COMMENTS

When Good Intentions Fail: California's Two-Tier System for Handling Civil Suits by Adult Survivors of Childhood Sexual Abuse

INTRODUCTION

For as long as she can remember, Jane Roe[1] has experienced feelings of shame and inadequacy.[2] Although she is a classic overachiever, she often feels worthless, even suicidal.[3] Through

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1 This Comment uses the female pronoun to refer to victims of childhood sexual abuse and the male pronoun to refer to perpetrators of childhood sexual abuse. Clinical studies have found that in the vast majority of cases, the child victim is female and the adult perpetrator is male. *See* SANDRA BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST 5 (2d ed. 1985); John E.B. Myers, *Protecting Children from Sexual Abuse: What Does the Future Hold?*, 15 J. CONTEMP. L. 31, 45 (1989). According to one study, roughly 90% of child victims are female and 90% of adult perpetrators are male. *See* BUTLER, *supra*, at 5. Although boys are also sexually abused, they comprise only 10% of child victims. *See* JUDITH L. HERMAN, FATHER-DAUGHTER INCEST 14 (1981). Like those who abuse girls, most adults who abuse boys are male. *Id.* However, sexual abuse does occur between adult women and boys. *See* JEAN RENVOIZE, INCEST: A FAMILY PATTERN 24 (1982). When it does, its effects on the victims are equally devastating. *See id.*

2 This hypothetical illustrates the typical symptoms of an adult survivor of childhood sexual abuse. *See, e.g.*, ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE 34-38 (1988) (describing typical adult survivor symptoms); E. SUE BLUME, SECRET SURVIVORS: UNCOVERING INCEST AND ITS AFTEREFFECTS IN WOMEN at xviii-xi (1990) (providing checklist of adult survivor symptoms).

3 *See supra* note 2 and accompanying text (describing typical adult survivor symptoms).

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intensive psychotherapy, Jane, now thirty-five, learns that her psychological problems stem from her stepfather's sexual abuse of her when she was five years old.[4] Jane wants to bring a civil action against her stepfather to recover for her physical and mental pain and suffering.[5] If Jane sues in California, however, she faces three serious obstacles.[6]

First, Jane's action may not survive a demurrer[7] based on the statute of limitations.[8] Because strict application of the statute of limitations would bar Jane's action,[9] her ability to survive a demurrer depends upon whether she can successfully invoke a delayed discovery rule.[10] California has tried to provide delayed discovery to adult survivors[11] of childhood sexual abuse through

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[4] *See, e.g.*, Marsha V. v. Gardner, 281 Cal. Rptr. 473 (Ct. App. 1991) (describing adult survivor who did not realize stepfather's sexually abusing her caused her psychological problems until after she entered psychotherapy), *dissenting opinion modified*, June 24, 1991, *and rev. denied*, Aug. 22, 1991; *infra* notes 242-46 and accompanying text (discussing *Marsha V.*).

[5] *See infra* notes 99-103 and accompanying text (describing advantages of bringing civil rather than criminal action against perpetrator).

[6] *See infra* notes 7-25 and accompanying text.

[7] A demurrer is a legal allegation by a defendant stating that, even if the facts stated in the plaintiff's complaint are true, they do not entitle the plaintiff to relief. *See* BLACK'S LAW DICTIONARY 432-33 (6th ed. 1990).

[8] *See* CAL. CIV. PROC. CODE § 430.10(e) (West Supp. 1992). This section allows a defendant to demur to a complaint on the ground that the complaint fails to state facts sufficient to constitute a cause of action. *Id.* Failure to bring an action before the applicable limitations period expires falls within § 430.10(e). *See id.*

[9] *See infra* notes 195-206 and accompanying text.

[10] *See* RESTATEMENT (SECOND) OF TORTS § 899 cmt. e (1979). A delayed discovery rule tolls the applicable statute of limitations until the plaintiff discovers, or reasonably should discover, the existence of a cause of action against the defendant. *Id.* For an extended discussion of the evolution of delayed discovery and its application in contexts other than that of adult survivor suits, see *infra* notes 135-54 and accompanying text.

[11] This Comment refers to adults who were sexually abused as children as "survivors" rather than "victims," a distinction promulgated by survivors themselves. *See* BLUME, *supra* note 2, at 19-20; WOMEN'S RESEARCH CENTRE, RECOLLECTING OUR LIVES: WOMEN'S EXPERIENCE OF CHILDHOOD SEXUAL ABUSE 22 (1989). Those who have been sexually abused as children prefer the term "survivors" because it emphasizes the strength and courage involved in actively confronting abuse and moving beyond it. *See* BLUME, *supra* note 2, at 20. "Victim," however, connotes a passive acceptance of abuse. *Id.*

The legal literature also uses "survivor" rather than "victim" to refer to adults sexually abused as children. *See, e.g.*, Sharon R. Lowenstein, *Incest,*

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an ad hoc combination of statutory and case law.[12] Unfortunately, this regulatory patchwork has created a two-tier system.[13] Under this system, the availability of delayed discovery depends upon the date the plaintiff files her lawsuit.[14]

Neither the California Legislature nor the California Supreme Court mandates delayed discovery for actions filed before January 1, 1991.[15] Consequently, state appellate courts are free to decide whether to give adult survivors the benefit of a delayed discovery rule.[16] Most courts have limited this equitable doctrine's availability to plaintiffs who have repressed[17] their memories of childhood sexual abuse until after the applicable statute of limitations has expired.[18] Thus, if Jane had filed suit before January 1, 1991, her ability to survive a demurrer would depend upon whether she repressed her memories of her stepfather's abusive behavior.

In contrast, if Jane filed her suit after January 1, 1991, her chances of surviving a demurrer would not depend upon whether she repressed her memories.[19] In 1990, the California Legislature amended section 340.1 of the California Code of Civil Procedure.[20] The amended statute tolls the limitations period for

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Child Sexual Abuse and the Law: Representation on Behalf of Adult Survivors, 29 J. FAM. L. 791 (1991); Lisa Bickel, Note, *Tolling the Statute of Limitations in Actions Brought by Adult Survivors of Childhood Sexual Abuse*, 33 ARIZ. L. REV. 427, 427 & n.2 (1991); Ann M. Hagen, Note, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355 (1991).

12 *See infra* notes 13-15 and accompanying text.

13 *See infra* notes 187-94 and accompanying text.

14 *See infra* notes 15-22 and accompanying text.

15 *See infra* notes 195-96 and accompanying text.

16 *See* Marsha V. v. Gardner, 281 Cal. Rptr. 473 (Ct. App. 1991), *dissenting opinion modified*, June 24, 1991, *and rev. denied*, Aug. 22, 1991; Evans v. Eckelman, 265 Cal. Rptr. 605 (Ct. App. 1990); Mary D. v. John D., 264 Cal. Rptr. 633 (Ct. App. 1989); Snyder v. Boy Scouts of America, Inc., 253 Cal. Rptr. 156 (Ct. App. 1988), *rev. denied*, Feb. 1, 1989; DeRose v. Carswell, 242 Cal. Rptr. 368 (Ct. App. 1987), *rev. denied*, Mar. 17, 1988.

17 Repression is a psychological defense mechanism. *See* BLUME, *supra* note 2, at 66. This mechanism allows a survivor to block out memories too painful to tolerate. *Id.* A survivor who represses her memories of childhood sexual abuse does not realize that she has been abused because she does not remember the abuse. *Id.*

18 *See infra* notes 210-51 and accompanying text.

19 *See infra* notes 20-22 and accompanying text.

20 *See* CAL. CIV. PROC. CODE § 340.1 (West Supp. 1992). This section provides:

> (a) In any civil action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of

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actions by adult survivors until the plaintiff knows or reasonably

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the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever occurs later.

(b) "Childhood sexual abuse" as used in this section includes any act committed by the defendant against the plaintiff which act occurred when the plaintiff was under the age of 18 years and which act would have been proscribed by Section 266j of the Penal Code; Section 285 of the Penal Code; paragraph (1) or (2) of subdivision (b), or of subdivision (c), of Section 286 of the Penal Code; subdivision (a) or (b) of Section 288 of the Penal Code; paragraph (1) or (2) of subdivision (b), or of subdivision (c), of Section 288a of the Penal Code; subdivision (h), (i), or (j) of Section 289 of the Penal Code; Section 647.6 of the Penal Code; or any prior laws of this state of similar effect at the time the act was committed.

(c) Nothing in this section shall be construed to alter the otherwise applicable burden of proof, as defined in Section 115 of the Evidence Code, which a plaintiff has in a civil action subject to this section.

(d) Every plaintiff 26 years of age or older at the time the action is filed shall file certificates of merit as specified in subdivision (e).

(e) Certificates of merit shall be executed by the attorney for the plaintiff and by a licensed mental health practitioner selected by the plaintiff declaring, respectively, as follows, setting forth the facts which support the declaration:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with at least one licensed mental health practitioner who is licensed to practice and practices in this state and who the attorney reasonably believes is knowledgeable of the relevant facts and issues involved in the particular action, and that the attorney has concluded on the basis of that review and consultation that there is reasonable and meritorious cause for the filing of the action. The person consulted may not be a party to the litigation.

(2) That the mental health practitioner consulted is licensed to practice and practices in this state and is not a party to the action, has interviewed the plaintiff and is knowledgeable of the relevant facts and issues involved in the particular action, and has concluded, on the basis of his or her knowledge of the facts and issues, that in his or her professional opinion there is a reasonable basis to believe that the plaintiff had been subject to childhood sexual abuse.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificates required by

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should know that she has a cause of action.[21] Thus, the amended

> paragraphs (1) and (2) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificates required by paragraphs (1) and (2) shall be filed within 60 days after filing the complaint.
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> (f) Where certificates are required pursuant to subdivision (d), separate certificates shall be filed for each defendant named in the complaint.
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> (g) A complaint filed pursuant to subdivision (d) may not name the defendant or defendants until the court has reviewed the certificates of merit filed pursuant to subdivision (e) and has found, in camera, based solely on those certificates of merit, that there is reasonable and meritorious cause for the filing of the action. At that time, the complaint may be amended to name the defendant or defendants. The duty to give notice to the defendant or defendants shall not attach until that time.
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> (h) A violation of this section may constitute unprofessional conduct and may be the grounds for discipline against the attorney.
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> (i) The failure to file certificates in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435.
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> (j) Upon the favorable conclusion of the litigation with respect to any defendant for whom a certificate of merit was filed or for whom a certificate of merit should have been filed pursuant to this section, the court may, upon the motion of a party or upon the court's own motion, verify compliance with this section by requiring the attorney for the plaintiff who was required by subdivision (e) to execute the certificate to reveal the name, address, and telephone number of the person or persons consulted with pursuant to subdivision (e) that were relied upon by the attorney in preparation of the certificate of merit. The name, address, and telephone number shall be disclosed to the trial judge in an in camera proceeding at which the moving party shall not be present. If the court finds there has been a failure to comply with this section, the court may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by the defendant for whom a certificate of merit should have been filed.
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> (k) The amendments to this section enacted at the 1990 portion of the 1989-90 Regular Session shall apply to any action commenced on or after January 1, 1991.
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> (*l*) Nothing in the amendments specified in subdivision (k) shall be construed to preclude the courts from applying equitable exceptions to the running of the applicable statute of limitations, including exceptions relating to delayed discovery of injuries, with respect to actions commenced prior to January 1, 1991.

Id.

[21] *Id.* § 340.1(a).

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statute eliminates the distinction between plaintiffs who repress their memories of abuse and those who do not.[22]

If Jane filed her suit after January 1, 1991, however, she faces two additional obstacles.[23] First, she may not recover for her physical pain and suffering.[24] Second, she must satisfy a burdensome certification requirement before she may name her stepfather as the defendant in her complaint.[25]

Given the obstacles that the existing two-tier system poses to adult survivor suits, the California Legislature should abolish the system by enacting a revised statute to govern all adult survivor suits.[26] This Comment proposes such a statute.[27] Part I of this Comment examines the problem of childhood sexual abuse in its historical context.[28] Part II then discusses the analytical defects of the court decisions and the current California statute that have attempted to deal with the problem.[29] To remedy these defects, Part III proposes a revised statute to govern cases of alleged childhood sexual abuse.[30] The proposed statute combines a Washington state statute[31] and previous legislative versions of section 340.1 of the California Code of Civil Procedure.[32] This Comment concludes by showing how the proposed revision facilitates adult survivor suits in three ways.[33] First, the revision makes delayed discovery available to more adult survivors.[34] Second, the revision allows recovery for physical as well as psychological injury.[35] Finally, the revision eliminates the procedural hurdle posed by section 340.1's certification requirement.[36]

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22 *See id.*

23 *See infra* notes 24-25 and accompanying text.

24 *See* CAL. CIV. PROC. CODE § 340.1(a) (West Supp. 1992); *infra* notes 285-89 and accompanying text (discussing statutory limitations on adult survivor recovery).

25 *See* CAL. CIV. PROC. CODE § 340.1(d)-(j) (West Supp. 1992); *infra* notes 290-304 and accompanying text (describing certification requirement).

26 *See infra* notes 305-08 and accompanying text.

27 *See infra* note 309 and accompanying text.

28 *See infra* notes 37-186 and accompanying text.

29 *See infra* notes 187-308 and accompanying text.

30 *See infra* notes 309-14 and accompanying text.

31 *See* WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1992).

32 *See infra* note 257 and accompanying text.

33 *See infra* notes 34-36 and accompanying text.

34 *See infra* notes 322-23 and accompanying text.

35 *See infra* note 324 and accompanying text.

36 *See infra* note 325 and accompanying text.

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I. ADULT SURVIVORS OF CHILDHOOD SEXUAL ABUSE: THE SCOPE OF THE PROBLEM

To understand why California needs a revised statute, one needs to appreciate the nature and extent of childhood sexual abuse. This section begins by defining childhood sexual abuse and detailing its effects on adult survivors.[37] Next, this section explains why the effects of abuse make it difficult for adult survivors to satisfy traditional statutes of limitation.[38] This section then traces the evolution of delayed discovery in California.[39] Finally, this section argues that courts should apply a delayed discovery rule to adult survivor suits.[40]

A. Definition, Extent, and Effects of Childhood Sexual Abuse

Childhood sexual abuse has been a part of human society for thousands of years.[41] It crosses cultural, racial, and economic barriers.[42] Despite the duration and prevalence of the problem, however, people have not always acknowledged its existence.[43] As one commentator has noted, society's response to child abuse has been cyclical; periods of recognition have alternated with periods of denial.[44] The late 1980s and early 1990s has been a period of acknowledgment, although there are signs that a new backlash of denial may be underway.[45]

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[37] *See infra* notes 41-116 and accompanying text.

[38] *See infra* notes 117-34 and accompanying text.

[39] *See infra* notes 135-57 and accompanying text.

[40] *See infra* notes 158-86 and accompanying text.

[41] *See* JEFFREY J. HAUGAARD & N. DICKON REPPUCCI, THE SEXUAL ABUSE OF CHILDREN: A COMPREHENSIVE GUIDE TO CURRENT KNOWLEDGE AND INTERVENTION STRATEGIES 1 (1988). For example, in ancient Greece and Rome, sexual abuse of children was widespread. *Id.* In fact, boy brothels were common. *Id.*

[42] *See* BLUME, *supra* note 2, at xiii-iv.

[43] *See* Myers, *supra* note 1, at 38.

[44] *Id.* at 32-38.

