

4-1-1996

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### Recommended Citation

Hall, Susan J. (1996) "Adult Repression of Childhood Sexual Assault: From Psychology to the Media and into the Courtroom," *North Carolina Central Law Review*: Vol. 22 : No. 1 , Article 5.  
Available at: <https://archives.law.nccu.edu/ncclr/vol22/iss1/5>

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# ADULT REPRESSION OF CHILDHOOD SEXUAL ASSAULT: FROM PSYCHOLOGY TO THE MEDIA AND INTO THE COURTROOM

SUSAN J. HALL\*

## INTRODUCTION

In 1989 Julie Herald sued her uncle, Dennis Hood, in a civil action for sexual abuse. The abuse began when Julie Herald was three years old and continued for twelve years.<sup>1</sup> Subsequently, Julie Herald repressed memories of the childhood sexual abuse and did not remember the perpetrator until the statute of limitations had expired.<sup>2</sup> Citing battery and intentional infliction of emotional distress, Julie Herald received a jury award of \$150,000 in compensatory damages and \$5,000,000 in punitive damages.<sup>3</sup>

Julie Herald's repression of her sexual abuse is not that unusual. According to the National Committee to Prevent Child Abuse, "[m]ore than 200,000 cases of sexual abuse are documented annually . . . and evidence suggests that the majority of cases go unreported."<sup>4</sup> Additionally, "studies show that from 18 to 59 percent of sexual-abuse victims repress memories for a period of time."<sup>5</sup> Linda Williams of the Family Violence Research Laboratory at the University of New Hampshire, in a follow-up study of 200 sexually abused children, found "that 1 in 3 did not recall the experiences that had been documented in their hospital records 20 years before."<sup>6</sup>

In recent years, repression of sexual assault has captivated, and in some instances, offended the public. The media has increased public awareness of psychological theories while attempting to portray the various issues that have divided countless families, friends, and profes-

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1. *Herald v. Hood*, No. 15986, 1993 WL 277541, at \*1 (Ohio Ct. App. July 21, 1993), cert. granted, 68 Ohio St. 3d 1409, 623 N.E.2d 566 (Ohio Dec. 15, 1993) (Table, No. 93-1864).

2. *Id.* at \*2.

3. *Id.* at \*1. However, the trial court reduced the punitive damages to \$2,500,000.00.

4. Miriam Horn, *Memories Lost and Found*, U.S. NEWS & WORLD REPORT, Nov. 29, 1993, 52, 56.

5. *Id.*

6. *Id.*

sionals. One recent national radio program discussed some of the common issues:

Do people repress memories of bad childhood experiences like sexual abuse, until those memories are released years later by a therapist? Or are those so-called memories actually false memories, induced by over-eager therapists and then promoted by greedy lawyers? And are dozens of accused parents, child-care workers, and priests actually innocent victims of a new Salem witch hunt?<sup>7</sup>

With the increased awareness and interest in repressed memory, the judicial system has been forced to confront these issues as victims of sexual abuse come forward and seek damages for their alleged injuries.

This comment will trace the evolution of adult repression of childhood sexual assault from the basic psychological theories, through its assimilation into society. Finally, this comment will discuss the introduction of adult repression into the legal environment.

### MEMORY DEFINED

In 1980 Lorey Newlander, twenty-one years old, filed a suit in a California court claiming that she began recalling incidents of sexual assault that took place when she was a teenager.<sup>8</sup> Although the case settled out of court in 1983, Lorey Newlander became the first in a steady stream of litigants to claim that a repressed memory had prevented her from filing her suit in a timely manner.<sup>9</sup> Since then, the medical and legal communities have had to look to the scientific community for answers on how to deal with the issue of repressed memories.

#### *Scientific Analysis*

Until recently, scientists were "concerned with the *mechanisms* of memory rather than the *contents* of memory. A new wave of interest in everyday memory has sparked studies which examine the working of memory in real-life situations."<sup>10</sup> Scientists generally agree on the mechanics of memory, but they do not agree on its veracity. Nonetheless, scientists agree that "memory consists of three operationally-distinct phases: acquisition (learning), storage (retention), and retrieval

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7. *Crossfire* (CNN radio broadcast, Mar. 1, 1994).

8. Norrie Clevenger, Note, *Statute of Limitations: Childhood Victims of Sexual Abuse Bringing Civil Actions Against Their Perpetrators After Attaining the Age of Majority*, 30 J. FAM. L. 447, 455 n.41 (1992).

9. *Id.* at n.42.

10. GILLIAN COHEN ET AL., *MEMORY: A COGNITIVE APPROACH* 19 (1986) (emphasis added).

(usage).<sup>11</sup> These phases may begin to blend with the passage of time.<sup>12</sup>

Although agreeing on the phases of memory, scientists have conflicting theories as to memory content. The influential theory centering around the contents of memory is the schema theory.<sup>13</sup> "Schema theory emphasizes the fact that what we remember is influenced by what we already know."<sup>14</sup> Packets of stored knowledge are called schemas, newly obtained knowledge is combined with past packets of schemas to form new memory.<sup>15</sup> To show how schemas operate, scientists gather information from a variety of scenarios; for example, one scenario is how memories differ when witnessing scenes and when witnessing autobiographical events.

In remembering scenes, scientific evidence has shown that people may be misled by false information. This may occur if "[the false information] concerns insignificant details that are peripheral to the main event, [if] [t]he false information is given after a delay . . . [and if] [t]hey are not aware that they may be deliberately misinformed and so have no reason to distrust the information they receive."<sup>16</sup>

Scenic memories may be important to a sexually abused person when trying to gather sufficient evidence to prepare a case for trial. Certain scenes tend to bring images to the mind and may trigger a memory. One example of a triggered image occurred in the much publicized Lorena Bobbitt trial.<sup>17</sup> When Lorena Bobbitt opened a refrigerator door late at night, the light triggered a flood of images of sexual battery—battery at the hands of her husband.<sup>18</sup>

Scientists study autobiographical memory to determine how well people "remember personal experiences and events from their past."<sup>19</sup> Scientific studies have shown that:

Autobiographical memories are *episodic*. They consist of specific events, objects and people personally experienced at particular times and places. *Semantic* memory consists of general knowledge abstracted from these personal experiences and organized into schemas.

11. Wayne A. Wickelgren, *Memory Storage Dynamics*, in 4 ATTENTION AND MEMORY 321 (William K. Estes ed., 1976).

12. *Id.*

13. COHEN ET AL., *supra* note 10, at 25.

14. *Id.*

15. *Id.* at 31.

16. *Id.* at 36.

17. Lorena Bobbitt was found not guilty by reason of insanity for the malicious wounding of her husband when she cut off his penis after he allegedly raped her. *Bobbitt Case Jury Re-Enacted Night Lorena Cut Husband*, ST. LOUIS POST DISPATCH, Jan. 23, 1994, at 3A.

18. *Id.*

19. COHEN ET AL., *supra* note 10, at 45.

Autobiographical memories which involve repeated occurrences of similar events become difficult to distinguish from each other. The episodic information specific to each event is lost, while the features common to all the repeated incidents are gradually built up into general schemas in semantic memory.

Trivial events that are of little emotional significance tend to be forgotten.

