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# STATUTE OF LIMITATIONS FOR CHILD SEXUAL ABUSE OFFENSES: A TIME FOR REFORM UTILIZING THE DISCOVERY RULE

## I. INTRODUCTION

A child at the age of nine had been sexually abused two to three times a week by her stepfather. Because of her stepfather's threats of further abuse and her mother's disregard for the criminal, sexual activities, the child was prevented from disclosing the wrongful acts to others. Her natural father became aware of the criminal, sexual acts against his daughter only after the child attempted suicide. By that time, it was too late. The stepfather escaped prosecution because the statute of limitations had expired, barring the state from commencing the criminal proceedings.<sup>1</sup>

The above scenerio is a repeated occurence in today's society. Child sexual abuse<sup>2</sup> itself is a societal injustice which has long plagued our nation. Recently, this crisis has gained the attention of legislatures throughout the country. Since the early 1980s, a number of states have undertaken statutory reform efforts to improve the handling of child sexual abuse cases in the legal system.<sup>3</sup> This recent proliferation of legislation is predominantly directed at the procedures utilized in criminal prosecution of child abuse offenders. Some of these reforms include the adoption of hearsay exceptions for the child's out-of-court statements of abuse, the removal of competency tests for child witnesses, the giving of testimony through videotape or closed circuit television, and the use of

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<sup>1</sup> These facts are taken from *State v. Danielski*, 348 N.W.2d 352, 354 (Minn. Ct. App. 1984). In *Danielski*, the district court dismissed the complaint on the ground that it was barred by the statute of limitations. *Id.* at 352. However, the appellate court, recognizing the injustice created an implied exception to toll the statutory period. *Id.* at 357.

<sup>2</sup> For purposes of this comment, the term "child sexual abuse" refers to any sexual contact ranging from fondling to intercourse with a minor.

<sup>3</sup> Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645 (1985) (suggests that the recent reform movement in child abuse matters is the result of a greater awareness of child sexual abuse and an increase in the number of reported incidents of abuse).

closed courtrooms during the child's testimony.<sup>4</sup>

Other legislative innovations concerning child sexual abuse include a statutory requirement of reporting abuse. For example, in North Carolina<sup>5</sup> any person or institution who has cause to suspect that any juvenile is abused or neglected is required to report such cases. Statutes requiring that abuse be reported specify that upon receipt of such reports the social service division must immediately inform the appropriate law enforcement agency.<sup>6</sup> Many states impose criminal sanctions or fines upon those professionals who fail to report possible cases of child abuse.<sup>7</sup> Further, the states of Ohio<sup>8</sup> and Utah<sup>9</sup> have mandated that sex offenders register their whereabouts with local and state officials.<sup>10</sup>

Despite these measures, prosecuting cases of child victimization remains difficult. This difficulty arises from the fact that many of these cases go unreported for years. Because children are often very young, confused, and feel responsible for the acts, they are afraid to report the assaults or may not even realize that what happened to them is a crime. This is especially true in incest cases, but it also occurs in cases involving molestation by nonfamily members. As a result, many cases of child sexual abuse cannot be prosecuted simply because the child did not report the abuse until years later, after the statute of limitations had expired.<sup>11</sup>

Faced with this awareness of the difficulties associated with the statute of limitations in prosecuting child sexual abuse offenses, many state legislatures have amended applicable legislation by the implementation of new exceptions to toll the running of the limitations period and by extending the period during which prosecution may be commenced. This Comment analyzes the procedures and exceptions to the statutes of limitations adopted in each state. It then endorses a procedure that grants discretion to the courts to toll the limitation period until discovery of the offense is made. This procedure takes into consideration the purposes of a statute of limitations as well as the circumstances common in child sexual abuse

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<sup>4</sup> See Comment, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 DICK. L. REV. 721 (1985).

<sup>5</sup> N.C. GEN. STAT. § 7A-543 (1986).

<sup>6</sup> See, e.g., D.C. CODE ANN. § 6-2102(a) (1989).

<sup>7</sup> See NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, SELECTED STATE LEGISLATION: A GUIDE FOR EFFECTIVE STATE LAWS TO PROTECT CHILDREN (Jan. 1985) [hereinafter GUIDE].

<sup>8</sup> OHIO REV. CODE ANN. § 2950.02 (Baldwin 1986).

<sup>9</sup> UTAH CODE ANN. § 62A-4-512 (1989).

<sup>10</sup> See GUIDE, *supra* note 7, at 18.

<sup>11</sup> *Id.* at 17.

offenses. Through the reformed exception, justice can be served against child sexual abusers who in the past were able to utilize statutes of limitations to their benefit.

## II. SURVEY OF THE STATE STATUTES OF LIMITATIONS FOR CHILD SEXUAL ABUSE OFFENSES

State legislatures, recognizing the social harm emanating from child abuse, have enacted legislation providing criminal sanctions against child abuse offenders.<sup>12</sup> However, to a certain degree, the effectiveness of any criminal legislation is determined by the enforceability of the laws against child abuse. In most states enforceability is limited by another provision, generally entitled "limitation of prosecution." A limitation of prosecution provision, or a statute of limitations, limits the enforcement of criminal legislation by limiting the period of time in which a prosecutor can bring the case to court. Thus, upon the expiration of the statutory limitation period, the state is prevented from prosecuting an alleged offender.

The limitation period for sexual offenses committed against children is predominantly prescribed by statute. Statutes of limitations are typically divided into subprovisions based upon the grade of the offense. Each gradation is provided with a specific time pe-

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<sup>12</sup> See ALA. CODE § 13A-6-66 (1975); ALASKA STAT. § 11.41.434 (1962 & Supp. 1988); ARIZ. REV. STAT. ANN. § 13-1405(8) (1978 & Supp. 1988); ARK. STAT. ANN. § 5-14-108 (1987); CAL. PENAL CODE § 261.5 (West 1980); COLO. REV. STAT. § 18-3-405 (1986); CONN. GEN. STAT. ANN. § 53a-70 (West 1958); DEL. CODE ANN. tit. 11 § 768 (1978); D.C. CODE ANN. § 22-3501 (1981); FLA. STAT. § 794.011 (1976 & Supp. 1989); GA. CODE ANN. § 26-2019 (1981); HAW. REV. STAT. § 707-736 (1985); IDAHO CODE § 18-1506 (1987 & Supp. 1989); ILL. REV. STAT. ch. 38, para. 12-15 (1979 & Supp. 1989); IND. CODE ANN. § 35-42-4-4 (West 1986); IOWA CODE § 709.3 (1979); KAN. STAT. ANN. § 21-3503 (1988); KY. REV. STAT. ANN. § 510.110 (Michie/Bobbs-Merrill 1987); LA. REV. STAT. ANN. § 14:80 (West 1986); ME. REV. STAT. ANN. tit. 17A, § 254 (1964 & Supp. 1989); MD. CRIM. LAW CODE ANN. § 27-464A (1987); MASS. GEN. LAWS ANN. ch. 265, § 24B (Law. Co-op. 1980); MICH. COMP. LAWS ANN. § 750.520(b) (West 1968 & Supp. 1989); MINN. STAT. ANN. § 609.342 (West 1987); MISS. CODE ANN. § 97-5-21 (1972 & Supp. 1989); MO. ANN. STAT. § 566.100 (Vernon 1979); MONT. CODE ANN. § 45-5-625 (1989); NEB. REV. STAT. § 28-320.01 (1985); NEV. REV. STAT. § 200.366(2)(c) (1986); N.H. REV. STAT. ANN. § 632A:2 (1986 & Supp. 1988); N.J. STAT. ANN. § 2C:24-4 (West 1982 & Supp. 1989); N.M. STAT. ANN. § 30-9-13 (1983); N.Y. PENAL LAW § 130 (McKinney 1987); N.C. GEN. STAT. § 14-27.7 (1986); N.D. CENT. CODE § 12.1-20-03 (1985 & Supp. 1989); OHIO REV. CODE ANN. § 2907.04 (Baldwin 1986); OKLA. STAT. ANN. tit. 21, § 1123 (West 1983 & Supp. 1989); OR. REV. STAT. § 163.415 (1971 & Supp. 1987); PA. STAT. ANN. tit. 18, § 3122 (Purdon 1981); R.I. GEN. LAWS § 11-37-8 (1961 & Supp. 1988); S.C. CODE ANN. § 16-3-655 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 22-22-7 (1988); TENN. CODE ANN. § 39-2-600 (1982 & Supp. 1987); TEX. PENAL CODE ANN. § 21.11 (Vernon 1989); UTAH CODE ANN. § 76-5-404.1 (1978 & Supp. 1989); VT. STAT. ANN. tit. 13, § 2602 (1974); VA. CODE ANN. § 18.2-370 (1988); WASH. REV. CODE ANN. § 9A.44.083 (1983 & Supp. 1989); W. VA. CODE § 61-8D-5 (1989); WIS. STAT. ANN. § 948.02 (West 1982 & Supp. 1989); WYO. STAT. § 6-2-300 (1977 & Supp. 1988).

riod during which commencement of prosecution against an offense of that grade may take place. For example, Hawaii's statute of limitations provides:

Time Limitations.