[45] *Id.* at 38. Myers argues that four factors have triggered this latest backlash against recognition of childhood sexual abuse. *Id.* at 38-39. The first is what he terms the "overreaction phenomenon," reflected in the efforts of overzealous prosecutors, the imposition of long mandatory prison sentences for child sex offenders even when such sentences are not appropriate, and the belief that "children never lie" about abuse. *Id.* at 39-40. The second factor is a gap in the medical, sociological, and psychological professions' knowledge about child sexual abuse. *Id.* at 40-41. The third factor is the fallout from the McMartin preschool case and other notorious cases of childhood sexual abuse. *Id.* at 41-42; *see infra* note

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One reason why society has periodically denied the existence of childhood sexual abuse is that experts[46] and legislators[47] disagree over how to define such abuse. Although definitions of childhood sexual abuse vary, they share a common theme: nonconsensual sexual contact or behavior between an adult and a child.[48] Such abuse encompasses a range of behaviors.[49] At one extreme, it includes inappropriate sexually oriented comments by an adult.[50] This extreme also includes exhibitionism[51]—for example, an adult walking around unclothed in a child's presence when that behavior obviously disturbs the child.[52] At the other behavioral extreme, childhood sexual abuse includes such forms of sexual behavior as oral-genital contact and vaginal or anal intercourse.[53]

Just as childhood sexual abuse may vary in degree of severity, it may vary in duration.[54] In some cases, the perpetrator abuses the child only once.[55] In other cases, the perpetrator repeatedly

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67 and accompanying text (discussing McMartin case). The final factor is society's desire not to deal with abuse because it is simply too ugly to confront. *See* Myers, *supra* note 1, at 42.

46 *See* Angela Brown & David Finkelhor, *Initial and Long-Term Effects: A Review of the Research, in* A SOURCEBOOK ON CHILD SEXUAL ABUSE 143 (1986).

47 *See* HAUGAARD & REPPUCCI, *supra* note 41, at 23. For example, California does not have a single statutory definition of childhood sexual abuse. Rather, California has a series of statutes criminalizing specific types of nonconsensual sexual behavior between adults and children. *See* CAL. PENAL CODE § 266j (West 1988) (forbidding procurement of child under 16 for lewd or lascivious acts); CAL. PENAL CODE § 285 (West 1988) (making incestuous fornication a felony); CAL. PENAL CODE § 286 (West Supp. 1992) (making sodomy between an adult and child a felony); CAL. PENAL CODE § 288 (West Supp. 1992) (prohibiting an adult from committing lewd or lascivious acts with a child under 14); CAL. PENAL CODE § 288a (West Supp. 1992) (making oral copulation between an adult and child a felony); CAL. PENAL CODE § 289 (West Supp. 1992) (forbidding an adult from either penetrating the genital or anal openings of a child with a foreign object, or requiring a child to so penetrate the adult's genital or anal openings); CAL. PENAL CODE § 647.6 (West 1988) (treating first instance of child molestation as a misdemeanor but subsequent offenses as felonies).

48 *See* HAUGAARD & REPPUCCI, *supra* note 41, at 13-29.

49 *See infra* notes 50-53 and accompanying text.

50 *See* BASS & DAVIS, *supra* note 2, at 21-22.

51 Exhibitionism is the indecent exposure of one's sexual organs to another person. *See* BLACK'S LAW DICTIONARY 573 (6th ed. 1990).

52 *See* BLUME, *supra* note 2, at 5; JOHN CREWDSON, BY SILENCE BETRAYED: SEXUAL ABUSE OF CHILDREN IN AMERICA 26 (1988).

53 *See* RENVOIZE, *supra* note 1, at 26.

54 *See* CREWDSON, *supra* note 52, at 25.

55 *Id.*

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abuses the child for years, often until the child leaves home.[56]

However experts and legislators choose to define childhood sexual abuse, it remains a significant problem.[57] Estimates of the prevalence of childhood sexual abuse vary, but even at the lower end of the scale, the numbers are striking.[58] Recent studies indicate that as many as one in three women and one in five men experienced some form of sexual abuse as children.[59] Currently, some 2.5 million children are abused annually;[60] in 1990 alone, 1,200 died from their injuries.[61]

Moreover, reports indicate that the incidence of abuse is increasing.[62] In 1986, child protective agencies in the United States reported 83,000 complaints of child abuse.[63] By 1990, the

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56 *See* RENVOIZE, *supra* note 1, at 31. Incest is a particular type of childhood sexual abuse. *See* BLUME, *supra* note 2, at 1. The most commonly used legal definition of incest is sexual intercourse between people who are related to each other in such a degree that they would be unable to marry legally. *See, e.g.*, BLACK'S LAW DICTIONARY 761 (6th ed. 1990). In contrast, clinical definitions of incest do not limit incest to sexual intercourse. *See* BUTLER, *supra* note 1, at 4. These definitions include any manual, oral, or genital sexual contact or other explicit sexual behavior that an adult family member imposes on a child. *Id.*

57 *See* LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE 154 (1989).

58 *See infra* notes 59-61 and accompanying text.

59 *See* James Coates, *Celebrity Tales of Childhood Abuse Jar Similar Memories for Many*, CHI. TRIB., Oct. 13, 1991, at 3 (citing widely quoted 1985 Roper poll). A nationwide survey of more than 2,000 adults conducted by psychologist David Finkelhor in the same year found that 27% of the women and 16% of the men had been sexually abused as children. *See* Nina Darnton, *The Pain of the Last Taboo*, NEWSWEEK, Oct. 7, 1991, at 70. A 1986 study prepared for the Department of Justice's National Institute of Corrections concluded that one in four women and one in six men were molested as children. *See* Rhonda Hillbery, *Identifying, Treating Sex Offenders; Program Focus on Preventing Future Rapes, Molestations*, WASH. POST, Oct. 22, 1991, at Z11. Researchers at the Kempe National Center for the Prevention and Treatment of Child Abuse and Neglect also found a one in four incidence of childhood sexual abuse for women, but noted a slightly lower incidence for men (one in eight). *See* Coates, *supra*, at 3.

60 *See* Paul Dean, *A Home; A Family; A Prison; Confinement and Abuse Shattered Their Childhoods. Now There is Evidence Their Lives Can Be Made Whole Again*, L.A. TIMES, Oct. 20, 1991, at E1.

61 *Id.*

62 *See infra* notes 63-64 and accompanying text.

63 *See* Darnton, *supra* note 59, at 70-71. In light of the historic underreporting of childhood sexual abuse, the true incidence is probably much higher. *Id.* at 71.

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number of complaints leapt to 375,000.[64] The growing extent of reported childhood sexual abuse is a serious problem that demands society's attention.[65]

Over the past decade, the media has helped direct attention to this problem.[66] During the 1980s, the McMartin preschool[67] and Jordan, Minnesota[68] cases thrust childhood sexual abuse into the national spotlight. Recently, a jury in San Mateo, California, convicted George Franklin of raping and murdering his daughter's childhood playmate.[69] Franklin's daughter testified that she had witnessed the crimes in 1969, but had repressed all memory of them for twenty years, in part because Franklin had sexually abused her.[70] The jury's willingness to convict Franklin based

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64 *Id.*

65 *See* CREWDSON, *supra* note 52, at 23. Some of the statistical increase in childhood sexual abuse may be due to increased reporting. *Id.* at 30. Studies indicate, however, that increased reporting alone does not account for all of the statistical increase. *Id.* at 31.

66 *See id.* at ix-xi.

67 *See* KARP & KARP, *supra* note 57, at 154. The McMartin preschool case first made national headlines in 1984. *Id.* The police arrested Virginia Buckey McMartin and six of her employees, including her son Raymond Buckey, for allegedly sexually abusing 125 children over a 10-year period at a day care center. *Id.* The prosecutor eventually dropped all charges against everyone except McMartin and Buckey, who were tried and acquitted on 52 charges of sexual abuse and conspiracy. *See* LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE 55 (Supp. 1992). The first trial alone took six years and cost $15 million. *Id.* at 56. A jury found McMartin not guilty, but failed to reach a verdict regarding Buckey. *See id.* Buckey's second trial ended in a mistrial on July 27, 1990. *Id.*

68 *See* CREWDSON, *supra* note 52, at 1-16. The Jordan, Minnesota case began in 1983 with allegations that Jim Rud, a 27 year-old trash collector who lived alone in Jordan's Valley Green Trailer Park, had molested several children. *Id.* at 1. By the time the case ended, some two dozen other Jordan residents had been accused of sexual abuse, in some cases by their own children. *Id.* at 4. Prosecutors eventually closed the case, amidst great controversy, upon discovering that many of the children had fabricated their stories. *Id.* at 16.

69 *See* Coates, *supra* note 59, at 3.

70 *Id.* Franklin's daughter, Eileen Franklin-Lipsker, apparently regained her memories of the crimes suddenly, while undergoing psychotherapy. *See* Amy D. Marcus, *Mists of Memory Cloud Some Legal Proceedings*, WALL ST. J., Dec. 3, 1990, at B1. Soon after she remembered the details of the crime, she turned her father in to the police. *Id.* At Franklin's trial, Franklin-Lipsker testified that in addition to raping and murdering her eight year-old playmate, Susan Nason, Franklin had sexually abused Franklin-Lipsker when

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solely on his daughter's testimony focused national attention on the concept of memory repression.[71]

As media attention has shattered the "conspiracy of silence"[72] surrounding childhood sexual abuse, politicians[73] and celebrities[74] have stepped forward with revelations of childhood sexual abuse. In addition, some survivors have published novels,[75] autobiographies,[76] and essays[77] detailing their experiences. Both survivors and mental health professionals have prepared self-help handbooks to enable others to recognize and confront childhood sexual abuse.[78]

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she was a child. *See Life Sentence in 1969 Killing*, S.F. CHRON., Jan. 30, 1991, at A4.

71 *See* Marcus, *supra* note 70, at B1.

72 *See* BUTLER, *supra* note 1, at 7-9.

73 *See* CREWDSON, *supra* note 52, at ix. In 1984, then-Senator Paula Hawkins (R-Florida) stunned the nation at the Third National Conference on the Sexual Victimization of Children in Washington, D.C., when she set aside her prepared remarks and instead revealed that she had been sexually abused by an elderly neighbor when she was six years old. *Id.*

74 *See* Darnton, *supra* note 59, at 72. In 1985, while interviewing an incest survivor on her talk show, television personality Oprah Winfrey found herself saying to her audience: "Well, this same thing happened to me." *Id.* When Winfrey was a child, relatives and a family friend had raped her on several occasions. *Id.* Although she had never repressed her memories of the abuse, she had never spoken of it before that day. *Id.* In May 1991, Marilyn Van Derbur Atler (Miss America 1958) publicly described her late father's sexual assaults on her during her childhood. *See* Coates, *supra* note 59, at 3. Four months later, on a nationally televised talk show, comedienne Roseanne Arnold accused her father of sexually abusing her as a child. *Id.* Pop singers LaToya Jackson, Sinead O'Connor, and Brian Wilson have also alleged that they were sexually abused as children. *Id.* Actresses Shirley Temple Black, Delta Burke, Sandra Dee, and Patty Duke have made similar allegations. *See* David Ragan, *Famous Victims Remember*, COSMOPOLITAN, May 1992, at 248-49.

75 *See, e.g.*, CAROLIVIA HERRON, THEREAFTER JOHNNIE (1991).

76 *See, e.g.*, MAYA ANGELOU, I KNOW WHY THE CAGED BIRD SINGS (1969); KATHERINE BRADY, FATHER'S DAYS: A TRUE STORY OF INCEST (1979); BETSY PETERSEN, DANCING WITH DADDY: A CHILDHOOD LOST & A LIFE REGAINED (1991).

77 *See, e.g.*, LOUISE ARMSTRONG, KISS DADDY GOODNIGHT: A SPEAK-OUT ON INCEST (1978); LOUISE ARMSTRONG, KISS DADDY GOODNIGHT: TEN YEARS LATER (1987); VOICES IN THE NIGHT: WOMEN SPEAKING ABOUT INCEST (Toni A.H. McNaron & Yarrow Morgan eds., 1982); WOMEN'S RESEARCH CENTRE, *supra* note 11.

78 *See, e.g.*, BASS & DAVIS, *supra* note 2; BLUME, *supra* note 2; LAURA DAVIS, THE COURAGE TO HEAL WORKBOOK (1988); ELIANA GIL, OUTGROWING THE PAIN: A BOOK FOR AND ABOUT ADULTS ABUSED AS CHILDREN (1983); KAREN

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The 1980s also witnessed a rapid expansion of professional literature on the long-term effects of childhood sexual abuse on survivors.[79] These studies paint a grim picture of the lives of adult survivors.[80] Most survivors suffer from chronic depression.[81] Betrayed by the adults they trusted and admired, many survivors find it impossible to trust others.[82] This inability to trust poses an almost insurmountable obstacle to forming healthy, lasting relationships.[83] Further, survivors often unconsciously try to recreate the physical and emotional pain of their childhoods in the relationships they do form.[84] They repeatedly marry abusive spouses or stay in abusive relationships.[85] Many survivors become prostitutes.[86] When involved in relationships, survivors tend to have great difficulty with intimacy and sexual enjoyment.[87]

In addition to experiencing problems with intimacy and relationships, survivors often engage in self-destructive behavior.[88] Filled with a rage against their perpetrators that they cannot act upon,[89] survivors turn their anger inward, sometimes to the point of mutilating themselves.[90] Survivor rates of drug abuse, alcohol-

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LISON & CAROL POSTON, RECLAIMING OUR LIVES (1989); WENDY MALTZ & BEVERLY HOLMAN, INCEST AND SEXUALITY: A GUIDE TO UNDERSTANDING AND HEALING (1987); CYNTHIA C. TOWER, SECRET SCARS: A GUIDE FOR SURVIVORS OF CHILD SEXUAL ABUSE (1988).

79 *See, e.g.*, BUTLER, *supra* note 1; DAVID FINKELHOR ET AL., A SOURCEBOOK ON CHILD SEXUAL ABUSE (1986); HERMAN, *supra* note 1; RENVOIZE, *supra* note 1; DIANA RUSSELL, THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN (1986).

80 *See infra* notes 81-94 and accompanying text.

81 *See* Brown & Finkelhor, *supra* note 46, at 152-54.

82 *See* BASS & DAVIS, *supra* note 2, at 223.

83 *See* TOWER, *supra* note 78, at 41-42; Brown & Finkelhor, *supra* note 46, at 157.

84 *See* HERMAN, *supra* note 1, at 29.

85 *Id.* at 29-30; Brown & Finkelhor, *supra* note 46, at 158.

86 *See* HERMAN, *supra* note 1, at 30; RENVOIZE, *supra* note 1, at 157-60; Brown & Finkelhor, *supra* note 46, at 161-62.

87 *See* HERMAN, *supra* note 1, at 29; TOWER, *supra* note 78, at 37-40; Brown & Finkelhor, *supra* note 46, at 159-61.

88 *See* BASS & DAVIS, *supra* note 2, at 48-49.

89 *See* TOWER, *supra* note 78, at 35-36.

