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LET SLEEPING MEMORIES LIE? WORDS OF CAUTION ABOUT TOLLING THE STATUTE OF LIMITATIONS IN CASES OF MEMORY REPRESSION

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Tragically, child sexual abuse is a serious and prevalent problem in our society.[1] Surveys reveal that as much as one-third of the population of the United States has experienced some form of childhood sexual abuse.[2] Abuse of this nature, in addition to posing an

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[1] *See generally* DEBORAH DARO, CONFRONTING CHILD ABUSE (1988).

[2] Johnson v. Johnson, 701 F. Supp. 1363, 1370 (N.D. Ill. 1988) (quoting NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, CHILD SEXUAL ABUSE: LEGAL ISSUES AND APPROACHES (rev. ed. 1981)). Estimates of the frequency of child sex abuse vary depending upon how people are questioned about their past. A study that many researchers believe is accurate is one conducted by psychologist David Finkelhor and his colleagues. That study found that 27% of the women and 16% of the men disclosed a history of sexual abuse. Nina Darnton, *The Pain of the Last Taboo*, NEWSWEEK, Oct. 7, 1991, at 70. An earlier estimate of incidence based on a 1978 survey of women in San Francisco revealed that 28% of women had experienced unwanted sexual touching and other forms of abuse before the age of 14 and that the percentage of victims increased to 38% if one extended the age to 18. DIANA RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND SEXUAL HARASSMENT 180-85 (1984). The perpetrators were relatives in 12% of the cases. Another source reports 38% of women have been sexually abused before age 18, with about 4.5% having been victimized by a biological, adoptive, step or foster father. Mary Gail Frawley, *From Secrecy to Self-Disclosure: Healing the Scars of Incest*, *in* SELF-DISCLOSURE IN THE THERAPEUTIC RELATIONSHIP 247-59 (George Stricker & Martin Fisher eds., 1990). Other estimates have been somewhat more conservative, but still disturbing. In a mail survey of Texas residents, 3% of males and 11% of females stated they had experienced some form of sexual abuse during their lifetimes. GLEN A. KERCHER, RESPONDING TO CHILD SEXUAL ABUSE: A REPORT TO THE 67TH SESSION OF THE TEXAS LEGISLATURE 38, 41 (1980) (study found 14 of 461 males and 65 of 593 females reported childhood sexual abuse). In a survey of Boston parents, 6% of males and 15% of females experienced sexual abuse before the age of 16 by a person at least five years older. About one-third of the cases involved relatives. DAVID FINKELHOR,

immediate threat to the physical well-being of the child, can have debilitating psychological effects that last for years, or even for a lifetime.

While many victims of childhood sexual abuse remember the abusive incidents throughout their lifetimes, some victims apparently repress, or subconsciously force, the memories from their minds.[3] Repression in this manner can have immediate benefits for a child-victim attempting to cope with sexual abuse. Nevertheless, the psychological damage inflicted by childhood sexual abuse may remain with the child throughout adulthood.[4] Consider the example of Mary Doe:

At age twenty-four, Mary Doe was a troubled young woman. She had problems with alcohol and drug abuse, possessed low self-esteem, and suffered from eating disorders. Her behavioral history was sprinkled with instances of self-mutilation and suicide attempts. Only after an arrest for drunken driving forced her to seek professional therapy did Mary Doe begin to understand the source of her problems. As her therapy progressed, Mary recovered memories that had been repressed for nearly twenty years. These memories of her early childhood included the severe sexual abuse inflicted upon her by her father when she was less then five years old. As the memories trickled and then flooded back, Mary began to understand what had caused the immense pain she had been living with for most of her life.[5]

Although there is little agreement among psychologists concerning the theory of repression and the recovery of previously repressed memories, therapists claim that the trauma caused by childhood sexual abuse may lead a victim to repress all memory of the event. The trauma of childhood sexual abuse is triggered not only by the fright and pain of the event, but also by the veil of secrecy demanded by the abuser and the innocence and dependency

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CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 69-86 (1984). In a survey of 2000 Americans, one in seven people confessed that they were victims of sexual abuse as children, three-quarters of whom were women. JAMES PATTERSON, THE DAY AMERICA TOLD THE TRUTH 125 (1991).

[3] *See, e.g.*, Karen Olio, *Memory Retrieval in the Treatment of Adult Survivors of Sexual Abuse*, 19 TRANSACTIONAL ANALYSIS J. 93, 93-94 (1989).

[4] Judith Herman et al., *The Long Term Effects of Incestuous Abuse in Childhood*, 143 AM. J. PSYCHIATRY 1293 (1986). *See also* Olio, *supra* note 3, at 93-94 (a 1989 study of nearly 500 adult patients who had been sexually abused found that 60% had experienced "a period of amnesia" regarding their abuse).

[5] Adapted from the facts of Mary D. v. John D., 264 Cal. Rptr. 633 (Cal. Ct. App. 1989). *See* Kathleen Hendrix, *Challenge to Child Abuse: Court Case Widens Options for Adults Seeking Redress*, L.A. TIMES, Dec. 20, 1989, at E1; Carol Lynn Mithers, *Incest and the Law*, N.Y. TIMES, Oct. 21, 1990, § 6 (Magazine), at 44.

of the victim. In response, the child, unable to understand or adequately deal with the event, escapes this psychological turmoil by pretending the abuse never happened and repressing all conscious memory of it.

Repressing memories of childhood sexual abuse does not, however, expunge all related problems. As exemplified in Mary Doe's case, repression of traumatic memories is thought to be associated with a number of psychological and behavioral problems for the victim later in life. As a result of these problems, victims often turn to psychological therapy, which in turn may lead to the reappearance of the memories. While many therapists believe recovery of repressed memories has therapeutic effects, such recovery also causes additional hardships for the victim, some of whom experience grave doubts and self-blame.[6]

Along with the emotional hardships associated with recovered memories, survivors[7] may face another obstacle: a legal system which does not recognize civil or criminal complaints with respect to those memories. Because repressed memories often do not resurface until years after the applicable statute of limitations has expired, civil and criminal actions are barred.

However, this is changing. In civil litigation, some courts have responded to the seeming unfairness of a time bar and have found that the statute of limitations is tolled during the time the survivor repressed the memory of the abuse. Take the example of Mary Doe:

As a result of her resurfaced memories, Mary filed a civil suit against her father. Although her suit was filed almost twenty years after the abuse occurred and over three years after her state's statute of limitations expired, the court allowed her case to proceed. The court applied the "discovery rule" and found that the statute of limitations had been tolled by the repression of her memory; although Mary possessed the memory she could not access it and thus only "discovered" the abuse when the memory resurfaced.[8]

In addition to this increased willingness to allow civil suits into court, criminal cases based on previously repressed memories also appear to be on the upswing. Although the discovery rule is not

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[6] Christine A. Courtois, *The Memory Retrieval Process in Incest Survivor Therapy*, 1 J. CHILD SEXUAL ABUSE 15, 23-27 (1992).

[7] Adults who, as children, were sexually abused and have recognized their abuse choose to be called survivors rather than victims, and we, the authors, adopt that distinction throughout this article. *See, e.g.*, Don Oldenburg, *Dark Memories: Adults Confront Their Childhood Abuse*, WASH. POST, June 20, 1991, at D5. However, throughout this article, we will use the term "victim" to refer to victims of childhood sexual abuse who do not recognize their abuse and who have yet to begin a curative process.

[8] *See* Mary D. v. John D., 264 Cal. Rptr. 633 (Cal. Ct. App. 1989).

applicable to criminal cases, situations arise whereby a repressed memory resurfaces before a lengthy (or indefinite) statute of limitation runs out.

This article examines the use of the discovery rule to toll the statute of limitations in civil cases such as Mary's and examines the use of a previously repressed memory as the basis for criminal charges. It finds that survivors who claim a previous inability to access their memory may, in rare cases, possess compelling reasons for tolling the statute of limitations for civil actions against their abusers. Additional reasons exist to warrant the extending or tolling of the criminal statute of limitations in some rare cases. Nonetheless, this article concludes that authenticity and reliability questions associated with long-repressed memories necessitate both caution in advancing these actions (particularly in cases without cogent corroboration) and a redoubling of research efforts in this area. To balance these concerns, this article recommends that courts implement procedural safeguards to minimize injustice occurring at the expense of an innocent defendant.

I. THE THEORY OF REPRESSION AS APPLIED TO CHILDHOOD SEXUAL ABUSE

A. A SHORT PRIMER ON REPRESSION

Mary Doe's case is a vivid example of repression, a concept invoked to characterize a person who experiences a traumatic event and then buries the memory deep in the recesses of her[9] mind in order to avoid the stress or anxiety associated with that memory.[10] A repressed memory, while theoretically intact in the mind, is not normally accessible by conscious thought processes. Thus repression is different from a memory that is permanently forgotten; access to a repressed memory may, in theory, be regained at some future point when a stimulus triggers the retrieval of the memory.

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9 The authors recognize that many victims of childhood sexual abuse are male; recent surveys estimate that as many as one in 10 male children will be sexually abused before they reach the age of 18. However, surveys estimate that as many as one in three female children will be sexually abused before they reach the age of 18. Herman et al., *supra* note 4, at 1293. Given the disproportionately high number of female victims, this article uses the female pronoun when referring to childhood sexual abuse victims. Additionally, the authors use the male pronoun when referring to perpetrators of childhood sexual abuse since reports suggest that 97 to 98% of child sexual abusers are male. Denise J. Gelinas, *The Persisting Negative Effects of Incest*, 46 PSYCHIATRY 312, 313 (1983).

10 Elizabeth Loftus & Leah Kaufman, *Why Do Traumatic Experiences Sometimes Produce Good Memory (Flashbulbs) and Sometimes No Memory (Repression)?*, *in* AFFECT AND ACCURACY IN RECALL: THE PROBLEM OF "FLASHBULB" MEMORIES 9 (Eugene Winograd & Ulric Neisser eds., 1992).

According to theory, the mind uses repression as a defensive maneuver that pushes unacceptable ideas into the "unconscious."[11] Thus, a person who experiences a particularly traumatic event may find it difficult or impossible to function normally while simultaneously maintaining memories of the event. The memories are simply too overwhelming. In order to cope with the traumatic event and to function in life, the victim represses memory of the trauma. In other words, the victim keeps a secret even from herself, or, in the case of multiple personality, keeps the secret within one functioning personality that has little or no interaction with another personality.[12]

Many types of trauma may lead a victim to repression. Repression may occur in cases of extreme physical injury, as it did with the "Central Park Jogger" who, in 1989, was brutally attacked, repeatedly raped and left for dead, and yet retains no memory of the incident.[13] But repression can also apparently happen in the absence of severe physical injury, where there is only "mental shock." Thus, Mary Doe, suffering a severe psychological shock, apparently repressed all memory of the sexual abuse her father inflicted upon her. Similarly, claims are made that returning war veterans repress memories of intensely frightening battles, even when they themselves have not been physically injured.[14]

The traumatic nature of events that leads to repression, however, virtually precludes experimental probing of the theory; researchers have yet to design experiments that will enable them to study the repression and subsequent retrieval of a memory. Thus, while traditional memory is neatly divided into three distinct phases—perception, retention, and retrieval[15]—a repressed memory does not fit so neatly into these categories. While it may be clear that the perception phase of a repressed memory is similar to that of a traditional memory, little is known about either the retention or the retrieval stage. Questions such as where the memory is stored and how it is eventually retrieved have no clear answers.

B. THE CONTROVERSY SURROUNDING REPRESSION

Although long afforded some recognition as a legitimate psy-

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11 SHELLEY E. TAYLOR, POSITIVE ILLUSIONS 126 (1989).

12 Frawley, *supra* note 2, at 247-48.

13 Alison Bass, *Researching Head Trauma and Amnesia: Brain Injury Usually Is the Cause But Often the Victim Represses the Painful Memories*, BOSTON GLOBE, July 9, 1990, at 27.

14 Irene Wielawski, *Unlocking the Secrets of Memory: Recent Tales of Child Abuse Have a Twist—Victims, Now Adults, Say Their Memories of the Horrors Were Repressed For Decades*, L.A. TIMES, Oct. 3, 1991, at A26.

15 ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 20-109 (1979).

chological phenomenon,[16] repression and later retrieval of memory are neither fully understood nor accepted.[17] Its existence is seemingly substantiated by a number of clinical cases in which people, often undergoing therapy, recall a memory of a previous traumatic event. Occasionally these memories are claimed to be corroborated from other sources, enhancing their credibility.[18] Using these case studies as their means of proof, therapists claim that the retrieval of repressed memories is a very real experience.[19]

Experimental psychologists and others, however, are not convinced. Clinical case studies have been rejected as unconfirmed speculations[20] and a review of over sixty years of research failed to turn up a single controlled laboratory experiment to support the concept of repression.[21] Considering the severe trauma necessary to induce repression, the kind that could not ethically be reproduced in an experimental setting, this may not be surprising. But until experimental proof is available to demonstrate the existence of repression, experimental psychologists will remain skeptical.

Much has been written about Freud's views on repression and the recollections of childhood seduction, but the eruption from this intellectual battleground merely clouds the picture. Some students of Freud maintain that he at one time believed his women patients when they talked about childhood seduction, but later came to the view that the patients had deceived themselves.[22] Freud decided that their previously repressed memories were nothing more than fantasies based on the accuser's Oedipal desires for her father.[23] While this understanding of Freud's views is a topic of some de-

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16 Sigmund Freud used the term "repression" differently at different times, contributing to the great confusion about its meaning. In its most general sense repression is simply the act of rejecting and keeping something out of consciousness. Matthew H. Erdelyi & Benjamin Goldberg, *Let's Not Sweep Repression Under the Rug: Toward a Cognitive Psychology of Repression*, *in* FUNCTIONAL DISORDERS OF MEMORY 355, 360 (J.F. Kihlstrom & F.J. Evans eds., 1979). Lately, the concept of total or robust repression is being invoked to explain how endless numbers of traumatic events spanning years of one's life can be banished completely from awareness, leaving an individual who professes a relatively happy childhood.