Flashbulb memories for events that are important and highly charged emotionally seem to be recalled in vivid detail. This may be due to some special encoding mechanism or to frequent retelling.<sup>20</sup>

New studies dealing with retrieval show that remote autobiographical memories can be retrieved when using a chronological organization and searching backwards in time, or when the person focuses on the relevant context.<sup>21</sup> Since studies are not precise and misinformation can occur, it is no wonder that the medical and legal communities are in an uproar over whether repressed sexual abuse memories are accurate.<sup>22</sup>

### PSYCHOLOGICAL THEORIES OF MEMORY REPRESSION

When psychologists and scientists study memory concepts, they are swayed by their own fundamental beliefs in psychology, which are dictated by the school they follow. Although the modern trend is toward a blending of psychological theories, currently there are four major identifiable schools of social psychology: behaviorism, cognitive theory, symbolic interactionism, and psychoanalysis.<sup>23</sup> Each school has an identifiable person who has been critical in its development, including Skinner, Lewin, Mead, and Freud.<sup>24</sup>

#### *The "Old Schools"*

Although behaviorism was formulated by American psychologist John B. Watson<sup>25</sup> in 1913, it is most closely associated with B.F. Skin-

20. *Id.* at 54-55.

21. *Id.* at 55. "[G]eneral knowledge schemas may be used to reinstate the context of the target and generate a description of the setting, the location, associated activities, physical attributes, etc." Then, the search process is focused on these memories until the "target" is remembered. *Id.*

22. For example, Dr. John Mack, a professor at Harvard University, believes that people who perceive themselves as being sexually abused as children have in fact been abducted by aliens and are remembering their sexual abuse at the aliens's hands. *Oprah Winfrey Show: Alien Abduction* (ABC television broadcast, Apr. 18, 1994).

23. JAMES A. SCHELLENBERG, *MASTERS OF SOCIAL PSYCHOLOGY* 126 (1978).

24. *Id.*

25. John B. Watson (1878-1958). In *Behavior* (1914) and other books, Watson argued that psychologists, to be scientific, must study what people do and not what they think or feel.

ner.<sup>26</sup> “The [behaviorist’s] basic rule is to deal with only what can be observed and measured.”<sup>27</sup> Behaviorism limits psychological investigation to objective events, thus opposing the study of mental processes as reported by the person experiencing them. Instead, behaviorism emphasizes laboratory experiments concerned with observable responses to stimuli.<sup>28</sup> Since behaviorists rely on objective events measured and observed in a laboratory setting, this theory is difficult to apply to studies of sexual abuse because it does not occur in a laboratory setting.

Kurt Lewin’s cognitive theory is concerned with how the individual subjectively creates the framework within which he or she acts. As with behaviorism, the cognitive theory also requires that “[s]cience must be based on systematic empirical evidence observed under carefully controlled conditions,”<sup>29</sup> thus this theory is not applicable to the study of sexual abuse.

Symbolic interactionism, developed by George H. Mead, measures behavior by examining the “full social context of an act” and not just “reducing it to some feature that can be physically measured.”<sup>30</sup> To understand an individual’s behavior, it is necessary to categorize him or her in a social group. An individual is much like a member of a baseball team; he or she is just one part of a greater unit. This theory is more receptive to the study of sexual abuse since it permits a study outside the laboratory and takes into account the individual’s entire social environment.

The most receptive theory for the study of repressed memory is psychoanalysis which was developed by Sigmund Freud.<sup>31</sup> Psychoanalysis is the study of the origins and structure of human personality and a method of treating some types of mental illness.<sup>32</sup> This theory probes the unconscious part of the personality.

### *Freudian Psychology Explored*

Freud believed in three levels of awareness: conscious mental material of which the person is aware, whether currently existing or in memories,<sup>33</sup> pre-conscious material of which the person is not aware

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26. Burrhus Frederick Skinner (1904-1990). Received Ph.D. in 1931 from Harvard University.

27. SCHELLENBERG, *supra* note 23, at 127.

28. 3 NEW STANDARD ENCYCLOPEDIA B-175 (1993).

29. SCHELLENBERG, *supra* note 23, at 127.

30. *Id.* at 128.

31. Sigmund Freud (1856-1939).

32. 13 NEW STANDARD ENCYCLOPEDIA P-615 (1993).

33. *Id.*

at the moment but can easily recall,<sup>34</sup> and unconscious material which cannot be brought to conscious awareness easily and voluntarily, [such as innate drives that work to preserve the life of the person, or memories, wishes, and other mental processes that once were conscious but have been repressed, or excluded from consciousness], because they are painful to the conscious mind.<sup>35</sup>

Classical psychoanalysis involves an analyst meeting with a patient several times a week in hour-long sessions in which the analyst helps the patient bring into consciousness the repressed conflicts that have caused the illness.<sup>36</sup> When the treatment is successful, the patient develops realistic methods of dealing with these conflicts.<sup>37</sup>

During therapy, the therapist uses the technique of free association. Free association occurs when the patient is encouraged to talk about whatever comes to mind, without regard to the apparent relevance or propriety of the material.<sup>38</sup> Patients develop certain resistances in their effort to talk freely, and it is the analyst's job to help the patient overcome these resistances. Resistances are generally associated with feelings of guilt in regard to fantasies about hostility, dependency, or sexuality.<sup>39</sup> Additionally, repressed wishes often appear in symbolic form in dreams.<sup>40</sup> Since the analyst helps the patient understand the meaning of the material, there is a probability that the analyst might place false memories of child abuse in the patient's mind where no abuse actually occurred.<sup>41</sup>

The first studies of sexual abuse appear to have developed with Freud's earliest works during the Victorian period.

The most famous discovery of incest was made by Freud in the late 1800s. His work with hysterical women patients led him to develop his seduction theory . . . which postulated that the symptoms exhibited by his patients were caused by sexual contacts with their fathers. His publication of this theory created quite a stir in Victorian Viennese society. This furor, coupled with his profound personal discomfort with the high prevalence of incestuous abuse reported by these women, led him to abandon his theory. Eventually, he replaced it with the oedipal theory, which in effect negated the medical/psychiatric profession and with it the response made to any child complaining of an adult's or parent's sexual behavior. It insured that the complaint was treated as a childhood fantasy and not as reality. It had the addi-

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34. *Id.*

35. *Id.*

36. 13 NEW STANDARD ENCYCLOPEDIA P-615 (1993).

37. *Id.* at P-616.

38. *Id.*

39. *Id.*

40. *Id.*

41. See *infra* text accompanying note 47.

tional effect of exonerating the involved adult while allowing for both the continuation of the incest and society's denial of it.

Public ignorance and misperception about incest continued from Freud's time until the late 1970's . . . .<sup>42</sup>

### *The Modern Movement*

Beginning in the late 1970's and continuing to the present, the study of sexual abuse has become more prevalent. Building upon the studies of proven master psychologists, new therapists began developing their own theories and began working with patients. Not all therapists, however, agree with psychoanalysis or the older schools.

One therapist, Alice Miller, reports that "[i]t is not possible for someone really to clarify his situation and dissolve his fears until he can *feel* them rather than discuss them."<sup>43</sup> She believes that traditional schools produce "new, emotion-resistant and ignorant 'therapists' who cannot but remain ignorant as long as they cling to fictions, do not query what they once learned, are afraid of the truth, and wish to exert power."<sup>44</sup> Hundreds of other therapists who have developed and advanced their own theories agree with Alice Miller's disapproval of the older schools.

As the modern psychologists and therapists began to publish their works, members of the general public became aware of sexual abuse and were more receptive to delving into their own pasts. However, with the increased awareness, the question arose as to whether therapists implanted false memories in some patients. Many reputable therapists, such as Pam Staszak,<sup>45</sup> stress that they will not implant any memories and will not "dredge up" any past memories unless the patients themselves bring up the memories.<sup>46</sup> But not all therapists are as reputable. Former patients and alleged abusers have filed negligence claims against therapists.<sup>47</sup> Investigations have revealed that some therapists suggested to their patients that they have had a traumatic experience even when there is only a suggestive history or symptom profile.<sup>48</sup> Other therapists have told patients during the pa-

42. C. Courtois, *HEALING THE INCEST WOUND* 7 (1988).

43. ALICE MILLER, *BANISHED KNOWLEDGE: FACING CHILDHOOD INJURIES* 184 (3d ed., 1988).

44. *Id.* at 189.