- (1) A prosecution for murder may be commenced at any time.
- (2) Except as otherwise provided in this section, prosecution for other offenses are subject to the following periods of limitation:
  - (a) A prosecution for a class A felony must be commenced within six years after it is committed;
  - (b) A prosecution for any other felony must be commenced within three years after it is committed;
  - (c) A prosecution for a misdemeanor or a parking violation must be commenced within two years after it is committed;
  - (d) A prosecution for a petty misdemeanor or a violation other than a parking violation must be commenced within one year after it is committed.<sup>13</sup>

The applicable limitation period for a child sexual abuse offense<sup>14</sup> in Hawaii would be three years. However, not every state's statute of limitations provision is this simple.

State legislatures have created a wide range of statutory limitation periods. Nationally, there is no consensus of an ideal limitation period or applicable exceptions. State statutes of limitations vary in the number of years, the time at which the limitation period commences, and exceptions which toll the limitation period. This Comment will first examine states with the simplest legislation and then proceed to the states with more complex statutes of limitations. States with similar legislation are categorized under general headings and analyzed accordingly.

#### A. NO STATUTORY PERIOD

Not all states have a specified statute of limitations period applicable to child sexual abuse offenses. In Alabama,<sup>15</sup> Kentucky,<sup>16</sup> and Rhode Island<sup>17</sup> there is no statute of limitations for felonies.

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<sup>13</sup> HAW. REV. STAT. § 701-108 (1985).

<sup>14</sup> In Hawaii a child sexual abuse offense is a class C felony. *See* HAW. REV. STAT. § 707-736(2) (1985). Likewise, the majority of the states classify sexual abuse of children as a felony. *See supra* note 12 and accompanying text.

<sup>15</sup> ALA. CODE § 15-3-5 (1975) states in pertinent part: "Offenses having no limitations. (a) Prosecution may commence at any time for . . . (4) Any sex offense involving a victim under sixteen years of age, regardless of whether it involves force or serious injury or death."

<sup>16</sup> KY. REV. STAT. ANN. § 500.050(1) (Michie/Bobbs-Merrill 1985) states in pertinent part: "Except as otherwise expressly provided, the prosecution of a felony is not subject to a period of limitation and may be commenced at any time."

<sup>17</sup> R.I. GEN. LAWS § 12-12-17(1) (1956 & Supp. 1988) states in pertinent part: "Stat-

Accordingly, prosecution may be commenced at any time for felonious child sexual abuse offenses in these three states.

Likewise in North Carolina, South Carolina, Virginia, West Virginia, and Wyoming, the state legislatures have remained silent with regard to any applicable statutory period of limitations.<sup>18</sup> Therefore, it is implied that prosecution may commence at any time.<sup>19</sup> The underlying rationale for not providing a bar to prosecution of certain felonies is that the interest of the state in prosecuting those crimes outweighs the benefits derived from the implementation of a limitation period.<sup>20</sup>

#### B. GENERAL STATUTORY PERIOD FOR FELONIES

Several states have enacted a specified statutory limitation period for felonies in general. In these states, the limitation period for sexual offenses committed against children is defined within the general statutes of limitations for felonies.<sup>21</sup> Generally, the period for felony statutes of limitations range between two and fifteen years.<sup>22</sup> These variations arise because states assign different weights to factors influencing a longer or shorter period of limitation: each state balances those interests supporting a longer period of limitations against those interests justifying a shorter period of

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ute of Limitations. (a) There shall be no statute of limitations for the following offenses . . . first degree child molestation sexual assault . . . ."

<sup>18</sup> In North Carolina, N.C. GEN. STAT. § 15-1 (1983), Virginia, VA. CODE ANN. § 19.2-8 (1989) and West Virginia, W. VA. CODE § 61-11-9 (1989), the statutory limitation provisions apply to prosecutions of misdemeanors only and not felonies. The penal code sections of the South Carolina and Wyoming statutes, however, do not have statutes of limitations.

<sup>19</sup> Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630 (1954) (where a statute limiting the time period for prosecution is absent, a criminal act may be prosecuted at any time after its commission).

<sup>20</sup> *Reed v. Commonwealth*, 738 S.W.2d 818, 819-20 (Ky. 1987). The indictment charged that upon five occasions, defendant engaged in sexual intercourse with his niece, a female under fourteen years of age, by forcible compulsion. Defendant contended that he was prejudiced by a delay of eight years in the bringing of charges against him. The court, however, held that under Kentucky statutes there is no time bar for commencement of prosecution when the offense is classified as a felony.

<sup>21</sup> See *supra* notes 13-14 and accompanying text.

<sup>22</sup> See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 8(2)(B) (1983), NEB. REV. STAT. § 29-110 (1985), OR. REV. STAT. § 131.125 (1987) (three years); HAW. REV. STAT. § 701-108(2) (1986) (a class A felony is six years, any other felony is three years); N.Y. CRIM. PROC. LAW § 30.10(2)(b) (McKinney 1981) (five years); LA. CODE CRIM. PROC. ANN. § 572(1) (West 1981 & Supp. 1989), OHIO REV. CODE ANN. § 2901.13 (Anderson 1983), WIS. STAT. ANN. § 939.74(1) (West 1982) (six years); MISS. CODE ANN. § 99-1-5 (1989), S.D. CODIFIED LAWS ANN. § 23A-42-2 (1988) (seven years); N.M. STAT. ANN. § 30-1-8 (1978 & Supp. 1984) (a first degree felony is 15 years, a second degree felony is six years and a third degree felony is five years).

limitations. For instance, both Hawaii<sup>23</sup> and New Mexico<sup>24</sup> provide a longer limitation period for a more serious offense and a shorter limitation period for a lesser offense. Under New Mexico's statute of limitations,<sup>25</sup> sexual penetration involving a child under thirteen years of age is a felony of the first degree,<sup>26</sup> which has a limitation period of fifteen years. Where the victim is between the age of thirteen and sixteen, the same conduct is a second degree felony,<sup>27</sup> and the period of limitation is reduced to six years. Finally, if only sexual contact occurs with a minor, it is a third degree felony<sup>28</sup> and thus subject to a three year limitation period.

In addition to the general specified periods of limitation for felonies, many state legislatures have provided specific time periods for offenses committed against minors. The Georgia<sup>29</sup> and Idaho<sup>30</sup> legislatures have provided for a longer period of limitation when an offense has been committed against a minor. North Dakota<sup>31</sup> and Pennsylvania<sup>32</sup> have also recognized the special need for a longer

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<sup>23</sup> HAW. REV. STAT. § 701-108(2) (1985). "For the most serious class of felonies, other than murder, a six year period is set, while for the other classes of felonies, three years is deemed sufficient." Commentary on HAW. REV. STAT. § 701-108(2) (1985).

<sup>24</sup> N.M. STAT. ANN. § 30-1-8 (1978 & Supp. 1984) states in pertinent part:

No person shall hereafter be prosecuted, tried or punished in any court of this state unless the indictment shall be found or information or complaint filed therefore within the time hereinafter provided:

A. for a capital felony, within fifteen years from the time the crime was committed;

B. for a first degree felony, within fifteen years from the time the crime was committed;

C. for a second degree felony, within six years from the time the crime was committed;

D. for a third or fourth degree felony, within five years from the time the crime was committed . . . .

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at § 30-9-11(A)(1).

<sup>27</sup> *Id.* at § 30-9-11(B)(1).

<sup>28</sup> *Id.* at § 30-9-13(A).

<sup>29</sup> GA. CODE ANN. § 26-503 (Harrison 1988) states in pertinent part:

Limitation of criminal prosecution, generally . . . (c) Prosecution for felonies . . . must be commenced within four years after the commission of the crime, provided that prosecution for felonies committed against victims who are at the time of the commission of the offense under the age of fourteen years must be commenced within seven years after the commission of the crime.

<sup>30</sup> IDAHO CODE § 19-402 (1985) states in pertinent part: "Commencement of prosecutions for crimes against children and other felonies. A prosecution for . . . any felony committed upon or against a minor child must be commenced within five years after the commission of the offense . . . ."