17 Wielawski, *supra* note 14, at A1.

18 *See, e.g.*, Judith Herman & Emily Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, 4 PSYCHOANALYTIC PSYCHOL. 1, 10 (1987).

19 Darnton, *supra* note 2, at 70.

20 David Holmes, *The Evidence for Repression: An Examination of Sixty Years of Research*, *in* REPRESSION AND DISSOCIATION: IMPLICATIONS FOR PERSONALITY, THEORY, PSYCHOPATHOLOGY AND HEALTH 85-102 (Jerome Singer ed., 1990).

21 *Id.*

22 JEFFREY M. MASSON, THE ASSAULT ON TRUTH (1984); Olio, *supra* note 3, at 97.

23 MASSON, *supra* note 22, at 54; Olio, *supra* note 3, at 97.

bate,[24] it underscores the fact that the authenticity of repressed and subsequently recovered memories is not universally accepted.

C. REPRESSION OF CHILDHOOD SEXUAL ABUSE

It cannot be doubted that the experience of child sexual abuse is particularly traumatic for the child-victim. Furthermore, it is widely accepted by clinicians that the particulars of the trauma are especially conducive to repression of memory of the incident. Thus, in addition to the intense pain[25] or fright[26] that a child-victim of rape or molestation may suffer, other factors are present which exacerbate the trauma, leading to an increased likelihood of memory repression.

The terror experienced by a victim of childhood sexual abuse is often encouraged by the abuser; abusers frequently threaten their young victims with grave consequences should the victim ever tell anyone of the abusive incidents. "If you tell, I'll kill you," is terrifying yet believable to an already frightened child.[27] Such threats are common;[28] abusers realize that threats or coercion must evoke a silencing terror if the abusers are to avoid legal and social repercussions and continue to have sexual access to their victims.[29]

Victims experience unresolvable confusion and guilt over activities which they do not understand. Abusers often compound these feelings by claiming that the acts should be a "secret."[30] Abusers may intensify confusion and guilt by accusing the child of seductive

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24 Defenders of Freud have argued that this claim represents a misreading of his scholarly articles and a deliberate ignorance of changes in his own analytic practice. Kenneth Silverman, *Cruel and Usual Punishment*, N.Y. TIMES, Feb. 17, 1991, at 5 (reviewing PHILIP GREVEN, SPARE THE CHILD (1991)).

25 Mary Doe recalled experiencing "searing, burning pain" as her father raped her. Mithers, *supra* note 5, at 44.

26 *See, e.g.*, DeRose v. Carswell, 242 Cal. Rptr. 368 (Cal. Ct. App. 1987) (plaintiff stated she had felt "great fear" during the abusive incidents); Evans v. Eckelman, 265 Cal. Rptr. 605, 607 (Cal. Ct. App. 1990) (all three of the male plaintiffs experienced fear of their alleged abuser).

27 Deborah Beraset Diamond, *Awful Truths: Telling the World About Incest Hurts—And Heals at the Same Time*, CHI. TRIB., Nov. 3, 1991, at 3.

28 *Id.*; *see also* Hammer v. Hammer, 418 N.W.2d 23 (Wis. Ct. App. 1987), *appeal denied*, 428 N.W.2d 552 (Wis. 1988) (plaintiff alleged that the abuse was accompanied by threats of harm to her if she ever told anyone); E.W. and D.W. v. D.C.H., 754 P.2d 817 (Mont. 1988) (plaintiff alleged that defendant told her that great harm would befall her if she told anyone).

29 Melissa Salten, Comment, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 196 (1984).

30 *See, e.g., E.W. and D.W. v. D.C.H.*, 754 P.2d at 817 (plaintiff alleged that defendant told her that the acts would be "our special secret"); Jones v. Jones, 576 A.2d 316, 318 (N.J. Super. Ct. App. Div. 1990) (the defendant allegedly repeatedly impressed upon the plaintiff the need for secrecy); Mary D. v. John D., 264 Cal. Rptr. 633, 635 (Cal. Ct. App.

behavior,[31] or by blaming the child for some other wrong, and thus justifying the abuse as a punishment.[32]

Furthermore, child-victims of sexual abuse often develop a sense of helplessness. This helplessness results in part from an inability to avoid or terminate the abusive situation. Dependent and vulnerable children, in reality, have few mechanisms by which to leave an abusive environment. Their dependency on the abuser, which is often total, and the abuser's age, authority, or position often make escape an impossibility.

Additionally, the helplessness of a child-victim is enhanced as a result of being unable to seek any form of assistance. Informing a third party of abuse presents insurmountable difficulties. First, the child must recognize the wrongful nature of the conduct. This alone is not an easy task; abusers often intimate that the abusive actions are natural or normal.[33] Additionally, given the status of the abuser, who is often a parent or close relative,[34] blaming the abuser or recognizing the abuser as evil is psychologically threatening for a dependent child.

Many child-victims, if they recognize that the conduct is wrong, face the perceived threat of destruction of the family,[35] a perception often encouraged by the abuser.[36] Alternatively, abusers warn their victims not to tell because no one will believe them.[37] For a dependent and vulnerable child-victim, these threats can be overwhelming and serve as an effective barrier against confiding in another person.

1989) (Mary D. alleged that her abuser gave her explicit directions never to tell anyone about the acts).

31 LEONARD KARP & CHERYL KARP, DOMESTIC TORTS: FAMILY VIOLENCE AND SEXUAL ABUSE 187 (1989).

32 *Hammer*, 418 N.W.2d at 24 (plaintiff said she was told that she had caused the acts; that it was her fault that she was being abused).

33 Comment, *Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation*, 50 OHIO ST. L.J., 753, 757 (1989) (citing ANN BURGESS ET AL., SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 86-87 (1978)). *See also* KARP & KARP, *supra* note 31, at 187; *Hammer*, 418 N.W.2d at 25 (victim's father had told her that the conduct was "normal and his right").

34 In one study of 583 cases of childhood sexual abuse, it was found that in 47% of the cases the abuser was a family member, in 42% of the cases the abuser was an acquaintance of the child, and in only 8% of the cases was the offender a stranger. Note, *Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 807 n.14 (1985) (*noted in* Tyson v. Tyson, 727 P.2d 226 (Wash. 1986) (en banc)). Of the cases in which the sexual abuse is within the family, 75% of the time the contact is father-daughter or stepfather-stepdaughter. HENRY C. KEMPE & RAY E. HELFER, THE BATTERED CHILD 204 (3d ed. 1980).

35 For an eloquent description of one case history, see CHARLOTTE V. ALLEN, DADDY'S GIRL (1984).

36 KARP & KARP, *supra* note 31, at 188.

37 *Id.*

A child-victim, traumatized, confused, unable to halt the abuse, and unable to obtain external relief, naturally develops a sense of helplessness. Pain, fear, confusion, and guilt are internalized. To manage, the victim is led to a final coping mechanism, the denial of the events and a repression of associated memories of the abusive incidents.[38]

Of course, not every case of child sexual abuse is alike and not every case leads the child-victim into repression. Clinicians tend to support the notion that the more egregious the abuse, the greater the likelihood that a child will repress.[39] Clinicians also believe that children abused at an early age will be more likely to repress than those abused at a later age.[40] Additionally, abuse occurring in a particularly violent or intrusive manner, or that occurs over a long period of time is more likely to lead a child to repress memory of the abuse.[41]

Repression of memories of childhood sexual abuse has immediate coping advantages for a child-victim. By pretending that nothing has happened, the victim can attempt to continue living a "normal" life. Repression may, however, have serious and long-term disadvantages. Psychiatrists and clinical psychologists have suggested that repression of traumatic memories leads to difficulties later in life, including severe depression, substance abuse, low self-esteem, sexual and social dysfunction, and, occasionally, suicidal tendencies.[42] These problems, similar to those exhibited by Mary Doe, are some of the symptoms of Post Traumatic Stress Disorder ("PTSD").[43]

D. RETRIEVAL OF THE PREVIOUSLY REPRESSED MEMORY

A repressed memory, bringing short-term benefits but also long-term problems, might not remain repressed throughout a victim's life. While many victims may never regain access to a "repressed" traumatic event, others may have "repressed" memories surface spontaneously, catching them totally by surprise. Other vic-

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38 Olio, *supra* note 3, at 94.

39 STEVEN FARMER, ADULT CHILDREN OF ABUSIVE PARENTS 53-54 (1989); Kay Shafer, *Child Sexual Abuse and the Law*, L.A. LAWYER, Sept. 1989, at 48.

40 Leonare Terr, *What Happens to Early Memories of Trauma?: A Study of 22 Children Under Age Five at the Time of Documented Traumatic Events*, J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 96-104 (1988). This is true for other types of trauma as well, for example death of a loved one or an accident, not just sexual abuse. *Id.*

41 Herman & Schatzow, *supra* note 18, at 2; Shafer, *supra* note 39, at 48.

42 Herman & Schatzow, *supra* note 18, at 2; Olio, *supra* note 3, at 93.

43 AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS § 309.89 (3d rev. ed. 1987); Herman & Schatzow, *supra* note 18, at 2.

tims may regain memory as a result of receiving therapy, counseling, or other mental health services.

Therapists have a number of common beliefs about the return of a repressed memory. The spontaneous resurfacing of a repressed memory may occur as the result of a variety of triggering mechanisms. Usually the triggering mechanism is somehow related to the abuse. Thus, a television show on childhood sexual abuse,[44] contact with an unrelated case of abuse,[45] or experiencing a scene similar to one associated with the repressed images[46] can all trigger the return of long repressed memories, according to this theory.

In other instances, repressed memories supposedly return as "flashbacks," a reliving of a traumatic experience as if it were currently happening.[47] Flashbacks can be stimulated by normal life experiences, especially milestones, such as marriage, birth of a baby, or death. They can be evoked by sexual encounters, or even by something as mundane as a particular laugh or certain expression.

Mercifully, repressed memories often wait patiently until the survivor is in a "climate of safety,"[48] often a therapist's company—a safe and trusting spot.[49] Victims of child sexual abuse are often lead to therapy by the symptoms of PTSD.[50] Indeed, child sexual abuse victims make up a comparatively large portion of those people seeking mental health treatment.[51] The "treatment" itself may provide the trigger to total recall of the repressed memory.

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44 Meiers-Post v. Schafer, 427 N.W.2d 606, 609 (Mich. Ct. App. 1988) (adult survivor's previously repressed memory of the sexual abuse she suffered as a child resurfaced while watching a television program on victims of childhood sexual abuse).

45 Shari L. Karney, an attorney, was prosecuting a child-rapist when, in court, her own memory of being sexually abused as a child began to flash back and eventually fully resurfaced. Mithers, *supra* note 5, at 44, 53-58.

46 In 1989, Eileen Franklin-Lipsker suddenly remembered a brutal rape-murder her father had committed on Eileen's best friend twenty years earlier. The event that triggered the recall was a glance from Eileen's 6-year-old daughter which reminded the mother of her childhood friend. *Daughter's Words Bring 1969 Slaying Conviction*, N.Y. TIMES, Dec. 1, 1990, at 26 [hereinafter *Daughter's Words*].

47 E. SUE BLUME, SECRET SURVIVORS 100 (1990).

48 *Id.* at 101.

49 One therapist described a client in her twenties who did not recall a history of abuse until she entered therapy, where she, in the environment of the therapist, began to experience intrusive flashbacks of abuse by her grandfather. She progressed to a semi-psychotic state in which she would go for periods of time not being able to distinguish between the flashback and the present world around her. She experienced rage, terror, a near uncontrollable impulse to physically destroy things around her. She hallucinated images of deceased relatives begging her to keep the sex abuse secret. Antipsychotic and antidepressant medications had to be prescribed. YVONNE M. DOLAN, RESOLVING SEXUAL ABUSE 109 (1991).

50 Herman & Schatzow, *supra* note 18, at 1-3.

51 *Id.* at 2; Olio, *supra* note 3, at 93.

Therapists often attempt to unlock repressed memories because they believe that in order to get well their patients must overcome the protective denial which was used to tolerate the abuse during childhood.[52] Memory-blocks can be protective in many ways, but they come at a cost; they cut off the survivor from a significant part of her past, and perhaps cause her negative self-image, low self-esteem, and other mental problems.[53] Therapists believe that these memories must be brought into consciousness to help the survivor acknowledge reality and overcome denial processes that are dysfunctional.[54] In the words of one prolific psychoanalyst: "Total memory recovery was total cure."[55]

Just as anecdotes exist to support the opinion that repressed memories may resurface later in life with clarity and certainty, so other anecdotes exist to support the belief in the curative powers of remembering. One thirty-eight year-old woman, Betsy, was hospitalized after a drunken rampage.[56] At intake she reported a history of bulimia nervose, alcohol abuse, and self-mutilation during which she would cut her forearms with a razor. She denied childhood sex abuse. Over six months of therapy, during which she cut her arms frequently, she began to dissociate, and, after repeated questioning, began to "recall" her father pushing her to her knees to perform oral sex on him. She also revealed that her father threatened to cut her arms off if she ever told about the abuse. To her therapist, her self-mutilation was now clearly an enactment of her past trauma. As her abuse memories pushed their way through consciousness, she gradually recovered and stopped her self-mutilation. In the words of her therapist: "Regaining the memories of her childhood incest and discussing them with another human being has improved this woman's capacity of intimately knowing and relating to herself and others."[57]

III. CURRENT LAW AND THE SURVIVOR

The unlocking of repressed memories can leave a survivor with a host of new problems; survivors must accept the veracity of the memory and overcome a sense of guilt, shame, or self-blame.[58] For

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52 SUSAN M. SGROI, 2 VULNERABLE POPULATIONS: SEXUAL ABUSE TREATMENT FOR CHILDREN, ADULT SURVIVORS, OFFENDERS, AND PERSONS WITH MENTAL RETARDATION 112 (1989); Herman & Schatzow, *supra* note 18, at 12.

53 Herman & Schatzow, *supra* note 18, at 12.

54 *Id.*; SGROI, *supra* note 52, at 115.

55 JEFFREY M. MASSON, FINAL ANALYSIS 12 (1990).

56 Frawley, *supra* note 2, at 255-56.

57 *Id.* at 256.

