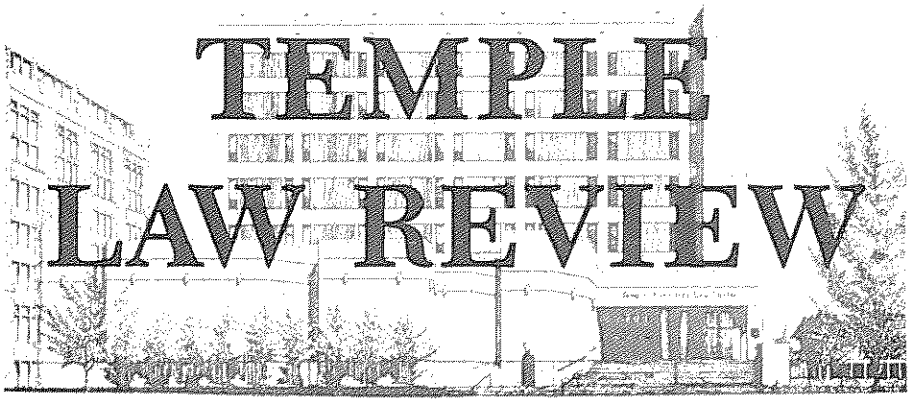

RECOVERED MEMORIES OF CHILDHOOD SEXUAL ABUSE: THE ADMISSIBILITY QUESTION

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INTRODUCTION

A recent Justice Department study suggests a shocking prevalence of childhood sexual abuse. The study examined reported incidents of rape, encompassing eleven states and the District of Columbia, and found that ten thousand women under the age of eighteen were raped in these jurisdictions in 1992.[1] The rape victims under eighteen represented half the total number of reported rapes from these jurisdictions.[2] One of six of these victims was under twelve years of age.[3] Ninety-six percent of the female victims under age twelve were raped by their fathers, other relatives, friends, or acquaintances.[4] This study only addressed incidents of rape against females, as opposed to other forms of sexual abuse, and included only reported cases. Because most cases of rape and sexual abuse go unreported, especially where the victim is a child,[5] the Justice Department findings underestimate the number of children affected by childhood sexual abuse.[6]

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1. Jeffrey G. Schneider, *Legal Issues Involving "Repressed Memory" of Childhood Sexual Abuse*, THE PSYCHOLOGIST'S LEGAL UPDATE (National Register of Health Service Providers in Psychology, Washington, D.C.), Aug. 1994, at 3, 15 n.26 (citing BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, CHILD RAPE VICTIMS (SELECTED FINDINGS IN THE FIELD)).

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* Linda M. Williams, *Recall of Childhood Sexual Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 J. CONSULTING & CLINICAL PSYCHOL. 1167, 1167 (1994) (noting importance of prospective studies in light of failure to report sexual abuse).

6. Even conservative estimates of incidents of childhood sexual abuse are staggering, ranging in the literature from 10% to 50% of the population. Elizabeth F. Loftus, *The Reality of Repressed Memories*, 48 AM. PSYCHOLOGIST 518, 524 (1993).

When children are sexually abused they can repress[7] or otherwise banish memories of their abuse well into adulthood.[8] Until recently, adults who wanted to bring tort actions against alleged perpetrators encountered the barrier erected by the statute of limitations.[9] Perhaps in response to the statistics regarding the prevalence of childhood sexual abuse and repression, many jurisdictions have recently allowed tolling of the statute where victims repress and subsequently recover memories of abuse.[10] As these cases begin to proceed to trial, tort defendants erect a second barrier: They claim that recovered memories of childhood sexual abuse should be excluded as unreliable evidence.

Victims can recover memories of childhood sexual abuse through clinical techniques, including hypnosis,[11] administered in a therapeutic context. This comment will refer to these memories as "clinically recovered" memories. Hypnosis can also be employed in the criminal context to recover memories in victims, defendants, and witnesses.[12] These memories will be referred to as "forensically recovered" memories.

