¹⁷² As explained below, neither this bill nor Ohio's current one year statute of limitations for childhood sexual abuse claims, including the discovery rule, properly balances the plaintiff's right to prosecute a claim and a defendant's right to be free of stale and fraudulent claims.

In formulating a statute of limitations regarding claims of childhood sexual abuse, one must "strike a proper balance between the need to place some restriction on the time period within which a[n action] . . . may be brought, and the need to ensure that those who abuse children do not escape . . . responsibility for their actions."¹⁷³ Based on current Ohio law, a plaintiff who is aware that she was sexually abused as a child has one year from when she reaches the age of majority to prosecute a claim for childhood sexual abuse, and a plaintiff who represses her memory of the abuse has one year from when she discovers or should have discovered the sexual abuse to prosecute a claim.¹⁷⁴ In both scenarios, one year is too short of a time to require a victim to initiate a claim.

As previously noted, the effects of childhood sexual abuse can be mentally and physically devastating to the victim.¹⁷⁵ Although a victim knows that she was sexually abused, the surrounding circumstances or the physical or emotional effects of the abuse still may prevent her from confronting her perpetrator and filing a timely claim.¹⁷⁶ Even if the trauma of the sexual abuse

¹⁷²H.B. 624, 120th Gen. Ass., Reg. Sess., 1993 Ohio H.B. 624. Section (C)(1) of the bill states the following:

[A] person who is twenty-six years of age or older at the time he commences a civil action . . . for childhood sexual abuse shall file with the complaint a certificate of merit executed by his attorney and by a psychiatrist or a psychologist. The certificate of merit shall contain both of the following:

(A) A declaration by the attorney that he has reviewed the facts of the case, that he has consulted with at least one psychiatrist or psychologist, who the attorney reasonably believes knows the facts and issues in the case and who is not a party to the action, and that the attorney has concluded on the basis of that review and consultation that the plaintiff has reasonable and meritorious cause for filing the action.

(B) A declaration by the psychiatrist or psychologist with whom the attorney has consulted that the psychiatrist or psychologist is licensed to practice in this state, that he is not a party to the action, that he has interviewed the plaintiff and knows the facts and issues in the action, and that in the psychiatrist's or psychologist's professional opinion, based on his knowledge of the facts and issues, there is a reasonable basis to believe that the plaintiff was a victim of childhood sexual abuse.

Id.

¹⁷³*State v. Hensley*, 571 N.E.2d 711, 714 (Ohio 1991).

¹⁷⁴*Doe*, 629 N.E.2d 402 (1994). *See also Ault*, 637 N.E.2d 870 (1994).

¹⁷⁵*See supra* notes 36, 39 and accompanying text.

¹⁷⁶*See supra* notes 36-48 and accompanying text.

has not forced the victim to repress her memory of the abuse, she still may be suffering from other effects, such as depression, anxiety, alcoholism, etc., that make her mentally, emotionally, and perhaps financially unable to prosecute a claim against her childhood perpetrator. Based on current Ohio law, this type of plaintiff would have one year from the age of majority to initiate a claim unless the effects of the abuse have made her of "unsound mind."¹⁷⁷

"Unsound mind" requires a showing by the plaintiff that she was suffering from a mental deficiency that prevented her from taking care of her affairs.¹⁷⁸ Although the effects of childhood sexual abuse are severe, they usually do not render a victim of "unsound mind" as required to toll the statute of limitations. Thus, Ohio should increase the one year time requirement to accommodate the psychological effects of childhood sexual abuse that are normally not associated with traditional forms of assault and battery.

While the statute of limitations for civil claims of childhood sexual abuse should be longer than one year, Ohio should not apply the discovery rule to

¹⁷⁷Section 2305.16 of the Ohio Revised Code provides that "if a person entitled to bring any action . . . is, at the time the cause of action accrues . . . of unsound mind, the person may bring it within the respective times . . . after the disability is removed." OHIO REV. CODE ANN. § 2305.16 (Baldwin 1994). Additionally, § 2305.16 tolls the statute of limitations when the plaintiff becomes of unsound mind after the cause of action accrues:

After the cause of action accrues, if the person entitled to bring the action becomes of unsound mind and is adjudicated as such by a court of competent jurisdiction or is confined in an institution or hospital under a diagnosed condition or disease which renders him of unsound mind, the time during which he is of unsound mind and so adjudicated or so confined shall not be computed as any part of the period within which the action must be brought.

Id.

¹⁷⁸*McKay v. Cutlip*, 609 N.E.2d 1272, 1274 (Ohio Ct. App. 1992), (citing *Bowman v. Lemon* 154 N.E.2d 317, (Ohio 1926)).

Where a plaintiff claims to have been of unsound mind at the time a cause of action accrues, so as to suspend the statute of limitations, which claim is denied by the defendant, plaintiff has the burden of proving that he was suffering from some species of mental deficiency or derangement, so as to be unable to look into his affairs, properly consult with counsel, prepare and present his case and assert and protect his rights in a court of justice. . . .