58 Hendrix, *supra* note 5, at E1; Olio, *supra* note 3, at 97; Diamond, *supra* note 27, at 4.

many survivors, therapy has apparently been useful in overcoming some of these debilitating psychological responses. By uncovering their past, they can understand the source of those responses.

A. THE LEGAL NEEDS OF SURVIVORS

Some survivors, however, have greater needs, including the need to exert control in some fashion. They can do this by initiating civil or criminal actions against their abuser.[59] Mary Doe, for instance, felt that her father had always been in power, and had always controlled and manipulated the family.[60] To escape from that power, Mary felt she had to stand up to him and hold him accountable for his actions. Mary needed society in general, and the court system in particular, to pronounce her father guilty in order to be free of him once and for all.

Many abusers refuse to admit the wrongfulness of their conduct or to appreciate its devastating results.[61] The denying abusers continue to blame their victims for any disruption and disgrace brought to the family as well as for any social or psychological problems the victim may have.[62] These adult survivors, then, often turn to the court system for judgment, to force accountability onto the abuser, and to allow the survivor to finally free herself of guilt or self-doubt.[63]

In addition to personal relief as a reason for bringing legal actions, many survivors say their motive is societal good. Mary Doe saw her suit as helping other victims, in part by increasing their awareness of their legal options.[64] These survivors believe that civil and criminal actions constitute more ways to demonstrate that child sexual abuse is not acceptable, and to increase awareness of the

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59 Some therapists encourage their patients to sue as "hope for emotional justice." One argument advanced by a therapist who had treated more than 1500 incest victims is that the lawsuit, however grueling, is "a very important step towards devictimization . . . a further source of validation. The personal satisfaction can be significant." SUSAN FORWARD & CRAIG BUCK, BETRAYAL OF INNOCENCE: INCEST AND ITS DEVASTATION 159 (1988).

60 Hendrix, *supra* note 5, at E1, E17.

61 *See* Nathan L. Pollock & Judith M. Hashmall, *The Excuses of Child Molesters*, 9 BEHAVIORAL SCI. & L. 53-60 (1991).

62 *See, e.g.*, Herman & Schatzow, *supra* note 18, at 10; Hammer v. Hammer, 418 N.W.2d 23, 24-25 (Wis. Ct. App. 1987) (defendant told plaintiff "she was at fault for her problems and the family's problems").

63 One survivor, after receiving a favorable judgment in a similar case, expressed his relief: "Just to see his name in the papers and to hear the guilty verdict, I feel good. My life has some meaning. I know that what he did to me wasn't my fault. After 18 years, I feel that justice can still be done." Alexander Reid, *Ruling Ignores Statutes of Limitations on Abuse Cases*, BOSTON GLOBE, Apr. 4, 1991, § 3 at 21, 31.

64 Hendrix, *supra* note 5, at E1, E17.

long-term damage childhood sexual abuse inflicts.[65] Moreover, legal actions serve as a warning to would-be child molesters that they will not get away with sexually abusing children, that society is ready and willing to hold them accountable for their actions no matter how long ago the abusive incidents occurred.[66] Finally, any monetary award accompanying a successful civil suit is often desperately needed by the victim who has possibly faced years of social dysfunction and expensive counseling.[67]

B. STATUTES OF LIMITATIONS

If an adult survivor makes the decision to file a civil or criminal charge against the abuser, a major obstacle arises: the statute of limitations. These statutes provide that no legal action can be maintained unless brought within a specified period of time, and, in cases of repressed memory, the victim is often unaware of the wrongful event until well after the statute of limitations has expired.[68] While this may seem unfair or unjust on the surface, statutes of limitations were developed to prevent unjustices, not to further them.

Statutes of limitations evolved over time with definite purposes in mind. They protect people from being forced to defend themselves against stale claims.[69] The statutes recognize that with the passage of time, evidence becomes more difficult to obtain and is less reliable.[70] Physical evidence is lost or destroyed, witnesses become impossible to locate, and memories fade.[71] With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense.[72] Additionally, statutes of limitations encourage plaintiffs to initiate actions promptly while evidence is fresh and a court will be able to judge more accurately.

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65 *Id.*

66 Mithers, *supra* note 5, at 44, 58.

67 *See, e.g.*, Hendrix, *supra* note 5, at E1, E17 (one of the reasons to sue is the money, for the survivor of child sexual abuse wasted years of her life and needed extensive therapy).

68 The statute of limitations for child abuse cases varies a great deal from state to state. Commonly, victims are allowed one to three years after reaching the age of majority before the statute of limitations expires on a civil action. *See* Martha Jean Zackin, Note, *The Discovery Rule and Father-Daughter Incest: A Legislative Response*, 29 B.C. L. REV. 941 (1988); Alan Rosenfeld, *The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy*, 12 HARV. WOMEN'S L.J. 206 (1989).

69 Tyson v. Tyson, 727 P.2d 226, 227 (Wash. 1986) (en banc).

70 *Id.* at 228.

71 *Id.*

72 *Id.*

C. CIVIL SUITS, STATUTES OF LIMITATIONS, AND THE DELAYED DISCOVERY DOCTRINE

Statutory time bars on the filing of civil suits, however, do have exceptions. In some cases, plaintiffs do not know when a wrong has occurred and may not discover their cause of action until years after the statute of limitations has expired. In response to such cases, courts fashioned the "delayed discovery doctrine" to prevent the injustice which would result from the strict application of the statute of limitations.[73]

A commonly used definition of the delayed discovery doctrine states that "the statute of limitations does not begin to run until the plaintiff has discovered, or in the exercise of reasonable diligence should have discovered, all of the facts which are essential to the cause of action."[74] This doctrine balances the unfairness faced by a plaintiff who is deprived of a verdict against the harm suffered by the defendant in letting the case go to trial after a long delay. Its purpose is to prevent the injustice which would result from the literal application of the statute of limitations in some cases.[75] Thus, "fundamental fairness is the linchpin" of the discovery doctrine.[76]

A traditional application of this doctrine has been in cases of medical malpractice: the patient discovers that her abdominal discomfort is caused by a surgical instrument left in her abdominal cavity after an appendectomy performed twenty-two years previously.[77] In such cases, courts find that the application of the balancing test

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[73] *Id.* at 229.

[74] DeRose v. Carswell, 242 Cal. Rptr. 368 (Cal. Ct. App. 1987). *See also* Lindabury v. Lindabury, 552 So. 2d 1117, 1118 (Fla. Dist. Ct. App. 1989) (Jorgenson, J., dissenting) ("where the plaintiff's ignorance is blameless, the cause of action will not arise until the plaintiff knows or is chargeable with knowing of an invasion of his legal right") (quoting Senfeld v. Bank of Nova Scotia Trust Co., 450 So. 2d 1157, 1162 (Fla. Dist. Ct. App. 1984)); *Tyson*, 727 P.2d at 227 ("a statute of limitations does not begin to run until the plaintiff, using reasonable diligence, would have discovered the cause of action"); Johnson v. Johnson, 701 F. Supp. 1363, 1367 (N.D. Ill. 1988) (the statute of limitations commences "when the plaintiff knew or should have known that he was injured") (quoting Lincoln-Way Community Villages v. Village of Frankfort, 367 N.E.2d 318, 323-24 (Ill. App. 1977)); Hammer v. Hammer, 418 N.W.2d 23, 26 (Wis. App. 1987) ("the cause of action accrues when the plaintiff discovers, or through the use of reasonable diligence should have discovered, both that s/he is injured and that the injury was caused by the defendant's misconduct") (quoting Comment, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 213 (1984)); Osland v. Osland, 442 N.W.2d 907, 909 (N.D. 1989) ("the discovery rule . . . tolls the statute of limitations until the plaintiff knows, or with reasonable diligence should know, that a potential claim exists") (citing Wall v. Lewis, 393 N.W.2d 758 (N.D. 1986)).

[75] *Tyson*, 727 P.2d at 231 (Pearson, J., dissenting).

[76] *Id.* (Pearson, J., dissenting).

[77] *See, e.g.*, Ruth v. Dight, 453 P.2d 631 (Wash. 1969).

required by the delayed discovery doctrine clearly strikes in favor of the patient.[78] Since the patient could not know that a surgical instrument had been negligently left in her abdomen until exploratory surgery found it after twenty-two years of discomfort, the harm of depriving her of a remedy outweighs the harm to the surgeon who must defend an operation conducted twenty-two years earlier.[79]

The discovery doctrine can similarly be applied to cases in which survivors of childhood sexual abuse have repressed all memory of the tortuous conduct. Thus, as the surgical instrument is hidden from the patient until a future event uncovers it, memory is hidden away until it, too, is discovered and the survivor possesses "all the facts which are essential to the cause of action."[80] When applying the doctrine in cases of previously repressed memories of childhood sexual abuse, courts must balance the harm of denying a remedy to a plaintiff who had no access to her memory against the hardships faced by a defendant defending against such longstanding claims.

1. Judicial Response in Civil Cases of Childhood Sexual Abuse

The first cases in which survivors of childhood sexual abuse argued for the application of the delayed discovery rule were unsuccessful.[81] Typical of these cases is *Tyson v. Tyson*.[82] In that case, the plaintiff, Nancy Tyson, accused her father of multiple acts of sexual assault occurring over a nine-year period, when she was between three and eleven years old.[83] Her complaint alleged that as a result of the trauma she experienced, she repressed all memories of the incidents until she entered therapy fifteen years later.[84]

The court, however, refused to use the delayed discovery doctrine to toll the statute of limitations.[85] The court expressed concern about the length of time which had elapsed since the alleged abusive events, and about the lack of "objective, verifiable evidence."[86] The court also thought that a substantial risk of stale claims would result from allowing repressed memories to toll the

78 *Id.* at 635-36.

79 *Id.*

80 *See supra* note 74 and accompanying text.

81 Newlander v. Newlander, No. B003156 (Cal. Ct. App. filed Jan. 9, 1984) (*cited in* Salten, *supra* note 29, at 203-06); Tyson v. Tyson, 727 P.2d 226 (Wash. 1986).

82 727 P.2d 226 (Wash. 1986).

83 *Id.* at 227.

84 *Id.*

85 *Id.* at 230.

86 *Id.* at 228.

statute of limitations.[87] Thus, in holding in favor of the defendant, the court found that the right of the defendant not to be forced to defend against a stale claim was superior to the right of the plaintiff to present her case.[88]

In recent years, however, arguments in favor of applying the discovery rule to cases of repressed memories of childhood sexual abuse have been more successful. Mary Doe and several other plaintiffs have succeeded in bringing suits that require the tolling of the statute of limitations by application of the discovery rule.[89] As much as twenty years had passed since the abusive incidents,[90] and yet the courts held that justice demanded that the statute of limitations be tolled by the repression of memory of the abuse. The courts in these cases examined the circumstances surrounding the sexual abuse of children, presumed the possible validity of a repressed memory, and found that to bar the plaintiffs' opportunity to bring a suit would be "most unfair."[91] Although the application of the discovery rule to cases of repressed memories has not been unanimous,[92] the trend is definitely toward the acceptance of the

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87 *Id.* at 230.

88 The *Tyson* court was deeply divided. The decision was 5-4, with Justices Durham, Dore, Anderson, Callow and Goodloe voting with the majority, and Chief Justice Dolliver and Justices Utter, Brachenbach, and Pearson dissenting. Additionally, a number of commentators criticized the holding almost immediately after it was issued. *See* Mark D. Kamitomo, Note, *Discovery Rule Application in Child Abuse Actions*, 23 GONZ. L. REV. 223 (1988); Naomi Berkowitz, Note, *Balancing the Statute of Limitations and Discovery Rule: Some Victims of Incestuous Abuse Are Denied Access to Washington Courts*-Tyson v. Tyson, 10 U. PUGET SOUND L. REV. 721 (1987).

89 Four cases have been brought with fact patterns very similar to those of the fictional Mary Doe, including the real Mary's case: Mary D. v. John D., 264 Cal. Rptr. 633 (Cal. Ct. App. 1989), *remanded* 275 Cal. Rptr. 380 (Cal. 1990); Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988); Evans v. Eckelman, 265 Cal. Rptr. 605 (Cal. Ct. App. 1990); Doe v. LaBrosse, 588 A.2d 605 (R.I. 1991). Additionally, three cases have arisen with somewhat similar fact patterns: although a victim of child sexual abuse did not repress the memory of the abuse, the victim was unaware of the causal relationship between the abuse and present mental and emotional difficulties. In these cases the courts tolled the statute of limitations in holdings broad enough to encompass a case similar to Mary Doe's. *See* Hammer v. Hammer, 418 N.W.2d 23 (Wis. App. 1987); Osland v. Osland, 442 N.W.2d 907 (N.D. 1989); Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986) (under the Federal Tort Claims Act, the statute of limitations does not begin to run until the victim learns that the abusive conduct caused her emotional injuries).

90 *Johnson*, 701 F. Supp. 1363, 1364 (N.D. Ill. 1988).

91 *Mary D. v. John D.*, 264 Cal. Rptr. at 639.