As early as 1897, trial judges in the criminal context were deciding whether to admit forensically recovered memories.[13] Today, the majority fo-

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7. While some victims respond to childhood sexual abuse through repression, others respond through dissociation. Both are involuntary mechanisms by which traumatic or unacceptable ideas are kept out of conscious awareness. *See* Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185, 1204-09 (1992) (discussing theoretical foundations of repression and dissociation). Keeping memories of experienced events from conscious awareness is a type of repression which may result in psychological problems later in life. *Id.* at 1205 (citing H.P. LAUGHLIN, THE EGO AND ITS DEFENSES 364-66, 375-78 (Aronson ed., 2d ed. 1979)). The mechanism of repression permits the victim to experience the event consciously, sometimes only briefly, after which the memory relocates in the unconscious due to the painful nature of recall. *Id.* (citing H.P. LAUGHLIN, THE EGO AND ITS DEFENSES 364 (Aronson ed., 2d ed. 1979)). Dissociation, on the other hand, is a psychic response to trauma which is characterized by the separation and breakdown of events from reality. *Id.* (citing Richard Kluft, *The Dissociative Disorders*, *in* TEXTBOOK OF PSYCHIATRY 557, 558-59 (John A. Talbott et al. eds., 1988)). The memories separate from consciousness (i.e., dissociate) and the psyche retreats into an altered state. The memories are thus registered and stored outside consciousness, resulting in an immediate "exclusion" of the event. *Id.* at 1206 (citing Richard Kluft, *Dissociation and Subsequent Vulnerability: A Preliminary Study*, 3 DISSOCIATION 167, 168 (1990)).

In this comment, the word "repression" will be used to denote all mechanisms by which a victim of childhood sexual abuse involuntarily excludes memories of the abuse.

8. See *infra* notes 140-42 and accompanying text for a discussion of specific research findings with respect to the prevalence of repression in cases of childhood sexual abuse.

9. See *infra* note 36 for a discussion of Tyson v. Tyson, 727 P.2d 226, 229-30 (Wash. 1986) (en banc) (disallowing intentional tort claim based solely on alleged repressed recollection of events with no means to verify independently after statute of limitations expired).

10. See *infra* part I.B for a discussion of the way in which the statute of limitations acts as a barrier to childhood sexual abuse claims and recent judicial and legislative responses.

11. See *infra* notes 18-31 and accompanying text for a discussion of the evolution of hypnosis as a means of recovering memory in the clinical context.

12. See *infra* notes 32-34 and accompanying text for a discussion of the use of hypnosis in the criminal context.

13. See *infra* notes 53-55 and accompanying text for a discussion of People v. Ebanks, 49 P. 1049 (Cal. 1897) (en banc) (first appellate decision regarding forensically recovered testimony).

rensic rule excludes such testimony *per se*.[14] Tort defendants in the emerging childhood sexual abuse cases will rely on the forensic rule to exclude clinically recovered memories. In light of two United States Supreme Court decisions[15] and recent memory research,[16] however, exclusion *per se* is an untenable response to the admissibility of both forensically and clinically recovered memories. The Supreme Court cases and memory research together suggest that courts should apply the minority forensic approach to both types of cases: a "totality of the circumstances" pre-trial determination.

Part I of this comment traces the history of clinical and forensic memory recovery and reports on the legal trend toward tolling the statute of limitations for victims of childhood sexual abuse. Part II evaluates the four judicial approaches to the admissibility of forensically recovered testimony and advocates that courts adopt the minority "totality of the circumstances" approach for the admissibility of both clinically and forensically recovered memories. Part III summarizes the current memory research; this research provides further support for the approach proposed in part II. Part IV discusses a recent federal case in which the court improperly excluded clinically recovered memories of alleged childhood sexual abuse because it failed to use the proposed approach. Part IV concludes by recommending factors which a trial judge, using a "totality of the circumstances" standard, could consider in ruling on the admissibility of clinically recovered memories of childhood sexual abuse.[17]

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14. See *infra* notes 48, 64-74, and accompanying text for a discussion of the exclusion *per se* approach.

15. See *infra* part II.C for a discussion of Rock v. Arkansas, 483 U.S. 44 (1987), and Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993).

16. See *infra* part III for a discussion of the implications of recent scientific research in the areas of hypnosis and memory.