90 *See* Brown & Finkelhor, *supra* note 46, at 154. Clinicians report that survivors often cut themselves intentionally with knives. BASS & DAVIS, *supra* note 2, at 219. Some survivors burn cigarette holes into their flesh. *Id.* One young girl even poured hot wax into her ears. Dean, *supra* note 60, at E1. She also made a point of contaminating her open cuts to make sure that they

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ism, and suicide are far above those of the general population.[91] For many, the horror of the past is so overwhelming that they dissociate[92] altogether from their abusive experiences.[93] Some survivors even develop multiple personalities as a coping mechanism.[94]

The effects of childhood sexual abuse demonstrate the great harm perpetrators cause the children they abuse.[95] This harm demands a legal remedy.[96] One legal remedy is to file a civil lawsuit against the perpetrator.[97]

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would remain painful and inflamed. *Id.* Eating disorders provide yet another example of self-abusive behavior. *See* Brown & Finkelhor, *supra* note 46, at 155. Indeed, many adult survivors struggle to overcome such disorders as anorexia nervosa and bulimia. *See* TOWER, *supra* note 78, at 36; Brown & Finkelhor, *supra* note 46, at 155.

91 *See* RENVOIZE, *supra* note 1, at 160; Dean, *supra* note 60, at E1.

92 Dissociation is a psychological defense mechanism that separates conflicting impulses, attitudes, or parts of the personality from each other to minimize emotional trauma. *See* COMMUNICATIONS RESEARCH MACHINES, INC., PSYCHOLOGY TODAY: AN INTRODUCTION 724 (2d ed. 1972).

93 *See* Brown & Finkelhor, *supra* note 46, at 155-56.

94 *See* BLUME, *supra* note 2, at 86-88. For an account of one woman's struggle to overcome the effects of childhood sexual abuse, see FLORA R. SCHREIBER, SYBIL (1973). Sybil's mother began physically and sexually abusing Sybil when Sybil was only six months old. *Id.* at 159-61. The abuse was so profound and of such duration that Sybil developed 16 separate personalities. *Id.* at 334-35. Schreiber's book describes the reality of Sybil's life, both as a child and as an adult undergoing intensive psychoanalysis in an attempt to reintegrate her personalities. *See generally id.*

95 *See supra* notes 81-94 and accompanying text. In addition to the problems detailed above, most survivors have very low self-esteem. *See* HERMAN, *supra* note 1, at 31; Brown & Finkelhor, *supra* note 46, at 156-57. Survivors often blame themselves for the abuse inflicted on them as children. *See* BASS & DAVIS, *supra* note 2, at 104. Many, particularly incest survivors, even call themselves witches and consider themselves evil. *See* Melissa G. Salten, Note, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 199 (1984). Salten explains that the survivor's perception of herself as "a potent force of evil" serves as a defense against the powerlessness she felt as a child when the perpetrator abused her. *Id.*

96 *See* CAL. CIV. CODE § 3523 (West 1970) ("For every wrong there is a remedy.").

97 A civil action is an action to enforce, redress, or protect private rights. BLACK'S LAW DICTIONARY 245 (6th ed. 1990). The aggrieved individual or entity is the plaintiff. *Id.* at 1150. In contrast, a criminal action is an action to punish violation of criminal laws. *Id.* at 372. The state, not the victim of the crime, is the plaintiff in a criminal action. *Id.* at 374.

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A lawsuit offers the adult survivor several advantages.[98] First, it empowers the survivor by allowing her to confront the perpetrator in a public courtroom.[99] Second, filing a lawsuit gives the survivor a chance to place the blame she has internalized where it belongs: on the person who abused her.[100] Third, a lawsuit offers the possibility of monetary compensation.[101] Most survivors require years of costly psychotherapy to help overcome their psychological trauma.[102] Forcing the perpetrator to pay for that therapy not only appeals to survivors, but comports with ideals of fairness and justice.[103]

Unfortunately, the adult survivor must weigh other, often countervailing concerns when deciding whether to file a lawsuit.[104] Before she can sue, she must overcome public antipathy,[105] familial hostility,[106] and a tradition of judicial resistance to adult survivor suits.[107] Moreover, filing a lawsuit means going public with

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98 *See infra* notes 99-103 and accompanying text.

99 Margaret J. Allen, Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U. L. REV. 609, 617 (1983). Although the adult survivor also confronts her perpetrator in a criminal action (by serving as a prosecution witness), the psychological dynamic is completely different. *Id.* at 617 n.55. In a criminal proceeding, she remains a subordinate; it is the State that accuses the abuser of wrongdoing. *Id.* In a civil action, however, the adult survivor confronts the abuser directly, an equal for the first time in her relationship with him. *Id.* That shift in power is highly therapeutic for survivors. *See id.*

100 *Id.* at 617.

101 *Id.* The monetary compensation usually consists of compensatory damages. *Id.* In addition, courts may award an adult survivor punitive damages if she meets the applicable standard. *Id.* at 635-36. To recover punitive damages in California, the plaintiff must prove by clear and convincing evidence that the defendant acted with oppression, fraud, or malice. *See* CAL. CIV. CODE § 3294(a) (West Supp. 1992).

102 *See* BLUME, *supra* note 2, at 289.

103 *See* Allen, *supra* note 99, at 638.

104 *See infra* notes 105-12 and accompanying text.

105 Lowenstein, *supra* note 11, at 830.

106 *Id.*

107 *See id.* at 800. Judges tend to disfavor adult survivor suits for several reasons. *Id.* First, many judges distrust the kind of psychological and psychiatric evidence upon which survivors' cases depend. *Id.* Second, many judges are unwilling to address family issues like childhood sexual abuse because they fear intruding upon family privacy. *Id.* at 801. Third, many judges are reluctant to find a perpetrator guilty for fear of draining the finances upon which the perpetrator's family depends for survival. *Id.* at 802. Finally, judicial commitment to precedent limits the success of adult survivor suits because there is little precedent favoring such suits. *Id.*

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the sordid, embarrassing details of the abuse.[108] Public disclosure can be both terrifying and humiliating for someone who may have spent years trying to keep the abuse a secret.[109] If the perpetrator is a relative or close acquaintance, it may be even more emotionally difficult for the survivor to file suit.[110] Further, disclosure may irreparably harm the survivor's relationship with innocent family members and friends who knew nothing of the abuse.[111] Finally, even if the adult survivor files suit and obtains a judgment against the perpetrator, she may never be able to collect on that judgment.[112]

Thus, for a variety of reasons, many adult survivors may never sue their perpetrators.[113] As one recent study has indicated, while the potential for litigation is great, the number of adult survivors who actually sue is relatively small.[114] Between 1980 and 1988, for example, only fifty incest survivors filed suit in California.[115] Unfortunately, those survivors who do overcome the psychological and social obstacles to filing suit often face an insurmountable legal hurdle: the statute of limitations.[116]

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[108] *See* James W. Harshaw III, Comment, *Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation*, 50 OHIO ST. L.J. 753, 759 (1989).

[109] *See* BASS & DAVIS, *supra* note 2, at 308.

[110] *See* Harshaw, *supra* note 108, at 759.

[111] *Id.*

[112] *See* Anthony Astrachan & Bonnie Freer, *Incest Survivors Who Sue*, GLAMOUR, June 1988, at 81. Most insurance policies do not cover intentional torts. *See* CAL. CIV. CODE § 1668 (West 1985) ("All contracts which have for their object . . . to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."); CAL. INS. CODE § 533 (West 1972) ("An insurer is not liable for a loss caused by the wilful act of the insured . . . ."). Thus, unless the survivor can characterize her cause of action as negligence, she must satisfy any judgment against the perpetrator out of his personal assets. *See* Allen, *supra* note 99, at 627. These assets may be meager. *See* Lowenstein, *supra* note 11, at 826. Even if the assets are substantial, the perpetrator may have secreted them outside the jurisdiction. *See id.*

[113] *See* Hagen, *supra* note 11, at 376.

[114] *See* Lowenstein, *supra* note 11, at 830.

[115] *Id.* at 825. Judgments in these suits ranged from $12,000 to $100,000. *Id.*

[116] *See infra* notes 117-34 and accompanying text.

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B. The Statute of Limitations Hurdle for Adult Survivors of Childhood Sexual Abuse

Most adult survivors who sue discover that strict application of the statute of limitations bars their actions.[117] The statute of limitations impedes adult survivor suits in two ways. First, the actual limitations period is usually quite short.[118] Survivors who sue typically bring one or more of the following tort claims: assault, battery, intentional infliction of emotional distress, or negligent infliction of emotional distress.[119] In most states, the statute of limitations for such personal injury actions ranges from one to three years.[120] Thus, even assuming that survivors realize they have been abused,[121] they have very little time in which to act if they wish to pursue their legal remedies.

But length is not the only aspect of the statute of limitations that impedes adult survivor suits.[122] When the applicable limitations period begins to run—that is, determining when a cause of action accrues[123]—is equally important. For tort actions, the basic rule is that a cause of action accrues when someone invades the legally protected interest of another.[124] This is known as the date-of-injury rule.[125] Thus, an assault is complete when the

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117 *See* Darnton, *supra* note 59, at 72.

118 *See infra* notes 119-20 and accompanying text.

119 *See* Allen, *supra* note 99, at 618-28.

120 *See* Bickel, *supra* note 11, at 430. In California, the statute of limitations for personal injury suits is one year. *See* CAL. CIV. PROC. CODE § 340(3) (West Supp. 1992). Statutes of limitation for such suits in other states range from one to six years. *See* Harshaw, *supra* note 108, at 765 n.150 (listing personal injury statutes of limitation by state). Most states, however, toll the statute of limitations during the period of a plaintiff's minority. *See, e.g.*, CAL. CIV. PROC. CODE § 352(a) (West Supp. 1992) (tolling statute of limitations until plaintiff turns 18).

121 *See supra* note 17 and accompanying text (describing repression as psychological defense mechanism blocking memories of abuse).

122 *See infra* notes 123-30 and accompanying text (describing date-of-injury rule as additional obstacle to adult survivor suits). The length of a statute of limitations in any given matter is arbitrary. *See* Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945). Its length simply represents the legislature's value judgment concerning the point at which the interests in favor of prohibiting stale claims outweigh the interests in favor of protecting valid claims. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 463-64 (1975).

123 *See* BLACK'S LAW DICTIONARY 21 (6th ed. 1990) (defining accrual).

124 *See* RESTATEMENT (SECOND) OF TORTS § 899 cmt. c (1979).

125 *See* Stephen V. O'Neal, Comment, *Accrual of Statutes of Limitations:*

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plaintiff anticipates harm;[126] a battery when the actual physical contact takes place;[127] and a negligent act when the harm occurs.[128]

Unlike victims of other tortious behavior, many adult survivors repress all memories of childhood sexual abuse until they are in their twenties, thirties, or even older.[129] But the statute of limitations begins to run on adult survivor actions when the perpetrator abuses the plaintiff, not when the plaintiff remembers the abuse.[130] The combination of a short statute of limitations and the date-of-injury rule is usually fatal for adult survivor suits.[131] Even if survivors do manage to sue, defendants often demur based on the statute of limitations.[132] Traditionally, courts have sustained these demurrers.[133] Adult survivors thus find themselves in the same position as some victims of medical malpractice; they lose a cause of action they never knew they had.[134]

C. *Evolution of Delayed Discovery Rules in California*

Historically, the combination of a short limitations period and the date-of-injury rule worked an injustice to plaintiffs who did not know they had a cause of action.[135] For this reason, states began creating delayed discovery rules[136] for certain types of proceedings.[137] These rules generally provide that a cause of action

California's Discovery Exceptions Swallow the Rule, 68 CAL. L. REV. 106, 106-07 (1980).

[126] *See* RESTATEMENT (SECOND) OF TORTS § 899 cmt. c (1979).

[127] *Id.*

[128] *Id.*

[129] *See* Darnton, *supra* note 59, at 71.

[130] *See* Hagen, *supra* note 11, at 364.

[131] Jocelyn B. Lamm, Note, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189, 2190 (1991).

[132] *See, e.g., infra* notes 236-41 and accompanying text (discussing case in which defendant demurred on this ground).

[133] *See* Salten, *supra* note 95, at 204-05 & n.96.

[134] *See infra* note 144 and accompanying text (discussing delayed discovery in medical malpractice actions).

[135] *See* Denise M. DeRose, Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191, 196 (1985).

[136] *See supra* note 10 and accompanying text (defining delayed discovery rule).

[137] *See infra* notes 140-54 and accompanying text (describing application of delayed discovery in contexts other than adult survivor actions).

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does not accrue until the victim knows or should reasonably know all of the facts constituting her cause of action.[138]

California was at the forefront of this movement.[139] In 1872, the California Legislature codified the first exception to the date-of-injury rule.[140] This exception tolled the statute of limitations in cases involving fraud or mistake.[141] California courts soon added their own exceptions to the date-of-injury rule, each of which embodied the concept of delayed discovery.[142] The first of these exceptions appeared in 1920 in the form of the doctrine of prospective warranty.[143] In 1936, the courts developed a delayed discovery exception to the date-of-injury rule for medical malpractice.[144] Later courts created similar exceptions for actions against escrow holders, accountants, stockbrokers, title compa-

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138 *See* RESTATEMENT (SECOND) OF TORTS § 899 cmt. e (1979) (stating that statute of limitations does not begin to run until plaintiff discovered or should reasonably have discovered injury).

139 *See* Elaine M. Hartnett, Note, *Use of the Massachusetts Discovery Rule by Adult Survivors of Father-Daughter Incest*, 24 NEW ENG. L. REV. 1243, 1256 (1990); *infra* notes 140-54 and accompanying text (describing California's application of delayed discovery rules in contexts other than adult survivor suits).

140 *See* CAL. CIV. PROC. CODE § 338(d) (West Supp. 1992). In its current form, this provision reads: "An action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." *Id.*

141 *See* O'Neal, *supra* note 125, at 107.

142 *Id.* at 108.

143 *Id.* This doctrine provided that a warranty relating to a future event was not breached until that event occurred. *See* Firth v. Richter, 196 P. 277, 279 (Cal. Ct. App. 1920). The doctrine allowed courts to move the date of injury forward, thus taking into account the plaintiff's justifiable delay in filing suit while nominally adhering to the date-of-injury rule. *See* O'Neal, *supra* note 125, at 108-09.

In *Firth*, the plaintiff had contracted to buy Valencia orange tree seedlings from the defendant. From all outward appearances, the seedlings were as the defendant represented them. *See Firth*, 196 P. at 278. When the trees eventually matured enough to bear fruit, however, the plaintiff discovered that they bore navel rather than Valencia oranges. *Id.* The statute of limitations on breach of warranty actions had long since run. *Id.* at 279. Nonetheless, the court allowed the plaintiff to file suit. *Id.* The court reasoned that it would have been impossible for the plaintiff to discover the defendant's fraud until the trees bore fruit, which was necessarily beyond the statute of limitations. *Id.*

144 *See* Huysman v. Kirsch, 57 P.2d 908, 912 (Cal. 1936) (holding that cause of action did not accrue until plastic tube left inside plaintiff's body

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nies, insurance agents, and attorneys.[145] More recently, courts have applied delayed discovery rules to cases involving prescription drugs,[146] negligent breach of contract,[147] industrially related deaths,[148] invasion of privacy,[149] and libel.[150] In each of these contexts, delayed discovery protected plaintiffs who could not reasonably have discovered their injuries within the applicable limitations period.

As the judicial doctrine of delayed discovery developed, courts adopted procedural requirements for invoking the doctrine.[151] To take advantage of equitable delayed discovery, plaintiffs now must bring their pleas of justifiable delay to the court's attention

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during operation was discovered and removed, long after applicable statute of limitations expired).

Medical malpractice has proved a fertile field for application of the delayed discovery rule for two reasons. *See* RESTATEMENT (SECOND) OF TORTS § 899 cmt. e (1979). First, statutes of limitation for such actions are typically quite short; one to two years is common. *Id.* Since the consequences of medical malpractice often are not apparent until beyond that period, plaintiffs end up losing rights they never knew they had. *Id.* Second, the nature of the tort forces plaintiffs to rely on what their doctors tell them; plaintiffs cannot discover the fact of the injury or its causes without expert assistance. *Id.*

[145] *See* O'Neal, *supra* note 125, at 111.