92 *See* Tyson v. Tyson, 727 P.2d 226 (Wash. 1986); Lindaburg v. Lindaburg, 552 So. 2d 1117 (Fla. Dist. Ct. App. 1989) (holding that the statute of limitations had run); Burpee v. Burpee, 578 N.Y.S.2d 359 (N.Y. App. Div. 1991). The *Lindaburg* court failed to even discuss the discovery rule in a half-page opinion that demonstrates great shortsightedness by the court, which would not even agree to toll the statute of limitations until the victim reached the age of majority.

discovery rule for survivors such as Mary Doe.[93]

2. *Legislative Reaction*

After failing in the courts, some plaintiffs' civil attorneys took their efforts to legislative arenas. There, legislative bodies of a number of states were impressed by arguments that the law should not protect perpetrators who successfully traumatize their victims into repression, and that survivors of childhood sexual abuse deserve a tolling of the statute of limitations during the period that their memory has been repressed. The first legislation to apply the discovery doctrine to civil cases of childhood sexual abuse was enacted in Washington in 1989.[94] This statute states:

> All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within the later of the following periods: (a) Within three years of the time of the act alleged to have caused the injury or condition; (b) Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or (c) Within three years of the time the victim discovered that the act caused the injury for which the claim is brought.[95]

Since the passing of the Washington law, at least twenty other states have enacted similar legislation allowing for the tolling of the statute of limitations in civil cases.[96] In addition, other states have

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93 A number of states that do not recognize the delayed discovery doctrine have attempted to apply other equitable doctrines to allow victims of childhood sexual abuse with previously repressed memories into court. Primarily, plaintiffs have attempted to argue that the repression of memory by a plaintiff places the plaintiff in an "insanity" exception which also tolls the statute of limitations. While this argument is occasionally used successfully, *see, e.g.*, Meiers-Post v. Schafer, 427 N.W.2d 606 (Mich. Ct. App. 1988); Jones v. Jones, 576 A.2d 316 (N.J. Super. Ct. App. Div. 1990), it has been rejected in numerous other jurisdictions, *see, e.g.*, Whatcott v. Whatcott, 790 P.2d 578 (Utah App. 1990); Strata v. Patin, 545 So. 2d 1180 (La. Ct. App. 1989); Smith v. Smith, 830 F.2d 11 (2d Cir. 1987); Hoffman v. Hoffman, 556 N.Y.S.2d 608 (N.Y. App. Div. 1990).

94 The legislation was largely instigated by Patti Barton, a survivor of childhood sexual abuse, who attempted to bring suit against her abuser in a Washington State court. After she learned that *Tyson* prevented her from bringing a suit, she successfully lobbied to get the statute enacted. Since that time, she and her husband have lobbied every state in the nation to enact similar laws, and it is largely through their efforts that similar statutes have been adopted by 20 other states. *See infra* note 96.

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

96 The states that have adopted legislation tolling the statute of limitations for civil suits alleging childhood sexual abuse are: Alaska (claims for sexual abuse may be brought within three years after discovery), ALASKA STAT. § 9.10.140(b)(1)-(2) (Supp. 1992); California (civil actions for childhood sexual abuse may be commenced within three years after the date of discovery); Arkansas (three year statute of limitations begins at date of discovery), S.B. 287, 79th Gen. Assembly, 1993 Sess. (enacted Mar. 5, 1993);

considered, or are currently considering, bills that would achieve the same result,[97] and law-makers from many other states are studying similar legislation for introduction in future legislative sessions.

While most states enacting legislation to toll the statute of limitations in cases of childhood sexual abuse have modeled their legislation after Washington's statute, several are even more liberal. For

CAL. CIV. PROC. CODE § 340.1 (West Supp. 1993); Colorado (civil actions for childhood sexual abuse must be brought within six years of discovery), COLO. REV. STAT. ANN. § 13-80-103.7 (West Supp. 1992); Connecticut (action must be brought no later than 17 years from the date the person attains the age of majority), CONN. GEN. STAT. ANN. § 52-577d (West 1991); Florida (action founded on childhood sexual abuse may be brought within four years of the time of discovery), FLA. STAT. ANN. § 95.11(7) (West Supp. 1993); Idaho (action for childhood sexual abuse must be commenced within five years of the child reaching 18 years of age), IDAHO CODE § 6-1704 (1989); Iowa (childhood sexual abuse actions must be brought within four years of their discovery), IOWA CODE ANN. § 614.8A (West Supp. 1993); Kansas (action for childhood sexual abuse may be brought within three years of discovery), KAN. STAT. ANN. § 60-523 (Supp. 1992); Maine (childhood sexual abuse actions may be brought up to six years after the victim discovers the harm), ME. REV. STAT. ANN. tit. 14, § 752-C (West Supp. 1992); Minnesota (child victims of sexual abuse may file complaints within three years after the offense was reported to law enforcement authorities), MINN. STAT. ANN. § 628.26 (West Supp. 1993); Missouri (victims of childhood sexual abuse may file civil suits within three years of the date of discovery), MO. REV. STAT. § 537.046 (Supp. 1991); Montana (childhood sexual abuse suit may be brought within three years of the date of discovery), MONT. CODE ANN. § 27-2-216(1)(b) (1991); Nevada (childhood sexual abuse suits may be brought within three years of discovery), NEV. REV. STAT. § 11.215 (Supp. 1991); New Mexico (childhood sexual abuse actions must be brought within three years of discovery), N.M. STAT. ANN. § 37-1-30 (Michie Supp. 1993); Oregon (childhood sexual abuse suits are allowed to be brought for three years after the date of discovery but not after the victim is 40 years old), OR. REV. STAT. § 12.117 (1991); Rhode Island (action for childhood sexual abuse may be brought within three years of discovery), R.I. GEN. LAWS § 9-1-51 (Supp. 1992); South Dakota (childhood sexual abuse suits may be brought up to three years after date of discovery), S.D. CODIFIED LAWS ANN. § 26-10-25 (1992); Vermont (childhood sexual abuse suits may be brought within six years of discovery), VT. STAT. ANN. tit. 12, § 522 (Supp. 1992); Virginia (cause of action accrues on the date which sexual abuse is discovered, but no action may be brought later than 10 years after the victim reaches the age of majority), VA. CODE ANN. § 8.01-249(6) (Michie 1992). One additional state, New Hampshire, already had a statute of limitations that incorporated the delayed discovery doctrine for all civil cases. N.H. REV. STAT. ANN. § 508.4 (Supp. 1992).

97 States considering such legislation include: Hawaii, H.B. 2606, 16th Leg., 1992 Sess. (1991) (childhood sexual abuse actions may be brought within two years of discovery); Illinois, H.B. 1335, 88th Gen. Assembly, 1993-94 Sess. (1993) (abolishes statute of limitations for actions based on childhood sexual abuse); Massachusetts, H.B. 915, 178th Gen. Court, 1993 Sess. (actions for childhood sexual abuse must be commenced within three years of discovery); Michigan, H.B. 4518, 87th Leg., 1993 Sess. (actions for childhood sexual abuse must be brought within three years of discovery); Nebraska, L.R. 176, 93d Leg., 1st Sess. (1993) (considering changes to statute of limitations); New York, A.B. 7695, 215th Gen. Assembly, 1st Sess. (1993) (actions based on childhood sexual abuse must be commenced within three years of discovery); Ohio, H.B. 271, 119th Gen. Assembly, 1991-92 Sess. (1991) (actions for childhood sexual abuse must be brought within four years of discovery); South Carolina, H.B. 3927, Statewide Sess. (1993) (actions must be brought within 12 years of victim's 18th birthday or four years from date of discovery).

example, Illinois recently enacted a statute abolishing the statute of limitations entirely for actions arising from childhood sexual abuse.[98] Virginia added a novel one-year window, during which victims of childhood sexual abuse who were previously barred under the prior statute of limitations could bring suit against their alleged abuser, to supplement that state's tolling of the statute of limitations until discovery.[99]

When the numbers are added up, at least twenty-one states allow the statute of limitations to be tolled in civil cases where a victim of child sexual abuse has repressed all memory of the incident.[100] These numbers are especially remarkable since as late as 1986 no states allowed such cases. The magnitude of the movement to allow repressed memories to toll the statute of limitations is even more apparent when one additionally considers the large number of states which are considering adopting similar laws. It is, then, indisputable that repression as a basis for tolling the statute of limitations will soon be quite common, at least in civil cases concerning child sexual abuse.

D. CRIMINAL ACTIONS AND THE STATUTE OF LIMITATIONS

The criminal statutes of limitations for child sexual abuse differ from state to state and differ widely, from states like South Carolina and Wyoming, which have no statutes of limitations for any criminal offenses, to Hawaii, which has a three year statute of limitations for rape of a child, regardless of the age and ability of the victim to report the crime.[101] Obviously, in states such as South Carolina and Wyoming, survivors of childhood sexual abuse will not face statute of limitations problems in bringing criminal charges against their abusers even much later in life. Traditionally, however, statutes of limitations were more likely to read like those of Hawaii, and allow for criminal charges to be filed only during a fixed time after the actual criminal event. Therefore, many survivors wishing to initiate criminal proceedings against their abusers face the potential problem of a statute of limitations that has run its course.

Furthermore, criminal statutes of limitations are often rigidly drawn, and the judicially created "delayed discovery" doctrine does

98 735 ILCS 5/13-202.2 (Supp. 1993).

99 1991 Va. Acts 674 (no claims for childhood sexual abuse "which occurred prior to July 1, 1991, shall be barred . . . if it is filed within one year of the date of this act").

100 Nineteen states have enacted statutes to allow these actions. *See supra* note 96 and accompanying text. In two additional states, judges have tolled the statute of limitations and allowed such suits to go forward. *See supra* note 89 and accompanying text.

101 HAW. REV. STAT. § 701-108(2)(b) (1985).

not extend to criminal proceedings. The limitation of the delayed discovery doctrine to civil actions has several justifications. First, the very origins of the doctrine focus on the civil plaintiff. Using the delayed discovery to toll a statute of limitations prevents an injustice from occurring at the expense of an innocently ignorant plaintiff. This is balanced against the hardship faced by a potential defendant, and, in the civil context, courts have found that in limited cases the application of the discovery doctrine is necessary for justice.

In criminal actions, on the other hand, the focus is on the rights of the potential defendant with the courts recognizing that a criminal charge portends far greater consequences than a civil charge. The purpose of criminal statutes of limitations is to limit potential criminal prosecution to a fixed period after the occurrence of the criminal acts[102] in order that a case may be heard while the evidence is fresh and to give the court the greatest chance of reaching a correct verdict. Statutes of limitations also prevent prosecution of people who committed a crime in the past, but have been law abiding for years, allowing a one-time criminal peace of mind years later knowing he or she is free from the threat of prosecution or blackmail.[103] Furthermore, such statutes of limitations encourage law enforcement agencies to proceed in a timely manner as to avoid delay which may be harmful to an accused person's attempt to mount a defense. Thus, according to the United States Supreme Court, criminal statutes of limitations "normally begin to run when the crime is complete" and are to be "liberally interpreted in favor of repose."[104] The result of these rulings is that unless there is a statutory provision providing otherwise, criminal time limits are given strict statutory construction.

1. *Judicial Response to Criminal Complaints of Childhood Sexual Abuse and Statutes of Limitations*

Regardless of the strict language of the Supreme Court mandating interpretation of statutes of limitations in favor of criminal defendants, a few courts, with prosecutorial urging, have fashioned opinions that allow the tolling of criminal statutes of limitations in specific circumstances. The theories most often urged upon the courts by prosecutors are the "continuing crime" and "concealment" theories.

The "continuing crime" theory uses a simple premise that a

102 Toussie v. United States, 397 U.S. 112, 114 (1970).

103 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 802 (2d ed. 1992).

104 *Toussie*, 397 U.S. at 115 (quoting Pendergast v. United States, 317 U.S. 412, 418 (1943) and United States v. Scharton, 285 U.S. 518, 522 (1932)).

crime is not complete as long as the defendant continues to engage in the criminal conduct, and, as long as the crime is not complete, the statute of limitations does not begin to run. This argument has been used successfully to extend the statue of limitations for criminal abuse of a child,[105] but its application is limited to those situations where some element of the crime continues for years,[106] and indeed it is only invoked if that element of the crime continues until after the traditional statute of limitations has expired. Most often, in child sexual abuse cases, that element is the perpetrator's continuing abuse of his authoritative position. Repressed memory cases, surfacing years after the completion of the abuse, will seldom contain such a continuing element.

The "concealment" argument is based upon statutory provisions in a number of states that allow for the tolling of the statute of limitations if the perpetrator conceals his crime.[107] Concealment provisions, when applied to cases involving childhood sexual abuse, have met with limited success.[108] These provisions, however, are

105 *See* State v. Danielski, 348 N.W.2d 352 (Minn. Ct. App. 1984) (an element of the sexual offense is the defendant's exertion of authority over the victim and the crime continued until that exertion of authority ceased, even though the abuse had ceased previously).

106 *See* State v. Shamp, 422 N.W.2d 736 (Minn. Ct. App. 1988), *rev'd on other grounds*, 427 N.W.2d 228 (Minn. 1988) (court held that since victim and defendant did not live in the same house and did not have day-to-day contact, there was no continuing unlawful crime with which to toll the statute of limitations); State v. French, 392 N.W.2d 596 (Minn. Ct. App. 1986) (court held that since uncle who abused victim did not control her day-to-day activities there was no continuing unlawful activity and the statute of limitations did not toll).

107 The law of Indiana is an example of the type of statutory provision designed to toll the statute of limitations when concealment of a crime occurs: "The period within which a prosecution must be commenced does not include any period in which: . . . 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 . . . ." IND. CODE ANN. § 35-41-4-2(d) (Burns 1986).

108 *See* Crider v. State, 531 N.E.2d 1151 (Ind. 1988) (threats of physical violence against victim can constitute concealment of a crime for the purposes of tolling the statute of limitations); Walstrom v. State, 752 P.2d 225 (Nev. 1988) (the methods used to perpetrate and hide the crime of child sex abuse resulted in concealment of that crime and served to toll the statute of limitations). *But see* State v. Davidson, 816 S.W.2d 316 (Tenn. 1991) (defendant's coercion of the victim not to tell anyone of the abuse held not concealment of a crime and therefore statute of limitations not tolled); Umfleet v. State, 556 N.E.2d 339 (Ind. Ct. App. 1990) (statute of limitations not tolled under the concealment provision where defendant made no positive actions such as threats to conceal the sexual abuse of his daughter); Tidwell v. State, 775 S.W.2d 379 (Tenn. Crim. App. 1989) (defendant found not to have concealed crime since victims were aware of it); State v. Bently, 721 P.2d 227 (Kan. 1986) (defendant's threats to victim not to tell anyone of the abuse held not to constitute concealment of the offense and thus the statute of limitations had not tolled).

usually narrowly construed since attempts at concealment are commonplace[109] and courts usually require a positive act to conceal the fact that a crime has been committed. The judiciary has taken two differing paths when faced with this argument. One response is that a crime against a person, by its very nature, cannot be considered concealed.[110] The other response is more sympathetic to the peculiarities involved with child sexual abuse and recognizes that the threats, coercion, and manipulation often invoked can in fact conceal the crime and thus serve to toll the statute of limitations.[111]

Despite these arguments, relatively few criminal child sex abuse cases exist in which either argument has successfully tolled the statute of limitations. Neither of the arguments has received anything like the almost universal acceptance that the delayed discovery doctrine enjoys in the civil context. Given these limitations in judicially created solutions, advocates desiring extended criminal statutes of limitations for child sexual abuse have successfully turned to the law-making bodies for help.