17. This comment will not address the issue of memories of childhood sexual abuse which are spontaneously recovered without clinical assistance. However, it is important to note the existence of such memories and that they undermine the idea that all recovered memories of childhood sexual abuse are false, implanted by over-zealous therapists. For a discussion of those who believe that all such recovered memories are false, see *infra* note 193 regarding the False Memory Syndrome Foundation. By contrast, one overwhelming example of spontaneously recovered memories of childhood sexual abuse is the Father Porter Case. In that case, a former alter boy of a Massachusetts church spontaneously recovered memories of abuse by a Roman Catholic priest, Father James Robert Porter, and ran an advertisement in local newspapers which stated, "Remember Father Porter?" Elizabeth Mehren, *Unlocking Painful Secrets from the Past*, L.A. TIMES, June 7, 1992 (View), at 1. Many people responded to the advertisement, and because the priest had been transferred to numerous parishes by the archdiocese, many other adults across the country eventually came forward. *Id.* Father Porter ultimately admitted to the Vatican that he had abused these children. Victoria Beening, *Porter's Alleged Abuse Victims Angry with Vatican*, BOSTON GLOBE, Oct. 25, 1992 (Metro), at 28. In all, 68 men and women came forward and ultimately settled with the church in what was reported as the "largest case of its kind." Christopher B. Daly, *Sexual Abuse Case Settled by Church: 68 Named Priest as 1960s Molester*, WASH. POST, Dec. 4, 1992, at A1.

I. BACKGROUND

A. Recovering Memories: The Rise of Clinical and Forensic Hypnosis

The history of clinical hypnosis parallels the history of modern psychiatry and psychology.[18] In late nineteenth-century France, Jean-Martin Charcot pioneered the use of hypnosis to study the psychopathological symptoms of so-called "hysterical" women.[19] Inspired by Charcot, Sigmund Freud began using hypnosis in the early 1890s to recover memories of childhood conflicts and traumas in order to alleviate these symptoms.[20] However, Freud soon abandoned hypnosis in favor of "free association," a technique which relied on the patient's spoken stream of consciousness.[21]

In 1896, Freud discovered what he thought was the source of all adult female psychopathology, instances of childhood sexual abuse, which he called "seductions."[22] As early as 1897, however, Freud began a gradual rejection of the "seduction theory" and instead attributed adult hysteria to "the child's perverse desire."[23] This shift gave rise to Freud's theory of the Oedipal Complex and the psychoanalytic method generally.[24] Under the new theory, Freud regarded memories of childhood sexual abuse as mere unconscious fantasies mistaken for actual experiences. Nevertheless, Freud remained uncertain that the memories of his patients were fantasy and continued to report on instances of childhood seduction after 1897.[25]

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18. *See generally* Martin T. Orne et al., *Reconstructing Memory Through Hypnosis: Forensic and Clinical Implications*, *in* HYPNOSIS AND MEMORY 21, 21 (Helen M. Pettinati ed., 1988) (belief that hypnosis recovers memories is contemporaneous with disciplines of psychiatry and psychology).

19. Charles Bernheimer, *Introduction: Part One*, *in* IN DORA'S CASE: FREUD, HYSTERIA, FEMINISM 1, 6-8 (Charles Bernheimer & Claire Kahane eds., 1985).

20. *Id.*

21. Kanovitz, *supra* note 7, at 1210 & n.98 (1992) (citing ROBERT J. URSANO ET AL., PSYCHODYNAMIC PSYCHOTHERAPY 20-22 (1991)).

22. In *The Aetiology of Hysteria*, Freud wrote:

> I therefore put forward the thesis that at the bottom of every case of hysteria there are *one or more occurrences of premature sexual experience*, occurrences which belong to the earliest years of childhood, but which can be reproduced through the work of psycho-analysis, in spite of the intervening decades. I believe this is an important finding, the discovery of a *caput Nili* [source of the Nile] in neuropathology.

3 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 203 (James Strachey trans. and ed., 1966) [hereinafter STANDARD EDITION] (emphasis in original) (citations omitted).

23. Bernheimer, *supra* note 19, at 14 (citing 1 STANDARD EDITION, *supra* note 22, at 259).

24. Kanovitz, *supra* note 7, at 1216 n.134.

25. *See* JEFFREY M. MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY 107-19 (1984). Freud was uncertain of his abandonment of the theory, evidenced by several unpublished letters. *Id.* This uncertainty was omitted from subsequent discussions regarding the evolution of Freudian thought. *Id.* Masson claims that Freud retreated from the seduction theory because the scientific community, unwilling to face the consequences of such findings, dismissed both the theory and Freud generally. *Id.* at 107-44.