45. Telephone interview with Pam Staszak, M.A., Adolescent and Family Mental Health Care Specialist, Rumbaugh Mental Health Clinic in Fayetteville, N.C. (June 1994).

46. *Id.*

47. On May 13, 1994, a California jury awarded Gary Ramona \$500,000 for therapist negligence. Gary Ramona lost his \$400,000 a year marketing job, his wife and family after his daughter confronted her father with sex abuse accusations in March 1990. *False-Memory Verdict Meant to Put Therapists on Notice*, ARIZ. REPUBLIC, May 15, 1994, at A3.

48. Elizabeth F. Loftus, *The Reality of Repressed Memories*, AM. PSYCHOLOGIST, 518, 526 (May 1993).



tient's first office visit that they [the patients] are victims of a satanic cult.<sup>49</sup> "Once the 'diagnosis' is made, the therapist urges the patient to pursue the recalcitrant memories."<sup>50</sup> The Philadelphia-based False Memory Syndrome Foundation has received more than 13,000 calls from individuals as well as families claiming that they have been the victims of therapists who implanted false memories.<sup>51</sup>

#### SOCIAL IMPLICATIONS AND AWARENESS OF MEMORY REPRESSION

Before society could discuss memory repression, people had to acknowledge that sexual abuse occurred. During Freud's Victorian era, children were required to work at the age of five or six and were considered to behave as adults at the age of nine or ten.<sup>52</sup> It was not until the women's movement of the 1970's and the growing concern of the child protection lobby that the prevalence of child sexual abuse first was identified.<sup>53</sup> Since then, the women's movement and child protection lobbyists have had "sufficient political power and experience to ensure progress in bringing some of the issues before the public."<sup>54</sup>

One result of the strength of the women's movement was the change in attitudes regarding sexuality. "In the course of the 1970's, most states rewrote their rape statutes, and in twenty-five of them a complete restructuring of the offense occurred along feminist lines, largely because of the lobbying of women's groups."<sup>55</sup> Prior to the movement, rape was seen as a crime of passion and not a crime of violence.

As the movements continued, the public became more aware of sexual abuse. Many therapists began writing their own books, lecturing around the country, and broadcasting programs on national radio.<sup>56</sup> In the 1980's, a new form of therapy developed called recovered memory therapy.

Recovered memory therapy is not a uniform method developed by a particular 'inventor.' It is a hodgepodge of ideas that grew, during the past decade, from a blend of re-defined Freudian terminology, pop psychology and self-help recovery groups. Patients are told that their

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49. *Id.*

50. *Id.*

51. *False-Memory Verdict Meant to Put Therapists on Notice, supra* note 47.

52. JEAN RENVOIZE, *INCEST: A FAMILY PATTERN 2* (1982).

53. *Id.* at 3.

54. RENVOIZE, *supra* note 52, at 3.

55. JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 314 (1988).

56. Dr. Susan Forward hosted her own daily national radio program on ABC Talkradio. She wrote numerous books dealing with sexual issues, including incest. DR. SUSAN FORWARD & CRAIG BUCK, *BETRAYAL OF INNOCENCE* (Penguin Books 1988) (1978).

eating or sexual or marital problems will clear up once the 'lost memories' have been found.<sup>57</sup>

In 1988, one of the first books to be published on the subject of sexual abuse was *The Courage to Heal* by Ellen Bass and Laura Davis.<sup>58</sup> Since the first edition was published, more than 700,000 copies have been sold.<sup>59</sup> The authors state that:

[w]hen we began work on *The Courage to Heal* in 1984, the climate for survivors of child sexual abuse was dramatically different than it is today. There was little understanding about the process of healing from child sexual abuse. There were few support groups or therapists knowledgeable about treating abuse. When survivors did disclose their abuse, they were most frequently met with denial, minimization, or blame.<sup>60</sup>

Later, in 1990, *The Secret Survivors* by E. Sue Blume<sup>61</sup> was published. This book published the Incest Survivors' Aftereffects Checklist that "describes the many ways that incest affects its victims."<sup>62</sup> This checklist provides thirty-four characteristics and states, "Do you find many characteristics of yourself on this list? If so, you could be a survivor of incest."<sup>63</sup> A reader would be hard pressed not to find several characteristics that would relate to him or her, thus the checklist has been heavily criticized.<sup>64</sup> The checklist heralded a steady stream of criticism that started to attack all self-help books.

For the first four years after its publication in 1988, *The Courage to Heal* was not considered controversial. Then suddenly in 1992, with the emergence of a highly publicized backlash against survivors, it was blamed for inducing 'false memories,' tearing families apart, and creating a climate of 'hysteria' around child sexual abuse.<sup>65</sup>

People began to question the varied authors' qualifications because the most popular of these self-help books were written by two women with "no formal training in memory, psychology or psychiatry."<sup>66</sup> In rebuttal, Ellen Bass and Laura Davis wrote:

57. John Hochman, *Buried Memories Challenge the Law*, NAT'L L. J., Jan. 10, 1994, at 17.

58. ELLEN BASS & LAURA DAVIS, *THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE* (3d ed. 1994).

59. Hochman, *supra* note 57.

60. BASS & DAVIS, *supra* note 58, at 14.

61. E. SUE BLUME, *SECRET SURVIVORS: UNCOVERING INCEST AND ITS AFTEREFFECTS IN WOMEN* (1990).

62. *Id.* at xvii.

63. *Id.* at xviii.

64. Some of the characteristics include: Fear of being alone in the dark, of sleeping alone; nightmares, night terrors; headaches; arthritis or joint pain; humorlessness or extreme solemnity; high risk taking; inability to take risks; blocking out some period of early years (especially 1-12), or a specific person or place; and sexual issues: must be sexual aggressor or cannot be. BLUME, *supra* note 61, at xviii-xx. For criticism, see Hochman, *supra* note 57.

65. BASS & DAVIS, *supra* note 58, at 14.

66. Hochman, *supra* note 57.

As authors, we have been criticized for our lack of academic credentials. But you do not have to have a Ph.D. to listen carefully and compassionately to another human being. In fact, our perspective as laypeople helped us to take the suffering of survivors out of the realm of pathology—and instead to present them as strong, capable people who'd been hurt.<sup>67</sup>

Self-help books, however, were not the only catalysts of repressed sexual memory theory. Many self-help groups abound, all of which are willing to assist survivors of sexual abuse to deal with their memories.

Adults who believe they have been sexually abused as children can seek help from a variety of such groups. Many groups prepare their own literature, offer counseling, and present seminars. The American Self-Help Clearinghouse<sup>68</sup> publishes *The Self-Help Sourcebook*, which provides information and contacts for over 700 national and model self-help groups.<sup>69</sup> These groups, however, have a tendency to quickly collapse.<sup>70</sup>

In response to public interest, national television, radio, and magazines have interviewed scores of people who have claimed repression of sexual abuse. Nearly all of the talk shows and articles presented the question of whether delayed memories are reliable. One side of the issue concerns people who tell “stories of pain, the lifelong aftereffects of childhood abuse. [T]he victims talk of physical, emotional and psychological after-effects.”<sup>71</sup> On the other side are those charged with the offense, those who suffer “humiliation and embarrassment.”<sup>72</sup> Fueling the issue are highly publicized articles of television and movie personalities, such as Roseanne Barr and Miss America, Marilyn Van Derbur.<sup>73</sup> The controversy erupted when victims began suing in court seeking monetary damages for their childhood abuse.