2. *Legislative Response To Criminal Complaints of Childhood Sexual Abuse and Statutes of Limitations*

Legislative change from the traditional fixed-time statute of limitations for criminal child sexual abuse is occurring at a rapid pace.[112] Only five states remain that do not have statutory tolling or extension provisions for childhood sexual abuses cases; thus, in these states, the statute of limitations begins to run immediately after the abuse is complete regardless of the age of the victim, the inability of the victim to report the crime, or the possible repression of the memory of the crime.[113]

The majority of states, however, have recognized and re-

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109 LAFAVE & ISRAEL, *supra* note 103, at 802.

110 *See, e.g., Bently*, 721 P.2d at 230 ("crimes against persons, by their very nature, cannot be concealed").

111 *See, e.g., Crider*, 531 N.E.2d at 1154 (defendant "successfully concealed the fact of his crimes by his positive acts of intimidation of his victims").

112 In a 1990 article, it was reported that 24 states did not have any provisions to toll criminal statutes of limitations in cases of childhood sexual abuse. Jessica Mindlin, *Child Sexual Abuse and Criminal Statutes of Limitation: A Model For Reform*, 65 WASH. L. REV. 189, 191 n.12 (1990). Current research indicates that only five states have no provisions to either toll or extend the statute of limitations in cases of childhood sexual abuse. *See infra* note 113.

113 *See* CONN. GEN. STAT. ANN. § 54-193(a) (West Supp. 1993) (five year statute of limitations); DEL. CODE ANN. tit. 11, § 205(e) (Supp. 1992) (five year statute of limitations); HAW. REV. STAT. § 701-108 (Supp. 1992) (six year statute of limitations); N.Y. CRIM. PROC. LAW § 30.10 (McKinney 1992) (five year statute of limitations); TEX. CODE CRIM. PROC. ANN. art. 12.01 (West Supp. 1993) (ten year statute of limitations).

sponded to what some perceive as injustice in the relatively short criminal statute of limitations for child sexual abuse.[114] These legislative responses are varied. An approach adopted by a number of states is to simply extend the statute of limitations in cases of child sexual abuse.[115] Thus in Mississippi, for example, the normal felony statute of limitations is two years, but in the case of a sex crime committed against a minor, the limitations period is extended until on or before the victim's twenty-first birthday.[116]

Most states, however, responding to the problem of a minor victim being unable or unwilling to come forward (or coming forward only to be met by disbelief) have enacted tolling statutes.[117]

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114 Two states, South Carolina and Wyoming, do not impose statutes of limitations on any crimes, and seven other states do not have statutes of limitations for felonies. *See* ALA. CODE § 15-3-5(a)(4) (Supp. 1993); KY. REV. STAT. ANN. § 500.050 (Michie/Bobbs-Merrill 1990); MD. CTS. & JUD. PROC. CODE ANN., § 5-106 (Supp. 1992); N.C. GEN. STAT. § 15-1 (1983); R.I. GEN. LAWS § 12-21-2 (1981); VA. CODE ANN. § 19.2-8 (Michie Supp. 1993); W. VA. CODE § 61-11-9 (1992).

115 COLO. REV. STAT. § 16-5-401(7) (Supp. 1993) (if the victim is under the age of 15, the statute of limitations increases from three years to ten years); IND. CODE ANN. § 35-41-4-2(c) (Burns Supp. 1993) (prosecution must be commenced before victim's thirty-first birthday); IOWA CODE ANN. § 802.2 (West Supp. 1993) (if the victim is under the age of 12, the statute of limitations is extended to the victim's 18th birthday plus six months); KAN. STAT. ANN. § 21-3106 (Supp. 1992) (if the victim is under 16, the statute of limitations is extended from two years to five years); MISS. CODE ANN. § 99-1-5 (Supp. 1993) (if the victim is under the age of 21, the statute of limitations is extended until on or before the victim's 21st birthday); MO. ANN. STAT. § 556.037 (Vernon Supp. 1993) (if victim is under 17 years old, the statute of limitations is extended to ten years); NEB. REV. STAT. § 29-110(2) (Supp. 1992) (if victim is under 16 years old, the statute of limitations is extended until seven years from the date of the crime or after the victim's 16th birthday, whichever is longer); S.D. CODIFIED LAWS ANN. § 22-22-7 (Supp. 1993) (if the victim is under the age of 16, the statute of limitations is increased to seven years or is extended until the victim reaches the age of 19, whichever is longer); TENN. CODE ANN. § 40-2-101(d) (1990) (the statute of limitations is increased to four years or is extended until the victim reaches the age of majority, whichever is longer); WIS. STAT. ANN. § 939.74(2)(c) (West Supp. 1992) (statute of limitations is either six years or extended until the victim reaches the age of 21, whichever is longer).

116 MISS. CODE ANN. § 99-1-5.

117 *See* ARK. CODE. ANN. § 5-1-109(h) (Michie Supp. 1991) (tolls the statute of limitations until the victim is 18); CAL. PENAL CODE § 803(f) (West 1993) (if victim is under age 17, the statute of limitations is extended until the victim's 17th birthday or to within one year of reporting, whichever is later); FLA. STAT. ANN. § 775.15(7) (West 1992) (if the victim is under 16 years old, statute of limitations is tolled until the victim is 16 years old or until the crime is reported, whichever occurs first); GA. CODE ANN. § 17-3-2.1 (Michie Supp. 1993) (tolls the statute of limitations until the victim reaches 16 years of age); IDAHO CODE § 19-402 (Supp. 1992) (tolls the statute of limitations until the victim is 18 years old); 720 ILCS 5/3-6(c),(d) (1993) (actions may be commenced within one year of victim's 18th birthday or within three years of date of offense); LA. CODE CRIM. PROC. ANN. art. 573(4) (West Supp. 1993) (if the victim is under 17, the statute of limitations is tolled until the victim turns 17); MASS. GEN. LAWS ANN. ch. 277, § 63 (West Supp. 1993) (if the victim is under 16, the statute of limitations is tolled until the victim reaches the age of 16, or reports the crime to a law enforcement agency, whichever is

Typically the statute of limitations is tolled until the minor reaches a certain age, usually that state's age of majority. The law of Massachusetts exemplifies this type of statute:

> Notwithstanding the foregoing, if a victim of a [sex crime] is under the age of sixteen at the time such crime is committed, the period of limitation 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.[118]

Some of these tolling statues extend the statute of limitations in addition to tolling its initiation until the victim reaches the age of majority. For example, in New Hampshire, if the victim of a sex crime is under the age of eighteen, the statute of limitations is tolled until the victim turns eighteen, and then the victim has twenty-two years to report the crime before the statute of limitations runs out.[119] Thus, a person could conceivably have until the age of thirty-nine or forty to initiate criminal charges for a sex crime that occurred, say, thirty-five years earlier.

All of these legislative responses, however, have one point in common: they include a fixed period after which criminal actions may not be brought. These statutes then, may not reach a case based upon a repressed memory that resurfaces years later, when the victim is in her thirties, forties, and beyond (except in rare cases, as in New Hampshire).

Seven state legislatures have enacted laws that go further than

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sooner); MICH. COMP. LAWS ANN. § 767.24 (West Supp. 1992) (indictment may be brought within six years of offense or by the victim's 21st birthday, whichever is later); MONT. CODE ANN. § 45-1-205(1)(b) (1991) (if victim is less than 18 years old, the statute of limitations is tolled until the victim turns 18); NEV. REV. STAT. ANN. § 171.095 (Michie 1993) (statute of limitations is tolled until the victim's 21st birthday if injury is discovered prior to victim's 21st birthday or else until victim's 28th birthday); N.H. REV. STAT. ANN. § 625:8 (Supp. 1992) (if the victim is under the age of 18, the statute of limitations is tolled until the victim is 18 and then the statute of limitations extends for 22 years); N.J. STAT. ANN. § 2C:1-6-b(4) (West Supp. 1992) (if the victim is under 18, the five year statute of limitations is tolled until the victim reaches 18); N.M. STAT. ANN. § 30-1-9.1 (Michie 1992) (tolls the statute of limitations until the victim turns 18 or reports the crime, whichever occurs first); OR. REV. STAT. § 131.125(2) (1991) (if the victim is less than 18 years old, the six year statute of limitations begins either when the victim reaches age 18 or when the crime is reported, whichever occurs first); PA. STAT. ANN. tit. 42, § 5554(3) (Supp. 1993) (if the victim is under 18 years old, tolls the statute of limitations until the victim's 18th birthday); VT. STAT. ANN. tit. 13, § 4501 (Supp. 1992) (for victims under age 17, the six year statute of limitations is tolled until the victim reaches the age of 24 or untiil the crime is reported, whichever is earlier); WASH. REV. CODE ANN. § 9A.04.080(1)(c)(i) (West Supp. 1993) (if victim is under age 14, the statute of limitations is tolled until the child reaches age 18 or until seven years after the offense, whichever is later).

118 MASS. GEN. LAWS ANN. ch. 277, § 63.

119 N.H. REV. STAT. ANN. § 625:8.

the toll-until-age-of-majority limitations statutes and reach most, if not all, repressed memory cases.[120] Alaska and Maine have removed the statute of limitations altogether for child sexual abuse when the victim is a minor.[121] The other five states, Arizona, Ohio, North Dakota, Utah, and Oklahoma, codify the delayed discovery doctrine into their criminal statute of limitations for childhood sexual abuse. Arizona's law, for example, reads: "[P]rosecutions [for felony sexual abuse of a child] must be commenced within [seven years] after actual discovery by the state or the political subdivision having jurisdiction of the offense or discovery by the state or such political subdivision which should have occurred with the exercise of reasonable diligence, whichever first occurs."[122]

Such laws go even beyond the delayed discovery doctrine as employed in civil cases. These statutes of limitations, unlike the delayed discovery doctrine, do not focus on the victim having discovered a previously repressed crime. Rather, these statutes focus on when the crime is reported, or when law enforcement officials should have discovered the crime. Thus, even if a victim is consciously aware of the abuse but chooses not to report it for twenty, thirty or more years, the statute of limitations will not have run. And certainly if a repressed memory resurfaces at anytime during the victim's lifetime, it can be used as the basis for criminal charges.

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120 ALASKA STAT. § 12.10.020 (Supp. 1992) (action for offense committed against a person under age 18 may be commenced anytime); ARIZ. REV. STAT. ANN. § 13-107(B) (1989) (tolls the statute of limitations until actual discovery of the crime by law enforcement officials or to the time when the law enforcement officials, using reasonable diligence, should have discovered the crime); ME. REV. STAT. ANN. tit. 17-A, § 8 (West Supp. 1992) (if the victim is under 16 years of age, there is no statute of limitations on the filing of criminal charges); N.D. CENT. CODE § 29-04-03.1 (Supp. 1993) (if the victim is under 18, the statute of limitations is tolled for seven years, or within three years of reporting of the offense, whichever is later); OHIO. REV. CODE ANN. § 2901.13(F) (Baldwin 1992) (before statute of limitations is initiated, the corpus delicti of the crime must be discovered; court in State v. Hensley, 571 N.E.2d 711 (Ohio 1991) held that the victim's knowledge of the crime did not initiate the statute of limitations nor did the victim's telling her mother of the sexual abuse; responsible people are limited to a group of statutorily listed professionals such as doctors, counselors, and law enforcement officials); OKLA. STAT. ANN. tit. 22, § 152(A) (West 1992) (five year statute of limitations does not begin to run until the crime is discovered); UTAH CODE ANN. § 76-1-303 (3) (Supp. 1993) (for sexual abuse of a minor, the four year statute of limitations does not begin to run until the crime is reported).

121 ALASKA STAT. § 12.10.020 (action for offense committed against a person under age 18 may be commenced anytime); ME. REV. STAT. ANN. tit. 17-A, § 8 (West Supp. 1992) (action may be commenced anytime if victim is under age 16).

122 ARIZ. REV. STAT. ANN. § 13-107(B).

IV. Problems with Tolling or Extending the Statute of Limitations in Cases of Repressed Memories

Tolling or extending the statute of limitations in cases of previously repressed memories raises a number of troublesome issues. These concerns center primarily around the lack of empirical information on repression in general. Serious questions exist about the reliability of repressed memories that return ten, twenty or more years later. Moreover, there is no agreement that repression, and the return of repressed memories, even exists. Resolving these concerns about repression is compounded by the very nature of repression which precludes experimental re-creation.

A. Are Repressed Memories That Return Authentic?

Are memories of childhood sex abuse, newly released from the grip of repression, authentic? There is little to be found in the scientific literature on the authenticity of previously repressed memories. One study attempted to examine the authenticity of memories, previously repressed or otherwise, of childhood sexual abuse.[123] The study entailed asking women to obtain verifying evidence of their memories of childhood sexual abuse. While the study is sometimes used as evidence of authentic repressed memories, a close examination shows that it does not contain the clear verification of repressed memories which some would like to believe it does.

In this study, fifty-three women who were being treated in therapy groups for incest survivors were asked to gather corroborating evidence of abuse.[124] Approximately three-quarters were able to find some form of corroboration, although in several cases the sufficiency of the corroboration may have been debatable.[125] Even if the corroboration was shown to be trustworthy, the data from this study was not, unfortunately, presented in sufficient detail for readers to know if any of the repressed-memory survivors were among those who provided corroboration.[126]

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123 Herman & Schatzow, *supra* note 18, at 3-12.

124 *Id.* at 2-3.