[146] G.D. Searle & Co. v. Superior Court, 122 Cal. Rptr. 218, 220 (Ct. App. 1975) (holding that products liability cause of action premised on manufacture of oral contraceptives did not accrue until plaintiff discovered or by exercise of reasonable diligence should have discovered cause of injury).

[147] Allred v. Bekins Wide World Van Serv., 120 Cal. Rptr. 312, 316 (Ct. App. 1975) (holding that cause of action for damages from skin rash caused by tiny bugs that defendant negligently allowed to enter boxes containing plaintiff's household goods did not accrue until plaintiff sustained damage and discovered or should have discovered cause of action).

[148] Arndt v. Workers' Comp. Appeals Bd., 128 Cal. Rptr. 250, 257 (Ct. App. 1976) (holding that statute of limitations for workers' compensation death benefits claim accrues when plaintiff knew or in exercise of reasonable diligence should have known that death in question was industrially caused).

[149] Cain v. State Farm Mut. Auto. Ins. Co., 132 Cal. Rptr. 860, 862 (Ct. App. 1976) (holding that cause of action for violation of right to privacy did not accrue until plaintiff knew or should have known all material facts essential to show elements of cause of action).

[150] Manguso v. Oceanside Unified Sch. Dist., 152 Cal. Rptr. 27, 31 (Ct. App. 1979) (holding that school teacher who sued principal and school district for libel based on placement of allegedly defamatory statements in her permanent personnel file could invoke delayed discovery rule).

[151] *See* O'Neal, *supra* note 125, at 108.

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at the earliest possible time.[152] These pleas must state specific facts demonstrating that delayed discovery is reasonable.[153] The specificity requirement prevents conclusory assertions of reasonableness and protects the complaint from a general demurrer by the defendant.[154]

Thus, a framework exists to handle actions in which strict application of the date-of-injury rule unjustly deprives plaintiffs of judicial relief.[155] Courts already use this framework in a variety of different circumstances.[156] Civil actions by adult survivors of childhood sexual abuse would fit equally well into this framework.[157]

D. The Need for a Delayed Discovery Rule for Adult Survivors of Childhood Sexual Abuse

Civil actions by adult survivors of childhood sexual abuse offer a natural venue for application of a delayed discovery rule.[158]

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[152] *Id.*

[153] *Id.* This entails pleading facts in the complaint that show: "(1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." Saliter v. Pierce Bros. Mortuaries, 146 Cal. Rptr. 271, 274 (Ct. App. 1978) (holding that son who brought action for negligent breach of contract against funeral home could not invoke delayed discovery rule because he knew of causal connection between his injuries and defendant's actions before applicable statute of limitations expired).

[154] *See Saliter*, 146 Cal. Rptr. at 275. While one commentator has urged adoption of delayed discovery as the basic accrual principle for all causes of action, courts have refused to expand the concept's reach that far. *See* O'Neal, *supra* note 125, at 119.

[155] *See supra* notes 151-54 and accompanying text.

[156] *See supra* notes 140-54 and accompanying text.

[157] *See infra* notes 159-81 and accompanying text.

[158] For this reason, courts in several states already apply delayed discovery rules as a matter of common law. *See, e.g.*, Callahan v. State, 464 N.W.2d 268, 270 (Iowa 1990) (holding that cause of action in childhood sexual abuse suit accrued when plaintiff discovered or should reasonably have discovered both resulting injury and its cause); Osland v. Osland, 442 N.W.2d 907, 908 (N.D. 1989) (allowing daughter to invoke delayed discovery rule in suit alleging incestuous abuse by parents); Hammer v. Hammer, 418 N.W.2d 23, 26 (Wis. Ct. App. 1987) (holding that cause of action for incestuous abuse did not accrue until victim discovered or reasonably should have discovered both fact and cause of injury), *rev. denied*, 428 N.W.2d 552 (Wis. 1988); *cf.* Meiers-Post v. Schafer, 427 N.W.2d 606, 610 (Mich. Ct. App. 1988) (allowing application of delayed discovery rule when plaintiff repressed memory of childhood sexual abuse by teacher and

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produced corroborating evidence that abuse occurred). *But see* Hildebrand v. Hildebrand, 736 F. Supp. 1512, 1521 (S.D. Ind. 1990) (concluding that since Indiana courts apply delayed discovery rule only to injuries resulting from prolonged exposure to hazardous substances, federal court sitting in diversity could not apply rule to daughter's suit against father based on incestuous abuse); Lindabury v. Lindabury, 552 So. 2d 1117, 1117 (Fla. Dist. Ct. App. 1989) (rejecting application of delayed discovery rule to suit by daughter against parents for childhood sexual abuse), *cause dismissed*, 560 So. 2d 233 (Fla. 1990); E.W. v. D.C.H., 754 P.2d 817, 820 (Mont. 1988) (rejecting application of delayed discovery rule to child's incest suit against step-uncle).

Some commentators have suggested alternatives to a delayed discovery rule for adult survivors. For instance, one commentator has proposed creating a new tort altogether for childhood sexual abuse, one which has no express statute of limitations. Kelli L. Nabors, Contributed Article, *The Statute of Limitations: A Procedural Stumbling Block in Civil Incestuous Abuse Suits*, 14 LAW & PSYCHOL. REV. 153, 165-66 (1990). *But see* Lowenstein, *supra* note 11, at 807-08 (criticizing idea of creating new tort specifically for childhood sexual abuse).

Another commentator has argued that under a "substantial basis" test, short statutes of limitation for civil actions by adult survivors are unconstitutional. *See* Harshaw, *supra* note 108, at 755. Such statutes fail to pass muster under the Due Process Clause because they treat dissimilarly situated people similarly. *Id.* at 760. Specifically, they apply the same limitations period to people sexually abused as children as to people sexually abused as adults. *Id.* Short statutes of limitation disregard "the practical obstacles to taking legal action encountered by child sexual abuse victims, the distinctiveness of sexual injuries sustained as a child, and their continuing impact through adulthood." *Id.* at 762.

Still other commentators have suggested that adult survivors invoke the classic fraud and duress exceptions to the date-of-injury rule. *See* DeRose, *supra* note 135, at 203; Carolyn B. Handler, Note, *Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle*, 15 FORDHAM URB. L.J. 709, 729 (1986-1987). The fraud exception applies when a defendant's false or misleading representations to a plaintiff prevent the plaintiff from suing within the limitations period. *See, e.g.*, Astrachan & Freer, *supra* note 112, at 80 (describing abuser who told young girl that having intercourse with him was not wrong because God commanded it). The duress exception applies when the defendant's threats of harm prevent the plaintiff from suing within the statute of limitations. *See, e.g.*, John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 952 (Cal. 1989) (tolling statute of limitations on action by student against teacher until student no longer subject to teacher's threats).

Finally, one commentator has urged survivors of incestuous abuse to analogize the familial relationship to a commercial fiduciary relationship to take advantage of the tolling provision for fiduciary relationships. *See* DeRose, *supra* note 135, at 205-08. In a fiduciary relationship, the statute of

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There are four reasons why this is the case.[159] First, many survivors do not file lawsuits within the applicable limitations period because they do not remember that they have been abused.[160] They have repressed[161] their memories of the abuse because the memories are unbearable.[162] Many survivors do not begin to remember the abuse they endured until they reach their twenties, thirties, or forties.[163] In fact, some survivors never recover memories of abuse at all.[164]

Those who do recover memories usually do so gradually.[165] They experience the process as "stirrings, flickers, a sense of something rising from deep within the self."[166] According to survivors, the process is agonizing and generates tremendous self-doubt.[167] The gradual nature of the process exacerbates the diffi-

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limitations on any cause of action arising from the relationship is tolled until the relationship is terminated and a final accounting made. *Id.* at 206.

Most commentators agree, however, that a delayed discovery rule offers adult survivors the best hope for surmounting the statute of limitations hurdle. *See id.* at 224-25; Hagen, *supra* note 11, at 380; Hartnett, *supra* note 139, at 1280; Carol W. Napier, Note, *Civil Incest Suits: Getting Beyond the Statute of Limitations*, 68 WASH. U. L.Q. 995, 1020 (1990). *But see* Charles J. Duffy III, Comment, *Use of the Discovery Rule in Cases of Alleged Child Sexual Abuse: Does the Statute of Limitations Ever Run?*, 28 DUQ. L. REV. 777, 782-83 (1990) (arguing that courts should apply delayed discovery rule to adult survivors only under narrow set of circumstances).

159 *See infra* notes 160-81 and accompanying text.

160 *See* Astrachan & Freer, *supra* note 112, at 74.

161 *See supra* note 17 and accompanying text (defining repression).

162 *See* Darnton, *supra* note 59, at 71.

163 *See* Coates, *supra* note 59, at 3.

164 *See* BASS & DAVIS, *supra* note 2, at 81-83.

165 *See* Darnton, *supra* note 59, at 71.

166 *Id.* Of course, some survivors do regain their memories all at once. *Id.* Roseanne Arnold and Eileen Franklin-Lipsker are two examples of women for whom memories of prior abuse returned all at once without warning. *Id.* at 70. According to experts, several factors may trigger the return of repressed memories. *Id.* Professional intervention sometimes causes previously hidden memories to surface—for example, when a survivor undergoes hypnosis or psychotherapy. *Id.* Furthermore, a dream can elicit repressed memories. *Id.* Finally, a significant life event such as the birth of a child, a marriage or divorce, or the death of a significant person in the survivor's life can trigger repressed memories of childhood sexual abuse. *Id.* at 71-72.

167 *Id.* One commentator described the process of regaining memory as follows:

> A constant tension exists in the victim between denying and repressing the memories or feelings, and the memories' push to

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culties survivors face in bringing suit within the short personal injury statutes of limitation.[168] A survivor may suspect that someone abused her when she was a child long before she recalls enough details to support a good-faith lawsuit.[169] By the time she remembers enough to identify the perpetrator and decides to explore the possibility of filing a lawsuit, the statute of limitations may have long since run.[170]

Second, even if a survivor remembers (or indeed never forgot) the actual abuse, she may not know that the abuse caused her current problems.[171] Adult survivors generally exhibit various symptoms of psychological injury over an extended period of time.[172] Without therapy, survivors tend to view each symptom in isolation, focusing on one particular problem at a time.[173] Because they do not see a pattern in their problems, they do not look for a common cause.[174] Consequently, survivors often do not link their problems to childhood sexual abuse.[175]

Third, even if a survivor remembers prior abuse and connects it to her present distress, she must recognize that someone has wronged her before she can take legal action.[176] While a survivor may realize intellectually that the perpetrator's behavior was legally and morally wrong, she may not acknowledge the wrong-

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> come out of the subconscious. This tension creates the environment that is the breeding ground for the disturbed relationships, substance abuse, depression and suicidal behaviors that many incest victims experience as adults. Even though repressed and out of awareness these memories constantly struggle for release, and the result is a cycle in which intrusive, repetitive thoughts alternate with denial and reports of numbing.

Hartnett, *supra* note 139, at 1251.

168 *See* BASS & DAVIS, *supra* note 2, at 22.

169 *Id.*

170 Rebecca L. Thomas, Note, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action*, 26 WAKE FOREST L. REV. 1245, 1255 (1991).

171 *Id.* at 1278.

172 *See supra* notes 81-94 and accompanying text.

173 *See* Allen, *supra* note 99, at 630. For example, a survivor may focus on her inability to form lasting personal relationships, without ever connecting that problem to her general anxiety, depression, and crippling self-doubt. *See supra* notes 81-94 and accompanying text.

174 *See* Allen, *supra* note 99, at 630.

175 *Id.*

176 *See* Harshaw, *supra* note 108, at 757.

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ful nature of the abuse on a psychological level.[177] Thus, she may be paralyzed with indecision and unable to take the action needed to file a lawsuit within the limitations period.[178]

Finally, the most commonly reported symptoms of childhood sexual abuse relate to sexual behavior and the ability to form and maintain intimate personal relationships.[179] These symptoms will not appear until the survivor becomes sexually active or enters into an intimate personal relationship.[180] Depending on the survivor's circumstances, this may not occur until she reaches her twenties or thirties. By this time, the statute of limitations for an abuse action will have run.[181]

The above reasons make a strong case for allowing adult survivors of childhood sexual abuse to use a delayed discovery rule.[182]

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[177] *See* Handler, *supra* note 158, at 737. Perpetrators typically tell the children they abuse that the abusive behavior is perfectly normal and natural. *See* Harshaw, *supra* note 108, at 757. Not surprisingly, this creates tremendous confusion in the children's minds and causes them to distrust their own feelings. *See* BUTLER, *supra* note 1, at 30. This distrust creates psychic confusion, which carries over into adulthood. *See* Harshaw, *supra* note 108, at 757. As one commentator has explained:

> While as an adult, the plaintiff may recognize that she did nothing wrong, that she did not invite the offender's conduct and that the defendant deceived her into believing these assertions, she may on a deeper level believe the representations to be true, well into adulthood, long after the applicable statutes of limitations have expired.

Handler, *supra* note 158, at 737.

[178] *See* Handler, *supra* note 158, at 737. Many incestuous abuse survivors know that the abuse is wrongful at the time it occurs. *See* DeRose, *supra* note 135, at 199. These survivors nonetheless continue to participate in incestuous relationships because the survivors believe that doing so is the only way to get loving attention from an adult. *Id.*

[179] *See supra* notes 82-87 and accompanying text.

[180] *See* Salten, *supra* note 95, at 202.

[181] *Id.* Salten notes that:

> Given that early sexual exploration is discouraged in our society and that "healthy" adult sexuality usually implies some degree of emotional maturity, it is unreasonable and inappropriate to expect the incest victim to detect symptoms of sexual trauma in her late teens or early twenties. Similarly, the incest victim's chronic difficulties with interpersonal relationships are difficult or impossible to identify until she has reached an age at which mature judgment and healthy intimacy might reasonably be expected.

Id.

[182] *See supra* notes 159-81 and accompanying text.

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Strict application of the statute of limitations and the date-of-injury rule allows perpetrators to benefit from their tortious acts.[183] As a matter of equity, this makes no sense.[184] California has tried to remedy this injustice through a combination of statutory and case law.[185] Unfortunately, this regulatory patchwork has created a two-tier system that poses significant obstacles to adult survivor suits.[186]

II. California's Two-Tier System for Handling Civil Suits by Adult Survivors of Childhood Sexual Abuse

Because of the nature and effects of childhood sexual abuse, most adult survivors cannot bring their claims within the applicable limitations period.[187] Thus, they should have access to a delayed discovery rule.[188] In California, however, the availability of delayed discovery for adult survivor actions depends upon when survivors sue.[189] Survivors who sued before January 1, 1991 may invoke a delayed discovery rule only if they repressed their memories of abuse.[190] In contrast, survivors who sue on or after January 1, 1991 automatically get the benefit of a delayed discovery rule.[191] However, the statute that codifies this delayed discovery rule allows recovery only for psychological injury.[192] Moreover, the statute requires plaintiffs to satisfy a burdensome certification requirement before they can name the defendant in

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[183] *See* Lamm, *supra* note 131, at 2198. The perpetrator benefits because the plaintiff's delay in filing suit is a direct outgrowth of the psychological harm inflicted on her by the perpetrator's prior abuse. *Id.* Specifically, the abuse itself triggers the psychological mechanism of repression that often prevents the plaintiff from suing within the applicable limitations period. *Id.*

[184] *Id.* In this respect, the delayed discovery rule is very similar to the doctrine of equitable estoppel. This doctrine prevents a defendant from profiting by her own misconduct. *See* Handler, *supra* note 158, at 722 (defining equitable estoppel). *But see* John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 951 n.4 (Cal. 1989) (noting important differences in procedural consequences between delayed discovery rule and doctrine of equitable estoppel).