As a result of Freud's choice of "free association," the use of hypnosis declined dramatically until after World War II.[26] In 1958, the Council on Mental Health of the American Medical Association officially recognized hypnosis as an effective clinical technique for post-war stress in veterans.[27] The American Psychological Association similarly recognized it in 1960.[28] In addition to hypnosis and free association, psychiatrists and psychologists began to use other techniques to clinically recover memories, including relaxation and guided imagery,[29] automatic writing,[30] and the sodium amytal interview.[31]

Not long after its emergence in the clinical setting, hypnosis became a forensic tool for memory recovery. The police and prosecutors, aided by psychiatrists, psychologists, and specially trained lay persons, began using hypnosis to refresh memories of witnesses to or victims of crime,[32] generate investigative leads, and strengthen the case generally against defendants.[33] At the same time, counsel for the defense began using hypnosis to recover a defendant's memory or prove that statements made during hypnosis established the defendant's innocence.[34]

Because forensically recovered memories generally involve recent criminal activity, courts are not faced with statutes of limitations barriers before determining the admissibility of such memories. However, as courts address the admissibility of clinically recovered memories of childhood sexual abuse, they must first address the statutory barrier.

B. Overcoming the Traditional Barrier to Childhood Sexual Abuse Claims

As a practical matter, statutes of limitations historically prohibited consideration of adult claims of childhood sexual abuse.[35] However, in the last

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26. Kanovitz, *supra* note 7, at 1210 n.98.

27. ALAN W. SCHEFLIN & JERROLD L. SHAPIRO, TRANCE ON TRIAL 57-58 (1989).

28. *Id.*

29. *See* Anees A. Shiekh & Charles S. Jordan, *Clinical Uses of Mental Imagery*, *in* IMAGERY: CURRENT THEORY, RESEARCH, AND APPLICATIONS 391, 394 (Anees A. Shiekh ed., 1983) (using mental imagery is analogous to "free association" in its ability to recover repressed memories).

30. *See* Kanovitz, *supra* note 7, at 1217 n.138 (citing M. GERALD EDELSTEIN, TRAUMA, TRANCE AND TRANSFORMATION 49-64 (1981)) (in automatic writing patient freely writes unconscious thoughts while performing other activities).

31. August Piper, Jr., *"Truth Serum" and "Recovered Memories" of Sexual Abuse: A Review of the Evidence*, 21 J. PSYCHIATRY & L. 447, 449-51 (1994) (sodium amytal interview involves ingestion by patient of barbiturate with alleged "truth serum" effects).

32. *See* Orne et al., *supra* note 18, at 21-22; SCHEFLIN & SHAPIRO, *supra* note 27, at 48-55.

33. Schneider, *supra* note 1, at 9; Orne et al., *supra* note 18, at 22. However, the use of forensic hypnosis to strengthen a case against a particular defendant has become unwise in those jurisdictions which hold forensically recovered testimony excluded *per se*. See *infra* notes 64-74 and accompanying text for a discussion of the exclusion *per se* approach.

34. Orne et al., *supra* note 18, at 21; SCHEFLIN & SHAPIRO, *supra* note 27, at 48-55.

35. See *infra* note 36 for a discussion of Tyson v. Tyson, 727 P.2d 226, 229-30 (Wash. 1986) (rejecting claim of recovered memories on statute of limitations grounds) (superseded by statute).

ten years, courts have begun to alter their position. Adults seeking tort remedies for childhood sexual abuse have sought to apply the "delayed discovery" rule to toll the statute of limitations. This rule states that the accrual of the cause of action is deferred until the plaintiff discovers, or should have discovered by the exercise of reasonable diligence, the basis for the claim.[36]

Two positions have been advanced by plaintiffs who seek application of the delayed discovery rule. First, some plaintiffs argue that their memories of childhood sexual abuse were repressed from conscious recall until after the tort statute of limitations expired.[37] Alternatively, some plaintiffs claim that

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According to another court (which ultimately tolled the statute), statutes of limitations were enacted for the purpose of "(1) recovering damages promptly; (2) penalizing plaintiffs who are not industrious in pursuing their claims; (3) providing security against stale demands; (4) relieving the defendant's fear of litigation; (5) preventing fraudulent claims; and (6) providing a remedy for the general inconvenience of delay." Lemmerman v. Fealk, 507 N.W.2d 226, 228 (Mich. Ct. App. 1993) (citing Nielsen v. Barnett, 485 N.W.2d 666, 669 (Mich. 1992)).