125 The study includes in its definition of corroborating evidence statements by others that they too believe they were the victims of child sexual abuse perpetrated on them by the same individual. *Id.* at 10. Such evidence is inadmissible in most, if not all, court proceedings. *See* Fed. R. Evid. 404(b) (banning admission of similar acts to prove the defendant acted in conformity therewith).

126 In the study, only 14 of the subjects were reported as having "severe memory defects." Herman & Schatzow, *supra* note 18, at 5. However, 14 subjects also were unable to confirm their abuse or obtain any corroborating evidence. *Id.* at 10-11. The report is unclear as to how many, if any, of those with memory defects were able to produce corroborating evidence.

In addition to the above study, individual clinical cases are used as a basis for establishing the authenticity of previously repressed memories. Nevertheless, even though examples of inconsistencies in the memories can be found in the clinical cases, clinicians would argue, without further proof, that the core of the memory is still valid.

Others in the field are not as convinced. They believe that, as with hypnosis, the therapeutic environment can be so suggestive that if a therapist goes looking for a memory of childhood sexual abuse, "it is more likely they'll find it whether it happened or not."[127] Thus, although the individual subjects may be honest, skeptics tend to disbelieve the clinical results as products of expectations and suggestive techniques.[128]

But while researchers attempt to discover more about the nature and validity of repressed memory, jurists are faced with difficult authenticity questions to which there are currently no empirical answers. In light of the need for authentication of repressed memories, other analytical tools must be utilized.

B. APPLICATION OF TRADITIONAL MEMORY CONCEPTS TO REPRESSED MEMORIES WHICH HAVE RETURNED

Volumes have been written about the reliability of normal memories. Laboratory experiments demonstrate that at each stage of memory—perception, retention, and retrieval—a host of factors may introduce error into the subject's memory.[129] Thus, the mood at perception, information learned after an event, or the environment in which a subject recalls a memory have all been shown to affect the accuracy of a memory.[130]

It is not known if repressed memories are more or less susceptible to erroneous data then standard memories.[131] However, a comparative analysis of repressed memories, using the body of empirical information on standard memories, is useful. Such an analysis demonstrates that previously repressed memories are often exposed to factors which have been experimentally demonstrated to introduce error into standard memories.

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127 Oldenburg, *supra* note 7, at D5 (statement of Richard Mikesell, a Washington, D. C. psychotherapist).

128 *Id.*

129 *See, e.g.*, LOFTUS, *supra* note 15, at 20-109.

130 *Id.*

131 Olio, *supra* note 3, at 95.

1. Perception

The perception phase involves the subject experiencing an event which is then committed to memory. At this stage, factors such as time of exposure, familiarity with the subject, and stressfulness of the event have been shown to affect the accuracy of the resultant memory.[132] Thus, the subject who experiences an event for a short time, or is unfamiliar with the subject, or is under a great deal of stress during the event will often retain a less accurate memory of that event.[133]

A misperception of an original event obviously leads to an inaccurate memory; an accurate memory was never recorded. One reason why the initial formation of memory could be inaccurate is that it is heavily influenced by context.[134] The contextual interpretation that an individual gives to a situation will affect how the situation is perceived. In many instances, critical aspects of an event may be missed because they are not relevant to the context the individual is using at the time of an event.[135] Also, some aspects could be exaggerated to reflect the interpretation used at the time.[136] The rules which guide the construction of an event in the first place, combined with context and expectancy effects, can lead an individual to perceive qualities that do not occur.

2. Retention

After some critical event is over, and some information is stored in memory, time passes. This phase of the process is referred to as the retention phase.[137] During retention, people are often exposed to new information which can influence their recollection of the past. The change in report arising from such postevent misinformation has been referred to as the "Misinformation Effect."[138] This effect has been found in scores of studies, and there seems to be little doubt that erroneous reporting is easy to induce.[139] Due to

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132 LOFTUS, *supra* note 15, at 20-51.

133 *Id.* at 23-51.

134 *See generally* MEMORY IN CONTEXT: CONTEXT IN MEMORY (Graham M. Davies & Donald M. Thomson eds., 1988).

135 *Id.*

136 ELIZABETH LOFTUS, MEMORY 145 (1980); LOFTUS, *supra* note 15, at 80 (1979).

137 LOFTUS, *supra* note 15, at 52-87.

138 Elizabeth F. Loftus & Hunter G. Hoffman, *Misinformation and Memory: The Creation of New Memories*, 118 J. EXPERIMENTAL PSYCHOL.: GEN. 100-104 (1989).

139 False reports of memories stimulated by misleading postevent exposures have been reported in the United States. *See, e.g.*, Robert F. Belli, *Influences of Misleading Postevent Information: Misinformation Interference and Acceptance*, 118 J. EXPERIMENTAL PSYCHOL.: GEN. 72 (1989); Stephen J. Ceci et al., *Age Differences in Suggestibility: Narrowing the Uncertainties*, *in* CHILDREN'S EYEWITNESS MEMORY 79 (Stephen J. Ceci et al. eds.,

information received after perception of an event, people have recalled nonexistent broken glass and tape recorders, a clean-shaven man as having a mustache, straight hair as curly, stop signs as yield signs, hammers as screwdrivers, and even something as large and conspicuous as a barn in a bucolic scene which contained no buildings at all.[140]

Retention is, however, somewhat of a mystery in cases of repression. Little is known about how and where a repressed memory might be stored in the brain. It is likely, however, that a repressed memory would be affected by new inputs,[141] and indeed, while experimental evidence is lacking, there is anecdotal evidence that "repressed memories" may be altered by additional information received.[142] One reason why repressed memories would be expected to be especially vulnerable to new inputs is because the alleged events being remembered occurred such a long time ago. There is ample evidence that as time passes, memory becomes increasingly malleable and susceptible to new information.[143]

There is one way in which repressed memories clearly differ from other memories; they are by definition not consciously rehearsed. Rehearsal provides one way in which some of our memories are kept alive.[144] Everyone occasionally thinks back to some favorite scenes of childhood, thus making them stronger and more

1987); Carloff C. Chandler, *Specific Retroactive Interference in Modified Recognition Tests: Evidence for an Unknown Cause of Interference*, 15 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 256 (1989); Neal Kroll & Keith H. Ogawa, *Retrieval of the Irretrievable: The Effect of Sequential Information on Response Bias*, *in* 1 PRACTICAL ASPECTS OF MEMORY: CURRENT RESEARCH AND ISSUES 490 (Michael Gruneberg et al. eds., 1988); D. Stephen Lindsay, *Misleading Suggestions Can Impair Eyewitness's Ability to Remember Event Details*, 16(6) J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 1077 (1990). For studies conducted in other nations, *see, e.g.*, Richard Hammersley & J. Don Read, *What is Integration? Remembering a Story and Remembering False Implications About the Story*, 77 BRIT. J. PSYCHOL. 329 (1986) (Canada); Felicity Gibling & Graham Davies, *Reinstatement of Context Following Exposure to Post-Event Information*, 79 BRIT. J. PSYCHOL. 129 (1988) (United Kingdom); Gunter Kohnken & Claudia Brockmann, *Unspecific Postevent Information, Attribution of Responsibility, and Eyewitness Performance*, 1 APPLIED COGNITIVE PSYCHOL. 197 (1987) (Germany); Peter Sheehan, *Confidence, Memory, and Hypnosis*, *in* HYPNOSIS AND MEMORY 95 (Helen Pettinati ed., 1988) (Australia); Willem A. Wagenaar & Johannes P. Boer, *Misleading Postevent Information: Testing Parameterized Models of Integration in Memory*, 66 ACTA PSYCHOLOGICA 291 (1987) (Netherlands).

140 LOFTUS, *supra* note 15, at 20-109; Elizabeth F. Loftus, *When a Lie Becomes Memory's Truth: Memory Distortion After Exposure to Misinformation*, 1 CURRENT DIRECTIONS IN PSYCH. SCI. 121 (1992).

141 Loftus & Kaufman, *supra* note 10, at 9-11.

142 After her initial report of a memory, Franklin-Lipsker changed her story six times, apparently keeping pace with new information she received. *Daughter's Words*, *supra* note 46, at 26.

143 LOFTUS, *supra* note 15, at 64-65.

144 Loftus & Kaufman, *supra* note 10, at 10-11.

vivid. Repressed memories, however, miss this opportunity to be rehearsed. On the one hand, this has lead some psychologists to suggest that they are only fantasies, or "skeletons filled in with plausibilities."[145] On the other hand, given that reconstructive rehearsal often leads to the modification of memory, this opportunity for modifying the memories is missing as well.[146]

3. Retrieval

The third and final stage in the memory process is the retrieval of a memory. Again, experiments demonstrate the ability of external factors to introduce error into a memory during the retrieval stage. The factors which influence the retrieval of a memory include the environment in which the memory is retrieved, expectations created in the subject's mind, the techniques used to retrieve the memory, and persons present.[147]

Based on theory alone one would expect repressed memories surfacing twenty or thirty years later to be especially prone to new inputs, suggestive questioning, and other sources of new information. This stems in part from the finding that it is the older memories that are especially malleable.[148] The retrieval stage is most amenable to critical examination since the conditions under which an allegedly "de-repressed" memory returns can sometimes be closely examined and evaluated.

The environment in which a memory is recalled may have subtle, or perhaps not so subtle, influences. Expectations may be created in the subject's mind. Thus, if a patient sees a therapist who specializes in counseling survivors of childhood sexual abuse, that patient may form assumptions about what is expected. One therapist stated that every single client who comes to her discovers repressed memories of childhood sexual abuse.[149] While this could reflect the type of client referred to her, it could also be the result of other, external factors leading to the recovery of a false memory. Regardless, a patient attending counseling sessions with a childhood sexual abuse specialist may form strong presumptions about what the therapy is supposed to uncover.

In other cases, therapists themselves may enter the counseling sessions with a bias toward uncovering repressed memories of childhood sexual abuse. One clinician advocates that "[i]t is crucial . . .

145 *Id.* at 11.
146 *Id.* at 10.
147 LOFTUS, *supra* note 15, at 88-108.
148 *See supra* note 143 and accompanying text.
149 Hendrix, *supra* note 5, at E1, E16.

that clinicians ask about sexual abuse during every intake."[150] The rationale for this prescription is that the clinician who addresses a patient in this way conveys to her that the patient will be believed, and that the clinician will join with the patient in working through the memories and emotions linked with childhood sexual abuse. While it may be natural to ask about previous abuse, one must ask whether the asking unlocks a repressed memory or suggests it.

Other therapists use different techniques that may introduce bias into a counseling session. One uses a questionnaire in the initial interview which contains only general questions about health, education, and occupation, but very detailed questions about incest.[151] Another therapist, who has treated more than 1500 incest victims,[152] openly describes her method of approaching patients.[153] Her method, which involves informing a patient that other people with similar problems were abused as children, exemplifies the bias and suggestiveness involved in some methods.[154]

It is difficult in individual cases to discern whether or not bias affects a memory. One woman, "Dana," was court-ordered to undergo therapy when her three year old daughter, Christy, was molested by Christy's father. In Dana's words: "I was in therapy talking about Christy, and instead of saying 'Christy' I said 'I'. And I didn't even catch it. My therapist did. She had always suspected that I was abused too. . . ."[155] Soon, after her therapist picked up this slip and began questioning her about possible incest, Dana was remembering that her own father had done to her some of the very things that her husband was doing to Christy. Whether these memories resulted from events long repressed or a bias introduced into the therapeutic sessions may never be known.

Another possible source for the introduction of error into a memory is the therapeutic technique itself. Group therapy is common for survivors and may have real therapeutic benefits. It does, however, create a danger of suggestiveness and the potential for creating false memories. The stories told by others, the open suggestions, and the expectations built around such therapy may have a

150 Frawley, *supra* note 2, at 251.

151 *Adult Illnesses Can Stem From Childhood Incest, Study Shows*, Proprietary to the United Press International, Mar. 25, 1988, AM cycle.

152 FORWARD & BUCK, *supra* note 59, at 160.

153 *Id.* at 161.

154 "You know, in my experience, a lot of people who are struggling with many of the same problems you are, have often had some kind of really painful things happen to them as kids—maybe they were beaten or molested. And I wonder if anything like that ever happened to you?" *Id.*

155 ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL 78 (1988).

powerful effect on a client whose behavioral history matches that of other survivors of childhood sexual abuse. One woman attended a support group which contained survivors of childhood sexual abuse. She later sought out a psychiatrist with experience treating survivors of child abuse to ask if her vague memories and feelings "meant" that she was an incest victim.[156] Doctors should, and some do, respond to these cases with caution, recognizing that group therapy contains an element of suggestibility "that sometimes is pushed too far."[157] Others have warned about a potential problem with group therapy, especially for persons who currently have no memory of childhood sexual abuse. "In their eagerness to belong and to identify with other group members, these clients tend to place enormous pressure on themselves to remember an abuse experience once they begin a cycle of group therapy."[158]

In another currently popular technique, therapists advise patients to "make stories up" or "fantasize" or "guess" about the cause of their current feelings.[159] The patient is then asked to expand, add detail, and essentially create an entire memory.[160] Additionally, when the patient evinces uncertainty about the memory, therapists find it important to reassure the subject and to state their belief in the subject's story.[161] Some therapists engage in these questionable procedures because they believe that they are the route to accessing genuine memories, and that the products of these procedures do lead to genuine memories. This, unfortunately, may not be the case. While not all patients later accept such memories as real, some individuals may later have difficulty distinguishing between the created and real memories.

Still another technique currently used by some therapists involves giving their patients books or booklets to read when the therapist suspects sexual abuse. The books often contain lists of criteria which, if satisfied, are meant to suggest the patient was abused. One book tells readers that they were abused if "You felt unloved . . . ; you . . . were verbally put down on a regular basis; you were physically hit; . . . you were sexually violated."[162] An examination of several other popular books on sexual abuse reveals such messages as: "you may realize you were abused, but have only vague images or

156 *Id.*
157 *Id.*
158 SGROI, *supra* note 52, at 118-19.
159 Olio, *supra* note 3, at 95.
160 *Id.*
161 *Id.* at 97.
162 KRISTIN A. KUNZMAN, THE HEALING WAY: ADULT RECOVERY FROM CHILDHOOD SEXUAL ABUSE 17 (1990).

fragmented memories of the abuse;" "you need to feel safe in order to remember what happened;" and "if you keep thinking something bad happened to you, it probably did."[163]

All of the above methods of therapy involve a high level of suggestibility. Although it is not known exactly what effect such suggestions may have upon a previously repressed memory, such techniques would almost certainly have an effect on regular, non-repressed memories.[164] Thus, until more is known about the vulnerability of repressed memories, memories surfacing in the face of suggestive therapeutic techniques should be treated with suspicion.