[185] *See infra* notes 195-254 and accompanying text.

[186] *See infra* notes 252-304 and accompanying text.

[187] *See supra* notes 158-81 and accompanying text.

[188] *See supra* notes 182-84 and accompanying text.

[189] *See infra* notes 190-91 and accompanying text.

[190] *See infra* notes 195-251 and accompanying text.

[191] *See supra* notes 19-21 and accompanying text.

[192] *See infra* notes 285-89 and accompanying text.

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their complaints.[193] Thus, both tiers of the system pose obstacles to adult survivor suits.[194]

A. Cases Filed Before January 1, 1991: A Judicial Delayed Discovery Rule

There is no statutory delayed discovery rule in California for adult survivors who filed suit before January 1, 1991.[195] To the extent that courts allow delayed discovery at all, they do so as a matter of equity.[196] The first step in this equitable process is determining which statute of limitations governs the action.[197] This in turn depends upon the defendant's identity.[198]

If the plaintiff alleged that a family or household member abused her, the 1986 version of section 340.1 of the California Code of Civil Procedure applied.[199] This statute gave the plaintiff three years from the time the cause of action accrued to file suit.[200] If she alleged that anyone other than a family or house-

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[193] *See infra* notes 290-304 and accompanying text.

[194] *See supra* notes 189-93 and accompanying text.

[195] The 1990 version of § 340.1 of the California Code of Civil Procedure is not retroactive. *See* CAL. CIV. PROC. CODE § 340.1(k) (West Supp. 1992); *infra* notes 264-82 and accompanying text (discussing need for retroactivity).

[196] *See* DeRose v. Carswell, 242 Cal. Rptr. 368, 373 (Ct. App. 1987), *rev. denied*, Mar. 17, 1988.

[197] A judicial delayed discovery rule simply tolls the applicable statute of limitations until the plaintiff fulfills certain conditions. *See infra* notes 223-28 and accompanying text (identifying conditions).

[198] *See infra* notes 199-206 and accompanying text.

[199] *See* Act of Sept. 20, 1986, ch. 914, § 1, 1986 Cal. Stat. 3165, 3165-66 (amended 1990) (former section 340.1 of the California Code of Civil Procedure). This section defined a "household or family member" as "a parent, stepparent, former stepparent, sibling, stepsibling, any other person related by consanguinity or affinity within the second degree, or any other person who regularly resided in the household at the time of the act, or who six months prior to the act regularly resided in the household." *Id.*

[200] *Id.* at 3165. The former statute provided:

> In any civil action for injury or illness based upon lewd or lascivious acts with a child under the age of 14 years, fornication, sodomy, oral copulation, or penetration of genital or anal openings of another with a foreign object, in which this conduct is alleged to have occurred between a household or family member and a child where the act upon which the action is based occurred before the plaintiff attained the age of 18 years, the time for commencement of the action shall be three years.

Id. The former statute included psychological injury or illness within the

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hold member abused her, the general one-year statute of limitations for personal injury actions applied.[201] No matter which statute applied,[202] however, the statute tolled the limitations period until the plaintiff reached eighteen,[203] the age of majority

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definition of "injury or illness," whether or not physical injury or illness accompanied the psychological injury or illness. *Id.*

Unlike the 1990 statute, the former statute did not codify a delayed discovery rule. *See supra* note 20 and accompanying text (providing text of 1990 statute). Rather, the former statute enlarged the general one-year personal injury statute of limitations codified in section 340(3) of the California Code of Civil Procedure. *See* CAL. CIV. PROC. CODE § 340(3) (West Supp. 1992). The former statute expanded the one-year period to three years for cases in which a survivor alleged that a household or family member abused her when she was a child. *See* Act of Sept. 20, 1986, ch. 914, § 1, 1986 Cal. Stat. 3165, 3165 (amended 1990). The former statute did not address the question of when a cause of action under this section accrued—that is, when the statute of limitations began to run. *See id.* The former statute left that matter to the courts. *See id.*

In 1990, Colorado adopted a statute very similar in effect to the 1986 version of section § 340.1. *See* COLO. REV. STAT. ANN. § 13-80-103.7 (West Supp. 1991). The Colorado statute provides in relevant part:

> (1) Notwithstanding any other statute of limitations specified in this article, or any other provision of law that can be construed to reduce the statutory period set forth in this section, any civil action based on a sexual assault or a sexual offense against a child shall be commenced within six years after a disability has been removed for a person under disability, as such term is defined in section 13-81-101(3), or within six years after a cause of action accrues, whichever occurs later, and not thereafter.

Id. Like the former California statute, the Colorado statute does not address the question of when a cause of action under it accrues. *See id.*

[201] *See* CAL. CIV. PROC. CODE § 340(3) (West Supp. 1992).

[202] After the California Legislature passed the 1986 statute, there was some confusion as to whether the plaintiff's age of minority in fact tolled the three-year period. The Second District Court of Appeal resolved that issue in 1989. *See* Colleen L. v. Howard M., 257 Cal. Rptr. 263 (Ct. App. 1989). In *Colleen L.*, the plaintiff sued her stepfather one month before her eighteenth birthday. *Id.* at 264. She alleged that he had sexually abused her from the time she was three until she was thirteen. *Id.* The stepfather moved for summary judgment. *Id.* He argued that the statute of limitations barred the plaintiff's action because the three years ran from the date of the last abusive incident (that is, five years from the date the plaintiff sued), not from the date the plaintiff turned eighteen. *Id.* The trial court accepted the defendant's argument and granted summary judgment in his favor. *Id.* at 265. On appeal, the Second District reversed, holding that "a minor described by Section 340.1 enjoys the tolling benefits of Section 352." *Id.* at 266.

[203] *See* CAL. CIV. PROC. CODE § 352(a) (West Supp. 1992).

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in California.[204] Thus, absent delayed discovery, a survivor abused by a family or household member had until age twenty-one to sue.[205] A survivor abused by anyone other than a family or household member had until age nineteen to sue.[206]

For the psychological reasons discussed earlier, most adult survivors could not satisfy the strict requirements of these statutes.[207] Faced with dismissals premised on the applicable statute of limitations, survivors have urged courts to apply judicially created delayed discovery rules to their suits.[208] These pleas have met with varying degrees of success.[209]

The California Supreme Court has not decided whether, and under what circumstances, adult survivors who sued before January 1, 1991 can use judicially created delayed discovery rules.[210] Thus, the leading California case is a Sixth District Court of Appeal case, *DeRose v. Carswell*.[211] Dianne DeRose sued her step-

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[204] *See* CAL. CIV. CODE § 25 (West 1982).

[205] *See supra* notes 199-204 and accompanying text.

[206] *See supra* notes 201-04 and accompanying text.

[207] *See supra* notes 158-81 and accompanying text (discussing repression of abuse, inability to connect past abuse to present harm, inability to recognize right to legal compensation, and delayed manifestation of certain symptoms of abuse). There are other reasons for failure to comply with the statute of limitations that apply only to plaintiffs alleging abuse by a family or household member. *See* Harshaw, *supra* note 108, at 759. At age 21, such a plaintiff may still be living at home. *Id.* Even if she is not living at home (for example, if she is attending a private high school or college in another town), she may still depend on the perpetrator for financial support. *Id.* In either of these situations, it is unrealistic to think that she will be in a position to jeopardize her economic and emotional survival by filing a civil lawsuit. *See* Lowenstein, *supra* note 11, at 792.

[208] *See* Marsha V. v. Gardner, 281 Cal. Rptr. 473, 474 (Ct. App. 1991), *dissenting opinion modified,* June 24, 1991, *and rev. denied,* Aug. 22, 1991; Evans v. Eckelman, 265 Cal. Rptr. 605, 610 (Ct. App. 1990). Plaintiffs have invoked former § 340.1 of the California Code of Civil Procedure as authority for applying a delayed discovery rule to adult survivor suits. *See* Act of Sept. 20, 1986, ch. 914, § 1, 1986 Cal. Stat. 3165, 3166 (amended 1990). The relevant statutory language provided: "Nothing in this bill is intended to preclude the courts from applying delayed discovery exceptions to the accrual of a cause of action for sexual molestation of a minor." *Id.*

[209] *See infra* notes 211-46 and accompanying text.

[210] *See infra* note 266 and accompanying text (discussing California Supreme Court's refusal to address availability of delayed discovery for adult survivors).

[211] 242 Cal. Rptr. 368 (Ct. App. 1987), *rev. denied,* Mar. 17, 1988. It is important to note that *DeRose* governs only cases that do not fall within the coverage of the 1990 revision of § 340.1.

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grandfather on January 13, 1986, when she was twenty-three years old.[212] Her complaint accused the defendant of sexually abusing her from the time she was four years old until she was eleven.[213] Specifically, DeRose alleged that her step-grandfather had repeatedly raped her and forced her to fondle his genitals.[214] Because the applicable statute of limitations was one year, the statute technically barred DeRose's suit.[215] Consequently, DeRose sought to invoke a delayed discovery rule.[216]

DeRose did not argue that she had repressed all memory of the abuse.[217] Furthermore, she acknowledged that she knew her step-grandfather's conduct was wrong at the time he abused her.[218] Instead, she premised her right to invoke a delayed discovery rule on the issue of causation.[219] She contended that she did not know that the abuse had caused her injuries until within one year of filing the lawsuit.[220]

The trial court refused to apply a delayed discovery rule and dismissed DeRose's complaint.[221] On appeal, the Sixth District affirmed.[222] The appellate court distinguished two types of cases: (1) those in which the plaintiff repressed all memory of the abuse, but sued within one year of regaining her memory; and (2) those in which the plaintiff did not repress memory of the abuse, but offered other justifications for her delay in filing suit.[223]

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212 *Id.* at 370.

213 *Id.* at 369.

214 *Id.* at 374.

215 *Id.* at 370. Because DeRose's step-grandfather was not a household or family member as defined by the former statute, the applicable statute of limitations was the one-year provision in § 340(3). *See id.*

216 *Id.*

217 *Id.* at 371-72.

218 *Id.* at 372.

219 *Id.* at 371-72.

220 *Id.* at 372. Specifically, DeRose alleged that she did not connect the abuse to her current psychological difficulties until she entered therapy. *Id.*

221 *Id.* at 369.

222 *Id.*

223 *Id.* The year after the Sixth District decided *DeRose v. Carswell*, an Illinois federal district court sitting in diversity drew a similar distinction. *See* Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988).

In *Johnson*, the plaintiff sued her parents when she was 33. *Id.* at 1365-66. She accused her father of sexually abusing her from age three until her early teens. *Id.* at 1365. She accused her mother of negligently failing to protect her from the abuse. *Id.* Unlike Dianne DeRose, the plaintiff alleged that she had repressed all memory of the abuse until she began therapy a year before

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The appellate court placed DeRose's complaint in the second category (Type 2).[224] The court noted that it was not required to apply a delayed discovery rule; rather, the 1986 statute left application to the court's discretion.[225] Invoking that discretion, the court concluded that DeRose could not use delayed discovery because she knew all of the facts essential to her cause of action when she was abused.[226] The court reasoned that DeRose's failure to causally connect the abuse and her emotional harm within the limitations period did not justify applying a delayed discovery rule.[227] However, the court left open the question of whether a

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she filed suit. *Id.* at 1364. She also alleged ignorance of any connection between the abuse and her injuries until that time. *Id.* at 1364-65.

The applicable Illinois statute of limitations was two years from the time the cause of action accrued, tolled until the age of majority. *Id.* at 1366-67. Assuming that the cause of action accrued when the last abusive act occurred, the statute barred the plaintiff's suit. *Id.* The defendant thus moved for summary judgment based on the statute of limitations. *See id.* Because Illinois state courts had not decided whether to allow delayed discovery in adult survivor suits, the federal district court had to determine whether to do so. *Id.* at 1367.

The federal district court examined the law of other states and distinguished two "types" of cases. *Id.* "Type 1" cases were those in which the plaintiff knew about the abuse when it occurred, but did not connect the abuse to her physical and psychological problems. *Id.* "Type 2" cases were those in which the plaintiff repressed all memory of the abuse until shortly before she filed suit. *Id.* The court then characterized Johnson's complaint as a Type 2 case. *Id.* It concluded that Illinois courts would allow delayed discovery in Type 2 cases. *Id.* at 1370. Thus, the court denied the defendant's motion for summary judgment. *Id.*

California courts have embraced the *DeRose* Type 1/Type 2 distinction. *See* Marsha V. v. Gardner, 281 Cal. Rptr. 473, 476-77 (Ct. App. 1991) (denying claim by plaintiff who did not allege repression), *dissenting opinion modified*, June 24, 1991, *and rev. denied*, Aug. 22, 1991; Evans v. Eckelman, 265 Cal. Rptr. 605, 612 (Ct. App. 1990) (rejecting claim by plaintiffs who did not allege repression); Mary D. v. John D., 264 Cal. Rptr. 633, 638-39 (Ct. App. 1989) (allowing claim by plaintiff who alleged repression); Snyder v. Boy Scouts of America, Inc., 253 Cal. Rptr. 156, 161 (Ct. App. 1988) (dismissing claim by plaintiff who did not allege repression), *rev. denied*, Feb. 1, 1989.

The legal literature has also adopted this distinction. *See, e.g.*, Hagen, *supra* note 11, at 373; Lamm, *supra* note 131, at 2201-02. Because of general acceptance, this Comment also follows the *DeRose* Type 1/Type 2 distinction.

224 *See DeRose*, 242 Cal. Rptr. at 371.

225 *Id.* at 373.

226 *Id.* at 371.

227 *Id.* at 371-72.

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delayed discovery rule might apply to a Type 1 case—that is, one in which the plaintiff repressed all memory of the abuse.[228]

Subsequent California cases have followed the *DeRose* distinction between plaintiffs who repress memories of abuse and those who do not.[229] In 1988, the Third District Court of Appeal affirmed the trial court's dismissal of a former Boy Scout's suit against the Boy Scouts of America.[230] The plaintiff alleged that his scout leader had sexually molested him from the time the plaintiff joined the organization in 1977 until he quit in 1981.[231] The plaintiff did not allege that he had repressed his memories of the abuse.[232]

In 1989, the Sixth District Court of Appeal made explicit what it had implied in *DeRose*—plaintiffs who repress their memories of abuse may invoke delayed discovery.[233] The court allowed a twenty-four-year-old plaintiff to proceed with a lawsuit against her father, whom she alleged had sexually abused her repeatedly from infancy until age five.[234] The court reasoned that because the plaintiff had repressed her memories, she did not know all of

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228 *Id.* at 371.

229 *See supra* note 223 and accompanying text.

230 *See* Snyder v. Boy Scouts of America, Inc., 253 Cal. Rptr. 156 (Ct. App. 1988), *rev. denied*, Feb. 1, 1989.