<sup>31</sup> N.D. CENT. CODE § 29-04-03.2 (1974 & Supp. 1989) states in pertinent part: "Statute of limitations as to child victim. If the victim . . . is under the age of fifteen, the applicable period of limitation, if any, does not begin to run until the victim has reached the age of fifteen."

<sup>32</sup> PA. STAT. ANN. tit. 42, § 5554(3) (Purdon 1981 & Supp. 1988) states in pertinent part:

limitation period for crimes committed against children and thus have enacted an exception applicable under such circumstances which tolls the running of the applicable limitations period for a specified number of years when the offense is committed against a minor.

### C. SPECIFIED STATUTES OF LIMITATION FOR CHILD SEXUAL ABUSE

Even a greater number of states have enacted specific legislation for limitation of prosecution for sexual offenses involving minor victims.<sup>33</sup> An examination of these statutes indicates how the legislature of individual states evaluate the various factors that determine the limitation period for child sexual abuse offenses.

Several states, in enacting a limitation period for sexual abuse offenses committed against minors, have simply specified a certain number of years in which prosecution against the alleged offender may be commenced. The specified number of years represents how each state legislature defines the ideal time period. This period takes into consideration factors of stale evidence, motivation for prosecution, and repose, and measures these factors against the state's desire for retribution, concealment of the wrongful acts, and the seriousness of the crime.<sup>34</sup> The range in the length of the statutory limitation periods illustrates the different mode of evaluation of the individual factors utilized by the different state legislatures.

Iowa<sup>35</sup> and Tennessee<sup>36</sup> have the shortest limitation period,

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Tolling of statute. Except as provided by section 5553(e) . . . the period of limitation does not run during any time when . . . (3) a child is under eighteen years of age, where the crime involves injuries to the person of the child caused by the wrongful act, or neglect, or unlawful violence, or negligence of the child's parents or by a person responsible for the child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parent.

<sup>33</sup> See, e.g., ALASKA STAT. § 12.10.020 (1962 & Supp. 1989) which states in part: Specific Time Limitation . . . (c) Even if the general time limitation has expired, a prosecution under A.S. § 11.41.410 - 11.41.460 [sexual offenses] . . . for an offense committed against a person under the age of sixteen may be commenced within one year after the crime is reported to a peace officer or the person reaches the age of sixteen, whichever occurs first. This subsection does not extend the period of limitation by more than five years.

<sup>34</sup> Uelmen, *Making Sense Out of the California Criminal Statute of Limitations*, 15 PAC. L.J. 35 (1983) (examines the factors for and against a longer or shorter period of limitations for various crimes and then compares these factors to current California law).

<sup>35</sup> IOWA CODE ANN. § 802.2 (West 1976 & Supp. 1989) states in pertinent part: "Sexual abuse of child. An information or indictment for sexual abuse in the first, second or third degree committed on or with a child under the age of ten years shall be found within four years after its commission."

<sup>36</sup> TENN. CODE ANN. § 40-2-101(c) (1977 & Supp. 1989) states in pertinent part: "Prosecution for any offense committed against a child that constitutes a criminal offense under the provisions of . . . [sexual offense listed] . . . shall be commenced no later



four years, while Massachusetts<sup>37</sup>, Missouri,<sup>38</sup> and Texas<sup>39</sup> have the longest limitation period, ten years. The remaining eight states<sup>40</sup> have enacted limitation periods which fall within these two extremes. Three of these states have determined that the optimal limitation period for child sexual abuse offenses is five years.<sup>41</sup>

Colorado also has a specific statute of limitations provision for the offense of sexual assault on a child. In Colorado the general limitation period of three years is extended to ten years when the offense is one of child sexual abuse.<sup>42</sup>

#### D. TOLLING THE STATUTE OF LIMITATIONS

An alternative approach to extending the limitation period is to provide exceptions to the prevailing general provisions when the of-

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than the date the child attains the age of majority or within four (4) years next after the commission of the offense, whichever occurs later . . . ."

<sup>37</sup> MASS. ANN. LAWS ch. 277, § 63 (Law Co-op 1980 & Supp. 1988) states, "An indictment for a crime set forth in sections . . . [sex offenses] . . . may be found and filed within ten years of the date of commission of said crime."

<sup>38</sup> MO. ANN. STAT. § 556.037 (Vernon 1979 & Supp. 1989) states that "prosecutions for unlawful sexual offenses involving a person seventeen years of age or under must be commenced within ten years after commission of the offense if the offense charged is a felony and within five years after commission of the offense if the offense is a misdemeanor."

<sup>39</sup> TEX. CRIM. PROC. CODE ANN. § 12.01(2)(d) (Vernon 1965 & Supp. 1989) (provides that prosecution for child sexual abuse offense must be commenced within 10 years from the date of the commission of the offense).

<sup>40</sup> See KAN. STAT. ANN. § 21-3106(2) (1969 & Supp. 1987), MONT. CODE ANN. § 45-1-205(1)(b) (1989) (provides a five year limitation period during which commencement of prosecution is permitted where the victim was under 18 years of age at the time the offense was committed.); PA. STAT. ANN. tit. 42, § 5552(b) (Purdon 1981 & Supp. 1989) (provides a five year limitations period); MICH. COMP. LAWS ANN. § 767.24(2) (West 1982 & Supp. 1989) (provides that prosecution may commence up until six years after the commission of the offense or until the victim reaches 21 years of age, whichever is later); VT. STAT. ANN. tit. 113, § 4501(c) (1974 & Supp. 1989) (provides a six years period of limitation if victim is under 16 years of age at the time of offense); MINN. STAT. ANN. § 628.26(c) (West 1983 & Supp. 1989) (provides a limitation period of seven years); N.D. CENT. CODE § 29-04-03.1 (1974 & Supp. 1989) (provides that prosecution may be commenced within seven years where victim is under 18 years of age); WASH. REV. CODE ANN. § 9A.04.080(1)(c) (1988 & Supp. 1989) (provides a seven year period of limitation).

<sup>41</sup> See KAN. STAT. ANN. § 21-3106(2) (1988); MONT. CODE ANN. § 45-1-205(1)(b) (1989); PA. STAT. ANN. tit. 42, § 5552(b) (Purdon 1981 & Supp. 1989).

<sup>42</sup> COLO. REV. STAT. § 16-5-401(7) (1984 & Supp. 1988) states:

When the victim at the time of the commission of the offense is a child under fifteen years of age, the period of time during which a person may be prosecuted shall be extended for an additional seven years as to a felony charged under section 18-3-404 . . . .

. . . . The intent of the general assembly in enacting § 16-5-401 (6) and (7) in 1982 was to create a ten year statute of limitations as to offenses specified in said subsections committed on or after July 1, 1979.

fense is one of child sexual abuse. These exceptions toll the applicable time period defined in the general provisions until the victim attains majority (or soon thereafter)<sup>43</sup> or until discovery of the wrongful act is made by a guardian or law enforcement agency.<sup>44</sup> A few states have utilized both types of tolling provisions, with the applicable period being the shortest of the two periods.<sup>45</sup> However, states which permit tolling the statutory period preserve a maximum time period during which prosecution must commence.<sup>46</sup>

### 1. *Attaining Majority*

For crimes involving minors and, in particular, child sexual abuse offenses, several state legislatures have extended the statutory period of limitations until the victim attains majority.<sup>47</sup> Generally, the limitation period provided by this exception will not be shorter than the general limitation period; otherwise, the latter provision applies.<sup>48</sup>

A few states<sup>49</sup> have taken this exception one step further and

<sup>43</sup> See *infra* notes 47-49 and accompanying text.

<sup>44</sup> See *infra* notes 67-69 and accompanying text.

<sup>45</sup> See ALASKA STAT. § 12.10.020(c) (1962 & Supp. 1989) (permits commencement of prosecution for a sexual offense committed against a minor, even though the general time limitation has expired, until one year after the victim reaches the age of 16 or the violation is reported to a peace officer, whichever occurs first); MASS. ANN. LAWS ch. 277, § 63 (Law. Co-op. 1980 & Supp. 1989) (provides that if the victim is under 16 years of age at the time of the commission of the offense, the limitation period is tolled until the victim reaches 16 years of age or until it is reported to a law enforcement agency, whichever occurs first); NEV. REV. STAT. ANN. § 171.095(2) (1986 & Supp. 1987) (prosecution may be commenced any time until the victim is 18 years old or until reported to the appropriate authority, whichever is earlier).

<sup>46</sup> See, e.g., ALASKA STAT. § 12.10.020(c) (1962 & Supp. 1989) states, "This subsection does not extend the period of limitation by more than five years."