It is important to note that therapists may not be especially concerned about the particular accuracy of a recovered memory. Since the memory retrieval is a means toward the ultimate goal of psychological healing, the particular attributes of the memory are not a primary concern, certainly not to the extent which the law demands. In this regard, K. V. Lanning, of the Behavioral Science Unit of the FBI Academy, made the point that therapists who see repressed memory cases often believe their patients in part because it allows the therapist to "make sense" of the collection of symptoms.[165] The level of proof necessary is not high because the consequences are only those needed for achieving patient health. Therapists do not particularly care about independent corroboration. But when the case heads for the legal system, the level of proof should be more than simply an allegation by someone.

Finally, it should be noted that some survivors may have their memories "restored" by methods that are in themselves not legally acceptable. Mary Doe initially had only vague and undefined fears.[166] Eventually, and with the help of hypnosis, she was able to retrieve her repressed memories of childhood sexual abuse, memories which Mary wrote down and now constitute a part of her case file.[167] Hypnosis, however, as a tool for reviving memories, has worried researchers for years, and many have urged that it not be used in court or that it be admitted only if strict safeguards are imposed.[168] The majority of courts that have heard cases regarding

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163 *Id.*

164 *See, e.g.*, LOFTUS, *supra* note 15, at 88-109.

165 Kenneth Lanning, *Ritual Abuse: A Law Enforcement View or Perspective, in* 15 CHILD ABUSE AND NEGLECT 171-73 (1991).

166 Hendrix, *supra* note 5, at E1, E17.

167 *Id. See also* Oldenburg, *supra* note 7, at D5 (the subject's first recollections of abuse surfaced as her therapist questioned her while she was under hypnosis).

168 Bernard L. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313 (1980); T. Martin Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 231 (1979).

the use of hypnotically refreshed testimony have resoundly banned its use.[169] These courts found that hypnotically refreshed testimony is either inherently unreliable, or at least that its reliability has little support from the relevant scientific community.[170]

The recognition on the part of courts that hypnosis may not be a reliable means of enhancing memory suggests that the courts are prepared to prevent the use of questionable techniques to enhance memory. In the hypnosis domain, policymakers could be guided by scores of studies demonstrating the unreliability of hypnotically refreshed memories.[171] In the repressed memory domain, no such collection of studies demonstrating the unreliability of previously repressed memories exist. Nor, however, does any study exist to prove their reliability, raising a tough policy question: Do we allow the admission of a new type of evidence until it is proven unreliable, or do we prevent its admission until it is proven reliable? The answer to this question could go either way. While the Federal Rules of Evidence do not preclude testimony of past recollections, repressed or not, testimony regarding resurfaced memory might be ruled inadmissible under Rule 403, which provides that even relevant evidence may be excluded if its probative value is outweighed by the danger of, for example, prejudice or confusion. On the other hand, the reliability of otherwise relevant evidence is normally left to be challenged by the opposing party. The reliability issue is crucial here, however. It forces us to ask whether a person should be permitted to initiate a court action in the first place solely on the basis of questionable evidence, and after significant time has passed.

C. HOW WILL TRIERS OF FACT RESPOND TO REPRESSED MEMORIES THAT RETURN?

Judges and juries are impressed with witness testimony delivered with confidence and containing concrete details. Although repressed memories often return with some vagueness, they may evolve to have considerable detail. Additionally, a patient with a repressed memory, initially often filled with doubt, may obtain a great deal of confidence in the memory. Does this mean the memory is accurate? Not necessarily. When false memories are created by misinformation, the holders of these memories can describe these

169 Over 25 states exclude hypnotically refreshed or enhanced testimony. Such exclusion represents the clear direction of the law in this area. State v. Tuttle, 780 P.2d 1203, 1208-09 (Utah 1989).

170 *Id.* at 1210.

171 Martin Orne et al., *Hypnotically Induced Therapy*, *in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 171, 210 (Gary L. Wells & Elizabeth F. Loftus eds., 1984).

false creations in great detail and with great conviction.[172] Moreover, studies have shown that a subject's confidence in a specific memory is not necessarily related to the accuracy of that memory,[173] and that judges have great difficulty discriminating between memories that are a result of suggestion and memories that are a result of a true perception or experience.[174]

D. SLIPPERY SLOPE

Aside from problems of authenticity, there is a somewhat different potential problem with tolling the statute of limitations: the slippery slope. If a previously repressed memory of child sex abuse is sufficient to toll the statute of limitations, where do we draw the line? Should anyone with a previously repressed memory of any type be allowed to bring suit regardless of the statute of limitations?

Hypothetical fact patterns can certainly be developed where the legal arguments for tolling the statute of limitations would be highly persuasive. Suppose a ten year-old child, Jane Jones, was sexually abused and truly repressed all memory of that abuse. Imagine further that, as an adult, her repressed memories of the abuse resurface in an environment free of any suggestion. Aided by her clear memory, she identifies her abuser, and produces corroboration in the form of a diary and photographs made at the time of her abuse by her abuser. This severe hypothetical provides compelling reasons why the survivor should be allowed to pursue her case. She obviously could not have discovered her harm until she had the conscious capacity to do so, and could not have pursued her case until that discovery was made.

While many people would agree that the above hypothetical survivor should be allowed her day in court, once courts toll the statute of limitations on this case, where does it stop? There are several potential areas of expansion. First, should the exception be expanded from sexual abuse to include physical abuse or even to mental or verbal abuse? Physical abuse and neglect of children are very serious problems. Studies have documented the alarming level of serious violence against children. For example, one study suggested that one in every twenty-five children between the ages of three and seventeen living in a dual parent household were seriously

172 ELIZABETH LOFTUS & KATHY KETCHAM, WITNESS FOR THE DEFENSE 208 (1990).

173 LOFTUS, *supra* note 15, at 100-01.

174 Jonathan Schooler et al., *Knowing When Memory is Real*, *in* PRACTICAL ASPECTS OF MEMORY: CURRENT RESEARCH AND ISSUES. VOL 1: MEMORY IN EVERYDAY LIFE 83-88 (Michael Gruneberg et al. eds., 1988).

beaten by a parent or threatened with a gun or knife.[175] This figure translates into over 46,000 children who were shot or stabbed by parents, with over 1,000 dying as a result of their injuries. Will the tolling of the statute of limitations be expanded to cover repressed memory for instances of physical abuse?

Another area for expansion concerns the status of the victim. Should the statute be tolled only for victims who are below the age of majority, or does the exception encompass all victims who repress their memories of a wrongful event? What if a twenty-five year old person is sexually assaulted and claims a repressed memory for the attack until she reaches forty? Should the tolling of the statutes of limitations be expanded to cover this case?

The final slippery slope issue is one of the completeness of the memory. If a person retains some memories of childhood sexual abuse, but later remembers more incidents, or remembers the abuse in greater detail, should these later recovered memories serve as the basis for tolling the statute of limitations?[176]

We raise these slippery slope issues only in the hypothetical and make no effort to answer these questions. However, states that have recognized the application of the discovery rule to cases of repressed memories of childhood sexual abuse have not yet experienced a flood or even a trickle of litigation from the slippery slope cases.[177] Nevertheless, one should not dismiss the potential. As the theory of repression becomes known, more and more cases may surface.

V. SOLUTIONS

The unanswered reliability issues surrounding repressed memories require that they be treated differently then normal memories

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175 Daro, *supra* note 1, at 12.

176 In Nicholette v. Carey, 751 F. Supp. 695 (W.D. Mich. 1990), there existed a one-year statute of limitations which began after a victim of childhood sexual abuse regained a previously repressed memory. The court, however, allowed the plaintiff's case to toll the statute of limitations even though there was proof she remembered at least three or four incidents of sexual abuse more then one year prior to bringing the suit. The court held that since the plaintiff recovered memories of further incidents and the recovery took place less then one year from the filing date, the statute of limitations was tolled as to the additional acts.

177 Indeed, a review of recent cases reveals only one exception, the murder case of George Franklin, which was based on the previously repressed memory of Franklin's daughter, Eileen Franklin-Lipsker. Ms. Franklin-Lipsker stated she had witnessed the crime but had repressed her memory of it. The case is distinguishable, however, from the slippery slope question, in that the repressed memory was not used to toll the statute of limitations, there is no statute of limitations on murder in California. Barbara Kantrowitz & Nadine Joseph, *Forgetting to Remember*, NEWSWEEK, Feb. 11, 1991, at 58.

and several alternative methods of treatment should be considered.[178] Some of these alternatives have insurmountable problems which may force their rejection, but consideration of these alternatives may serve to stimulate policymakers to examine other more pragmatic measures.

A. DO NOT TOLL THE STATUTE OF LIMITATIONS FOR CASES CONCERNING A PREVIOUSLY REPRESSED MEMORY

Until recently courts have not tolled the statute of limitations for cases of previously repressed memories. Should we return to that state of affairs? There are at least two ways to look at this issue.

Tolling the statute of limitations may be necessary so that some worthy plaintiffs are not denied justice, and some genuine perpetrators cannot freely escape punishment for their acts. It would be necessary in order for survivor Jane Jones in our hypothetical case to seek justice. Without tolling, Jones' trauma would be unredressed, and the tactics of her perpetrator would go unpunished. There is a real sense of unfairness about this.

On the other hand, adoption of a rule that says that the statute of limitations is not tolled in these cases protects defendants aginst old claims that are difficult to defend against. It prevents the innocently accused of being dragged through the legal system, and families from being further wrenched apart. It might even encourage victims, family members, and others to come forward sooner when child sexual abuse is suspected.

Perhaps a beginning point in examining this question is to take a step back and ask whether the courts will, in any case, allow testimony based upon "de-repressed" memories? Perhaps there is a lesson to be learned from examining the admissibility of hynotically enhanced testimony.

Indeed, courts initially displayed a tendency to admit hynotically enhanced testimony as scientific and reliable.[179] Courts did not begin to resoundly prohibit the use of hynotically enhanced testimony until years of scientific studies proved the malleability and general unreliability of the resulting memory and subsequent testimony.[180] Thus, courts now routinely disallow the use of such testi-

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178 The following solutions analysis is an adaptation and expansion of an approach used to analyze possible solutions to problems associated with eyewitness testimony in general as used in Fredrick Woocher, *Did Your Eyes Deceive You? Expert Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969 (1977).

179 *See, e.g.*, Harding v. State, 246 A.2d 302, 306 (Md. 1968), *cert. denied*, 395 U.S. 949 (1969); State v. McQueen, 244 S.E.2d 414, 427 (N.C. 1978).

180 LOFTUS, *supra* note 15, at 104-08.

mony as scientifically unreliable, or because jurors, innocently believing in the power of hypnosis, will give the testimony undue credence.[181]

Newly resurfaced repressed memories, on the other hand, present a different case. Unlike hypnotically enhanced memories, where a good deal of research has documented the lack of reliability, when it comes to "de-repressed" memories, little or no such research exists. There is a problematic lack of evidence as to whether or not these recollections are authentic. There are cases in which the memories have been proven to be false, often arising from known sources of suggestion. But in the vast majority of cases, since corroboration is lacking, there is simply no way to know whether they are real or not.

The Federal Rules of Evidence proclaim that any competent witness may testify on any matter regarding that which the witness has personal information.[182] We could presume that the memories are reliable until proven otherwise, just as we did in the case of hypnotically enhanced memories. We could then also presume that such memories would justify tolling the statute of limitations. But in doing so, we should not overlook the large cost in terms of due process for defendants.

B. REQUIRE CORROBORATING EVIDENCE IN SUPPORT OF A RETURNED MEMORY

Another solution, adopted by several courts in addressing the reliability-due process problem,[183] allows for the tolling of the statute of limitations, but only where resurfaced memories can be supported by corroborating evidence. A corroboration requirement, however, creates some clear difficulties. The initial problem with a corroboration requirement is the definition of corroboration itself. What type and amount of evidence would be required for corroboration? While an abuser's diary, describing in minute detail the abuse he inflicted, is clearly corroborative in one case,[184] is the testi-

181 State v. Tuttle, 780 P.2d 1203, 1209 (Utah 1989).

182 FED. R. EVID. 601, 602.

183 *See* Meiers-Post v. Schafer, 427 N.W.2d 606, 610 (Mich. Ct. App. 1988) (allowing the statute of limitations to be tolled if: a) the plaintiff can make out a case that she repressed the memory of the facts on which her claim is predicated and b) there is corroborating evidence for plaintiff's testimony that the sexual assault occurred); Peterson v. Bruen, 792 P.2d 18, 25 (Nev. 1990) (court held that no statute of limitations existed in cases of alleged childhood sexual abuse where the plaintiff could show by clear and convincing evidence that the named defendant had sexually abused the plaintiff as a minor).

184 Herman and Schatzow, *supra* note 18, at 1-14.

mony of a sister that she too was sexually abused sufficiently corroborative in another?[185]

These questions underscore the uncertainty as to what constitutes sufficient corroboration. They also introduce another problem with a corroboration requirement: such a requirement gives the judge involved much discretionary power. The examination of the supporting evidence would, in effect, be a fact-finding by a judge. In the event that a judge decides that a memory has not been properly corroborated and thus declines to toll the statute of limitations, the case would be decided without ever having presented the evidence to a jury. Some would argue that this solution infringes on the dominion of the jury, which is to be the sole finder of fact and determiner of the credibility of a particular witness. Others would point to the fact that judges routinely examine the sufficiency of evidence in the absence of the jury, for example, when they decide on motions for summary judgment.