67. BASS & DAVIS, *supra* note 58, at 14.

68. American Self-Help Clearinghouse, St. Clares-Riverside Medical Center, Denville, NJ 07834. (201) 625-7101.

69. The Self-Help Sourcebook also provides contacts for local self-help clearinghouses internationally, national toll-free numbers, and ideas and resources for starting a group. The sourcebook is available for ten dollars, postpaid from American Self-Help Clearinghouse; see *supra* note 68.

70. After sending out approximately twenty inquiries, nine inquiries were returned to sender as unforwardable, and only seven organizations responded.

71. BONNIE ANDERSON, *Testimony Continues in Father Porter Sentencing Hearing* (CNN radio broadcast, Dec. 6, 1993).

72. Nancy Marlowe, *False Memory*, ASHEVILLE CITIZEN-TIMES, Mar. 28, 1994, at C1.

73. Loftus, *supra* note 48, at 519.

## LEGAL THEORIES

*Criminal Prosecution*

The criminal prosecution of sex offenders is difficult whenever children are involved. Sex offenders are usually in a position of authority, power, strength, or trust in relation to their victims.<sup>74</sup> Many abusers appear to be normal, intelligent, successfully employed, active in community affairs, and have no prior criminal records.<sup>75</sup> They can be family members, neighbors, baby-sitters, members of the clergy,<sup>76</sup> scout masters<sup>77</sup> or teachers.<sup>78</sup> Often, a child may repress the memories or forget completely,<sup>79</sup> which prevents punishment of the offender and gives the offender a sense of security.

In criminal proceedings, the focus of the courts is on the rights of the potential defendant as the courts realize that a criminal charge is far more damaging than a civil charge.<sup>80</sup> Except for rare cases, a defendant in a civil case is not apt to be sentenced to prison. "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.'"<sup>81</sup>

"Criminal prosecution has been available to adult survivors [of childhood sexual assault] under the ordinary remedies for rape, sexual assault, etc., but this path has not always been the ideal recourse."<sup>82</sup>

74. AM. PROSECUTORS RESEARCH INST., INVESTIGATION AND PROSECUTION OF CHILD ABUSE 2 (2d ed. 1993).

75. *Id.* Additionally, one recent article reported that:

More than half of the reported cases . . . involve a family member as the offender with a parent or parent figure the largest group at 42 percent. Other family members are usually brothers, grandfathers, or uncles. Only 13 percent of child victims are assaulted by strangers, with the remainder of offenses committed by family, friends, neighbors, babysitters, or individuals who work with children, such as coaches, scout leaders, or teachers.

Edward J. Saunders, *The Child Sexual Abuse Case: A Short Course for Judges*, 27 No. 1 JUDGES' J. 20 (1988) (1994 WL, Lawprac Database).

76. James R. Porter, the former Roman Catholic priest who admitted sexually assaulting dozens of children while serving as a parish priest in the New Bedford, MA, area three decades ago was sentenced on Dec. 7, 1993, to eighteen to twenty years in prison. Christopher Daly, *Ex-Priest Gets 18-20 Years for Sexual Abuse of Youths*, THE WASH. POST, Dec. 7, 1993, at A1.

77. *Snyder v. Boy Scouts of Am., Inc.*, 253 Cal. Rptr. 156 (Cal. Ct. App. 1988).

78. AM. PROSECUTORS RESEARCH INST., *supra* note 74, at 1.

79. "While findings are preliminary, 28-59% of the women in clinical samples claim to have at some time forgotten the sexual abuse they suffered as children." AM. PROSECUTORS RESEARCH INST., *supra* note 74, at 29.

80. Ernsdorff & Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 148 (1993).

81. *Id.* at 148, citing *Toussie v. United States*, 397 U.S. 112, 115 (quoting *Pendergast v. United States*, 317 U.S. 412, 418 (1943) and *United States v. Scharton*, 285 U.S. 518, 522 (1932)).

82. Sylvia Chute, *Adult Survivors of Childhood Sexual Abuse: Preparing the Plaintiff's Case* (Sylvia Chute, J.D., Richmond, VA), Apr. 7, 1992, at 3.

Despite criminalization of childhood sexual abuse in all fifty states, abusers continue to escape prosecution. One study shows that only 24 percent of all childhood sexual abuse cases nationwide result in criminal actions, and even fewer in convictions. In most states, criminal statutes of limitations for childhood sexual abuse expire around five years after commission of the crime,<sup>83</sup> thereafter barring criminal charges.<sup>84</sup>

Two new theories that prosecutors are urging on the court are the "concealment" and "continuing crime" theories.

The "concealment" theory is based upon statutory provisions that, in some states, permit the tolling of the statute of limitations if the perpetrator conceals his crime.<sup>85</sup> In *Crider v. State*,<sup>86</sup> the Illinois court

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83. Statute of limitations are designed to "prevent prosecution of those who have been law abiding for some years, avoid prosecution when the community's retributive impulse has ceased, and lessen the possibility of blackmail. But foremost is the desirability of requiring that prosecutions be based upon reasonably fresh evidence so as to lessen the possibility of an erroneous conviction. Thus, these statutes share an important common purpose with speedy trial preparations, and to that end are liberally construed in favor of criminal defendants." WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 18.5(a) (2d ed. 1992). Statutes extending or removing the statutes of limitation for offenses against children: ALA. CODE § 15-3-5 (1985); ALASKA STAT. § 12.10.120(c) (1985); ARK. CODE ANN. § 5-1-109(h) (1987); CAL. PENAL CODE § 803(f) (1990); COLO. REV. STAT. § 16-5-401 (1989) and COLO. REV. STAT. § 18-6-401.1 (1985); CONN. GEN. STAT. § 54-193a (1991); FLA. STAT. ANN. § 775.15(7) (1989); GA. CODE ANN. § 17-3-1(c) (1987); IDAHO CODE § 19-420 (1990); ILL. REV. STAT. ch. 720 § 5/3-6 (1988); IOWA CODE § 802.2 (1990); KAN. STAT. ANN. § 21-3106 (1986); LA. CODE CRIM. PROC. ANN. art. 573 (1988); ME. REV. STAT. ANN. tit. 14, § 752-C (1991); MASS. GEN. L., ch. 277, § 63 (1987); MICH. COMP. LAWS § 628.26 (1987); MINN. STAT. § 628.26 (1991); MISS. CODE ANN. § 99-1-5 (1990); MO. REV. STAT. § 556.037 (1990); MONT. CODE ANN. § 45-1-205 (1989); NEB. REV. STAT. § 29-110(2) (1990); NEV. REV. STAT. § 171.095 (1989); N.H. REV. STAT. ANN. § 625:8 (1990) and N.H. REV. STAT. ANN. § 639:2 (1987); N.J. REV. STAT. § 2C:1-6(4) (1989); N.M. STAT. ANN. § 30-1-9.1 (1987); N.D. CENT. CODE § 29-04-03.1 (1987) and N.D. CENT. CODE § 29-04-03.2 (1987); OKLA. STAT. tit. 22, § 152(A) (1991); OR. REV. STAT. § 131.125 (1991); 42 PA. CONS. STAT. ANN. § 5554 (1985); R.I. GEN. LAWS § 12-12-17(a) (1990); S.D. CODIFIED LAWS ANN. § 22-22-7 (1989) and S.D. CODIFIED LAWS ANN. § 22-22-19.1 (1989); TENN. CODE ANN. § 40-2-101(d) (1990); TEX. CRIM. PROC. CODE ANN. § 12.01 (1987); UTAH CODE ANN. § 76-1-303(3) (1991); VT. STAT. ANN. tit. 13, § 4501(c) (1989); WASH. REV. CODE § 9A.04.080(c) (1989); WIS. STAT. § 939.74(c) (1987); and 18 U.S.C. § 3509(k) (1990). Kentucky, Maryland, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming have no statutes of limitation for criminal felony prosecutions. The citation date indicates the year of passage or last amendment. This listing includes all legislation passed through December 31, 1991, and was compiled by the Am. Prosecutors Research Inst., *supra* note 74, at 204-05.