36. The first case to apply the delayed discovery rule was Urie v. Thompson, 337 U.S. 163, 170-71 (1949) (statute of limitations tolled where plaintiff suffered from silicosis and did not discover cause of action until many years later when plaintiff manifested disease). The cases after *Urie* generally involved medical malpractice and were modeled after Ruth v. Dight, 453 P.2d 631 (Wash. 1969) (en banc), in which a surgeon left a sponge in a patient which was discovered 22 years later. *Id.* at 636.

With respect to repressed memories of childhood sexual abuse, the first case to address the delayed discovery rule was Tyson v. Tyson, 727 P.2d 226 (Wash. 1986). In that case, the plaintiff repressed all memories of sexual abuse suffered until therapy, approximately 14 years later. *Id.* at 229-30. While recognizing that the delayed discovery rule should be applied when "the risk of stale claims is outweighed by the unfairness of precluding justified causes of action," the *Tyson* court refused to toll the statute of limitations and distinguished the "sponge cases" because they dealt with objectively verifiable evidence of negligence. *Id.* at 228. *Tyson* was superseded in 1988, however, by a statute which adopted the position of the *Tyson* dissent. WASH. REV. CODE § 4.16.340(1) (Supp. 1995). The statute states in pertinent part:

> 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 act . . .;
>
> (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 . . . .

WASH. REV. CODE § 4.16.340(1).

For a current case which follows the trend toward allowing delayed discovery, see Ault v. Jasko, 637 N.E.2d 870, 873 (Ohio 1994) (statute of limitations tolled where plaintiff repressed all memory of childhood sexual abuse between expiration of statute and late discovery of abuse).

37. *See, e.g.*, Johnson v. Johnson, 701 F. Supp. 1363, 1370 (N.D. Ill. 1988) (finding that Illinois courts would toll statute of limitations for plaintiffs who repressed memories of abuse) (superseded by statute); Phillips v. Johnson, 599 N.E.2d 4, 7 (Ill. Ct. App. 1992) (statute of limitations began running at time of discovery of previously repressed memories) (superseded by statute); Lemmerman v. Fealk, 507 N.W.2d 226, 230 (Mich. Ct. App. 1993) (in action for abuse occurring 50 years prior to bringing suit, court tolled statute of limitations and stated that "[a]dults who have repressed child sexual abuse bring to the courts unusual circumstances and injuries not readily conforming to the ordinary constructs on which periods of limitations are imposed"); Meiers-Post v. Schafer, 427 N.W.2d 606, 607 (Mich. Ct. App. 1988) (discovery rule applied when plaintiff repressed memory and there was corroboration of sexual assault); Peter-

they are unable to "make the connection" between their present psychological problems and the initial abuse until after the expiration of the statute of limitations.[38] In *Johnson v. Johnson*,[39] the United States District Court for the Northern District of Illinois standardized this distinction into Type I plaintiffs, those who fail to "make the connection," and Type II plaintiffs, those who have completely repressed their memories of abuse.[40] Courts that allow tolling of the statute of limitations generally seem to favor Type II plaintiffs over Type I. Indeed, courts in seven jurisdictions adopt the view that repression serves to trigger the delayed discovery rule[41] while courts typically refuse to toll in failure to "make the connection" cases.[42] One court

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sen v. Bruen, 792 P.2d 18, 24-25 (Nev. 1990) (action not time barred where evidence of childhood sexual abuse shown by clear and convincing evidence, regardless of knowledge and delay); Osland v. Osland, 442 N.W.2d 907, 909 (N.D. 1989) (where plaintiff was psychologically incapable of discovering her cause of action, discovery rule applied to toll statute of limitations); Olsen v. Hooley, 865 P.2d 1345, 1350 (Utah 1993) (if corroborated, alleged complete repression of memory would require tolling of statute of limitations); *cf.* Roe v. Doe, 28 F.3d 404, 406 (4th Cir. 1994) (statute of limitations not tolled between time plaintiff was allegedly abused and time when she actually remembered the events); Sanchez v. Archdiocese of San Antonio, 873 S.W.2d 87, 91 (Tex. Ct. App. 1994) (statute of limitations not tolled via discovery rule where victim of childhood sexual abuse knew of wrongfulness of conduct at time of its occurrence).

