

Article

DELAYED RESPONSES TO CHILD SEXUAL ABUSE, THE KAVANAUGH CONFIRMATION HEARING, AND ELIMINATING STATUTES OF LIMITATION FOR CHILD SEXUAL ABUSE CASES

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INTRODUCTION

The current literature on responses of childhood sexual abuse¹ victims routinely finds that delayed responses and reporting of the abuse are not exceptional. While disclosure rates of child sexual abuse reflect only approximately 10% of actual offenses committed, in 2015, about 57,000 cases of child sexual abuse were reported in the United States.² Delays of 30 years or more before victims disclose incidents of sexual abuse are not uncommon.³ The shame and humiliation suffered by these victims often makes it difficult to disclose to loved ones what occurred to them, and even more so, to seek legal recourse for their abuse. This is not to suggest that all victims of childhood sexual abuse delay reporting to caregivers for years or longer, but the process of delay in reporting has been long recognized by professionals working in the field, including therapists, physicians, and lawyers. The legal system's failure to identify this phenomenon and to respond appropriately has not gone unnoticed.⁴

The American Academy of Pediatrics defines child sex abuse as "engaging children in sexual activities they cannot understand or consent to, including genital or anal contact; exposing the child to exhibitionism, voyeurism, or sexually explicit material; using the child in pornography; and pandering the child for sex by others."⁵ In some cases, there may be limited or no physical evidence available, but it is still possible to render a medical diagnosis of child sexual abuse.⁶ The child's lack of comprehension of the abuse coupled with an inability to consent or to withhold consent are central to the act. The World Health Organization offers a more extensive definition:

¹ "The term *sexual abuse* describes a wide range of sexually assaultive activities and circumstances." David P.H. Jones, *Assessment of Suspected Child Sexual Abuse*, THE BATTERED CHILD 296 (Mary Edna Helfer et al. eds., 5th ed. 1997).

² Jacquelyn F. Duron, *Legal Decision-Making in Child Sexual Abuse Investigations: A Mixed-Methods Study of Factors that Influence Prosecution*, 79 CHILD ABUSE & NEGLECT 302 (2018) (57,286 cases of child sexual abuse were reported according to the U.S. Department of Health and Human Services. Statistics from 22 countries indicate that 7% of men and 19% of women have experienced some form of sexual abuse by the time they are 18 years old, or 703 million women and 266 million men having experienced child sexual abuse in reporting countries ("CSA")).

³ For an early study of the process of delayed reporting by sex abuse survivors, see Daniel W. Smith et al., *Delay in Disclosure of Childhood Rape: Results from a National Survey*, 24 CHILD ABUSE & NEGLECT 273 (2000).

⁴ The scope of this article is limited to acts of sexual abuse in a non-war context. The application of the discussion to wartime sexual violence falls outside the scope of this piece, and it constitutes a tragic and complex reality for millions of women victimized over centuries. See Kimberly E. Carson, *Reconsidering the Theoretical Accuracy and Prosecutorial Effectiveness of International Tribunals' Ad Hoc Approaches to Conceptualizing Crimes of Sexual Violence as War Crimes, Crimes Against Humanity, and Acts of Genocide*, 39 FORDHAM URB. L.J. 1249 (2012).

⁵ Nancy Kellogg & Comm. on Child Abuse & Neglect, *The Evaluation of Sexual Abuse in Children*, 116 PEDIATRICS 506 (2005).

⁶ Jan Bays & David Chadwick, *Medical Diagnosis of the Sexually Abused Child*, 17 CHILD ABUSE & NEGLECT 91 (1993); also see Joyce A. Adams et al., *Updated Guidelines for the Medical Assessment and Care of Children Who May Have Been Sexually Abused*, 29 J. PEDIATRIC & ADOLESCENT GYNECOLOGY 81 (2016).