84. Rebecca L. Thomas, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action*, 26 WAKE FOREST L.REV. 1245, 1246 (1991).

85. Ernsdorff & Loftus, *supra* note 80, at 149.

86. 531 N.E.2d 1151 (Ind. 1988); *See also* 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 and had opportunity to report the acts); State v.

found that threats of physical violence against the victim can constitute concealment of a crime for the purposes of tolling the statute of limitations. Courts, however, tend to narrowly interpret concealment arguments since most crimes are concealed;<sup>87</sup> additionally some advocates feel that a crime against a person, by its very nature, cannot be concealed.<sup>88</sup> As a result, the concealment theory has been argued with limited success.

The "continuing crime" theory proposes that a crime is not complete so long as the defendant continues to engage in the criminal conduct; therefore, until the criminal act is complete, the statute of limitations will not begin to run.<sup>89</sup> That element of the crime must continue until after the statute of limitations has expired.<sup>90</sup> Generally, this theory can be advanced when sexual abuse of a child has taken place and the perpetrator continues to abuse his authoritative position.<sup>91</sup> Since most repressed memory cases surface years after the abuse has been completed, repression cases will seldom contain this authority element, such as living in the same house or day-to-day contact.<sup>92</sup> As with the concealment theory, the continuing crime theory has met with limited success.

Prosecutors find, as a practical matter, that even if the statutes of limitation can be met,<sup>93</sup> it is difficult to obtain a conviction. There is generally little or no evidence except for the prosecuting witness' testimony.<sup>94</sup> The prosecutor, then, must weigh the chance of conviction in these cases against other cases that stand a potentially greater chance of a successful conviction.

In prosecuting repressed memory cases, one must also consider the fact that carrying the victim through the criminal justice system may further damage the victim psychologically. Usually a "not guilty" verdict will give rise to a feeling that society does not believe the victim.<sup>95</sup> Buntie Russ, an experienced prosecutor of sex crimes states, "Jurors

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). Ernsdorff & Loftus, *supra* note 80, at 149 n.108.

87. Ernsdorff & Loftus, *supra* note 80, at 150.

88. *Id.*

89. *Id.* at 149.

90. *Id.*

91. *Id.* at 149 n.105. See also 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; the crime continued until that exertion of authority ceased, even though the abuse had ceased previously).

92. Ernsdorff & Loftus, *supra* note 80, at 149.

93. If the defendant has been out of state, the statutes of limitation are usually tolled during any period when the defendant is outside the jurisdiction. AM. PROSECUTORS RESEARCH INST., *supra* note 74, at 205.

94. Interview with Buntie Russ, Senior Assistant District Attorney in the 12th Judicial District of North Carolina, in Fayetteville, N.C. (May 28, 1994).

95. *Id.*

do not want to admit sexual molestation occurs as they will feel pressured themselves to do something about it."<sup>96</sup> In most cases, any family relationship will usually terminate completely once litigation commences, and family members feel compelled to "choose" sides. Therefore, a criminal trial is not always in the best interest of the victim. Oftentimes, it is necessary to file a civil action.

### *Civil Litigation*

#### *Statutes of Limitation*

In filing a civil action, the plaintiff must first determine if the statute of limitations<sup>97</sup> has expired. "[M]any find that the highest hurdle to clear is the statute of limitations, which usually bars their claims before they realize a claim existed."<sup>98</sup> In fact, every case concerning repressed memory has centered on whether the statute of limitation has barred the plaintiff's action.

The statute of limitations is measured from the date the cause of action accrues.<sup>99</sup> In states where the statute of limitations is tolled pending discovery of the cause of action, the victim need only file within the designated statutory time limitation following discovery. Victims of childhood abuse must first determine their individual state's legislative policy to determine if they have a viable suit. Currently, many states are adjusting their statutes to permit adult survivors of sexual abuse to bring suit against their abusers.<sup>100</sup>

#### *Discovery Exception*

Some courts have sidestepped the statute of limitation periods by using date of discovery rules.<sup>101</sup> "The discovery rule provides that a cause of action accrues when the plaintiff discovers, or through the exercise of due diligence should have discovered, that he or she was injured by the defendant's misconduct."<sup>102</sup> Generally, the courts will apply discovery in malpractice actions; for example, when the plaintiff

96. *Id.*

97. Defined as "statutes of the federal government and various states setting maximum time periods during which certain actions can be brought or rights enforced. After the time period set out in the applicable statute of limitations has run, no legal action can be brought regardless of whether any cause of action ever existed." BLACK'S LAW DICTIONARY 927 (6th ed. 1990).

98. Thomas, *supra* note 84, at 1.

99. A cause of action accrues when a suit may be maintained and the law varies state by state. For example, a cause of action may accrue on date of injury or upon date of discovery of the injury. BLACK'S LAW DICTIONARY 21 (6th ed. 1990). The statute of limitations begins running upon date of accrual.

100. See *infra* notes 134 and 135.

101. Michael Dayton, *Victim May Sue for Decades-Old Sexual Abuse*, N.C. LAWYER'S WEEKLY, June 13, 1994, at 1.

102. Clevenger, *supra* note 8, at 454.

discovered years after the statute of limitations barred any action that the defendant doctor left a sponge or other implement in her body.<sup>103</sup>

In applying the discovery rule, courts are faced with several considerations. First, courts must decide whether the rule is applicable to childhood sexual abuse.<sup>104</sup> Second, courts must determine when the plaintiff discovered, or with all due diligence should have discovered, the causal connection between the abuse and the injuries, or discovered the abuse.<sup>105</sup> Third, courts must determine the propriety of applying the discovery rule to the applicable case at hand.<sup>106</sup> Generally, "courts are more willing to apply delayed discovery when the plaintiff has no memory of sexual abuse due to trauma, rather than when the plaintiff was aware of the violation but unaware of the connection with present-day physical or psychological problems."<sup>107</sup>

Following Lorey Newlander's case in 1980,<sup>108</sup> the first time an abuse survivor made the discovery rule argument was in *Tyson v. Tyson*.<sup>109</sup> In *Tyson*, Nancy Tyson alleged that her father committed multiple acts of sexual assault on her when she was between the ages of three and eleven. At twenty-six years of age, she filed her complaint within one year of her recollection of the alleged acts, stating that she suppressed her memory of the acts until she entered psychological therapy.<sup>110</sup> The defendant moved for summary judgment based on the statute of limitations.<sup>111</sup>

The *Tyson* court held that the discovery rule did not apply to "a cause of action for childhood sexual abuse, where the plaintiff has blocked the incident from her conscious memory during the period of the statute of limitations."<sup>112</sup> The court was concerned that there was

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103. See *Ruth v. Dight*, 453 P.2d 631 (Wash. 1969), where a sponge was left in a plaintiff's body for twenty-two years following a hysterectomy. The court held that where medical malpractice is asserted to have occurred through negligently leaving foreign substances or articles in surgical wounds, and such substances remained in the body after the wound has been surgically closed, the statute of limitations commences to run when the patient discovers or should have discovered the presence of the foreign article.

104. Thomas, *supra* note 84, at 1260.

105. *Id.*

106. *Id.*

107. *Id.*

108. See *supra* text accompanying note 8.

109. 727 P.2d 226 (Wash. 1986).

110. *Id.* at 227.