38. *See, e.g.*, Messina v. Bonner, 813 F. Supp. 346, 349-50 (E.D. Pa. 1993) (no tolling where plaintiff was aware of childhood sexual abuse but did not make connection between abuse and present psychological problems); E.W. v. D.C.H., 754 P.2d 817, 820-21 (Mont. 1988) (discovery rule not applied to plaintiffs who retained memory of events but failed to appreciate psychological consequences) (superseded by statute); E.J.M. v. Archdiocese of Phila., 622 A.2d 1388, 1394 (Pa. Super. Ct. 1993) (tort statute of limitations not tolled where plaintiff allegedly did not know that acts being inflicted upon him were "abuse" and would result in psychological harm).

39. 701 F. Supp. 1363 (N.D. Ill. 1988).

40. *Id.* at 1370.

41. *Johnson*, 701 F. Supp. at 1363; *Ault*, 637 N.E.2d at 873; Daly v. Derrick, 281 Cal. Rptr. 709, 718 (Cal. Ct. App. 1991); Callahan v. State, 464 N.W.2d 268, 273 (Iowa 1990); *Meiers-Post*, 427 N.W.2d at 606; *Petersen*, 792 P.2d at 18; Jones v. Jones, 576 A.2d 316, 317 (N.J. Super. Ct. App. Div.), *cert. denied*, 585 A.2d 412 (N.J. 1990); *E.W.*, 754 P.2d at 817 (in dicta); *Osland*, 442 N.W.2d at 907; Hammer v. Hammer, 418 N.W.2d 23, 25 (Wis. Ct. App. 1987), *review denied*, 425 N.W.2d 552 (Wis. 1988). *But see* Baily v. Lewis, 763 F. Supp. 802, 810 (E.D. Pa.) (applying Pennsylvania law), *aff'd without opinion*, 950 F.2d 721 (3d Cir. 1991); Hildebrand v. Hildebrand, 736 F. Supp. 1512, 1521 (S.D. Ill. 1990); Tyson v. Tyson, 727 P.2d 226, 230 (Wash. 1986) (superseded by statute).

42. See *supra* note 38 for cases which disallow tolling for plaintiffs who fail to "make the connection" between childhood abuse and subsequent psychological injuries.

Commentators note that allowing tolling of the statute of limitations only for complete repression may encourage plaintiffs to misrepresent the nature of their memories, claiming they completely repressed them as a "ticket of entry into the courtroom." David Spiegel & Alan W. Scheflin, *Dissociated or Fabricated? Psychiatric Aspects of Repressed Memory*, 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 411, 425 (1994). Professor Scheflin maintains that fairness requires application of the delayed discovery rule to both kinds of plaintiffs because childhood sexual abuse produces both shame and diminished confidence, two disincentives for timely actions. Telephone Interview with Alan W. Scheflin, Professor of Law, Santa Clara University (Feb. 2, 1995). To deny Type I plaintiffs also denies the scientific evidence which supports their position. *Id.*; see *supra* part III for a discussion of this scientific evidence.

recognized no exception to the statute of limitations and disallowed the claims of both types of plaintiffs.[43]

Like courts, legislatures can also toll the statute of limitations. Since 1989, nineteen states have enacted laws preserving tort claims for adults who were sexually abused as children and repressed their memories.[44] Presently, legislatures and courts in twenty-three jurisdictions toll the statute of limitations for plaintiffs who have repressed memories of childhood sexual abuse.[45]

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43. *See* Lindabury v. Lindabury, 552 So. 2d 1117, 1117-18 (Fla. Dist. Ct. App. 1989) (statute of limitations began running, at latest, at time of last act of abuse), *dismissed*, 560 So. 2d 233 (Fla. 1990).