Child sexual abuse is the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the laws or social taboos of society. Child sexual abuse is evidenced by this activity between a child and an adult or another child who by age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person. This may include but is not limited to: —the inducement or coercion of a child to engage in any unlawful sexual activity; —the exploitative use of a child in prostitution or other unlawful sexual practices; —the exploitative use of children in pornographic performance and materials.⁷

Manipulating relationships of trust with children for purposes of gratifying the abuser is yet another component of this form of abuse.⁸ For example, the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders—Fifth Edition (“DSM-5”), defines child sexual abuse as:

Child sexual abuse encompasses any sexual act involving a child that is intended to provide sexual gratification to a parent, caregiver, or other individual who has responsibility for the child. Sexual abuse includes activities such as fondling a child's genitals, penetration, incest, rape, sodomy, and indecent exposure. Sexual abuse also includes noncontact exploitation of a child by a parent or caregiver—for example, forcing tricking, enticing threatening, or pressuring a child to participate in acts for the sexual gratification of others, without direct physical contact between child and abuser.⁹

This definition interestingly requires interaction intended to gratify “a parent, caregiver, or other individual who has responsibility for the child.”¹⁰

⁷ WHO Consultation on Child Abuse Prevention ... American Academy of Pediatrics and their Committee on Childhood Abuse and Neglect in their policy reports: “Child sexual abuse is defined as engaging children in sexual activities they cannot understand or consent to, including genital or anal contact; exposing the child to exhibitionism, voyeurism, or sexually explicit material; using the child in pornography; and pandering the child for sex by others.”

⁸ David P.H. Jones, psychiatrist and senior clinical lecturer in child and family psychiatry at Oxford University, defined “child sexual abuse very simply as ‘the actual or likely occurrence of a sexual act (or acts) perpetrated on a child by another person.’” Jones, *supra* note 1, at 296. This broad-based definition would likely include a larger number of victims than the definition provided by the DSM-5. Dr. Jones’ definition of child sexual abuse also turns on the issue of assessing whether sexual abuse has occurred results in *exploitation* of the child victim. *Id.* at 297. He states that exploitation means the balance of power between the child and the other person at the time when the sexual activity first occurred, and if it was unwanted when it first began and/or involved a misuse of conventional age, authority, or gender differentials, or when the suspected perpetrator is five or more years older than the child, there will generally have been an exploitation of the age differential. *Id.*

⁹ AM. PSYCH. ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 718 (5th ed. 2013).

¹⁰ *Id.*

Curiously, defining an abuser as one who has responsibility for the child seems to create a limitation—it results in adult abusers with no “responsibility” for the victim actually being excluded from the diagnostic criteria for child sexual abuse. It is unclear whether this was intentional omission, but it might well alter the numbers of those who would otherwise fit the diagnosis.

How an organization defines child sexual abuse clearly reflects its perspective and priorities. During the first decades of research on child sexual abuse, there was no consistency in terminology, methods, and results. But much of that changed in 1989, when published research began to include Photo documentation which increased consistency and clarity among researchers.¹¹ Groups of professionals, however, continue to employ various definitions for child sexual abuse. Physicians who engage in clinical practice treating child patients, for instance, may be less focused on including the identified perpetrators in the definition, so that child sexual abuse focuses on the child victim;¹² whereas, the definition contained in the DSM-5 limits the definition to acts performed by adult perpetrators or someone who has responsibility for the child. The DSM-5 definition might eliminate adolescent perpetrators, other child perpetrators, or adults who bear no responsibility for the child victim. It is worth noting these discrepancies among specialized organizations’ definitions reflect a jurisdiction’s decision as to which definition of child sexual abuse will either include or exclude victims based on the selected definition of abuse. It should also be noted that organizations of various experts working in the field may amend the definitions from time to time as the literature improves the knowledge base and empirical data available on child sexual abuse.¹³

Contrary to conventional wisdom is the notion that physical evidence will corroborate a medical interview of a child where sexual abuse is suspected.¹⁴ Researchers have often concluded that “medical, social, and legal professionals have relied too heavily on the medical examination in diagnosing child sexual abuse.”¹⁵ In many cases, if not most, there will be no physical evidence of the sexual misconduct.¹⁶ One medical evaluator found:

¹¹ Astrid Heger et al., *Children Referred for Possible Sexual Abuse: Medical Findings in 2384 Children*, 26 CHILD ABUSE & NEGLECT 645, 646 (2002).

¹² Jones, *supra* note 1.