It must be acknowledged that the requirement of corroboration might have the effect of unfairly barring valid suits. Imagine the difficulty faced by a survivor of childhood sexual abuse trying to obtain corroborating evidence for acts that occurred ten, twenty, or more years previously. Additionally, survivors may have long since severed all ties with their families, friends, and past, making collection of corroborating evidence difficult or impossible.

C. ADOPT SPECIFIC PROCEDURAL REQUIREMENTS IN CASES INVOLVING THE RETURN OF A PREVIOUSLY REPRESSED MEMORY

While there are costs in allowing the statute of limitations to run during the period that a memory of childhood sexual abuse is repressed, there are also costs in allowing old claims to be pursued without some procedural safeguards. Indeed, once the decision is made to toll the statute of limitations and to allow a childhood sexual abuse suit based upon a repressed memory, several factors indicate the need for caution: (1) little is empirically known about repressed memories and their reliability, (2) when empirical information concerning standard memories is used to analyze repressed memories, repressed memories would be expected to be especially malleable and unreliable, (3) a sizable percentage of child abuse

185 *Id.* Note that FED. R. EVID. 404(b), which provides that "evidence of prior acts is not admissible to show action in conformity therewith," would render the use of such corroborative evidence at trial unlikely.

cases are spurious,[186] and (4) the mere accusation of child abuse has a dramatic and negative effect on the professional, personal and social relationships of an accused. Several procedural requirements can help minimize the possibility of a fact-finding body accepting an erroneous memory, and mitigate the damage of a suit filed against an innocent defendant.

1. Require Fictitious Names

Child abuse is a horrible crime and its perpetrators are among the most despised of criminals. An accusation of child sexual abuse brings with it an immense and unshakeable stigma. Even false accusations can destroy a person's reputation, ruin personal relationships, and shatter long standing careers.[187] Recognizing the onus associated with an accusation, one potential procedural requirement in cases involving repressed memories of child abuse is to require both parties to assume fictitious names for use in all matters associated with the lawsuit.[188]

The use of fictitious names during a lawsuit protects both parties from unwanted and perhaps undeserved publicity. Additionally, in the event of a judgment in favor of the defendant, the use of a fictitious name in the lawsuit protects the defendant from the unwarranted stigma of being a child molester. Although this procedural requirement is not linked with ascertaining the truth of the allegation, it recognizes the unreliability concerns surrounding repressed memories.

Requiring fictitious names to be used by the parties to a lawsuit is rarely a safeguard utilized in other civil or criminal actions (although there are exceptions, as in juvenile proceedings, or in cases that are filed under seal). But here we recognize that so little

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186 In 1988, the United States Department of Health and Human Services reported that 48% of all incidents of abuse reported to child welfare agencies were unfounded. Rebecca Kuzins, *False Accusations*, L.A. LAWYER, Sept. 1989, at 58. Although this figure does not reflect cases of adult survivors bringing suit against their abusers, it does reflect a large problem surrounding false accusations of child abuse. Another study, conducted by the National Center of Child Abuse and Neglect, reported that the figure for unfounded or unsubstantiated accusations of child sexual abuse is between 65 and 80% of all cases. *Id.* Claims that large proportions of child sex abuse allegations are false occur routinely in child custody cases. A recent article in a Canadian journal suggested that a full 25% of all allegations in this type of case are unfounded. D. Mayland McKimm, *Child Sexual Abuse Allegations in Custody Cases: The Substantive Law*, 49 THE ADVOCATE 407-13 (May 1991).

187 Kuzins, *supra* note 186, at 59.

188 In Mary D. v. John D., 264 Cal. Rptr. 633 (Cal. Ct. App. 1989), the parties assumed fictitious names as a result of agreement between the parties. Hendrix, *supra* note 5, at E1, E16.

is known about the authenticity of recently recovered, previously repressed memories, and that there is good reason to be worried about their potential for error. Such a safeguard would at least afford an accused protection from allegations based upon repressed memories until the whole issue of the authenticity of repressed memories is better understood.

2. *Limit Evidence*

Most jurisdictions have rules of evidence similar to Federal Rule 404(b), which prohibits the use of evidence of other conduct of the defendant to prove similar conduct on the occasion in question.[189] This rule is based upon a belief that such evidence has undue sway over a jury; it is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again.[190] Such evidence of a defendant's prior bad acts simply weighs too much with a jury, causing prejudice and loss of a fair opportunity to defend against a particular charge.[191] Furthermore, such evidence is sometimes of marginal probative value in determining how the defendant acted on a subsequent occasion.[192] Therefore, under this rule a plaintiff may not show that the defendant committed completely different acts of child sexual abuse on unrelated people to support the allegation that the defendant abused the plaintiff as well.

This rule, however, does not prohibit all use of prior act evidence. It allows the admission of such evidence for the purpose of proving motive, opportunity, or other factors not directly related to proving conduct in conformity with the prior act.[193] Consequently, courts routinely admit evidence of other crimes accompanied by a limiting instruction that directs the jury not to use the evidence of prior acts to form an assumption that the defendant acted similarly during the time in question.[194] The effectiveness of such instructions however, is a convenient fiction at best, and it has been noted that limiting instructions can sometimes make the problem worse,

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189 FED. R. EVID. 404(b): "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . ."

190 State v. Jones, 677 P. 2d 113, 120 (Wash. 1984).

191 Michelson v. United States, 335 U. S. 469, 475-76 (1948).

192 Robert H. Aronson, THE LAW OF EVIDENCE IN WASHINGTON 404-06 (1989).

193 *See supra* note 189.

194 J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71-98 (1990).

drawing attention to the evidence that is not to be considered.[195]

In repressed memory cases, if they are to go forward, one could argue for a modification of Rule 404(b), such that evidence of prior sexual conduct would not be admissible for any purpose in child sexual abuse cases. In one case,[196] for example, evidence of early pre-teenage homosexual experimentation on the part of a defendant was allowed in court as corroboration for a daughter's resurfaced memory of acts of rape. The damaging effect of such testimony is clear, and its probative value minimal. Given the emotional and prejudicial value the introduction of such evidence has in a child sexual abuse case, it is arguable that the use of all such evidence should be prohibited.

On the other hand, while limiting evidence in this way would reduce the chances of erroneous conviction, it would not prevent a potentially innocent defendant from being hauled into court in the first place. Nor would it directly address the potential unreliability of resurfaced-memory testimony. If anything, the antidote to unreliability is more evidence, not less. Consequently, an argument could be made for the opposite approach, that is, amending Rule 404(b) such that in sexual abuse cases, evidence of prior commission of the same offense would be admissible to support the testimony of past recollections. Or, in order to avoid the problem of unduly prejudicing a jury, such evidence could be admissible as corroborating evidence in an adjudication to determine whether the statute of limitations should be tolled. If the judge determines that the evidence is sufficiently corroborative, and that its probative value outweighs its prejudicial potential, the claim could then go to trial, and the evidence could be presented to a jury.

3. Jury Instructions

One method to minimize the possibility of a jury giving undue weight to any particular item of evidence is through the use of specific jury instructions. Jurors routinely receive at least two types of instructions:[197] "charging instructions" telling them about the law and procedure they are supposed to follow, and "admonitions" that warn them not to consider certain kinds of information as they ar-

195 *Id.* at 97-99. *See also* State v. Jones, 677 P.2d 131, 136 (Wash. 1984) ("Statistical studies have shown that even with limiting instructions, a jury is more likely to convict a defendant with a criminal record.").

196 Personal communication with attorney Steve Moen of Shafer, Moen, & Bryan, in Seattle, Washington (1991).

197 Tanford, *supra* note 194, at 73.

rive at their verdict.[198]

What more could be done with jury instructions? First, charging instructions are typically drafted by lawyers and read but once to a jury.[199] They are known to be difficult to understand and follow.[200] Admonitions are often misunderstood and, what is worse, they occasionally stimulate jurors to do the opposite of what they are told.[201]

Jurors enter the legal world with their own intuitive psychology of repression. It comes from the media or from television law programs. It may come from novels like Agatha Christie's *Sleeping Murder*.[202] Perhaps a jury instruction could be crafted to minimize the chances that jurors would rely on their own intuitions, and misconceptions, about repression.

But what would such an instruction say, given the dearth of research on the authenticity of repression? A blue ribbon commission of experienced clinicians and researchers could conceivably come together to draft a useful instruction. At the very least an instruction might inform the jury about the scientific controversy surrounding the authenticity of repressed memories.

4. Admit Expert Testimony on Reliability of Memories at the Request of the Defendant

The courts of most states allow expert testimony at the discretion of the trial judge. The Federal Rules of Evidence state: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence, or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify . . . in the form of an opinion or otherwise."[203]

A few states have gone further than this rule, declaring that in a limited set of circumstances, it is an abuse of judicial discretion to

198 *Id.* at 73-78.

199 *Id.* at 79-85.

200 *See, e.g.*, Free v. Peters, 778 F. Supp. 431 (N.D. Ill. 1991) (defendant's death sentence reversed after a finding that jurors might not be properly guided by semantics of death penalty instruction). To avoid confusing the jury, judges often will, in addition to reading the instructions to a jury, allow the jurors to review a written copy during deliberation.

201 Tanford, *supra* note 194, at 86-87.

202 AGATHA CHRISTIE, SLEEPING MURDER (1976). This story, Miss Marple's last case, is about a woman, Gwenda, who witnesses a murder as a three year old child. Her "memory" returns 18 years later when she coincidentally returns to the house where the murder occurred. Although cautioned to "let sleeping murder lie," curiosity compels her to investigate. *Id.* at 53.

203 FED. R. EVID. 702.

overrule the use of experts.[204] These cases most often deal with expert testimony concerning eyewitness testimony. The guidelines of the state of Washington as to when expert testimony must be admitted upon the request of the defendant are representative:

1. an eyewitness identification is the principal issue at trial;
2. the defendant presents an alibi defense; and
3. there is little or no other evidence linking the defendant to the crime.[205]

Although cases concerning resurfaced memories of childhood sexual abuse may loosely fit into these requirements, the lack of unanimity in adopting these requirements,[206] and their inexact fit to cases of child abuse, requires a separate, conclusive rule to be adopted for cases of repressed memories. Such a rule would remove the introduction of expert testimony from the discretion of the judge and make it a right exercisable by a defendant who seeks it.

Experts testifying in cases concerning repressed memories could testify on several issues. First, experts could review the literature and scientific background on repressed memories. The expert could emphasize that very little is known about repression of memories and their subsequent retrieval, and that in fact many experts are in disagreement as to its actual existence and the authenticity of the memories so retrieved.

Experts could also discuss the science of memory more generally. They could testify as to their opinions about external influences on repressed memories and what factors may lead to the introduction of errors. Experts could analogize between what is known about the reliability and malleability of standard memories, and how they think a repressed memory may be affected by the same factors that introduce error into standard memories.

An expert could also relate to the jury what is known about witness confidence and its relationship to accuracy of recalled events. Such an expert could testify about the nebulous correlation that exists between the confidence of a witness in the accuracy of her memory and the actual factual precision of that memory. Empirical data

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204 Elizabeth Loftus, *Ten years in the Life of an Expert Witness*, *in* LAW AND HUMAN BEHAVIOR 10, 241-63 (1986).

205 State v. Moon, 726 P.2d 1263, 1266 (Wash. 1986).

206 These rules have not been adopted by the Supreme Court of Washington. In State v. Coe, 750 P.2d 208, 214 (Wash. 1988) (involving hypnotic testimony), the Supreme Court was presented with an opportunity to adopt the requirement that if a defendant in a case meeting the criteria wants expert testimony, it is an abuse of discretion not to allow it. But the Court declined, finding other determinative factors on which to reach a decision in the case.

could be introduced to demonstrate that indeed, in some cases, witnesses can be highly confident about inaccurate memories, and thus caution a jury that a confident witness is not necessarily an accurate one.

Finally, an expert for the defense could examine the circumstances surrounding the resurfacing of the repressed memory for factors which may have had an influence upon the memory. Such factors as retrieval techniques used by a therapist, expectations formed by the subject undergoing therapy, or the suggestive atmosphere surrounding group therapy can all be examined by an expert and their possible influence on the resulting memory explained.

VI. CONCLUSION

Child sexual abuse is a heinous crime and its perpetrators should be punished. Abusers must not be permitted to get away with such horrible acts. Genuine victims need the protection of our society in general and our legal system in particular. The last decade has seen a number of commendable sweeping changes in the direction of protecting genuine victims.

But what should the legal system do when claims are based on memories that have been recently recovered decades after alleged acts? In some cases, our legal system might want to allow these victims to use the justice system and bring suits against their abusers, regardless of the limits placed upon their actions by traditional statutes of limitations.

But the cases should not go forward without full recognition of the rights of defendants. Given the outrage and bias against defendants produced by even a hint of accusation involving child sexual abuse, we urge caution. If a repressed memory case is to go forward, courts should allow a defendant anonymity and only release names of defendants upon a guilty verdict. Finally, defendants have a right to an impartial jury, and one informed about the difficult authenticity issues surrounding previously repressed memories.

While the balancing of rights may tip in favor of allowing some repressed memory cases to go forward, these cases should be expected to be relatively rare until the whole subject of repressed memories and their authenticity is better understood. Researchers are just now beginning to take up the challenge presented by repressed memories, and are attempting to gather sound data upon which courts and juries can make informed and accurate factual determinations.[207]

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[207] Elizabeth Loftus, *The Reality of Repressed Memories*, 48 AM. PSYCHOL. 518 (1993).

Allowing repressed memories only under rare circumstances will surely mean that there will be some unredressed injuries resulting from long-ago child abuse, but, unless we want to jettison the Constitution, this is an inevitable cost. Just as surely, the problem of protecting today's children from horrendous abuse will not be successfully addressed by allowing the victims to bring forty-year old claims. Rather, efforts might be more productive if they were aimed at detecting the crimes as, or shortly after, they happen. They will be enhanced by educating both children and adults on how to identify signs of current abuse. When genuine offenders are identified, they then must be vigorously prosecuted, and then either severely punished or effectively treated.