<sup>47</sup> See MICH. COMP. LAWS ANN. § 767.24(2) (West 1982 & Supp. 1989) (permits commencement of prosecution within six years from the date of the commission of the crime or by the victim's twenty-first birthday, whichever is later); NEV. REV. STAT. ANN. § 171.095(2) (1986 & Supp. 1987) (permits prosecution of the offense until the victim is 18 years old if not previously reported); N.J. STAT. ANN. § 2C:1-6(b)(4) (West 1982 & Supp. 1989) (permits commencement of prosecution until two years after the victim attains eighteen years of age or within five years from the date of the commission of the crime, whichever occurs later); TENN. CODE ANN. § 40-2-101(c) (1982 & Supp. 1989) (permits commencement of prosecution at any time until the victim attains majority or within four years).

<sup>48</sup> See, e.g., ILL. ANN. STAT. ch. 38, para. 3-6(d) (Smith-Hurd 1989) which states:

When the victim is under eighteen years of age, a prosecution for criminal sexual assault . . . may be commenced within one year of the victim attaining the age of eighteen years. However, in no such case shall the time period for prosecution expire sooner than three years after the commission of the offense.

<sup>49</sup> ARK. STAT. ANN. § 5-1-109(h) (1987) states in pertinent part:

If the period prescribed in subsection (b) [three years] has expired, a prosecution may nevertheless be commenced for violations of the following offenses if, when the alleged violation occurred, the offense was committed against a minor, the violation

have tolled application of the statutory period until the victim attains majority. Thus, the applicable statutory period does not begin to run until the victim becomes of age.

## 2. *Discovery*

### a. In General

Statutes of limitations may also be tolled until discovery of the alleged offense is made by the victim or a law enforcement agency. This exception is based upon the common law "discovery rule" principle.<sup>50</sup>

Ordinarily, a statute of limitations begins to run "upon the occurrence of the last fact essential to the cause of action."<sup>51</sup> However, in jurisdictions in which the discovery rule is applicable, courts have held that the limitation period does not begin to run until the plaintiff discovered or in the exercise of diligence should have discovered all of the facts essential to the cause of action.<sup>52</sup>

The underlying rationale of the discovery rule focuses on the inequity in foreclosing a cause of action where the victim may not know of the injury or harm.<sup>53</sup> The interests of the defendant, on the other hand, are protected by employing a balancing test to determine the applicability of the discovery rule. This balancing test weighs the harm to the defendant of being forced to prosecute stale claims against the harm to a plaintiff of being deprived of a rem-

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has not previously been reported to a law enforcement agency or prosecuting attorney, and the period prescribed in subsection (b) has not expired since the victim has reached the age of eighteen (18): . . . (8) Sexual abuse in the first degree as prohibited in § 5-14-108.

FLA. STAT. ANN. § 775.15(7) (West 1976 & Supp. 1989) states, "If the victim of a violation of . . . [sex offenses listed] . . . is under the age of sixteen, the applicable period of limitations, if any, does not begin to run until the victim has reached the age of sixteen . . ."; MASS. GEN. LAWS ANN. ch. 277, § 63 (1980 & Supp. 1988) states:

Notwithstanding the foregoing provisions, if a victim of a crime set forth in . . . [includes sex offenses] . . . is under the age of sixteen at the time such crime is committed, the period of limitations for prosecution shall not commence until the victim has reached the age of sixteen or the violation is reported to a law enforcement agency, whichever occurs earlier.

<sup>50</sup> See Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191 (1985) (The discovery rule permits tolling of the statute of limitations until all the elements of the crime have been discovered. The comment argues that the application of the delayed discovery exception is appropriate for damages suffered by adult incest survivors.)

<sup>51</sup> *E.W. v. D.C.H.*, 754 P.2d 817, 819 (Mont. 1988) (The court refused to apply the discovery rule to extend the statutory limitation period in a civil action to recover damages for emotional distress resulting from sexual abuse committed against the plaintiff as a child.)

<sup>52</sup> Note, *Evidence: Discovery Rule Application in Child Abuse Actions*, 23 GONZ. L. REV. 223, 226 (1987/88).

<sup>53</sup> *Id.* at 224-225.

edy.<sup>54</sup> Therefore, the discovery rule "should be adopted only when the risk of stale claims is outweighed by the unfairness of precluding justified causes of action."<sup>55</sup>

Attempts to apply the discovery rule to toll the statute of limitations for sexual offenses committed against children have been made by plaintiffs in civil actions seeking to recover damages for emotional distress.<sup>56</sup> In the landmark case of *Tyson v. Tyson*,<sup>57</sup> the issue presented to the court was whether the discovery rule should be applied to toll the statute of limitations until the plaintiff discovers the cause of action, where the victim had blocked the illicit incidents from her conscious memory for a period extending beyond the duration of the limitation period.<sup>58</sup>

The court, in addressing its concern about the evidentiary problems surrounding stale claims, examined other fact scenarios in which the discovery rule had been applied, such as medical malpractice, products liability, and asbestos cases, and found that in each instance there was "objective, verifiable evidence" of the wrongful conduct.<sup>59</sup> The court determined that existence of this evidence diminished the risk of stale evidence by increasing the possibility that the fact finder would be able to determine the truth despite the passage of time.<sup>60</sup> However, due to the absence of such objective evidence of the allegations, the *Tyson* court refused to apply the discovery rule.<sup>61</sup> Since *Tyson*, the existence of objective, verifiable evidence as a prerequisite to application of the discovery rule has

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<sup>54</sup> See Glimcher, *Statute of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law*, 43 U. PITT. L. REV. 501 (1982).

<sup>55</sup> *Tyson v. Tyson*, 107 Wash.2d 72, 76, 727 P.2d 226, 228 (1986) (citing *United States Oil & Refinery Co. v. Dep't. of Ecology*, 96 Wash.2d 85, 93, 633 P.2d 1329, 1334 (1981)).

<sup>56</sup> See, e.g., *Tyson*, 107 Wash.2d at 72, 727 P.2d at 226; *John R. v. Oakland Unified School Dist.*, 206 Cal. App. 3d 1473, 240 Cal. Rptr. 319 (1987); *E.W. v. D.C.H.*, 754 P.2d 817 (Mont. 1988); *DeRose v. Carswell*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (1987).

<sup>57</sup> 107 Wash.2d at 72, 727 P.2d at 206.

<sup>58</sup> *Id.* at 73-74, 727 P.2d at 227. The plaintiff-victim was subject to multiple acts of sexual assault during her childhood from 1960 through 1969 but failed to file a complaint until 1983. The cause for the delay was the suppression of the alleged acts by the victim, which resurfaced only through psychological therapy undertaken several years later in 1983. *Id.* at 74, 727 P.2d at 227.

<sup>59</sup> *Id.* at 76, 727 P.2d at 228.

<sup>60</sup> "Because of the availability and trustworthiness of objective, verifiable evidence in the above cases, the claims were neither speculative nor incapable of proof. Since the evidentiary problems which the statute of limitations is designed to prevent did not exist or were reduced, it was reasonable to extend the period for bringing the actions." *Id.* at 77, 727 P.2d at 228.

<sup>61</sup> *Id.* at 77, 80, 727 P.2d at 229, 230.

been followed by several courts in other jurisdictions.<sup>62</sup>

Nevertheless, the five-four decision in *Tyson* is not without controversy. Many critics, supporting the views expressed in the dissent,<sup>63</sup> suggest that the need for objective, verifiable evidence ignores the balancing of interests test. At the very least, the balancing of interests test essentially becomes biased towards the accused when objective, verifiable evidence is required.<sup>64</sup> Furthermore, many of the courts following the *Tyson* decision have noted that the application of the discovery rule to a particular offense is the province of the legislatures and not the courts.<sup>65</sup> Other courts have suggested that legislatures should give special attention to the applicability of the discovery rule for cases involving the sexual abuse of children.<sup>66</sup>

In response to the courts, the state legislatures of Alaska, Oklahoma, and Utah<sup>67</sup> have recognized the applicability of the discovery rule to child sexual abuse offenses. For example, in Utah the statutory limitation provision provides that if the four-year period has expired, "a prosecution may nevertheless be commenced for . . . (c) sexual abuse of a child within one year after the report of offense to law enforcement officials, so long as no more than eight years has elapsed since the alleged commission of the offense."<sup>68</sup>

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<sup>62</sup> See *John R. v. Oakland Unified School Dist.*, 206 Cal. App. 3d 1473, 240 Cal. Rptr. 319 (1987); *DeRose v. Carswell*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (1987); *E.W. v. D.C.H.*, 754 P.2d 817 (Mont. 1988).