Id.

In *McKay*, the plaintiff alleged that her "alcoholism and drug abuse rendered her mentally 'unsound' at the time the causes of action against her father" for childhood sexual abuse accrued. *Id.* The Lorain County Court of Appeals recognized that mere evidence of alcoholism and drug abuse was insufficient to establish "unsound mind" as required by section 2305.16. *Id.* at 1275. The court reasoned that a plaintiff must demonstrate that her condition "continually prevented the timely prosecution of the lawsuit." *Id.* (emphasis omitted). Here, the plaintiff's only proof of "unsound mind" was her own declaration; "[h]er psychologist did not express an opinion as to her ability to initiate legal proceedings against her father." 609 N.E.2d at 1274. Thus, the appellate court affirmed the trial court's granting of summary judgment for the defendant because the plaintiff failed to assert a genuine issue of material fact as to whether she satisfied the requirements of Section 2305.16 to toll the statute of limitations. *Id.* at 1274.

such claims. At this time, recovered memories are fraught with problems of reliability, especially when recovered with the encouragement of a psychotherapist.¹⁷⁹ Application of the discovery rule to cases of childhood sexual abuse is unlike historical application of the discovery rule to situations where a surgeon leaves an instrument inside a patient. In those types of medical malpractice cases, proof is generally unsusceptible to error. In contrast, recovered memories of childhood sexual abuse are highly susceptible to error, and there is usually little if any concrete evidence to support the memories. Thus, until the medical and scientific communities are able to better understand recovered memories and to distinguish true memories from imagined ones, the Ohio General Assembly should enact a statute of limitations and should not apply the discovery rule to toll the statute of limitations in civil claims of childhood sexual abuse involving repressed memories.

This Note, therefore, proposes that the Ohio General Assembly enact a new statute of limitations for civil claims of childhood sexual abuse requiring a plaintiff to initiate an action within eight years after the cause of action accrues. Similar to other actions for assault and battery, the cause of action for childhood sexual abuse accrues upon the later of the following: the date on which the sexual assault or battery occurs, or if the plaintiff did not know the identity of the perpetrator, the date on which she learns or should have learned the identity of the perpetrator.¹⁸⁰ Additionally, this statute of limitations would toll during the minority or mental disability of a plaintiff, as described in section 2306.16 of the Ohio Revised Code.

This proposed statute of limitations would not differentiate among plaintiffs who are aware when they reach the age of majority that they were sexually abused as a child, plaintiffs who are aware of the sexual abuse when they reach the age of majority but unaware of the causal connection between the sexual abuse and their current injuries, and plaintiffs who naturally recover repressed memories of the childhood sexual abuse. This statute, however, would require that any claim of childhood sexual abuse based on memories recovered through psychotherapy include a certificate of merit executed by a non-treating psychiatrist. This certificate of merit would require that a non-treating psychiatrist attest that there is a reasonable basis to believe that the plaintiff is a victim of childhood sexual abuse.¹⁸¹ Like all statutes of limitations, this

¹⁷⁹See *supra* notes 65-71 and accompanying text.

¹⁸⁰See OHIO REV. CODE ANN. § 2305.111 (Baldwin 1994). The latter part of this proposed statute, which delays the accrual of the cause of action if the plaintiff does not know the identity of the perpetrator, applies only to situations where the plaintiff is aware when she reaches the age of majority that she was abused. It does not apply as a discovery rule to situations where the plaintiff does not know the identity of the perpetrator because she repressed her memory of the sexual abuse until after the age of majority.

¹⁸¹The purpose of this additional requirement is to increase the likelihood that the claim is based on an accurate and true recovered memory. As recognized by the AMA, "in trying to enhance a person's memory a psychotherapist faces the danger of implanting false memories," and the use of such memories is "fraught with problems of

proposed statute represents an arbitrary line drawing. An eight-year statute of limitations, however, would provide plaintiffs an opportunity to prosecute a claim while protecting defendants and courts from having to deal with stale claims.

Moreover, an eight-year statute of limitations would satisfy Ohio's rationale for having statutes of limitations. An eight-year time limit will ensure fairness to the defendant by encouraging prompt prosecution of claims and suppressing stale or false claims. In any claim of childhood sexual abuse, proof is usually difficult because the alleged acts of sexual abuse occurred when the plaintiff was a child. Memories are fresher and evidence is more readily available, however, when a plaintiff is younger.¹⁸² In contrast, application of the discovery rule to claims of childhood sexual abuse contradicts the rationale of statute of limitations by allowing stale claims based on alleged recovered memories which cannot be determined to be true or false. Furthermore, unlimited application of the discovery rule does not assure an end to litigation.¹⁸³

While an eight-year statute of limitations may deny a remedy to a plaintiff who represses her memory of the abuse until after her twenty-sixth birthday, such consequences cannot be avoided until the medical and scientific communities can ensure the reliability of recovered memories.¹⁸⁴ At this point

potential misapplication." Coleman, *supra* note 150, at 1. Although having an independent psychiatrist review the patient will not ensure that the recovered memory is accurate, it will serve as necessary quality control.