44. The jurisdictions with special statutes of limitations for childhood sexual abuse claims are: Alaska (ALASKA STAT. § 09.10.140(b)(1)-(2) (1994) (within 3 years of date person discovered or should reasonably have discovered childhood sexual abuse)); California (CAL. CIV. PROC. CODE § 340.1 (West. Supp. 1990) (within 8 years of majority or 3 years of date person discovered or should reasonably have discovered childhood sexual abuse)); Connecticut (CONN. GEN. STAT. ANN. § 52-577d (West 1991) (within 17 years of majority); Illinois (ILL. ANN. STAT. ch. 110, para. 13-202.2 (Smith-Hurd Supp. 1992) (within 2 years of date person discovered or reasonably should have discovered, but not more than 12 years after person attains 18 years of age)); Iowa (IOWA CODE ANN. § 614.8A (West Supp. 1994) (within 4 years of discovery of injury or illness and causal relationship between injury and childhood sexual abuse)); Kansas (KAN. STAT. ANN. § 60-523 (1993) (within 3 years of either majority or discovery of illness of injury caused by childhood sexual abuse)); Maine (ME. REV. STAT. ANN. § 752-C (West Supp. 1994) (within 12 years of date cause of action accrues or 6 years of date person discovered or reasonably should have discovered harm)); Minnesota (MINN. STAT. ANN. § 541.073 (West Supp. 1994) (within 6 years of date person knew or should have known injury caused by childhood sexual abuse)); Missouri (MO. REV. STAT. § 537.046 (Supp. 1994) (within 5 years of majority or 3 years of date person discovered or reasonably should have discovered childhood sexual abuse)); Montana (MONT. CODE ANN. § 27-2-216 (1993) (within 3 years of either childhood sexual abuse or date person discovered or reasonably should have discovered abuse)); Nevada (NEV. REV. STAT. § 11.215 (Supp. 1993) (within 10 years of either majority or when person discovered or reasonably should have discovered childhood sexual abuse)); Oklahoma (OKLA. STAT. ANN. tit. 12, § 95(6) (West Supp. 1995) (within 2 years of either childhood sexual abuse or of date person discovered or reasonably should have discovered childhood sexual abuse)); Oregon (OR. REV. STAT. § 12.117(1) (1993) (within 6 years of majority or 3 years of date person discovered or reasonably should have discovered injury or casual connection between childhood sexual abuse and injury)); Rhode Island (R.I. GEN. LAWS § 9-1-51 (Supp. 1994) (within 7 years of either injury or of date person discovered or reasonably should have discovered injury)); South Dakota (S.D. CODIFIED LAWS ANN. § 26-10-25 (1992) (within 3 years of either childhood sexual abuse or of date person discovered or reasonably should have discovered abuse)); Utah (UTAH CODE ANN. § 78-12-25.1 (Supp. 1994) (within 4 years of majority or of date person discovered or reasonably should have discovered childhood sexual abuse)); Vermont (VT. STAT. ANN. tit. 12, §§ 522, 560 (Supp. 1994) (within 6 years of either abuse or discovery of abuse)); Virginia (VA. CODE ANN. § 8.01-249(6) (Michie Supp. 1994) (within 10 years of either last act of abuse or removal of disability)); and Washington (WASH. REV. CODE § 4.16.340(1) (Supp. 1995) (within 3 years of either abuse or date when person discovered or reasonably should have discovered childhood sexual abuse)). *See generally* Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191, 191 (1985) (arguing that delayed discovery rule is appropriate for adult incest survivors).

In Pennsylvania, State Senator Stewart Greenleaf is sponsoring a bill that would toll the statute of limitations for 12 years after majority or 3 years from the time of discovery in cases of childhood sexual abuse. S. 597, 179th Pa. Gen. Assembly, Reg. Sess. (1995).

45. These 23 jurisdictions are comprised of the 19 jurisdictions with statutes, see *supra* note 44, and the following jurisdictions, which have favorable case law: *Meiers-Post*, 427 N.W.2d at

In addition, Representatives Pat Schroeder and Connie Morella recently co-sponsored a bill in the United States House of Representatives which would allow delayed discovery to toll the statute of limitations.[46] If this bill is enacted, statutes of limitations for plaintiffs in all fifty states will not begin to run until plaintiffs recover memories of childhood sexual abuse.