111. *Id.*

112. *Id.* at 230. For the leading cases holding that a plaintiff cannot use the discovery rule to toll the statute of limitations, see *DeRose v. Carswell*, 196 Cal. App. 3d 1011 (1987) (discovery doctrine cannot be applied to overcome statute of limitations when adult brought suit against step grand-parent for sexually abusing her as a child when she had been aware of the harm at the time of the abuse); *Lindabury v. Lindabury*, 552 So. 2d 1117 (Fla. Dist. Ct. App. 1989) (discovery rule does not toll statute of limitation under Florida law when daughter sues parents); *E.W. v. D.C.H.*, 754 P.2d 817 (Mont. 1988) (under Montana law discovery rule does not toll statute of limitations when child sues step-uncle for prior sexual abuse); *Bowser v. Guttendorf*, 541 A.2d



no objective evidence that the alleged acts had occurred and that witnesses would be forced to recall events from seventeen to twenty-six years ago.<sup>113</sup> Additionally, the court felt that psychology and psychiatry were "imprecise disciplines,"<sup>114</sup> which could lead to a "distortion of the truth."<sup>115</sup> Although the Washington courts had decided that the discovery rule did not apply to repressed memory cases, this ruling was eventually superseded by statute.<sup>116</sup>

In *Johnson v. Johnson*,<sup>117</sup> a federal court developed a system of type one and type two plaintiffs, which has been embraced nationwide. Type one plaintiffs are aware of the abuse at or before majority, but do not know their mental problems arise from that abuse.<sup>118</sup> Type two plaintiffs have completely repressed all memory due to the trauma, until shortly before filing suit.<sup>119</sup> Since identifying plaintiffs as type one or two, a majority of courts and law reviews have also delineated the plaintiffs as such<sup>120</sup> because the categories simplify discussing the issues.

In *Johnson*, a type two plaintiff filed suit against her parents. The defendant mother and father moved to dismiss the suit brought by their adult daughter who alleged sexual abuse from the ages of three to thirteen years of age.<sup>121</sup> The plaintiff alleged that she had suppressed all memories of the abuse until psychotherapy caused her to remember the injuries.<sup>122</sup> Since the recent therapy triggered the forgotten abuse, the *Johnson* plaintiff was labeled a type two plaintiff.

The *Johnson*<sup>123</sup> court denied the defendant's motion for a summary judgment after discussing opinions on type two plaintiffs rendered by

377 (Pa. Super. Ct. 1988) (discovery rule does not toll statute when woman sues foster mother for negligent infliction of emotional harm under Pennsylvania law); *Raymond v. Ingram*, 737 P.2d 314 (Wash. Ct. App. 1987) (discovery rule does not toll statute in Washington but case superseded by Wash. Rev. Code. Ann. § 4.16.340(2)); Ann Marie Hagen, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355, 356 n.4 (1991).

113. *Tyson*, 727 P.2d at 229.

114. *Id.*

115. *Id.*

116. WASH. REV. CODE ANN. § 4.16.340 (West 1995).

117. 701 F. Supp. 1363 (N.D. Ill. 1988).

118. *Id.* at 1367.

119. *Id.*

120. See, e.g., *Clevenger*, *supra* note 8.

121. *Johnson*, 701 F. Supp. at 1364.

122. *Id.*

123. For leading cases allowing plaintiff to use the discovery rule to toll the statute of limitations, see *Doe v. Doe*, 216 Cal. App. 3d 285, 264 Cal. Rptr. 633 (1990) (allowing use of discovery rule when plaintiff has no memory of past sexual abuse); *Meiers-Post v. Schafer*, 427 N.W.2d 606 (Mich. Ct. App. 1988) (allowing use of discovery rule when plaintiff has psychologically repressed memory of sexual abuse, and after memory is revived, there is corroborative evidence that events actually occurred); *Evans v. Eckleman*, 216 Cal. App. 3d 1609, 265 Cal. Rptr. 605 (1990) (allowing use of discovery rule when plaintiff is ignorant of or has suppressed memories of the sexual abuse); *Petersen v. Bruen*, 792 P.2d 18 (Nev. 1990) (allowing plaintiff to toll statute

a variety of courts.<sup>124</sup> Relying heavily on the *Tyson*<sup>125</sup> dissent, the court stated the following:

The purpose behind extending the discovery rule to adult survivors of childhood sexual abuse is not to provide a guaranteed remedy to such plaintiffs. The purpose is to provide an *opportunity* for an adult who claims to have been sexually abused as a child to prove not only that she was abused and the defendant was her abuser, but that her suffering was such that she did not and could not reasonably have discovered all the elements of her cause of action at an earlier time.<sup>126</sup>

In addition to the *Tyson* dissent, the *Johnson* court relied on *Hammer v. Hammer*.<sup>127</sup>

In *Hammer*, a type one plaintiff who was aware of the abuse but did not connect it to her mental problems alleged that she had been sexually abused by her father on an average of three times a week, beginning when she was five years old and ending when she was fifteen.<sup>128</sup> Although the plaintiff told her mother about the assault when she was fifteen, the plaintiff alleged that she was only able to understand the past and present impact of his abuse after consulting a psychologist.

The *Hammer* court held "as a matter of law, that a cause of action for incestuous abuse will not accrue until the victim discovers, or in the exercise of reasonable diligence should have discovered the fact and cause of the injury."<sup>129</sup> By so ruling, the *Hammer* court extended the discovery rule to both type one and two plaintiffs. In other words, whether the plaintiff is a type one, who has always known of the abuse, or a type two plaintiff, who has always repressed the memory, until the plaintiff can discover the abuse and link it to her mental problems, the cause of action will not accrue. Although the application of the discovery rule to cases of repressed memories has not been unanimous, the trend is definitely toward the acceptance of the discovery rule for survivors.<sup>130</sup>

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of limitations when there is repressed memory of abuse and there is clear and convincing evidence of abuse); *Osland v. Osland*, 442 N.W.2d 907 (N.D. 1989) (upholding use of discovery rule and daughter's damages for assault and battery involving acts of sexual abuse by father); Ann Marie Hagen, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355 n.4 (1991).

124. *Johnson*, 701 F. Supp. at 1370.

125. See *supra* note 109.

126. *Johnson*, 701 F.Supp. at 1368 (quoting *Tyson*, 727 P.2d at 237).

127. 418 N.W.2d 23, (Wis. Ct. App. 1987), *rev. denied*, 428 N.W.2d 552 (Wis. 1988).

128. *Id.* at 24.

129. *Id.* at 26.

130. Ernsdorff & Loftus, *supra* note 80, at 144-45.

*Legislative Help*

Many plaintiffs took their efforts to legislative arenas after failing in court.<sup>131</sup> Washington State enacted the first statute to apply the discovery doctrine to civil cases of childhood sexual abuse in 1989.<sup>132</sup> Other states quickly followed suit by modeling the Washington statute. The Washington 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.<sup>133</sup>

Currently, 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.<sup>134</sup> Other states are considering

131. *Id.* at 145.

132. *Id.*

133. *Id.* citing WASH. REV. CODE ANN. § 4.16.340 (West 1995).

134. *Id.* at 147. 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); Arkansas (three year statute of limitations begins at date of discovery) S.B. 287, 79th Gen. Assembly, 1993 Sess. (enacted Mar. 5, 1993); California (civil actions for childhood sexual abuse may be commenced within three years after the date of discovery) CAL. CIV. PROC. CODE § 340.1(a) (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(1) (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 eighteen 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(a) (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, § 752C (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 ten 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 forty years old), OR. REV. STAT. § 12.117 (1991); Rhode Island (action for childhood sexual abuse may be brought within seven 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.

similar legislation.<sup>135</sup> In a mere seven years, since 1986 when no court would permit such cases to be heard, over half of the states either have or are considering extending the statute of limitations to cover childhood sexual abuse. Obviously the trend is for courts to recognize repression as a basis for tolling the statute of limitations in civil cases.