The certificate of merit should be similar to that contained in H.B. 624, 120th Gen. Assembly, Reg. Sess., 1993 Ohio H.B. 624. See *supra* note 170. However, an additional requirement, not contained in House Bill 624, should require that the psychiatrist or psychologist, interviewing the plaintiff and executing the certificate of merit, is not treating the plaintiff and has not treated the plaintiff in the past. See CAL. CIV. PROC. CODE § 340.1 (e)(2) (West 1994).

¹⁸²Based on current Ohio case law, a plaintiff of any age who allegedly repressed her memory of the childhood sexual abuse, could initiate a claim of childhood sexual abuse against an alleged perpetrator. Statute of limitations should not allow claims of this type due to stale evidence and fading memories.

¹⁸³See *Doe v. Doe*, No. C-920809, 1994 Ohio App. LEXIS 1546 (Ohio Ct. App., Mar. 6, 1994), *rev'd* 639 N.E.2d 432 (Ohio 1994). In that case, a claim of childhood sexual abuse was based on recovered memories of acts of sexual abuse that allegedly occurred more than thirty years ago. *Id.*

¹⁸⁴The thought that one perpetrator of child sexual abuse will escape liability based on the running of the statute of limitations is disturbing. However, the thought of one father being falsely accused of childhood sexual abuse based on a recovered memory is equally disturbing. If all the accused defendant stood to lose was money, then application of the discovery rule might be a risk worth taking. In cases of childhood sexual abuse, however, this is not the case. A person accused of childhood sexual abuse stands to lose his family, friends, job, and reputation, regardless of whether the recovered memory later turns out to be false. In *Ault*, the Ohio Supreme Court reasoned that "application of the discovery rule is fair to defendants in light of the hardship that would be visited upon plaintiffs by refusing them a remedy for an injury they were unaware existed until after the expiration of the statute of limitations." *Ault*, 637 N.E.2d

there is insufficient scientific, empirical, and other information to enable legislatures and courts to craft a discovery rule "that will protect those accused of being abusers and those who have been abused or believe they have been abused as children."¹⁸⁵

VIII. CONCLUSION

Americans are just beginning to recognize and understand the severity of childhood sexual abuse and its lasting effects on children. The problem of childhood sexual abuse requires that Ohio lawmakers enact a statute of limitations that provides a victim with an opportunity to sue her abuser for monetary damages. But such a statute should not ignore medical and scientific realities. Neither a one-year statute of limitations nor the discovery rule properly balances a plaintiff's right to sue her alleged abuser for acts of childhood sexual abuse and a defendant's right to be free of stale and fraudulent claims. "Statutes of limitation are designed to assure an end to litigation and to establish a state of stability and repose."¹⁸⁶

As a result of *Ault v. Jasko*, the rule of law in Ohio is that a person of any age, after any lapse of time between the alleged childhood sexual abuse and the alleged recovered memory of such abuse, may sue her alleged abuser for monetary damages.¹⁸⁷ This rule of law overlooks the historical rationale of both statutes of limitations and the discovery rule. Moreover, the Ohio Supreme Court's adoption of the discovery rule is based on the theory of recovered memories, a theory which is not supported by empirical data nor the medical community. For all of these reasons, the Ohio General Assembly needs to address the issue of childhood sexual abuse and create a statute of limitations during which a plaintiff may bring a civil claim for damages against her perpetrator.

Cases of childhood sexual abuse require a civil remedy. A victim should be able to sue her perpetrator for monetary damages. Furthermore, a statute of limitations should not preclude a plaintiff, who does not discover that she was sexually abused as a child until after the statute of limitations has expired, from prosecuting a claim of childhood sexual abuse against her perpetrator. However, because at this time the reliability of recovered memories is severely questioned by the medical, psychological, and scientific communities, an eight-year statute of limitations for all civil claims of childhood sexual abuse is more appropriate than current Ohio law. Application of the discovery rule may be appropriate in years to come when the medical community better

at 872-73. The court's reasoning is reasonable and logical provided that the claim of childhood sexual abuse is based on a recovered memory that is true and accurate. If the recovered memory is not true, requiring an alleged perpetrator to defend against a false claim of childhood sexual abuse is an undue burden.

¹⁸⁵*Ault*, 637 N.E.2d at 874 (Moyer, C.J., dissenting).

¹⁸⁶*Wyler v. Tripi*, 267 N.E.2d 419, 423 (Ohio 1971).

¹⁸⁷*Ault*, 637 N.E.2d at 874 (Moyer, C.J., dissenting).

understands repressed memories and recovered memories. At this point, however, the medical community does not know how to distinguish true recovered memories of childhood sexual abuse from imagined events; thus, it is inappropriate to ask attorneys, judges, and jurors to do that exact thing. As society's awareness of childhood sexual abuse continues to develop, one can only hope that more victims will have the courage to come forward and confront their abusers before the statute of limitations expires.

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