<sup>63</sup> See, e.g., Note, *supra* note 52, at 229-34.

<sup>64</sup> "Fundamental fairness, not availability of objective evidence, has always been the linchpin of the discovery rule." *Tyson*, 107 Wash. 2d at 82, 727 P.2d at 231 (Pearson, J., dissenting). The dissent suggested that the issue was simply to decide "whether notions of fundamental fairness entitle the plaintiff to try to convince a court or jury that she discovered or should have discovered her cause of action after it would otherwise have been foreclosed by the statute of limitations." *Id.* at 231 (Pearson, J., dissenting). According to the dissent, the evidentiary problems encountered by the plaintiff in trying to convince the trier of fact of the reasonableness of her late discovery should not be the court's concern. *Id.* at 231 (Pearson, J., dissenting).

<sup>65</sup> See, e.g., *id.* at 80, 727 P.2d at 230 (5-4 decision) (Goodloe, J., concurring) (concluded that it was a policy decision that should be determined by the legislature).

<sup>66</sup> See, e.g., *E.W. v. D.C.H.* 754 P.2d at 821. "While this Court is aware of the horrifying damage inflicted by child molesters, it is not for us to rewrite the statute of limitations to accommodate such claims through judicial fiat. Such a task is properly vested in the legislature."

<sup>67</sup> See *infra* note 68 and accompanying text.

<sup>68</sup> UTAH CODE ANN. § 76-1-303 (1978 & Supp. 1989). See also ALASKA STAT. § 12.10.020 (1962 & Supp. 1988), which states in pertinent part:

Specific Time Limitations . . . (c) Even if the general time limitation has expired, a prosecution under Alaska statutes § 11.41.410 - 11.41.460 [sexual offenses] for an offense committed against a person under the age of sixteen may be commenced within one year after the crime is reported to a peace officer or the person reaches the age of sixteen, whichever occurs first. This subsection does not extend the period of limitation by more than five years.

Similarly, Georgia statutorily provides for the application of the discovery rule for general offenses.<sup>69</sup> However, courts in Georgia have denied tolling the statutory period for child sexual abuse offenses by imputing the victim's knowledge of the acts to knowledge of the state. In *Sears v. State*,<sup>70</sup> for example, the victim testified that she knew of the sexual acts wrongfully committed against her when she was eleven years old, but she was not specifically aware that such conduct was criminal. She only became aware of the criminality of the conduct four years later as the result of radio and television news broadcasts.<sup>71</sup> The court held:

Where, as here the undisputed record evidence shows that the victim had knowledge of the offenses (if not their criminality) allegedly committed upon her by the appellant 'in the year 1980,' such knowledge is imputed to the State, and precludes the State from obtaining an indictment against appellant for those alleged crimes more than four years after both the offenses and the offender were known.<sup>72</sup>

Georgia, however, as a discovery rule state, stands alone on this view.

Several state legislatures have qualified the application of the discovery rule by requiring that there be either a breach of a fiduciary relationship or concealment of the crime by the accused.<sup>73</sup>

#### b. Breach of Fiduciary Obligation

A common circumstance under which several states permit toll-

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OKLA. STAT. ANN. tit. 22, § 152 (1978 & Supp. 1989) states, "Limitations in General . . . the crime of lewd or indecent proposals or acts against children, pursuant to § 1123 of Title 21 of the Oklahoma statutes, [lists other child sexual abuse offenses and other offenses] shall be commenced within five years after the discovery of the crime."

<sup>69</sup> GA. CODE ANN. § 26-503 (Harrison 1988) states, "The period within which a prosecution must be commenced under Code Section 17-3-1 . . . does not include any period in which: . . . (2) The person committing the crime is unknown or the crime is unknown. . . ."

CONN. GEN. STAT. ANN. § 53a-69 (1976) provided that where the alleged victim was under 16 years old, the offense must be brought within one year after a parent, guardian, or other competent person especially interested in the alleged victim learns of the offense. However, this section was repealed in 1987. The current applicable provision, CONN. GEN. STAT. ANN. § 54-193(b) (West 1985 & Supp. 1989) provides a one year statutory period of limitations.

<sup>70</sup> 182 Ga. App. 480, 356 S.E.2d 72 (1987).

<sup>71</sup> *Id.* at 481, 356 S.E.2d at 74.

<sup>72</sup> *Id.* see also *People v. Strait*, 152 Ill. App. 3d 599, 367 N.E.2d 768 (1977). Charges of indecent liberties with a child were dismissed because prosecution of the offense was barred by the statute of limitations. Here again, the court held that the crime was easily discoverable because the victim had knowledge. The court further stated that because the victim did not immediately report the incident to the authorities, the statutory discovery rule exception would not operate to extend the period of limitations. *Id.* at 602, 367 N.E.2d at 771.

<sup>73</sup> See *infra* notes 74-101 and accompanying text.

ing the statute of limitations until discovery of the offense is made is when a breach of a fiduciary obligation or relationship occurs. For instance, Delaware's limitation provision provides:

If the period . . . has expired, a prosecution for any offense in which the accused's acts include or constitute . . . breach of fiduciary duty . . . may be commenced within two years after discovery of the offense has been made or should have been made in the exercise of ordinary diligence by an aggrieved party or by an authorized agent, fiduciary guardian, personal representative or parent . . . who is not a party to the offense. In no case shall this provision extend the period of limitation otherwise applicable by more than an additional three years beyond the period specified in subsection (b) of this section.<sup>74</sup>

Such an exception may arguably be applied to sexual offenses committed against children. The existence of a fiduciary relationship between the accused and the child imposes an affirmative obligation upon the dominating party to make full disclosure. The failure to disclose is treated as fraudulent concealment of the cause of action by the defendant, even though no active misrepresentation is ever made.<sup>75</sup>

In Illinois, the legislature has specifically applied this discovery exception to sexual offenses:

A prosecution for any offense involving sexual conduct or sexual penetration, as defined in § 12-12 of this Code, where defendant was within a professional or fiduciary relationship with the victim at the time of the commission of the offense may be commenced within one year after discovery of the offense by the victim.<sup>76</sup>

However, in many of the other states, breach of the fiduciary obligation must be a "material element of the offense" before the limitation period may be tolled.<sup>77</sup> In *State v. Mills*,<sup>78</sup> the court de-

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<sup>74</sup> DEL. CODE ANN. tit. 11, § 205(c) (1987). HAW. REV. STAT. § 701-108(3)(a) (1985 & Supp. 1988) states:

If the period . . . has expired, a prosecution may nevertheless be commenced for:  
(a) Any offense an element of which is either fraud or a breach of a fiduciary obligation within two years after discovery of the offense by a person who has a legal duty to represent an aggrieved party, and who is himself not a party to the offense.

ME. REV. STAT. ANN. tit. 17A, § 8(5)(a) (1978) states, "If the period of limitation has expired, a prosecution may nevertheless be commenced for: (a) Any crime based upon breach of fiduciary obligation, within one year after discovery of the crime by an aggrieved party . . . ."

<sup>75</sup> See Comment, *supra* note 50, at 204.

<sup>76</sup> ILL. ANN. STAT. ch. 38, para. 3-6(e) (Smith-Hurd 1989).

<sup>77</sup> HAW. REV. STAT. § 701-108(3)(a) (1985 & Supp. 1988) states:

If the period . . . has expired, a prosecution may nevertheless be commenced for:  
(a) Any offense an element of which is either fraud or breach of a fiduciary obligation within two years after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself not a party to the offense . . . but in no case shall this provision extend the period of limitation otherwise applicable by more than six years.

financed material elements as "[t]hose constituent parts of a crime which must be proved by the prosecution to sustain a conviction." 79 In *Mills*, the state argued that the deviate sexual intercourse of defendant upon his daughter, a person under the age of sixteen years, constituted a breach of the fiduciary obligation that a father owes to his daughter.<sup>80</sup> The court, however, held that the breach of a fiduciary obligation is not a material element of the offense; thus, the exception to toll the statutory period is not applicable.<sup>81</sup> According to the statutory language, the offense of sodomy only requires that the victim be a close family relation of the defendant.<sup>82</sup> There is no explicit requirement to prove breach of a fiduciary obligation in order to obtain a conviction.<sup>83</sup> Further, the *Mills* court stated that if the legislature desired to extend the limitation period for crimes involving sexual abuse of minors, it would have done so in a clear and straightforward manner.<sup>84</sup>

### c. Concealment

Concealment of a crime is another recognized cause for tolling the statute of limitations until discovery is made. In *State v. Danielski*,<sup>85</sup> a Minnesota court utilized the doctrine of concealment as a means to toll the running of the statutory period in order to overcome certain injustices in child sexual abuse cases. Prosecution for child sexual abuse under Minnesota statute requires that the defendant both be in a position of authority over the victim and use that authority to coerce the victim to submit to the acts.<sup>86</sup> The Min-

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OR. REV. STAT. § 131.125(3)(a) (1987) states:

If the offense has as a material element either fraud or the breach of a fiduciary obligation, prosecution may be commenced within one year after discovery of the offense by the aggrieved party . . . but in no case shall the period of limitation otherwise applicable be extended by more than three years.