¹³ Thus, the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders which provides a comprehensive listing of mental disorders, conditions and illnesses is currently in its 5th edition, although previous editions included a numbered edition in addition to revised editions using the same number of the previous edition, so more than five versions of the organization’s DSM have evolved over time.

¹⁴ Notwithstanding, the literature exists for collecting forensic evidence in child sex abuse cases when it is available. See Jonathan D. Thackeray et al., *Forensic Evidence Collection and DNA Identification in Acute Child Sexual Assault*, 128 PEDIATRICS 227 (2011).

¹⁵ Heger et al., *supra* note 11, at 645.

¹⁶ One report on prosecuting child sexual abuse found that child sexual abuse cases are notoriously difficult to prosecute: “A challenge in these cases [prosecuting child sexual abuse] is that they often rely heavily on the statements of the child victim. Not unlike cases of adult rape, in cases of CSA [child sexual abuse] physical evidence of the assault is present for fewer than 5% of the victims.” Stephanie D. Block

In cases of suspected child sexual abuse, a careful, well-conducted interview is likely to be even more critical to making the diagnosis than is the physical examination. Before they make a decision about the disposition of a child who has disclosed sexual abuse, parents, caseworkers, police officers, attorneys, and judges often demand that the child undergo a physical examination. Health care providers must explain to them that intervention determinations should not be based on the medical findings alone. It must be stressed that a normal examination not only *does not refute* the possibility that a child has been abused—the absence of physical evidence of sexual abuse, especially in nonacute cases, is in fact the *expected finding*.¹⁷

The child's history "remains the single most important diagnostic feature in coming to the conclusion that a child has been sexually abused."¹⁸ It is worth noting that this lack of physical evidence in child sexual abuse may be problematic for lawyers seeking to introduce evidence in trial settings,¹⁹ but it is crucial to think of child sexual abuse along a type of spectrum, with acute abuse varying from nonacute abuse, and with consideration of the many forms of sexual abuse. Not all sex abuse cases culminate in rape or penetration. In fact, the misapprehension that physical evidence might become unavailable over an extended period of time is based upon a presumption that physical evidence existed in the first place, that it was readily available²⁰ and that it required preservation. While that may be an accurate presumption in some cases, it is inapplicable in many—if not most—cases of child sexual abuse.²¹

& Linda M. Williams, *The Prosecution of Child Sexual Abuse: A Partnership to Improve Outcomes*, NAT'L INST. OF JUST., OFF. OF JUST. PROGRAMS, U.S. DEPT. OF JUSTICE grant No. 2014-MU-MU-0001, Univ. of Massachusetts, Lowell (Feb. 2019).

¹⁷ Susan K. Reichert, *Medical Evaluation of the Sexually Abused Child*, THE BATTERED CHILD 313 (Mary Edna Helfer, Ruth S. Kempe, Richard D. Krugman, eds., 5th ed., revised and expanded 1997), citing Joyce A. Adams et al., *Examination Findings in Legally Confirmed Child Sexual Abuse: It's Normal to Be Normal*, 94 PEDIATRICS 310 (1994).

¹⁸ Heger et al., *supra* note 11, at 645.

¹⁹ "A normal physical exam is common in child sexual abuse. Even when the offender has confessed to penetration, the examination may be normal. Thus, examiners must use historical as well as physical information to reach a diagnosis. Paradise (1990) has summarized data from 12 studies of reported medical findings in children who were allegedly sexually abuse ... Normal examinations were reported in 26% to 73% of girls (mean 50%) and 17% to 82% (mean 53%) of boys. Findings diagnostic of sexual abuse, for example, the presence of genital trauma, sexually transmitted diseases or sperm, were found only in 3% to 16% of child victims." Bays & Chadwick, *supra* note 6, at 91, 92.

²⁰ Surveyed prosecutors indicated that "prosecution of child maltreatment is difficult, because evidence is often sparse and often so much of the effort to prove abuse in court rests on the child's testimony. Small proportions of cases are prosecuted." Theodore P. Cross & Debra Whitcomb, *The Practice of Prosecuting Child Maltreatment: Results of an Online Survey of Prosecutors*, 69 CHILD ABUSE & NEGLECT 20 (2017).

²¹ "While the child's history remains the most important piece of evidence in child sexual abuse evaluations, physical findings result from sexual abuse, when present, are important in the investigative and legal arenas." Adams et al., *supra* note 6, at 85.