231 *Id.* at 158. In *Snyder*, the plaintiff filed suit three months after his nineteenth birthday. *Id.* Because the alleged perpetrator was not a household or family member, the one-year general statute of limitations for personal injury actions applied. *Id.* at 160. The statute of limitations thus barred Snyder's lawsuit. *Id.* Snyder invoked a delayed discovery rule, arguing that while he was aware of the wrongful nature of the scout leader's conduct at the time it occurred, he delayed filing suit because of his "embarrassment, humiliation, and sorrow over what had occurred." *Id.* at 158. He claimed that he did not realize he had a cause of action against the defendant until he consulted an attorney after being arrested for drunk driving. *Id.* He then discovered that the attorney represented other boys whom the scout leader had abused. *Id.* At that point, the plaintiff authorized the attorney to file suit on his behalf. *Id.*

The trial court granted the defendant's summary judgment motion. *Id.* at 157. On appeal, the Third District affirmed. *Id.* at 158. The appellate court held that the plaintiff could not rely on a delayed discovery rule because he knew all of the facts constituting his cause of action long before he sued. *Id.* at 161.

232 *Id.* at 159.

233 *See* Mary D. v. John D., 264 Cal. Rptr. 633, 635 (Ct. App. 1989).

234 *Id.* at 634. In *Mary D.*, the plaintiff alleged that she had repressed all memory of the abuse until she entered therapy. *Id.* at 635. She filed suit in 1986, eleven months after her memory began to return. *Id.* at 634. Since

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the facts constituting her cause of action until after the limitations period expired.[235]

In 1990, the First District Court of Appeal affirmed a trial court's dismissal of an action by three brothers against their former foster father.[236] The brothers alleged that the defendant had sexually abused them while in his care.[237] The plaintiffs did not allege that they had repressed their memories of the abuse.[238] Instead, they argued that they did not realize the nature and extent of their psychological injuries until after the limitations period expired.[239] The court held that mere lack of awareness of

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the alleged perpetrator was a member of her family, the applicable statute of limitations was three years. *Id.* at 635.

The defendant moved for summary judgment. *Id.* He contended that because the plaintiff did not sue before she turned 21, the statute of limitations barred her action. *Id.* The plaintiff argued that she could invoke a delayed discovery rule under *DeRose* because she did not remember the abuse until after the statute of limitations expired. *Id.* at 636. The trial court granted the defendant's summary judgment motion. *Id.* at 634.

On appeal, the Sixth District reversed. *Id.* The California Supreme Court granted review on March 24, 1990. *See* Mary D. v. John D., 788 P.2d 1155 (Cal. 1990). However, it dismissed review on November 28, 1990, and remanded the case to the Sixth District. *See* Mary D. v. John D., 800 P.2d 858 (Cal. 1990).

235 *See Mary D.*, 264 Cal. Rptr. at 639.

236 *See* Evans v. Eckelman, 265 Cal. Rptr. 605 (Ct. App. 1990).

237 *Id.* at 606. The alleged abuse began in 1966, when two of the brothers were age seven and the third was age ten. *Id.* The abuse continued until 1968, when the state removed the boys from the defendant's custody. *Id.*

When the plaintiffs filed suit in 1987, the applicable statute of limitations was three years from the age of majority. *Id.* at 607. Because the brothers turned 18 in 1974 and 1977 respectively, the statute barred their causes of action. *Id.* The brothers argued that a delayed discovery rule applied because they lacked awareness of the nature and extent of their injuries. *Id.* at 610.

The trial court sustained the defendant's demurrer without leave to amend based on the statute of limitations. *Id.* at 606. On appeal, the First District reversed. *Id.* The appellate court held that the trial court had erred in sustaining the demurrer without leave to amend. *Id.* at 611. The plaintiffs could conceivably amend the complaint and allege that they did not realize the defendant's conduct was wrong until after the limitations period expired. *Id.* The appellate court indicated, however, that if the plaintiffs could not make such a showing, delayed discovery would not save their complaint. *Id.* at 612. According to the court, mere lack of awareness of extent of injury would not revive a time-barred cause of action. *Id.*

238 *Id.* at 610.

239 *Id.*

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the extent of injuries suffered from childhood sexual abuse does not trigger delayed discovery.[240] Rather, the plaintiffs must allege that they either (1) repressed all memory of the abuse, or (2) did not know that the defendant's conduct was wrong when the abuse occurred.[241]

In 1991, the Second District Court of Appeal denied a thirty-two-year-old plaintiff's claim against her stepfather.[242] The plaintiff alleged that her stepfather had sexually abused her when she was between the ages of eight and seventeen.[243] The appellate court noted that the plaintiff did not allege repression.[244] Rather, she contended that she did not know that her stepfather's abuse and her psychological injuries were causally related until after the limitations period expired.[245] Following *DeRose*, the appellate court held that because the plaintiff did not allege repression, she was not entitled to delayed discovery.[246]

The above cases show that judges have discretion whether to allow delayed discovery in cases filed before January 1, 1991.[247] In practice, California appellate courts uniformly follow the distinction promulgated in *DeRose*.[248] Consequently, plaintiffs who

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240 *Id.* at 612.

241 *Id.* at 611-12.

242 *See* Marsha V. v. Gardner, 281 Cal. Rptr. 473 (Ct. App. 1991), *dissenting opinion modified*, June 24, 1991, *and rev. denied*, Aug. 22, 1991. The Sixth District (the same court that decided *DeRose*) decided another case one week after the Second District released its opinion in *Marsha V. See* Daly v. Derrick, 281 Cal. Rptr. 709 (Ct. App. 1991), *rev. denied and ordered depublished*, Aug. 22, 1991. The dissenting justice in *Marsha V.*, Justice Johnson, filed a modified opinion on June 24, 1991, which relied heavily on *Daly*. *See* CAL. L. WKLY., Aug. 16, 1991, at 12-14. In the opinion, Johnson heralded the Sixth District's "emasculation" of the *DeRose* distinction between plaintiffs who repress memory of abuse and those who do not. *See Marsha V.*, 281 Cal. Rptr. at 484 n.11 (Johnson, J., dissenting). However, the "emasculation" of *DeRose* was short-lived. *See* CAL. L. WKLY., Sept. 20, 1991, at 84. On August 22, 1991, the California Supreme Court denied review of *Daly* and depublished the Sixth District's opinion. *Id.*

243 *See Marsha V.*, 281 Cal. Rptr. at 473.

244 *Id.* at 476.

245 *Id.*

246 *Id.* at 476-77.

247 *See supra* note 225 and accompanying text.

248 *See supra* notes 229-46 and accompanying text (discussing California cases following the *DeRose* Type 1/Type 2 distinction). This distinction persists even though it lacks a reasonable basis in either logic or historical precedent. *See* Lamm, *supra* note 131, at 2203.

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allege repression may invoke a delayed discovery rule.[249] Plaintiffs who do not allege repression may not invoke such a rule.[250] These plaintiffs' claims cannot survive a demurrer premised on the statute of limitations.[251]

In contrast, the current version of section 340.1 of the California Code of Civil Procedure allows plaintiffs who sue on or after January 1, 1991 the benefit of delayed discovery even if they do not allege repression.[252] This section, however, limits recovery to psychological injury.[253] Further, the section requires plaintiffs to satisfy a burdensome certification requirement before they can name the defendant in their complaints.[254]

B. Cases Filed On or After January 1, 1991: A Statutory Delayed Discovery Rule

On December 20, 1988, Senator Bill Lockyer introduced Sen-

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[249] *See supra* notes 233-35 and accompanying text.

[250] *See supra* notes 230-46 and accompanying text.

[251] *See supra* note 133 and accompanying text. In his dissent to *Marsha V. v. Gardner*, discussed *supra* note 242, Justice Johnson emphasized the unfairness of the distinction and its consequences for adult survivors of childhood sexual abuse. *See* Marsha V. v. Gardner, 281 Cal. Rptr. 473, 478 (Ct. App. 1991) (Johnson, J., dissenting), *dissenting opinion modified*, June 24, 1991, *and rev. denied*, Aug. 22, 1991. Speaking of the class of survivors who discovered the cause of their adult psychological injuries more than three years before January 1, 1991, and who were 26 or older when they did so (i.e., those survivors not covered by the 1990 statute), Johnson wrote:

> Is this group to be singled out and denied the right to compensation for their equally traumatic, equally expensive, and equally undiscovered injuries while those who happened to discover the cause of their injuries a few years or even a few months later are allowed a remedy. I find such a result is both unfortunate and unjustified under the normal principles of the discovery doctrine which applied to these cases before section 340.1 was amended.

Id. Justice Johnson continued:

> In my opinion, it is neither wise nor fair to slam the courthouse door in the face of child sex abuse victims who have been so traumatized by this experience that it takes years for them to comprehend they have been injured, or to awaken to the wrongfulness of a parental figure's behavior with them, or to uncover the true cause of their ongoing psychological misery.

Id. at 485.

[252] *See* CAL. CIV. PROC. CODE § 340.1 (West Supp. 1992).

[253] *See infra* notes 285-89 and accompanying text.

[254] *See infra* notes 290-304 and accompanying text.

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ate Bill 108, the bill that amended section 340.1 of the California Code of Civil Procedure.[255] Although the original bill did not involve delayed discovery at all,[256] subsequent amendments converted the bill into a delayed discovery measure.[257] Unfortunately, by the time the bill reached Governor George Deukmejian's desk, political infighting and extensive lobbying

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[255] *See* CALIFORNIA LEGISLATURE-SENATE-BILLS, 1989-1990 Sess. (S.B. 106-130) (S.B. 108, introduced December 20, 1988). The California Assembly passed the final version of the bill on August 20, 1990. *See* 1 CALIFORNIA LEGISLATURE, SENATE FINAL HISTORY, at 97 (1990) (legislative history table for S.B. 108). The Senate approved it on August 21, 1990. *Id.* Governor George Deukmejian signed it into law on September 29, 1990. *Id.*

[256] *See* CALIFORNIA LEGISLATURE-SENATE-BILLS, 1989-1990 Sess. (S.B. 106-130) (S.B. 108, introduced December 20, 1988). The bill tolled the general one-year statute of limitations for personal injury actions for five years beyond the age of majority for plaintiffs bringing civil actions for seduction of a person below the age of legal consent. *Id.* The bill also altered the limitations period for prosecution of certain felony offenses. *Id.*

[257] *See id.* In the 20 months between introduction and final approval, the California Legislature amended S.B. 108 five times. *Id.* On February 6, 1989, the Senate approved a series of amendments proposed by the bill's author, Senator Lockyer. *See* CALIFORNIA LEGISLATURE-SENATE-BILLS, 1989-1990 Sess. (S.B. 106-130) (S.B. 108, amended February 6, 1989). These amendments converted the bill into a statutory delayed discovery rule. *Id.* A plaintiff alleging childhood sexual abuse did not have to file suit until age 26, or within three years of the date she discovered or reasonably should have discovered that her injury or illness was caused by the abuse, whichever occurred later. *Id.* The bill defined "injury or illness" to include psychological injury or illness, whether or not accompanied by physical harm. *Id.* Further, the bill explicitly stated that "[d]iscovery that the injury or illness was caused by sexual abuse shall not be deemed to have occurred solely by virtue of the plaintiff's awareness, knowledge, or memory of the acts of abuse." *Id.* Finally, the bill included a provision that made the extension of the statute of limitations retroactive. *Id.* Specifically, it covered: (1) any action begun on or after January 1, 1990, including any action barred by the limitations period in effect before that date; and (2) any action begun before and pending on January 1, 1990. *Id.*

On August 21, 1989, the Senate approved additional amendments proposed by Senator Lockyer. *See* CALIFORNIA LEGISLATURE-SENATE-BILLS, 1989-1990 Sess. (S.B. 106-130) (S.B. 108, amended August 21, 1989). These amendments deleted language specifically stating that discovery of the cause of action shall not be deemed to have occurred solely by virtue of the plaintiff's awareness, knowledge, or memory of the abusive behavior. *Id.* The amendments also substituted new language for the section premising accrual of the three-year limitations period on the plaintiff's discovery of a causal connection between her injury or illness and prior abuse. *Id.* As amended, the bill provided that the statute of limitations ran from the time the plaintiff discovered or reasonably should have discovered

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efforts had narrowed the bill's potential scope.[258] The final measure limited recovery for childhood sexual abuse to psychological

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"that the psychological injury or illness occurring after the age of majority was caused by the sexual abuse." *Id.*

On January 31, 1990, the Assembly amended the bill. *See* CALIFORNIA LEGISLATURE-SENATE-BILLS, 1989-1990 Sess. (S.B. 106-130) (S.B. 108, amended January 31, 1990). These amendments transformed the bill. Taken as a whole, this version of the bill made it much more difficult for plaintiffs to bring civil actions premised on childhood sexual abuse. *See infra* notes 284-304 and accompanying text. First, the amendments mandated a certification procedure for plaintiffs over the age of 26 when they filed suit. *See* CALIFORNIA LEGISLATURE-SENATE-BILLS, 1989-1990 Sess. (S.B. 106-130) (S.B. 108, amended January 31, 1990). Attorneys for such plaintiffs had to file "certificates of merit" stating that they had consulted a licensed mental health practitioner and determined that there was "reasonable and meritorious cause" for bringing the action. *Id.* Failure to comply with the certification requirement would expose attorneys to professional disciplinary action. *Id.* Second, the amendments deleted the retroactivity provisions of the bill. *Id.* Third, the amendments barred any plaintiff 38 years or older from suing under this section. *Id.*

On April 30, 1990, the Assembly further amended the bill. *See* CALIFORNIA LEGISLATURE-SENATE-BILLS, 1989-1990 Sess. (S.B. 106-130) (S.B. 108, amended April 30, 1990). These amendments expanded the certification procedure to require not only an attorney's certificate of merit but also a licensed mental health practitioner's certificate of merit stating that there was good cause to believe the plaintiff had been abused. *Id.* The amendments also added a provision that the plaintiff could not name the defendant in her complaint until the court had reviewed the certificates of merit in camera and determined, based solely on those certificates, that there was "reasonable and meritorious cause" for filing the lawsuit. *Id.* Finally, this version of the bill omitted the absolute ban on lawsuits by adult survivors 38 years of age or older at the time of filing suit. *Id.*

The Assembly amended the bill again on August 15, 1990. *See* CALIFORNIA LEGISLATURE-SENATE-BILLS, 1989-1990 Sess. (S.B. 106-130) (S.B. 108, amended August 15, 1990). These amendments modified the certification procedure slightly. *Id.* They also addressed the retroactivity issue in the negative by stating that the statute would apply only to actions filed on or after January 1, 1991. *Id.* Finally, the Assembly added a section indicating that the statute should not be construed to prevent courts from applying an equitable delayed discovery rule to actions commenced prior to January 1, 1991. *Id.*

[258] *See* Carol L. Mithers, *Incest and the Law*, N.Y. TIMES, Oct. 21, 1990, § 6 (Magazine), at 44. Insurers feared that expanding the statute of limitations would increase the number of claims based on homeowners' insurance policies, since many adult survivors include a negligent infliction of emotional distress cause of action in their lawsuits. *Id.* Opposition to the bill also came from those concerned about suits against nonrelatives such as teachers. *Id.*

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injury and imposed a burdensome certification procedure on plaintiffs.[259]

Section 340.1 of the California Code of Civil Procedure applies to any action filed on or after January 1, 1991.[260] Thus, unlike the former version of the statute[261] and both the second[262] and third[263] versions of Senate Bill 108, the 1990 statute is not retroactive.[264] Although the statute does not prohibit application of common-law delayed discovery rules to pre-January 1, 1991 cases, it does not require such application either.[265] Given the California Supreme Court's refusal to address the availability of

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259 *See supra* note 20 and accompanying text (providing text of final version).