PA. STAT. ANN. tit. 42, § 5552(c)(1) (Purdon 1981) states, "If the period prescribed . . . has expired, a prosecution may nevertheless be commenced for: (1) Any offense a material element of which is either fraud or breach of fiduciary obligation within one year after discovery of the offense . . . ."

<sup>78</sup> 77 Or. App. 125, 711 P.2d 207 (1985).

<sup>79</sup> *Id.* at 129, 711 P.2d at 209 (quoting BLACK'S LAW DICTIONARY 467 (5th ed. 1979)).

<sup>80</sup> *Id.* at 128-29, 711 P.2d at 208.

<sup>81</sup> *Id.* at 129, 711 P.2d at 209.

<sup>82</sup> *Id.* at 128, 711 P.2d at 208.

<sup>83</sup> *Id.*; accord, *Commonwealth v. Goldhammer*, 507 Pa. 236, 241-42, 489 A.2d 1307, 1311-12 (1985) (The court held that for purposes of tolling the statute of limitations, the definition of the offense must include fraud or breach of fiduciary obligation as one of its elements. Theft by unlawful taking does not contain as a material element either fraud or breach of fiduciary obligation.)

<sup>84</sup> *Mills*, 77 Or. App. at 130, 711 P.2d. at 209.

<sup>85</sup> 348 N.W.2d 352 (Minn. Ct. App. 1984).

<sup>86</sup> MINN. STAT. § 609.342(b) (1980).



nesota court held that commission of the offense is continuing as long as the accused abuses his or her position of authority and thus the statutory period of limitation does not commence until the coercion ceases.<sup>87</sup>

The court's application of the concealment exception is justified under the doctrine of continuing offenses. The Supreme Court has held that the "[s]tatute of limitations normally begins to run when the crime is complete."<sup>88</sup> A crime is said to be complete upon the satisfaction of all of the elements of the offense.<sup>89</sup> However, under the doctrine of continuing offenses, even though all the elements of the crime have occurred, if one of the elements persists, the crime is not complete but is a continuing offense.<sup>90</sup>

In child sexual abuse cases, although each act of penetration may constitute a separate offense, as long as the same authority "that is used to accomplish criminal sexual acts against a child is used to prevent the reporting of that act," the offense is continuous and "the statute of limitations does not begin to run until the child is no longer subjected to that authority."<sup>91</sup>

Furthermore, the concealment of a crime which suspends the operation of the statute of limitations must be the result of positive acts done by the accused, calculated to prevent the discovery of the commission of the offense.<sup>92</sup> Mere silence, inaction, or nondisclo-

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<sup>87</sup> *Danielski*, 348 N.W.2d at 357.

<sup>88</sup> *Toussie v. United States*, 397 U.S. 112, 115 (1970) (quoting *Pendergast v. United States*, 317 U.S. 412, 418 (1943)) (Court acknowledged that whether a particular criminal offense is a continuing offense is a question of statutory interpretation).

<sup>89</sup> *See, e.g.*, ALASKA STAT. § 12.10.030 (1984) (statutory period starts running when every element of the offense occurs or the prohibited conduct is terminated).

<sup>90</sup> Note, *supra* note 19, at 642.

<sup>91</sup> *Danielski*, 348 N.W.2d at 356. The court found that the offense was a continuing one because the defendant who was in a position of authority over the victim used that authority, by means of threats, to coerce the victim to submit to the sexual acts. The defendant's conduct and use of authority was found sufficient to toll the statutes of limitations until the child was no longer subjected to such authority. *Id.* at 357; *see also* *State v. Johnson*, 422 N.W.2d 14, 17-18 (Minn. Ct. App. 1988) (The court, in following *Danielski*, affirmed the trial court's determination that the defendant actively coerced his victim by threatening to throw her into jail along with threats of other physical abuse. The court also noted that the lapse of time after the statute had run was irrelevant. *But see* *State v. Bentley*, 239 Kan. 334, 339, 721 P.2d 227, 230 (1986). (an uncle's threat to repeat the act if his nine year old niece revealed the sexual incidents did not constitute concealment and thus did not toll the statute of limitations).

<sup>92</sup> *State v. Mills*, 238 Kan. 189, 190, 707 P.2d 1079, 1081 (1985). (threats issued by a third party not to reveal incidents of fondling did not constitute concealment to toll the running of the statute of limitations); *State v. Shamp*, 422 N.W.2d 736, 740 (Minn. App. 1988) (the court held that where the accused, here the victim's sister, did not control the victim's day to day movements and did not reside with the victim, the statute of limitations is not tolled).

sure alone does not constitute concealment.<sup>93</sup>

Many courts have rejected the concealment exception, claiming that "it is not the province of the court to fashion exceptions to the statute of limitations as that task is left to the legislature."<sup>94</sup> However, a few state legislatures, recognizing that many child sexual abuse acts are in fact concealed by the abuser, have enacted legislation to counter this result. The Louisiana concealment exception to the four-year statutory limitation period for child sexual abuse offenses reads as follows:

The time limitations established by Article 572 shall not commence to run as to the following offenses until the relationship or status involved has ceased to exist where: . . .

(4) The offense charged is one of the following . . . indecent behavior with juveniles (R.S. 14:81) . . . and the victim is under the domination or control of the offender while under seventeen years of age.<sup>95</sup>

Emphasis is placed upon the existence of control.<sup>96</sup> Thus the limitation period is tolled only until the coercion or domination ceases.

In Nevada,<sup>97</sup> Indiana,<sup>98</sup> and Kansas,<sup>99</sup> general provisions for concealment exceptions have been enacted. Although these provisions are not explicitly applicable to cases regarding child sexual abuse, the courts in Nevada<sup>100</sup> and Indiana<sup>101</sup> have applied the gen-

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 191, 707 P.2d at 1081; *Bentley*, 239 Kan. at 339, 721 P.2d at 230.

<sup>95</sup> LA. CODE CRIM. PROC. ANN. art. 573 (West 1981 & Supp. 1989).

<sup>96</sup> *State v. Barre*, 532 So. 2d 842, 843 (La. Ct. App. 1988). Application of the Louisiana statutory exception "requires a showing of a relationship or status and proof of 'domination or control' by the offender over his victim while the victim is under the age of seventeen." Here the court held that the record failed to support a finding that the victim was under the domination of her father, the defendant. The victim stated that she was never forced to visit her father and would often call him and arrange to see him even after the alleged offense. She also testified that she did not fear physical harm from her father if she revealed his behavior.

<sup>97</sup> NEV. REV. STAT. ANN. § 171.095(1) (Michie 1986 & Supp. 1988) ("If a felony . . . is committed in a secret manner . . . an information [must be] filed [within three or four years] after the discovery of the offense.").

<sup>98</sup> IND. CODE ANN. § 35-41-4-21(d) (West 1986) states:

The period within which a prosecution must be commenced does not include any period in which: . . . (2) the accused person conceals evidence of the offense, and evidence sufficient to charge him with that offense is unknown to the prosecuting authority and could not have been discovered by that authority by exercise of due diligence.

<sup>99</sup> KAN. CRIM. PROC. CODE ANN. § 21-3106(4)(c) (Vernon 1988) ("The period within which a prosecution must be commenced shall not include any period in which . . . (c) the fact of the crime is concealed; . . .").

<sup>100</sup> *See, e.g., Walstrom v. State*, 752 P.2d 225, 228 (Nev. 1988):

We conclude that a crime is done in a secret manner, under NRS 171.095, when it is committed in a deliberately surreptitious manner that is intended to and does keep all but those committing the crime unaware that an offense has been committed . . . given the inherently vulnerable nature of a child, we conclude that the crime of

eral statutory exception to child sexual abuse offenses. However, the courts in Kansas have consistently held that their statutory concealment exception does not apply to child sexual offenses. In *State v. Bentley*,<sup>102</sup> the Kansas Supreme Court held that “[c]rimes against persons, by their very nature, cannot be concealed.”<sup>103</sup> The court concluded that threats by an uncle to repeat the offensive acts if the nine year old victim revealed the incidents to anyone did not amount to concealment of a crime.<sup>104</sup> However, the court noted that the uncle’s ability to control the child victim in this case was too remote.<sup>105</sup>

#### E. AMENDMENT TO STATUTE OF LIMITATIONS

In recent years many state legislatures have amended their legislation for offenses committed against minors by extending the applicable limitation period.<sup>106</sup> The constitutionality of these amendments have been upheld.<sup>107</sup>

In absence of language to the contrary, these extended periods

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lewdness with a minor can be committed in a secret manner, even though a victim is involved.