There may be no medically-collected physical evidence or law enforcement-collected physical evidence to support the victim's statement.²² Small proportions of child sexual abuse cases are actually prosecuted because of the lack of evidence in most cases.²³ Bays and Chadwick have identified eight factors that contribute to the lack of physical findings substantiating child sexual abuse. They preface their list of factors by acknowledging that over a 20-year span, the criteria for what constitutes physical evidence of molestation has changed as clinical studies on abused and nonabused children have increased;²⁴ nevertheless, their identified factors include:

(a) Delay in seeking a medical examination decreases the likelihood of positive findings...36 of children examined within 24 hours of penetrating sexual assault had evidence of genital trauma but only 13% had such evidence when seen after 24 hours....irritation and inflammation of the genitals, found in 21 of 31 child victims seen within one week of sexual assault, were not seen at all in victims after a delay of a week or more.

(b) Semen or evidence of ejaculate are unlikely to be found during examination of sexually abused children, particularly if the child has washed, urinated or defecated and more than 72 hours have elapsed since the assault.

(c) When injuries do occur, healing can be rapid...[and w]ith the onset of puberty, evidence of injury can be obscured by changes in hymen tissue due to estrogen effect.

(d) Many types of sexual molestation such as fondling, "French kissing," oral sodomy, and cunnilingus, do not leave physical findings.

(e) Because rape is defined as penetration, however slight, of the vulval cleft, rape can occur without ejaculation or damage to tissues like the hymen.

(f) 34% of rapists of adult women had erectile or ejaculatory dysfunction. Pedophiles may suffer similar dysfunction, decreasing the chance their abusive activity will leave evidence behind.

²² See Wendy A. Walsh et al., *Prosecuting Child Sexual Abuse: The Importance of Evidence Type*, 56 CRIME & DELINQ. 436 (2010).

²³ Cross & Whitcomb, *supra* note 20.

²⁴ Bays & Chadwick, *supra* note 6, at 94.

(g) The anal sphincter allows routine passage of stools larger in diameter of a penis without damage.

(h) Hymen tissue is elastic...and full penetration by a finger or penis, particularly in an older child, may cause no visible trauma or simply enlarge the hymenal opening.²⁵

Thus, three-day delays or more in reporting abuse complicate the process of rendering medical diagnoses of child sexual abuse, but even brief delays may impact those conditions observable by medical personnel. Updating guidelines for evidence collection in child sex abuse cases is ongoing.²⁶ Recent studies confirm that DNA is “predominantly recovered when examinations of prepubertal children are conducted less than 24 hours from the time of assault,” so current guidelines suggest changing what had been known as the “72-hour rule” for evidence collection in young children be upgraded to collect evidence within 24 hours of the time of the assault [but still within 72 hours for adolescent victims].²⁷ In those cases where actual physical injuries manifest as a result of sexual abuse, healing often occurs at a rapid rate and may be complete by the time a physician is able to perform an evaluation.²⁸ Unlike adults where abrasions, cuts and bruises may take a week or more before they heal, young children are still growing, and their healing processes generally are far more rapid than adult counterparts.

These are not easy cases to litigate,²⁹ and the credibility of victims becomes critical to the outcome of court cases.³⁰ Understanding the difficulties involved in cases with very young victims that have a limited vocabulary and even further limited comprehension of sexual matters may become pivotal to litigation.³¹ Testifying in court by young victims can be very stressful,³² and although testifying can result in better mental health outcomes for victims, having to testify repeatedly has been associated with poorer mental health outcomes for victims.³³ Identifying expert medical testimony to present in

²⁵ *Id.*

²⁶ See Rebecca Girardet et al., *Collection of Forensic Evidence from Pediatric Victims of Sexual Assault*, 128 PEDIATRICS 233 (2011).

²⁷ Adams et al. *supra* note 6, at 82.

²⁸ *Id.* at 95.

²⁹ See Theodore P. Cross et al., *Prosecution of Child Sexual Abuse: Which Cases Are Accepted*, 19 CHILD ABUSE & NEGLECT 1431 (1994).

³⁰ See Cross & Whitcomb, *supra* note 20, at 21.