260 CAL. CIV. PROC. CODE § 340.1(k) (West Supp. 1992).

261 Act of Sept. 20, 1986, ch. 914, § 1, 1986 Cal. Stat. 3165, 3166 (amended 1990). The former statute provided:

> This section shall apply to both of the following:
>
> (1) Any action commenced on or after January 1, 1987, including any action which would have been barred by application of the period of limitation applicable prior to January 1, 1987.
>
> (2) Any action commenced prior to January 1, 1987, and pending on January 1, 1987.

Id.

262 CALIFORNIA LEGISLATURE-SENATE-BILLS, 1989-1990 Sess. (S.B. 106-130) (S.B. 108, amended February 6, 1989). This version of the bill stated:

> This section shall apply to both of the following:
>
> (1) Any action commenced on or after January 1, 1990, including any action which would have been barred by application of the period of limitation applicable prior to January 1, 1990.
>
> (2) Any action commenced prior to January 1, 1990, and pending on January 1, 1990.

Id.

263 CALIFORNIA LEGISLATURE-SENATE-BILLS, 1989-1990 Sess. (S.B. 106-130) (S.B. 108, amended August 21, 1989). This version of the bill retained the language of the February 6, 1989 Senate amendment. *Id.* However, the Assembly deleted that language when it passed the fourth version of S.B. 108 on January 31, 1990. CALIFORNIA LEGISLATURE-SENATE-BILLS, 1989-1990 Sess. (S.B. 106-130) (S.B. 108, amended January 31, 1990). That version of the bill contained the provision that ended up in the final version of the bill, and hence, in the 1990 statute. *See supra* note 257 and accompanying text (describing final version of bill).

264 That is, it does not cover actions commenced before but pending on January 1, 1991. *See* CAL. CIV. PROC. CODE § 340.1(k) (West Supp. 1992).

265 *See id.* § 340.1(*l*).

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delayed discovery for adult survivors,[266] this guarantees perpetuation of the *DeRose* Type 1/Type 2 distinction.[267]

Unlike California, several states with statutory delayed discovery rules apply them retroactively.[268] California should follow the lead of these states.[269] Constitutional due process challenges to the legislature's right to revive otherwise time-barred causes of action need not pose an obstacle to retroactive application.[270] Courts have consistently rejected these challenges in the past.[271]

In addition, important policy considerations support retroac-

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266 *See supra* notes 234, 242 and accompanying text (describing cases in which California Supreme Court refused to determine availability of delayed discovery in adult survivor actions).

267 *See supra* note 223 and accompanying text (discussing *DeRose* Type 1/ Type 2 distinction).

268 These states fall into two groups. One group applies its statutes to actions pending as of the statute's effective date. *See, e.g.*, MINN. STAT. ANN. § 541.073 (West Supp. 1992). The historical and statutory notes to the Minnesota statute indicate that the statute applies to all actions pending or begun on or after May 20, 1989. *Id.*

The other group of states applies its statutes to actions time-barred by the limitations period that is applicable when the cause of action arises. *See* ALASKA STAT. § 09.10.140(b) (1990) (applying "to all actions commenced on or after February 2, 1990, regardless of when the cause of action may have arisen"); VT. STAT. ANN. tit. 12, § 522 (1990) (applying "to all causes of action commenced on or after July 1, 1990, as long as either the act of sexual abuse or the discovery that the injury or condition was caused by the act of sexual abuse occurred on or after July 1, 1984, to which extent section 2 [i.e., § 522] applies retroactively"); WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1992) (applying "to all causes of action commenced on or after the effective date of this act, regardless of when the cause of action may have arisen. To this extent . . . [§ 4.16.340] appl[ies] retrospectively").

269 *See* Thomas G. Burroughs, Comment, *Retroactive Application of Legislatively Enlarged Statutes of Limitations for Child Abuse: Time's No Bar to Revival*, 22 IND. L. REV. 989 (1989). Burroughs makes this argument persuasively with respect to criminal statutes of limitation for child abuse prosecutions. *Id.* at 1015-17. Because the criminal context poses constitutional difficulties not applicable in the civil context (for instance, the prohibition against ex post facto laws in U.S. CONST. art. I, § 9, cl. 3, and § 10), Burroughs' argument applies even more strongly to civil suits by adult survivors.

270 *See* Burroughs, *supra* note 269, at 989-90.

271 *See* Campbell v. Holt, 115 U.S. 620, 629 (1885) (holding that legislature does not violate Due Process Clause when it lengthens or shortens statutes of limitation because right to defeat action by statute of limitations is not vested right subject to constitutional protection); *see also* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 315-16 (1945) (concluding that state legislature does not violate Fourteenth Amendment when it

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tive application of the statute of limitations to adult survivor actions.[272] Historically, opponents have argued that retroactive application encourages plaintiffs to "sleep on their rights,"[273] violates defendants' interest in repose,[274] and creates problems of stale evidence and stale claims.[275] However, these arguments are

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repeals or extends statute of limitations to restore remedy lost through mere lapse of time).

In California, two appellate courts have also upheld retroactive application of statutes of limitation. *See* Liebig v. Superior Court, 257 Cal. Rptr. 574 (Ct. App. 1989), *rev. denied*, June 22, 1989; Gallo v. Superior Court, 246 Cal. Rptr. 587 (Ct. App. 1988), *opinion modified*, June 1, 1988. In *Liebig*, the plaintiff sued her grandfather in 1987 when she was 24. *Liebig*, 257 Cal. Rptr. at 574. Her complaint alleged that her grandfather had repeatedly sexually molested her when she was between the ages of five and fourteen. *Id.* at 575. When the alleged abuse occurred, the applicable statute of limitations was the one-year provision in California Code of Civil Procedure § 340(3). *Id.* When the plaintiff filed her lawsuit, however, the applicable statute was the three-year provision in § 340.1. *Id.*

The defendant demurred, contending that the one-year statute of limitations in effect at the time of the alleged abusive acts barred the plaintiff's action. *Id.* at 574. The trial court overruled the demurrer. *Id.* at 575. It held that § 340.1 expressly revived the plaintiff's previously barred cause of action. *Id.* On appeal, the First District Court of Appeal affirmed, holding that "the Legislature has the power to retroactively extend a civil statute of limitations to revive a cause of action time-barred under the former limitations period." *Id.* at 574. The court stressed the state's interest in increasing the availability of tort remedies to adult survivors of childhood sexual abuse. *Id.* at 578.

In *Gallo*, the Sixth District Court of Appeal confirmed that a potential civil defendant "has no vested right in the sense of repose conferred by his knowledge a lawsuit against him appears to be barred. The issue is one of fairness and of statutory construction, rather than constitutional right." *Gallo*, 246 Cal. Rptr. at 592. Construing California Code of Civil Procedure § 340.3 (statute of limitations for civil actions based on commission of felony offenses), the court found that the Legislature had not expressly made the section retroactive. *Id.* at 589. The court therefore declined to apply the statute retroactively to revive a suit that predicated the defendant's civil liability on his criminal convictions for assault, extortion, false imprisonment, and attempting to dissuade a witness from testifying. *Id.* at 588.

272 *See infra* notes 277-82 and accompanying text.

273 *See* Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944).

274 *Id.* Repose is the concept that after a certain number of years, courts should no longer hold a defendant responsible for her past acts. *See* William L. Prosser et al., Cases and Materials on Torts 607 (8th ed. 1988).

275 *See Order of R.R. Telegraphers*, 321 U.S. at 348-49. Largely because of

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not persuasive in the context of adult survivor suits.[276]

First, the concept of a plaintiff "sleeping" on her rights assumes knowledge of those rights.[277] Yet, the premise of a delayed discovery rule is that the plaintiff does not know she has any rights against the defendant.[278] Second, courts have consistently held that defendants have no vested right of repose.[279] Finally, the modern hearsay[280] and legal relevance[281] doctrines

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the problem of stale claims, one commentator has urged courts to allow delayed discovery only in cases that satisfy two criteria. *See* Duffy, *supra* note 158, at 778. First, the unfairness of precluding a justified claim must outweigh the risk of a stale claim. *Id.* Second, objective, verifiable evidence of abuse must exist. *Id.*

The dissent in a recent California Supreme Court case offers a good example of the concerns underlying the stale claims argument. *See* John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 962-63 (Cal. 1989) (Eagleson, J., concurring and dissenting). Justice Eagleson envisioned the following scenario of a defendant's plight during a civil trial for child abuse:

> A defendant charged with a molestation that allegedly occurred five or ten years ago is at a terrible disadvantage. The plaintiff, perhaps still a child, understandably has the jury's sympathy. The defendant has only his denial . . . . A defendant charged with other crimes, e.g., murder or robbery, can attempt to show that he was elsewhere when the crime was committed. Consider, however, the trial of an action for molestation many years after the event. The child will likely not remember with any specificity when the alleged molestation occurred. His recollection may be something like "a few years ago or the summer two or three years ago." An innocent defendant will be hard pressed to assert an alibi after passage of such a long and vague period of time.

Id.

276 *See infra* notes 277-82 and accompanying text.

277 *See* DeRose, *supra* note 135, at 220.

278 *Id.* Thus, as one commentator has concluded, refusing to apply an expanded statute of limitations retroactively would not increase the likelihood that plaintiffs would bring timely claims. *Id.*

279 *See* Campbell v. Holt, 115 U.S. 620, 628 (1885); Gallo v. Superior Court, 246 Cal. Rptr. 587, 587 (Ct. App. 1988), *opinion modified*, June 1, 1988. Further, courts have noted that a state has a compelling interest in deterring child abuse and providing redress to its victims. *See* DeRose, *supra* note 135, at 217.

280 *See* CAL. EVID. CODE § 1200 (West 1966) (limiting admission of hearsay); *see also* FED. R. EVID. 801-806 (regulating admission of hearsay).

281 *See* CAL. EVID. CODE § 352 (West 1966) (allowing exclusion of otherwise relevant evidence if probative danger substantially outweighs probative value); *see also* FED. R. EVID. 403 (authorizing exclusion of logically relevant evidence only if probative danger substantially outweighs probative value).

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adequately protect defendants against the potentially prejudicial effects of stale evidence and stale claims.[282] For these reasons, any expanded statute of limitations for actions by adult survivors should be retroactive.

Although section 340.1 provides some benefits to the plaintiffs it does cover,[283] the statute fails to adequately protect the rights

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[282] *See* DeRose, *supra* note 135, at 218-19; Hagen, *supra* note 11, at 375. There is an additional argument against the stale evidence and stale claims criticism of retroactivity. *See* Marsha V. v. Gardner, 281 Cal. Rptr. 473, 483 (Ct. App. 1991) (Johnson, J., dissenting), *dissenting opinion modified*, June 24, 1991, *and rev. denied*, Aug. 22, 1991; *see also* Naomi Berkowitz, Note, *Balancing the Statute of Limitations and the Discovery Rule: Some Victims of Incestuous Abuse are Denied Access to Washington Courts* - Tyson v. Tyson, 10 U. PUGET SOUND L. REV. 721, 734 (1987). This argument draws an analogy to the risk of false or stale claims in the criminal context: "Just as the risk of an erroneous criminal conviction does not stop criminal prosecutions, the mere possibility that the trier of fact will believe a false or stale claim should not prevent the litigation of incestuous abuse cases." *Id.*

Justice Johnson makes an interesting point about the "stale claims" argument. Even absent retroactive application, California Code of Civil Procedure § 352(a) tolls the statute of limitations for adult survivor actions until the plaintiff reaches the age of majority. *See Marsha V.*, 281 Cal. Rptr. at 483 (Johnson, J., dissenting). Because sexual abuse often starts when the child is very young, 10 to 15 years may pass between the abusive acts and the lawsuit. *Id.* Since most memory loss occurs in the first few years after an event, the incremental loss from delaying suit another 5, 10, or even 15 years would be minimal. *Id.* As a result, the evidence will not be "stale" as opposed to "fresh." *Id.* Rather, it will only be "*slightly* more stale" than it would otherwise have been. *Id.* In the case at bar, Johnson concluded:

> [It] makes little sense to deny [Marsha] V. her right to sue when the abusive acts occurred 15 to 23 years before on grounds the evidence is somehow too "stale" in her case while suits are allowed in other like cases where the time span between event and trial is nearly as long or conceivably longer.

Id.

[283] The section benefits plaintiffs in three ways. First, unlike the previous statutory scheme, the 1990 version of § 340.1 does not differentiate between adult survivors abused by a family or household member and those abused by someone else. *See supra* notes 199-206 and accompanying text (describing previous statutory scheme). Thus, an adult survivor abused by her teacher has the same amount of time to sue as an adult survivor abused by her father. *See* CAL. CIV. PROC. CODE § 340.1(a) (West Supp. 1992).

Second, the statute eliminates the *DeRose* Type 1/Type 2 distinction between plaintiffs who repress their memories and those who do not. *See id.* As a result, even a plaintiff who did not repress her memories of abuse may sue her perpetrator. *See id.*

Third, the statute allows plaintiffs two different options for filing suit.

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of those adult survivors in two ways.[284] First, section 340.1 restricts recovery by narrowing the range of injuries for which plaintiffs can claim damages.[285] Unlike the former version of the statute, which allowed claims for both physical and psychological injury caused by childhood sexual abuse,[286] the 1990 version limits recovery to psychological injury.[287] Furthermore, the phrase

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First, a plaintiff may sue any time before she turns 26 (regardless of when the abuse occurred), when she remembered the abuse, or when she connected her injuries to the abuse. *See id.* Alternatively, she can sue within three years of the time she discovered or reasonably should have discovered that childhood sexual abuse caused her injuries. *Id.*

The few judges and commentators who have analyzed the statute have praised these positive features. *See Marsha V.*, 281 Cal. Rptr. at 483 (Johnson, J., dissenting); Lowenstein, *supra* note 11, at 811-13; 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, 466-69 (1991-92); Lamm, *supra* note 131, at 2208; Thomas, *supra* note 170, at 1275-77. However, in addition to its lack of retroactivity, the statute has two serious flaws that make it an imperfect instrument of reform. *See infra* notes 285-304 and accompanying text (describing statute's flaws). Thus, this Comment proposes a revised statute that will maintain the positive features of § 340.1 while remedying its flaws. *See infra* notes 309-14 and accompanying text (detailing proposed revision).

284 *See infra* notes 285-304 and accompanying text.

285 *See infra* notes 286-89 and accompanying text.

286 *See* Act of Sept. 20, 1986, ch. 914, § 1, 1986 Cal. Stat. 3165 (amended 1990). The former statute established a three-year statute of limitations for "any civil action for *injury or illness*" based on conduct between a child and an adult family or household member. *Id.* (emphasis added). Under the former statute, plaintiffs could recover for both physical and psychological harm: " '[i]njury or illness' as used in this section *includes* psychological injury or illness, whether or not accompanied by physical injury or illness." *Id.* (emphasis added). The statute's language provided that "injury or illness" *includes* psychological injuries and illnesses; it did not state that "injury or illness" is *limited to* those of a psychological nature. *Id.* Thus, it enabled plaintiffs to allege and seek compensation for both physical and psychological harm. *See id.*

287 *See* CAL. CIV. PROC. CODE § 340.1(a) (West Supp. 1992). The 1990 version of the statute does not mention physical injury or illness. *See supra* note 20 (providing text of statute). The statute's plain meaning thus suggests that plaintiffs get the benefit of delayed discovery only for psychological injury, not for physical injury. *See* CAL. CIV. PROC. CODE § 340.1(a) (West Supp. 1992). This is true whether or not they were aware of the physical injury when it occurred, and whether or not they knew that the injury resulted from a wrongful act. *See id.* Thus, the statute would completely bar a plaintiff who had suffered permanent physical harm from prolonged childhood sexual abuse from recovering for her physical injuries. *See id.*

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"occurring after the age of majority" implies that if the psychological injury or illness occurred *before* the age of majority, the plaintiff does not get delayed discovery.[288] Other states that have codified a delayed discovery rule have not included such restrictive language in their statutes.[289]

Second, the statute actually discourages adult survivors from suing by adding a burdensome certification requirement to the customary filing process.[290] The statute also imposes stiff penal-

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[288] *See* CAL. CIV. PROC. CODE § 340.1(a) (West Supp. 1992).