<sup>101</sup> See, e.g., *Crider v. State*, 351 N.E.2d 1151, 1154 (Ind. 1988). Defendant who was convicted of child molesting threatened his daughter with bodily harm if she revealed the acts. The court held that the defendant concealed the fact of his crime by her positive acts of intimidation of his victim. The statute of limitations did not run until the victim made her disclosure to authorities.

<sup>102</sup> 239 Kan. 334, 721 P.2d 227 (1986).

<sup>103</sup> *Id.* at 339, 721 P.2d at 230.

<sup>104</sup> *Id.*; accord *State v. Miller*, 11 Kan. App.2d 410, 413-14, 722 P.2d 1131, 1134 (1986) (threats by defendant to step-daughters that he would hurt them if they told anyone about the alleged aggravated incest did not constitute concealment).

<sup>105</sup> *State v. Bentley*, 239 Kan. 334, 339, 721 P.2d 227, 230 (1986).

<sup>106</sup> See, e.g., ALA. CODE § 15-3-5(a)(4) (1975) (extended the general provision of three years to a no limitation period in 1985); ALASKA STAT. § 12.10.020 (1984) (in 1983 extended a five year period to a one year period after the child reaches 16 or after the crime is reported to a peace officer, whichever occurs first); ARK. STAT. ANN. § 5-1-109(h) (1987) (in 1987 added an exception to the three year limitation period in which prosecution may be commenced within three years of the victim attaining the age of 18, where the offense was committed against a minor and the violation had not been previously reported to a law enforcement agency); FLA. STAT. ANN. § 775.15 (1976 & Supp. 1989) (in 1984 added that if the victim is under the age of 16, the period of limitations does not begin to run until the victim has reached the age of sixteen or the violation is reported to a law enforcement agency, whichever occurs first); WASH. REV. CODE ANN. § 9A.040.080(1)(c) (in 1985 extended the period in which prosecution may be commenced for crimes of indecent liberties from five to seven years).

<sup>107</sup> The Seventh Circuit, in upholding the constitutionality of these amendments, explicitly held that the extension of a statute of limitations was merely a procedural alteration which did “not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.” *United States ex rel. Massarella v. Elrod*, 682 F.2d 688, 689 (7th Cir. 1982) (quoting *Weaver v. Graham*, 450 U.S. 24, 29 n. 12 (1981)).

apply not only to crimes committed subsequent to the date the statute was amended, but encompass those offenses not barred by the previous legislative period.<sup>108</sup> However, where the statute explicitly states that the provision of this section (or act) does not apply to any offense committed before the effective date of the section, the limitation period only operates prospectively.<sup>109</sup>

### III. LEGISLATIVE RECOMMENDATION

A period of limitation should be determined by the legislative goals and purposes underlying statutes of limitations. The main purpose of any statute of limitations is "to protect the accused from the burden of defending himself against charges of long completed misconduct."<sup>110</sup> Likewise, criminal prosecution should be based on evidence that is reasonably fresh and trustworthy.<sup>111</sup> To allow otherwise would infringe upon the accused's rights to a fair trial due

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<sup>108</sup> See *State v. Creekpau*, 753 P.2d 1139 (Alaska 1988) (Defendant who allegedly sexually assaulted a nine year old girl filed a motion to dismiss the case on the grounds that the applicable statute of limitations had run. The court held that the extension of the statute of limitations before the original limitation period had run on defendant's alleged offense was not an unconstitutional ex post facto law.); *People v. Callan*, 174 Cal. App. 3d 1011, 220 Cal. Rptr. 339 (1985) (statutory amendments lengthening the statute of limitations for bringing prosecution to six years for lewd and lascivious conduct with a child under the age of 14 years was not time barred where statutory amendments were enacted before the old statutory period expired); *People v. Whitesell*, 729 P.2d 985 (Colo. 1986) (Defendant was charged with sexual criminal assault on a child. The Colorado Supreme Court held that the amendment increasing the applicable statute of limitations for an additional three years applied to all offenses not time barred as of the amendment's effective date.).

The court in *Commonwealth v. Thek*, 376 Pa. Super. 390, 401, 546 A.2d 83, 89 (1988) stated:

Where the legislature amends a statute of limitations to provide a longer limitations period or enacts [an amendment] which tolls the running of the statute of limitations before prior limitations period has expired, in the absence of language in the statute to the contrary, the amendments will be construed to apply so as to extend the period within which prosecution is to be commenced.

However, an amendment would be in violation of the state constitution's ex post facto clause if it extends the statute of limitations to resurrect a case for which the statutory period has already run. *Id.* at 401, 546 A.2d at 89.

The court in *State v. Traczyk*, 421 N.W.2d 229 (Minn. 1988), however, held that the amended statute of limitations is not to be applied retroactively to any offense committed prior to the effective amendment date.

<sup>109</sup> See *Martin v. Superior Court*, 135 Ariz. 99, 100, 659 P.2d 652, 653 (1983). The language specifying the applicability of the act was not explicit in the statute of limitations provision but in another section of the act. Nevertheless, the court held that all provisions of the new criminal code applied prospectively and not retroactively. Thus, the court dismissed the indictment on the grounds that the old applicable statutory period had expired.

<sup>110</sup> Note, *supra* note 19, at 632.

<sup>111</sup> *Id.*

to evidentiary problems of obtaining witnesses,<sup>112</sup> forgotten events,<sup>113</sup> and lost records.<sup>114</sup> This general goal of a statute of limitations is further supplemented by a defendant's constitutional right to a speedy trial.<sup>115</sup>

Generally, to determine the length of a statute of limitations, state legislatures weigh factors supporting a shorter period of limitation against factors justifying a longer limitation period. Factors which justify a short period of limitation are staleness of evidence, motivation, and repose. A short period of limitation overcomes many of the problems associated with stale evidence.<sup>116</sup> A brief limitation period also motivates the state to be efficient in prosecuting criminal offenses.<sup>117</sup> Furthermore, a shorter period of limitation fosters rehabilitation by assuring a criminal that any rehabilitative progress will not be shattered by the enforcement of some long-dormant claim.<sup>118</sup>

Factors which support a long period of limitation are concealment, investigation, and the seriousness of the offense.<sup>119</sup> The very nature of certain crimes, particularly child sexual abuse, makes detection of the offense especially difficult. A long period of limitation

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<sup>112</sup> *Id.* (As time lapses, witnesses may be difficult to locate because they might have moved or passed away.)

<sup>113</sup> *Id.* (As memories fade, testimonies become less reliable.). *But see* Uelman, *supra* note 34, at 46 ("Some research suggests that passage of time assumes less significance as more time passes, since loss of memory is most acute in the period immediately following the events while long term memory is more of a gradual process.").

<sup>114</sup> *See* *Tyson v. Tyson*, 107 Wash.2d 72,75-76, 727 P.2d 226, 228 (1986) (Physical evidence is more likely to be lost when a claim is stale either because it has been misplaced or because its significance was not comprehended at the time of the alleged wrong.)

<sup>115</sup> Note, *supra* note 19, at 633 (Statutes of limitations provide no assurance as to the time of the trial. A limitation period only assures that an indictment will be issued within a specified time.)

<sup>116</sup> *See* Uelman, *supra* note 34, at 46-47.

<sup>117</sup> *See* Uelman, *supra* note 34, at 48-49 (This is to insure against bureaucratic delays. However, the author also suggests that the statute of limitations may be a negligible factor in motivating, as priority in investing and prosecuting is determined by other means such as the seriousness of the offense.)

<sup>118</sup> Note, *supra* note 19, at 634. (Society will have more to lose than to gain in prosecuting a criminal unlikely to commit another crime. Desirable to bar prosecution where there is a strong possibility that self rehabilitation has taken place.) *Id.* at 638. Uelman, *supra* note 34, at 51 (quoting Model Penal Code § 1.07 at 16) states:

If the person refrains from further criminal activity, the likelihood increases with the passage of time that he has reformed, diminishing pro tanto the necessity for imposition of the criminal sanction. If he has repeated his criminal behavior, he can be prosecuted for recent offenses committed within the period of limitations. As time goes by, the retributive impulse which may have existed in the community is likely to yield place to a sense of compassion for the person prosecuted for an offense long forgotten.'