³¹ See Delores D. Stroud et al., *Criminal Investigations of Child Sexual Abuse: A Comparison of Cases Referred to the Prosecutor to Those Not Referred*, 24 CHILD ABUSE & NEGLECT 689 (2000).

³² See Desmond K. Runyan et al., *Impact of Legal Intervention on Sexually Abused Children*, 113 J. PEDIATRICS 647 (1988).

³³ Cross & Whitcomb, *supra* note 20, at 20-21.

court proceedings³⁴ is often beyond the "realm of standard medical practice."³⁵ As a result, bringing experienced experts before a jury or judge becomes crucial in these cases, and being able to explain that in a majority of cases the victims have normal genital examinations and that "a physical examination alone does not prove or disprove that sexual abuse occurred."³⁶

I. MANIFESTATIONS OF CHILD SEXUAL ABUSE

Reactions and responses to child sexual abuse may vary widely among victims.³⁷ Factors that impact the victim and contribute to different outcomes among victims are whether the victim knew the perpetrator prior to the abuse—as in the majority of sex abuse cases where the children know the authority figure or family member—how frequent the child's exposure to the sexual abuse was, and the child's age at the time of the abuse.³⁸ Approximately one out of three victims of child sexual abuse develop post-traumatic stress disorder.³⁹ One group identified many variations in abuse outcomes:

Longitudinal studies of girls who were sexually abused in childhood or early adolescence reveal deleterious effects across a host of biopsychosocial domains (the impact on boys has not been well established to date). The most illustrative of these studies followed a sample of sexually abused girls for 23 years, documenting problems and concerns at home, school, and with peers. The pattern and extent of harm to these girls was substantial: Comparison to a non-abused comparison group of girls those with histories of sexual abuse had significant neurodevelopmental differences in their responses to stress; earlier onsets of puberty; greater cognitive deficits; more mental health problems (especially depression and PTSD); higher rates of obesity; and more major illnesses and health care utilization. They

³⁴ Complicating the role of expert witnesses is the realization that in other components of this litigation, reliance on experts to "prove" that an individual is a sex offender may be frustrating because "[i]n fact, no instrument, or group of instruments, has yielded a clearly defined set of characteristics, traits, or personality patterns for any group of sex offenders." Holly A. Miller et al., *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions*, 29 L. & HUM. BEHAV. 29, 37 (2005).

³⁵ Adams et al., *supra* note 6, at 86.

³⁶ *Id.*

³⁷ "No specific behavioral syndromes characterize victims of sexual abuse. Sexual abuse involves a wide range of possible behaviors that appear to have widely varying effects on its victims. The absence of any sexualized behavior does not confirm that sexual abuse did not take place any more than the presence of sexualized behavior conclusively demonstrates that sexual abuse occurred; rather, both pieces of information affect the level of suspicion concerning the child's possible experiences and should serve to promote careful and nonsuggestive investigation." Michael E. Lamb, *The Investigation of Child Sexual Abuse: An Interdisciplinary Consensus Statement*, 18 CHILD ABUSE & NEGLECT 1021, 1023 (1994).

³⁸ See Rachel Calam et al., *Psychological Disturbance and Child Sexual Abuse: A Follow-Up Study*, 22 CHILD ABUSE & NEGLECT 901 (1998) (the percentage of sexually abused children with psychological problems actually increased over a two year period following the abuse).

³⁹ Dean Kilpatrick & Benjamin Saunders, U.S. DEP'T OF JUSTICE, *THE PREVALENCE AND CONSEQUENCES OF CHILD VICTIMIZATION* 1, 2 (1997).

also had higher rates of dropping out of high school; self-mutilation; physical and sexual revictimization; teen motherhood; drug and alcohol abuse; and domestic violence in adulthood.⁴⁰

A recent study identified trauma symptoms in child victims which “were highly associated with the degree of self-blame the child felt about the abuse incident(s).”⁴¹ Another health problem found in higher rates among child sexual abuse survivors is insomnia, a previously overlooked manifestation that generated relatively low interest among researchers until recently.⁴² As research continues to expand on child sexual abuse, it is likely that the recognized manifestations in child sex abuse survivors will continue to increase.