As a result of these changes, clinically recovered memories of childhood sexual abuse are now closer to being heard in courtrooms. The next hurdle, however, is admissibility. As a result of the similar techniques involved in clinically and forensically recovered memory cases, courts have already begun to rely on precedent in the forensic area to exclude clinically recovered memories.[47]

II. The Admissibility of Forensically Recovered Memories: A Case of Multiple Personalities

Courts currently use one of four major approaches to determine the admissibility of forensically recovered memories. A majority of state courts adopt the view that forensically recovered testimony is *per se* excludable.[48]

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610 (Mich.) (discovery rule applies if plaintiff repressed memory of abuse, which constituted "insanity," and abusive acts are corroborated by other evidence); *Jones*, 576 A.2d at 321 (N.J.) (delayed discovery applied when plaintiff repressed memories of abuse; repression constituting "insanity"); *Osland*, 442 N.W.2d at 909 (N.D.) (discovery rule applies when plaintiff incapable of discovering her cause of action within applicable limitations period); *Hammer*, 418 N.W.2d at 26 (Wis.) (delayed discovery applicable when plaintiff prevented from appreciating abusive nature of sexual acts and their causal relationship to her adult psychological problems).

46. H.R. Con. Res. 200, 103d Cong., 2d Sess. (1994).

In contrast, after a recent case in Chicago in which an accusation of abuse by a former parishioner against a Roman Catholic cardinal was retracted due to the parishioner's subsequent uncertainty, the Illinois Senate voted to ban all civil lawsuits by people over 30 who claim they were victims of childhood sexual abuse. *See* 1993 Ill. S.B. 1223; Edward Felsenthal, *Sexual Abuse Lawsuit*, Wall St. J., Mar. 1, 1994, at B9 (reporting that charges were dropped against Roman Catholic Cardinal Joseph Bernardin of Chicago after plaintiff retracted his accusations). However, for a discussion of the inconclusive nature of retractions generally, see *infra* note 154 and accompanying text.

47. See *infra* part IV for a discussion of the first federal district court decision on this issue, Borawick v. Shay, 842 F. Supp. 1501, 1508 (D. Conn. 1994), which relied on forensic precedents to exclude a plaintiff's clinically-recovered testimony of childhood sexual abuse.

48. *See, e.g.*, Contreras v. State, 718 P.2d 129, 136-37 (Alaska 1986) (witness prohibited from testifying in criminal trial about facts forensically recovered through hypnosis); Prewitt v. State, 460 So. 2d 296, 302 (Ala. Crim. App. 1984) (same); State v. Mena, 624 P.2d 1274, 1279-80 (Ariz. 1981) (same); People v. Shirley, 723 P.2d 1354, 1375 (Cal.) (same), *cert. denied*, 458 U.S. 1125 (1982); State v. Davis, 490 A.2d 601, 604 (Del. Super. Ct. 1985) (same); Stokes v. State, 548 So. 2d 188, 196 (Fla. 1989) (same); Bundy v. State, 471 So. 2d 9, 18 (Fla. 1985) (same), *cert. denied*, 479 U.S. 894 (1986); State v. Moreno, 709 P.2d 103, 105 (Haw. 1985) (same); People v. Zayas, 546 N.E.2d 513, 519 (Ill. 1989) (same); Peterson v. State, 448 N.E.2d 673, 678-79 (Ind. 1983) (same); State v. Haislip, 701 P.2d 909, 925 (Kan.) (same), *cert. denied*, 474 U.S. 1022 (1985); State v. Collins, 464 A.2d 1028, 1044 (Md. 1983) (same) (overruling earlier decision which adopted total admissibility); Commonwealth v. Kater, 447 N.E.2d 1190, 1196 (Mass. 1983) (witness prohibited from testifying as to forensically recovered memories); People v. Gonzales, 329 N.W.2d 743, 748 (Mich. 1982) (same); State v. Mack, 292 N.W.2d 764, 772 (Minn. 1980) (same); State v. Palmer, 313 N.W.2d 648, 655 (Neb. 1981) (same), *rev'd on other grounds*, 338