<sup>119</sup> Uelman, *supra* note 34, at 52.

insures that a perpetrator does not escape punishment simply by successfully concealing his acts. Besides, concealed crimes generally require a longer period of investigation and thus justify a longer limitation period.<sup>120</sup> Generally, the seriousness of the offense correlates with the duration of a limitation period regardless of whether the purpose of criminal law is deterrence, incapacitation, or rehabilitation.<sup>121</sup>

The extent to which current states' statute of limitations for child sexual abuse offenses reflect and satisfy these purposes and factors merits discussion.

Statutes of limitations which permit commencement of prosecution up until a specified number of years after the commission of the offense are inflexible and ineffective. Such an approach is advantageous only to the extent that it is expedient and cost efficient in determining whether a certain case may or may not be prosecuted.<sup>122</sup> However, to screen worthy causes of action at the pleading stage rather than through the trier of fact would be an "elevation of procedural efficiency over substantive justice."<sup>123</sup>

States adopting this approach have failed to consider the special circumstances that arise in child sexual abuse cases. In many instances, for example, report of the abuse is delayed because of coercion employed by the accused.<sup>124</sup> This coercion generally results in the child becoming confused and guilt-ridden.<sup>125</sup> An incest victim may also fear losing the affection of those from whom he or she is accustomed of regularly seeking comfort.<sup>126</sup> Furthermore, the mystique surrounding sex often causes the child to fear that he or she will not be believed or is somehow personally responsible for the sexual incident(s).<sup>127</sup> Finally, because of his or her youth and ignorance, a child may not fully comprehend the criminal nature of

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<sup>120</sup> *Id.* There is an obvious correlation between crimes that require a lengthy investigation and those associated with concealment. *Id.* at 55. In a survey to identify the crimes most likely to be concealed, child molesting was ranked seventh out of 26 crimes. *Id.* at 53. However, the author suggests that the concealment factor can be accommodated by suspending the limitation period until discovery. *Id.* at 54.

<sup>121</sup> *Id.* at 56. (Generally the more serious the offense, the longer the period of limitation.)

<sup>122</sup> Comment, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 108 CALIF. L. REV. 106, 118 (1988).

<sup>123</sup> *Id.*; see also Note, *supra* note 52, at 228.

<sup>124</sup> See HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING (1985) [hereinafter HIGHLIGHTS].

<sup>125</sup> See Comment, *Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle*, 15 FORDHAM L. REV. 709 (1987).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

the defendant's behavior.<sup>128</sup>

States which have recognized the need for special consideration for offenses committed against children have enacted statutes of limitations which extend or toll the limitation period until the victim attains the age of majority or soon thereafter.<sup>129</sup> This approach attempts to remedy the inequity associated with the inability of minors to commence prosecution on their own behalf or to inform the state of the criminally committed acts due to coercion, dependence, or ignorance.<sup>130</sup>

However, even this approach is inflexible and fails to serve satisfactorily the purposes underlying the statute of limitations. Under such a statute of limitations, there is a possibility that a prosecutor might obtain sufficient evidence against the accused soon after the crime is committed but waits until a time just before the victim attains majority to commence prosecution. Such strategizing may prevent a defendant from effectively and equitably establishing a defense, and will undermine many of the purposes of the statute of limitations.<sup>131</sup>

Many of the problems associated with the above two methods could be overcome by providing exceptions to toll the running of the statutory provision.<sup>132</sup> By means of exceptions, particular circumstances that may arise can be accommodated without sacrificing the purposes and factors of the statute of limitations.

The discovery approach—tolling the statute of limitations until discovery of the offense has been made—is superior to the fixed time approach of the prior two methods. Discovery of the offense is said to occur when a third person, who is not a party to the offense, becomes aware of the offense.<sup>133</sup> The fact that the victim may real-

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<sup>128</sup> See Comment, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?* 89 DICK. L. REV. 721, 731 (1985). According to a study conducted by the American Humane Society and the National Center on Child Abuse and Neglect approximately 28.5% of child sexual victims are under the age of five and therefore do not realize the wrongfulness of the sexual act. HIGHLIGHTS, *supra* note 124, at 19.

<sup>129</sup> See *supra* notes 47-49 and accompanying text.

<sup>130</sup> The preamble to the 1987 amendment of ARK. STAT. ANN. § 5-1-109 (1978) states, "[W]hereas, in many instances, child victims are threatened or intimidated to prevent the prompt reporting of abuse or sexual offenses; and whereas, it is in the best interest of the State to extend the statute of limitations for certain offenses involving child victims; now therefore . . . ."

<sup>131</sup> Note, *supra* note 19, at 639.

<sup>132</sup> Uelman, *supra* note 34, at 63.

<sup>133</sup> See *John R. v. Oakland Unified School Dist.*, 206 Cal. App. 3d 1473, 240 Cal. Rptr. 319 (1987). The court determined that the statutory period commenced from the date of the parents' discovery even though the child was aware of the criminal act because under those circumstances the timeliness of the action for sexual assault depended upon the knowledge of someone other than the plaintiff-victim.

ize that the conduct is of a criminal nature prior to discovery by a third party should not be determinative for statute of limitations purposes because the victim may not report such conduct due to coercion, self-blame, or fear of destroying the family.

Suspension of the statute of limitations until discovery of the offense where the crime is concealed should be preferred over a longer limitation period.<sup>134</sup> Under this approach, the accused is arguably no more prejudiced in his or her attempt to gather evidence than would be the victim.<sup>135</sup> Furthermore, the desire for motivation is satisfied by limiting the prosecution period following discovery. The state would be able to prosecute only to the point of discovery plus a reasonable time thereafter to properly investigate.<sup>136</sup>

However, under the present statutory discovery rule approach, the interests of the accused are not fairly considered. The state's interest in prosecution unjustly takes automatic precedent over the interests of the defendant.

Historically, courts have employed a balancing of interests test to determine the applicability of the discovery rule to toll a statute of limitations.<sup>137</sup> A balancing test enables a court to avoid sacrificing one factor of a limitation period to accommodate another factor. To accommodate both the circumstances that may arise in child sexual abuse cases as well as the purposes of a statute of limitations, focus must be on the reasons for delay.<sup>138</sup> Therefore, the following provision should be utilized:

*No person shall be prosecuted, tried or punished for the offense of child sexual abuse unless an indictment is issued or information is filed within x years after the commission of the offense.*

*If the above period has expired, a court has discretion to toll the limitation period until one year after discovery of the offense has been made by a law enforcement agency or any other person who is not a party to the offense.*

Factors to be taken into consideration and balanced by the court to determine whether to apply the discovery rule exception should include:

- 1) *the time elapsed since the offense was committed;*
- 2) *whether the victim and the state acted reasonably or in good faith in making the discovery;*

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<sup>134</sup> Uelman, *supra* note 34, at 51.

<sup>135</sup> The state is unaware of the offense until informed by the victim or a third party. Furthermore, unlike a manufacturer who does not know that an injury has occurred, a sexual abuse offender is completely aware of the abuse. See DeRose, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191, 222 (1985).

<sup>136</sup> See *supra* notes 74-77 and accompanying text.

<sup>137</sup> See *supra* note 54-55 and accompanying text.

<sup>138</sup> Note, *Supra* note 52, at 233.



- 3) *whether the victim, under the circumstances, was diligent in informing a third party and that any delay in so doing was done in good faith;*
- 4) *whether timely notice was given to the defendants when the offense was discovered;*
- 5) *whether there was a rational basis for the delay in discovery;*
- 6) *the extent the defendant will suffer prejudice, if at all, in his right to gather evidence if discovery accrual is allowed;*
- 7) *whether there was a fiduciary relationship involved;*
- 8) *whether coercion was employed; and*
- 9) *the grievousness of the act.*<sup>139</sup>

#### IV. CONCLUSION

In the midst of statutory reform efforts to improve the handling of child sexual abuse cases in the legal system, legislative attention must be given to the statute of limitations. Courts troubled by the injustice that have arisen due to the inflexible nature of present statutes of limitations have looked to the legislatures for relief.<sup>140</sup> By adopting the proposed legislation, relief can accommodate both the purposes of a statute of limitations as well as the circumstances common in child sexual abuse cases.

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<sup>139</sup> See Comment, *supra* note 50, at 220-21; Note, *supra* note 19, at 638-39.

<sup>140</sup> See *Supra* notes 66, 84 and 94 and accompanying text.