### *Insanity Exceptions*

In addition to the discovery exception, many courts are classifying the plaintiff as having a disability, thus providing the plaintiff additional years to bring the suit.<sup>136</sup> Many states toll the statute of limitations when the plaintiff is under a disability, thereby rendering the plaintiff incompetent until the disability is lifted. After the disability has been lifted, the plaintiff has a statutorily defined number of years to bring the suit.<sup>137</sup>

One disability that some courts have recognized that will trigger the insanity exception is Post-Traumatic Stress Disorder or Syndrome. In *Nichollette v. Carey*,<sup>138</sup> the court discussed Post-Traumatic Stress Disorder as related to repression and disassociation in the case of child sexual abuse. "Repression occurs when a person puts into their unconscious mind any memory that is too painful to think about."<sup>139</sup> People tend to repress incidents, such as sexual abuse, that they do not want to deal with.<sup>140</sup> "Disassociation is an extension of repres-

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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 ten 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). Ernsdorff & Loftus, *supra* note 80, at 145-46 n.96.

135. 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). Ernsdorff & Loftus, *supra* note 80, at 146 n.97.

136. *See, e.g.*, 51 AM. JUR. 2d *Limitation of Actions* § 178 (1970).

137. In North Carolina, for instance, the plaintiff has three years from the date the disability is lifted to bring the action before it is barred. N.C. GEN. STAT. § 1-17(a) (1983).

138. 751 F. Supp. 695 (W.D. Mich. 1990).

139. *Id.* at 698.

140. *Id.*

sion—it is repression magnified.”<sup>141</sup> It occurs when an event is so traumatic that a person enters into an altered state of consciousness.<sup>142</sup> “When an event has been disassociated, a person represses it not because they do not want to remember it, [but] because they cannot remember it. They are unable to bring it to their conscious mind at will.”<sup>143</sup>

One level of disassociation is Post-Traumatic Stress Disorder.<sup>144</sup> “At this level, the time period itself is not disassociated—only the memories of the specific events.”<sup>145</sup> Generally, this level is reached by a series of chronic events that occur. Post-traumatic syndrome occurs when a “person has experienced an event that is outside the range of usual human experience and that would be markedly distressing to almost anyone.”<sup>146</sup> If the victim has been subjected to serious threats as to his life or his family or friends, he is subject to post-traumatic syndrome.<sup>147</sup>

Courts have reached different results on the effects of post-traumatic syndrome. In *Hammer v. Hammer*,<sup>148</sup> a daughter allegedly suffering from a post-traumatic stress reaction that had occurred from ten years of abuse sued her father. The court determined that the plaintiff could file suit because she lacked any information as to the reasonable nature of her injury, or the facts concerning their cause, due to her father’s dominion and authority over her and her own guilt, depression, and disassociation.<sup>149</sup> In *Snyder v. Boy Scouts of America*,<sup>150</sup> however, the court ruled against an allegedly molested boy scout despite testimony of post-traumatic syndrome.<sup>151</sup> The court stated that the plaintiff had been cognizant of all the facts of his harm long before attaining adulthood.<sup>152</sup>

Recently, in *Leonard v. England*,<sup>153</sup> a North Carolina court found that post-traumatic stress syndrome made a woman legally incompetent until psychiatric treatment began in 1990. In *Leonard*, a psychiatrist testified that the plaintiff suffered from post-traumatic syndrome which caused her to repress memories of abuse and that she lacked

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141. *Id.*

142. *Id.* at 698-99.

143. 751 F. Supp. at 699.

144. *Id.*

145. *Id.*

146. AMERICAN PSYCHIATRIC ASSOCIATION STAFF, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM III-R 250 (3d rev ed. 1987).

147. *Id.* at 248.

148. 418 N.W.2d 23, 26 (Wis. Ct. App. 1987).

149. *Id.*

150. 253 Cal. Rptr. 156 (Cal. Ct. App. 1988).

151. *Id.* at 1322.

152. *Id.* at 1323.

153. 115 N.C. App. 103, 445 S.E.2d 50 (1994).

“sufficient capacity to make or communicate important decisions regarding her legal rights, her person and property, including specifically, the decision to file suit for damages for childhood abuse.”<sup>154</sup>

Some courts follow the *Meiers-Post*<sup>155</sup> two-prong test for determining whether an adult survivor of childhood sexual abuse is insane for purposes of tolling the statute of limitations. The plaintiff must first prove she repressed the memory of the essential facts which establish her claim. This prong ensures that the plaintiff was unaware of rights of action she otherwise would have known.<sup>156</sup> Under the second prong, the plaintiff must have corroboration that the sexual assault occurred.<sup>157</sup> If both prongs are satisfied, the plaintiff is ruled as having been insane for purposes of tolling the statute of limitations.

In *Nichollette*, the Michigan court denied the defendant’s motion for summary judgment when it found that both prongs of the *Meiers-Post* test had been met.<sup>158</sup> To meet the first prong, the plaintiff offered affidavits of a psychiatrist who treated her in 1988 and 1989 and a psychological counselor who treated her regularly from 1981 through 1984 and infrequently from 1984 to 1986.<sup>159</sup> Both doctors agreed that the plaintiff was depressed throughout her counseling.<sup>160</sup> Further-

154. *Id.* at 108, 445 S.E.2d at 52.

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

156. *Id.* at 610.

157. *Id.* Additionally, once a suit is successfully filed, the attorney faces many challenges, one of which is evidence of the fact of abuse. Even after a period of years, evidence may be found in a variety of ways including the following:

[A] child conceived as a result of the sexual abuse and the resulting laboratory tests which prove paternity and thus sexual abuse to a great degree of certainty;

[A]dmissions on the part of the abuser made to therapists, family members, friends, attorneys, etc.;

[A] childhood psychological history of the survivor which shows a pattern of dysfunction consistent with being a victim of sexual abuse;

[T]he existence of emotional problems as an adult which are consistent with post traumatic stress syndrome or the incest syndrome;

[E]vidence of physical injury to the survivor documented in medical records which is consistent with sexual abuse;

[E]vidence in childhood medical records of medical problems associated only with sexual activity such as venereal disease, abortions, the use of birth control, etc.;

[S]iblings or other persons who witnessed the abuse or were forced to participate in some way;

[P]ornographic photographs taken of the abuse;

[P]hotographs of the abuser and survivor which show seductive poses;

[C]riminal convictions of the abuser for acts of sexual abuse;

[P]araphernalia such as tubes, vibrators, and objects which were used by the abuser in the course of the sexual abuse;

[A]rtwork depicting acts of sexual abuse;

[C]ourt documents such as custody or divorce proceedings which corroborate the existence of past abuse prior to the filing of the civil suit;

[A]nd correspondence or writings which refer to the abuse. Chute, *supra* note 82, at 15-16.

158. *Nichollette*, 751 F. Supp. at 699.