In the late 1980s, Finkelhor and Brown proposed a traumagenic model⁴³ to explain the “dynamics of the effects of sexual abuse on children and young people”⁴⁴ and offered an initial explanation as to why some abused children “go on to abuse others as part of their responses to their own abusive experiences.”⁴⁵ Unlike many other victims of crime or misconduct, child sex abuse victims have been identified as subsequently engaging in the very acts of misconduct of which they were once the victims.⁴⁶ Finkelhor and Brown theorized that part of the “traumatic sexualization” which follows abuse, the victim’s inappropriate sexual behavior and responses might be “rewarded” either literally by the abuser or psychologically or physiologically, causing closeness and intimate relationships to become sexualized.⁴⁷ The victim’s sense of powerlessness—which may become part of the abuse—can lead to the victim’s need to control or dominate people or events, thus leading to the

⁴⁰ Christine Wekerle et al., *Child Maltreatment*, CHILD PSYCHOPATHOLOGY 737, 760 (Eric J. Mash & Russell A. Barkley eds., 3d ed. 2014) (citing Penelope K. Trickett, Jennie G. Noll & Frank W. Putnam, *The Impact of Sexual Abuse on Female Development: Lessons from a Multigenerational, Longitudinal Research Study*, 23 DEV. & PSYCHOPATHOLOGY 453 (2011)).

⁴¹ Adams et al., *supra* note 6, at 82.

⁴² Iris M. Steine et al., *Insomnia Symptoms Trajectories Among Adult Survivors of Childhood Sexual Abuse: A Longitudinal Study*, 93 CHILD ABUSE & NEGLECT 264 (2019).

⁴³ David Finkelhor & Angela Browne, *The Traumatic Impact of Child Sexual Abuse: An Update*, 55 AM. J. ORTHOPSYCHIATRY 530 (1985); also see Finkelhor & Browne, *Initial and Long-Term Effects: A Conceptual Framework*, in DAVID FINKELHOR, SOURCEBOOK ON CHILD SEXUAL ABUSE (Sage 1986).

⁴⁴ Marcus Erooga & Helen Masson, *Children and Young People Who Sexually Abuse Others: Incidence, Characteristics and Causation*, in MARCUS EROOGA & HELEN MASSON, CHILDREN AND YOUNG PEOPLE WHO SEXUALLY ABUSE OTHERS, CHALLENGES AND RESPONSES 2-3 (Marcus Erooga & Helen Masson eds., 1st ed. 1999).

⁴⁵ *Id.* at 2.

⁴⁶ Nevertheless, “it would appear that girls who sexually abuse are much more likely to have experienced sexual abuse themselves ... approximately 77 per cent of girls and women who sexually abuse are also sexual abuse victims ... In contrast ... 30 and 50 per cent of boys are themselves victims of sexual abuse...[and yet] only a few of the many tens of thousands of female victims of child sexual abuse become perpetrators.” Anne Blues et al., *Work with Adolescent Females who Sexually Abuse*, in MARCUS EROOGA & HELEN MASSON, CHILDREN AND YOUNG PEOPLE WHO SEXUALLY ABUSE OTHERS, CHALLENGES AND RESPONSES 172 (Marcus Erooga & Helen Masson eds., 1st ed. 1999).

⁴⁷ Masson & Erooga, *supra* note 44, at 3.

re-enactment of the abuse.⁴⁸ The abuse, especially if left untreated, may create a cycle of victimization.⁴⁹ This continuity of sexual misconduct requires further study, but it should be addressed by any legal reforms seeking to increase access of child sexual victims to court remedies.⁵⁰ The theories seeking to explain patterns of behavior by child sex abusers would not easily be replicated through studies,⁵¹ but the patterns of behavior themselves can be identified and studied.⁵²

Any legislative proposal providing self-identified victims of sexual misconduct access to the court system should not overlook some of the damaging complications associated with sexual misconduct. Just as current studies show delays in victims reporting child sexual abuse, studies also identify a pattern of child victims becoming perpetrators of sexual abuse.⁵³ This is not to suggest that any victim of sexual abuse will eventually become a perpetrator of sexual abuse.⁵⁴ Researchers have found that "being abused is far from being a predictive factor in becoming abusive, and only around 50 percent of young abusers have themselves experienced sexual victimization."⁵⁵ Criminal career trajectories⁵⁶ of children and adolescents with sexual behavior