[289] *See, e.g.*, WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1992). That statute provides:

> (1) 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 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:
>
> *Provided*, That the time limit for commencement of an action under this section is tolled for a child until the child reaches the age of eighteen years.
>
> (2) The victim need not establish which act in a series of continuing sexual abuse or exploitation incidents caused the injury complained of, but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is part of a common scheme or plan of sexual abuse or exploitation.

Id.; *see also* ME. REV. STAT. ANN. tit. 14, § 752-C (West 1990) (allowing recovery of damages for harm caused by childhood sexual abuse); MINN. STAT. ANN. § 541.073 (West Supp. 1992) (permitting recovery of damages for personal injury resulting from childhood sexual abuse); MONT. CODE ANN. § 27-2-216 (1991) (authorizing recovery of damages for injury caused by childhood sexual abuse); VT. STAT. ANN. tit. 12, § 522 (1990) (enabling recovery of damages for injury resulting from childhood sexual abuse).

[290] *See* CAL. CIV. PROC. CODE § 340.1(d) (West Supp. 1992). The procedure requires the plaintiff's attorney to execute a certificate of merit and file it with the court. *Id.* § 340.1(e)(1). The attorney's certificate of merit must state:

> That the attorney has reviewed the facts of the case, that the attorney has consulted with at least one licensed mental health practitioner who is licensed to practice and practices in this state and who the attorney reasonably believes is knowledgeable of the relevant facts and issues involved in the particular action, and

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ties for failure to satisfy the certification requirement.[291] The requirement prevents the plaintiff from naming the defendant in her complaint until she files "certificates of merit" with the

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> that the attorney has concluded on the basis of that review and consultation that there is reasonable and meritorious cause for the filing of the action. The person consulted may not be a party to the litigation.

Id. The plaintiff must also have at least one licensed mental health practitioner who is not a party to the case execute a certificate of merit and file it with the court. *Id.* § 340.1(e)(2). The mental health practitioner's certificate of merit must state:

> That the mental health practitioner consulted is licensed to practice and practices in this state and is not a party to the action, has interviewed the plaintiff and is knowledgeable of the relevant facts and issues involved in the particular action, and has concluded, on the basis of his or her knowledge of the facts and issues, that in his or her professional opinion there is a reasonable basis to believe that the plaintiff had been subject to childhood sexual abuse.

Id.

The statute does not specify when the certificates must be filed. *See id.* § 340.1(d). The plaintiff, however, may not name the actual defendant or defendants in her complaint until the court has reviewed the required certificates and found good cause for filing the action. *Id.* § 340.1(g). Thus, as a practical matter, the plaintiff must file the certificates at the outset of the litigation.

[291] *Id.* § 340.1(h)-(j). The statute provides three different penalties for failure to comply with the certification requirement. *Id.* First, failure to comply "may constitute unprofessional conduct and may be the grounds for discipline against the attorney." *Id.* § 340.1(h). This explicit threat of State Bar disciplinary action is unusual. *Compare* CAL. CIV. PROC. CODE § 340.1(h) (West Supp. 1992) (establishing penalties for failure to comply with certification requirement) *with* CAL. CIV. PROC. CODE § 340.5 (West 1982) (codifying delayed discovery rule for medical malpractice) *and* CAL. CIV. PROC. CODE § 340.6(a) (West 1982) (codifying delayed discovery rule for attorney malpractice). Neither § 340.5 nor § 340.6(a) threatens disciplinary proceedings against attorneys who violate a procedural element of the statute. *See infra* note 297 (setting forth text of delayed discovery rules for medical and attorney malpractice actions).

In addition, failure to file the required certificates constitutes a ground for either a demurrer or a motion to strike. CAL. CIV. PROC. CODE § 340.1(i) (West Supp. 1992). The statute leaves open the question of whether the court must sustain such a demurrer without leave to amend, or whether the court may in its discretion allow a plaintiff to cure the deficiency by filing the required certificates at a later date. *See id.* Finally, the court may assess attorney's fees against the plaintiff, her attorney, or both if it finds a failure to comply with the specified procedure. *Id.* § 340.1(j).

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court.[292] This requirement applies to any plaintiff twenty-six years of age or older at the time she files suit.[293] Because most adult survivors repress their memories of abuse at least until they reach their early thirties, they will have to satisfy this requirement.[294]

The California Legislature presumably imposed this certification requirement to protect a defendant's reputation and to deter meritless lawsuits.[295] However, no other state that has codified a delayed discovery rule imposes such a requirement on adult survivors.[296] Further, the California Legislature does not apply such a requirement to any other area in which it has codified delayed discovery.[297] Rather, plaintiffs in other types of civil litigation

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[292] *See* CAL. CIV. PROC. CODE § 340.1(g) (West Supp. 1992).

[293] *Id.* § 340.1(d).

[294] *See* Coates, *supra* note 59, at 3; Darnton, *supra* note 59, at 71.

[295] *See* Mithers, *supra* note 258, at 58.

[296] *See* ALASKA STAT. § 09.10.140(b) (1990); IOWA CODE ANN. § 614.8A (West Supp. 1992); ME. REV. STAT. ANN. tit. 14, § 752-C (West Supp. 1991); MINN. STAT. ANN. § 541.073 (West Supp. 1992); MONT. CODE ANN. § 27-2-216 (1991); VT. STAT. ANN. tit. 12, § 522 (Supp. 1991); WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1992).

One state, Vermont, does require the clerk of the court to seal any complaint alleging an act of childhood sexual abuse that occurred more than six years before the filing date. *See* VT. STAT. ANN. tit. 12, § 522(b) (Supp. 1991). The complaint remains sealed until the defendant serves an answer or the court rules on any motion to dismiss by the defendant. *Id.* If the court grants the motion, all court papers remain sealed. *Id.* If the court denies the motion, the clerk unseals the complaint. *Id.*

While the same concern—avoiding harm to an innocent defendant's reputation—undoubtedly motivated the Vermont and California legislatures, the Vermont provision is much more narrowly tailored to achieve this goal. *See id.* First, a Vermont court does not determine at the outset whether the plaintiff has good cause to file the lawsuit based solely on "certificates of merit"—that is, without first examining the defendant's responsive pleadings. *See id.* Rather, as in any other civil lawsuit, the judge lets the defendant make his own case. *See id.* Second, the Vermont statute does not contain any sort of sanctions directed against plaintiffs and their attorneys. *See id.*

[297] *See* CAL. CIV. PROC. CODE § 340.5 (West 1982). This section codifies the delayed discovery rule for medical malpractice. *See id.* The statute does not require plaintiffs' attorneys to file certificates of merit. *See id.* Rather, the statute provides:

> In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or

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routinely file complaints against named defendants without an initial judicial screening for reasonable and meritorious cause.[298]

This provision perpetuates a perennial problem for adult survivors: societal[299] and judicial resistance to their claims.[300] It is difficult for an adult survivor to file a lawsuit in the first place.[301]

> through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person.

Id. Similarly, the delayed discovery rule for legal malpractice omits any mention of a certification requirement. *See* CAL. CIV. PROC. CODE § 340.6(a) (West 1982). This section states:

> An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.

Id. The statute further provides that in no instance can the statute of limitations for legal malpractice exceed four years, unless it is tolled for one of the following reasons: (1) the plaintiff has not sustained actual injury, (2) the attorney continues to represent the plaintiff in the same subject matter, (3) the attorney willfully conceals the facts constituting the wrongful act or omission from the plaintiff, or (4) the plaintiff is under a legal or physical disability. *Id.*

298 *See, e.g.*, CAL. CIV. PROC. CODE § 340.3 (West Supp. 1992) (providing statute of limitations for civil action premised on commission of felony). This is true even when the facts or causes of action pleaded are particularly heinous and thus likely to harm the defendant's reputation if made public—presumably the rationale for the certification requirement. *See* Mithers, *supra* note 258, at 58. This includes civil actions premised on criminalized sexual activity between adults, such as rape and nonconsensual sodomy. *See generally id.*

The "reasonable and meritorious cause" requirement also raises a significant procedural issue. *See* CAL. CIV. PROC. CODE § 340.1(e)(1) (West Supp. 1992). The statute leaves open the possibility that if the plaintiff's certificate does not satisfy the court, the court may simply dismiss the suit on its own motion, without ever requiring the defendant to appear. *See id.*

299 *See* Lowenstein, *supra* note 11, at 830.

300 *Id.*

301 *See supra* notes 105-11 and accompanying text. Placing a survivor's complaint "on hold" until a judge determines that "reasonable and meritorious cause" exists will exacerbate any self-doubt the survivor harbored before filing. *See* Astrachan & Freer, *supra* note 112, at 81-82.

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Most survivors who sue do so because they want to confront their perpetrators in public.[302] The certification requirement, however, largely negates the empowerment that the right to sue affords the survivor—that is, the ability to name the perpetrator and place the blame for the abuse on him.[303] Further, the statute's penalty provisions may discourage plaintiffs' attorneys from accepting adult survivor cases.[304]

Because neither the common law nor the existing statute adequately protects adult survivors, the California Legislature should abolish California's two-tier system for handling adult survivor suits.[305] The California Legislature should replace the system with a revised statute that makes delayed discovery available to all adult survivors, regardless of when they sue.[306] The revised statute should also allow recovery for physical as well as psychological injury.[307] Finally, the revised statute should eliminate section 340.1's burdensome certification requirement.[308]

III. Proposed Statutory Scheme for Handling Civil Suits by Adult Survivors of Childhood Sexual Abuse

This Comment proposes a revised statute that remedies the defects of California's two-tier system.[309] First, the revised stat-

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Such a determination is tantamount to questioning whether the survivor is telling the truth when she claims that the defendant abused her. *See id.* Thus, like the victim in a rape prosecution, the survivor will be on trial. *See* FRED E. INBAU ET AL., CASES AND COMMENTS ON CRIMINAL LAW 284 (4th ed. 1987) (describing historical skepticism of courts toward rape victims).

302 *See* Mithers, *supra* note 258, at 58.

303 *See supra* notes 99-100 and accompanying text.

304 *See supra* note 291 and accompanying text (describing statutory penalties).

305 *See supra* notes 195-304 and accompanying text (describing two-tier system's flaws).

306 *See infra* notes 310-12 and accompanying text.

307 *See infra* note 313 and accompanying text.

308 *See infra* note 314 and accompanying text.

309 The proposed revision would replace § 340.1 with the following language:

> (a) In any civil action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that the injury or illness complained of was caused by sexual abuse, whichever occurs later. "Injury or illness" as used in this section

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ute requires retroactive application of a delayed discovery rule to adult survivor suits.[310] It also authorizes courts to apply equitable delayed discovery principles to *any* case of childhood sexual abuse that does not meet the requirements of the statute.[311] Thus, the revised statute allows those survivors omitted from the 1990 statutory scheme to use a delayed discovery rule.[312] Second, the revised statute explicitly permits recovery for both physical and

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> includes both physical and psychological injury or illness. Psychological injury or illness need not be accompanied by physical injury or illness in order to be actionable under this section.
> (b) This section shall apply to both of the following:
> (1) Any action commenced on or after the effective date of this act, including any action which would be barred by application of the statute of limitations applicable prior to the effective date of the act.
> (2) Any action commenced prior to the effective date of this act and pending on the effective date of this act.
> (c) Nothing in this section shall be construed to preclude the courts from applying equitable exceptions to the running of the applicable statute of limitations, including exceptions relating to delayed discovery of physical and/or psychological injuries, with respect to actions which do not meet the requirements of subsection (a) of this section.

The language in subsections (a) and (b) is drawn largely from the first amended version of Senate Bill 108. *See* CALIFORNIA LEGISLATURE-SENATE-BILLS, 1989-1990 Session (S.B. 106-130) (S.B. 108, amended February 6, 1989). Washington has adopted a similar provision. *See* WASH. REV. CODE ANN. § 4.16.340(1) (West Supp. 1992). Section 4.16.340(1) provides that the action must be brought within three years of the act alleged to have caused the injury or condition, 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 within three years of the time the victim discovered that the act caused the injury for which the claim is brought, whichever period expires later. *Cf.* MINN. STAT. ANN. § 541.073 (West Supp. 1992) (providing that action must be brought within six years "of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse"). The language in subsection (c) tracks the 1990 statute insofar as it authorizes equitable delayed discovery. *See* CAL. CIV. PROC. CODE § 340.1(*l*) (West Supp. 1992).

[310] *See supra* notes 260-82 and accompanying text (explaining why California Legislature should apply delayed discovery rule retroactively).

[311] *See supra* note 309 and accompanying text. This gives judges a way to "do justice" in an appropriate case.

[312] *See supra* notes 195-96 and accompanying text.

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psychological injury or illness.[313] Finally, the revised statute deletes section 340.1's certification procedure.[314]

CONCLUSION

Historically, strict application of the statute of limitations has barred most suits by adult survivors of childhood sexual abuse.[315] A delayed discovery rule would allow survivors to surmount this obstacle.[316] Unfortunately, California's two-tier system for handling adult survivor suits unduly limits the availability of delayed discovery.[317]

This limitation flies in the face of California's traditional leadership in areas of concern to adult survivors.[318] California has contributed significantly to the development of tort law, family law, equitable and statutory doctrines of delayed discovery, and the diagnosis and treatment of child abuse.[319] Indeed, the 1986 version of section 340.1 was one of the first expansions of a statute of limitations for adult survivor actions in the United States.[320] Thus, it is ironic that current California law poses significant obstacles to adult survivor suits.[321]

The revised statute that this Comment proposes eliminates these obstacles by abolishing California's two-tier system. The revised statute applies a single standard to all adult survivors, regardless of whether they are *DeRose* Type 1 or Type 2 plaintiffs,[322] and regardless of whether they sued before or after January 1, 1991. It thus gives the class of survivors ignored by the 1990 revision to section 340.1 the same opportunity to seek compensation for their injuries as other survivors.[323] Further, it allows all survivors to recover for physical as well as psychological damages.[324] Finally, the revised statute removes the obstacle to

[313] *See supra* notes 285-89 and accompanying text (discussing present recovery standards).

[314] *See supra* notes 290-304 and accompanying text (discussing present certification requirement).

[315] *See supra* note 117 and accompanying text.

[316] *See supra* notes 158-81 and accompanying text.

[317] *See supra* notes 187-94 and accompanying text.

[318] *See* Salten, *supra* note 95, at 205.

[319] *Id.*

[320] *Id.* at 205-06.

[321] *See supra* notes 189-304 and accompanying text.

[322] *See supra* note 223 and accompanying text.

[323] *See supra* note 251 and accompanying text.

[324] *See supra* note 313 and accompanying text.

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adult survivor suits that section 340.1's certification procedure poses.[325] The proposed statute therefore guarantees that Jane Roe will receive the same treatment, regardless of when she filed her lawsuit.

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[325] *See supra* note 314 and accompanying text.

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