159. *Id.*

160. *Id.*

## 52 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 22:31]

more, the psychologist stated that the plaintiff was psychologically incapable of bringing a claim against her father.<sup>161</sup> Additionally, the plaintiff provided a letter written to her by her father discussing three or four incidents of sexual contact he had with the plaintiff when she was a child.<sup>162</sup>

Another mental illness that could cause a plaintiff to be deemed incompetent is psychogenic amnesia. Psychogenic amnesia is characterized by a sudden inability to recall important personal information that is not due to an organic mental disorder.<sup>163</sup> Under selective amnesia, one type of psychogenic amnesia, it is possible that someone could "recall some, but not all, of the events occurring during a circumscribed period of time."<sup>164</sup> The disorder is most often observed in adolescent and young adult females.<sup>165</sup>

A more publicized mental disorder that could also affect the statutes of limitation is Multiple Personality Disorder which is characterized by the existence within one individual of two or more distinct personalities, each of which is dominant at a particular time.<sup>166</sup> Each personality is distinct from the others in that each personality has its own unique memories, behavior patterns, and social relationships.<sup>167</sup> The original personality usually has no knowledge or awareness of any other personalities, and the transition from one personality to another is sudden and often associated with stress.<sup>168</sup>

To date, over two hundred cases of multiple personality disorder have been discovered.<sup>169</sup> Dr. Robert Phillips, an expert in the study of Multiple Personality Disorder states, "The majority of reported cases of multiple personality occur in men and women who have experienced severe and repeated sexual and physical abuse over a signifi-

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161. *Id.*

162. *Id.* at 699-700.

163. AMERICAN PSYCHIATRIC ASSOCIATION STAFF, *supra* note 146, at 273. Multiple Personality Disorder has been renamed Dissociative Identity Disorder by the American Psychiatric Association Staff. AMERICAN PSYCHIATRIC ASSOCIATION STAFF, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM IV* (4th ed. 1994).

164. *Id.* at 274.

165. *Id.*

166. ROBERT A. PHILLIPS, JR., *Introduction to TRUDDI CHASE, WHEN RABBIT HOWLS* ix (1987).

167. *Id.*

168. *Id.* at iv.

169. *Id.* See also a series of books that have been written by and for people with Multiple Personality Disorder: TRUDDI CHASE, *WHEN RABBIT HOWLS* (1987) (written by a victim of child sexual abuse who developed multiple personalities); CORBETT H. THIGPEN & HERVEY M. CLECKLEY, *THE THREE FACES OF EVE* (rev. ed. 1992) (written by the therapists involved in the process of psychotherapy); FLORA R. SCHREIBER, *SYBIL* (1989) (written by a professional writer who attempted to re-create a total early life experience with a lengthy period of psychotherapy); and JOAN CASEY, *THE FLOCK: THE AUTOBIOGRAPHY OF A MULTIPLE PERSONALITY* (1991) (written by a victim of child sexual abuse who developed multiple personalities).

cant period of time."<sup>170</sup> Child victims usually cope with severe and repeated abuse by disassociation.<sup>171</sup> In disassociation, a new personality will develop that handles the abuse for the original personality, thereby providing an escape from the childhood pain and terror.<sup>172</sup>

In the courtroom, a plaintiff with Multiple Personality Disorder faces a myriad of procedural and psychological problems. In *Dorsey v. State*,<sup>173</sup> the court permitted the prosecutor to solicit the appearance of the personality who remembered the sexual assault after that personality switched with another personality before cross-examination began. Often, the Multiple Personality Disorder witness may be required to take the oath several times as various personalities come forward and assume control during the trial.<sup>174</sup> Additionally, the judge may have to stop the trial so that the witness can be instructed on any events that have just transpired.<sup>175</sup>

### *Estoppel and Fraud*

In some cases, plaintiffs have argued that the defendant should be estopped from claiming the statute of limitations as a defense.<sup>176</sup> Two cases which have dealt with estoppel are *DeRose v. Carswell*<sup>177</sup> and *Snyder v. Boy Scouts of America*.<sup>178</sup> In *DeRose*, the plaintiff argued that the defendant threatened to harm her if she revealed the abuse to anyone, thus delaying the plaintiff's suit. The court refused to apply the estoppel doctrine because the defendant's abuse and threats stopped when the plaintiff was eleven years old.<sup>179</sup> The plaintiff had the benefit of a full period of limitations since the defendant's abuse stopped while the plaintiff's minority tolled her claim.<sup>180</sup>

In *Snyder*, the plaintiff also argued that due to the defendant's threats, he did not file a timely claim.<sup>181</sup> The plaintiff, however, left the Boy Scouts when the abuse began, thus ceasing the abuser's influ-

170. PHILLIPS, *supra* note 166, at xi.

171. *Id.*

172. *Id.*

173. 426 S.E.2d 224 (Ga. Ct. App. 1992) The defendants appealed their superior court convictions of various sex offenses against a young woman suffering from multiple personality disorder. The Georgia Court of Appeals held that the victim was properly permitted to testify in a dissociative state and affirmed the lower court's decision.

174. David Hamilton and Joann Ondrovik, *Forensic Issues: May I Speak With. . .?*, 12 INTERNATIONAL SOCIETY FOR THE STUDY OF MULTIPLE PERSONALITY AND DISORDER NEWS, Feb. 10, 1994, at 10.

175. *State v. Badger*, 551 A.2d 207 (N.J. 1988).

176. Lisa Bickel, *Tolling the Statute of Limitations in Actions Brought by Adult Survivors of Childhood Sexual Abuse*, 33 ARIZ. L. R. 427, 442 (1991).

177. 242 Cal. Rptr. 368 (Cal. Ct. App. 1987).

178. 253 Cal. Rptr. 156 (Cal. Ct. App. 1988).

179. *DeRose*, 242 Cal. Rptr. at 378.

180. *Id.*

181. *Snyder*, 253 Cal. Rptr. at 158.



ence.<sup>182</sup> Therefore, the court, as in *DeRose*, denied the plaintiff's estoppel argument.<sup>183</sup>

The *Snyder* plaintiff also argued a fraud theory which was similar to the induced delay argument.<sup>184</sup> Under the fraud theory, the plaintiff would have to show that "the abuser fraudulently concealed the cause of action or facts material to that cause of action."<sup>185</sup> Additionally, the plaintiff cannot be at fault for failing to discover the facts earlier.<sup>186</sup>

In California, the statute of limitations for fraud is one year, and the age of majority is eighteen years of age.<sup>187</sup> "Where fraud is established the statute is tolled only for so long as the plaintiff remains justifiably ignorant of the facts upon which the cause of action depends; discovery or inquiry notice of the facts terminates the tolling."<sup>188</sup> The *Snyder* plaintiff was over nineteen years old when he filed suit. Since the plaintiff in *Snyder* left the Boy Scouts because he knew the sexual abuse was wrong, the admission that the abuse was wrong shows that the plaintiff was "well aware of the [facts necessary to state a cause of action] long before he reached the age of majority."<sup>189</sup> Therefore, the statute was not tolled by the fraud.<sup>190</sup>

#### CONCLUDING REMARKS

Current research indicates that the legal system is adapting and adjusting to the notion of repression of child sexual assault. This adaptation began at the turn of the century with the growth of the psychology movement and was later fueled by the widespread influence of the media. As people express less and less shock at the concept of sexual abuse and are willing to admit that sexual abuse does occur to children at an alarming rate, hopefully legislatures will continue to pass new laws to protect victims' rights.

Once the statutes of limitation have been lifted for repressed memories, the litigation itself will exclude those claims that are based on false memories or false therapeutic input. Those plaintiffs who are victims of repressed memories should be allowed to prove their case in a courtroom. Oftentimes, it is not the monetary award that is im-

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182. *Id.*

183. *Id.*

184. *Id.* at 158-59.

185. *Id.*

186. *Bickel*, *supra* note 176, at 442. See also *Snyder*, 253 Cal. Rptr. at 158.

187. *Bickel*, *supra* note 176, at 442.

188. *Snyder*, 253 Cal. Rptr. at 159 (citing *Regus v. Schartkoff*, 319 P.2d 721 (1957)).

189. *Id.*

190. *Id.*

1996]

*REPRESSED MEMORY PHENOMENON*

55

portant to the plaintiff, but rather the acknowledgement from twelve people that the abuse did occur.