⁴⁸ *Id.*

⁴⁹ See Kristen M. Benedini et al., *The Cycle of Victimization: The Relationship Between Childhood Maltreatment and Adolescent Peer Victimization*, 59 CHILD ABUSE & NEGLECT 111 (2016). Nevertheless, some researchers continue to challenge this cycle and have concluded that they have been unable to confirm any association between sexual abuse and sexual offending. See Chelsea Leach et al., *Testing the Sexually Abused-Sexual Abuser Hypothesis: A Prospective Longitudinal Birth Cohort Study*, 51 CHILD ABUSE & NEGLECT 144 (2015).

⁵⁰ For a recent compilation of the multitude of studies documenting sex offenders having been sexually abused themselves, see Alan J. Drury et al., *Childhood Sexual Abuse Is Significantly Associated with Subsequent Sexual Offending: New Evidence Among Federal Correctional Clients*, 95 CHILD ABUSE & NEGLECT 104035 (2019).

⁵¹ Nevertheless, the cycles of sexual abuse for some survivors of childhood sexual abuse can be studied and documented. See Alan R. King et al., *Revisiting the Link Between Childhood Sexual Abuse and Adult Sexual Aggression*, 94 CHILD ABUSE & NEGLECT 104022 (2019) ("These results were consistent with other studies showing association between CSA and adult sexual aggression." *Id.* at 7).

⁵² See Arnon Bentovim & Bryn Williams, *Children and Adolescents: Victims Who Become Perpetrators*, 4 ADVANCES PSYCHIATRIC TREATMENT 101 (1998).

⁵³ R.K. Hanson & S. Slater, *Sexual Victimization in the History of Sexual Abusers: A Review*, 1 ANNALS SEX RSCH. 485 (1988).

⁵⁴ Although not suggesting that there is a concrete cause and effect connection between child sex abuse and child sex abusing, one expert has noted that in cases especially involving boys who have been sexually victimized, "the first indication of their sexual victimization occurs when they sexually abuse younger children. Many sexual abuse victims do not present until adult life, when they exhibit a wide variety of symptoms, including sexual dysfunction, suicidal behavior, drug and alcohol abuse, prostitution, personality disorder, and psychiatric illness. On occasion, the manifestation in adults do not emerge until they themselves become parents." Jones, *supra* note 1, 296, 298.

⁵⁵ Marcus Erooga & Helen Masson, *Children and Young People who Sexually Abuse Others: Incidence, Characteristics and Causation*, in CHILDREN AND YOUNG PEOPLE WHO SEXUALLY ABUSE OTHERS, CHALLENGES AND RESPONSES 3 (Marcus Erooga & Helen Masson eds., 1st ed. 1999).

⁵⁶ See Alfred Blumstein et al., *Criminal Career Research: Its Value for Criminology*, 26 CRIMINOLOGY 1 (1988).

problems is now the focus of researchers attempting to better understand the factors that lead to sexual offending.⁵⁷

One of the more horrific consequences of children being exposed to sexual abuse is the victims themselves becoming victimizers of other children.⁵⁸ Hopefully, by providing these children with access to current therapeutic interventions, this particular symptom of some abuse victims might be responsive to treatment.⁵⁹ Furthermore, if statutes of limitations are eliminated, child victims who are now adults will have the possibility as part of their legal remedy to make the abuser financially liable for any necessary treatment or interventions.

It is important to remain open to refining legislation, even after initial adoption of legal reforms, as many initiatives seeking to aid child victims are now known to have limited effectiveness in practice. For instance, state statutes seeking to alert the public to convicted sex offenders by compelling them to register in publicly accessible databases offer little to no public protection in the majority of child sex abuse cases where the victim knows the offender or the victim is related to the offender.⁶⁰ Such laws appear to have been based upon the assumption that the majority of child molestation cases involve strangers unknown to their victims; however, the majority of child molestation cases do not involve strangers,⁶¹ but members of the child's immediate family, or friends of the family, acquaintances, or authority figures such as clergy members, teachers or scout leaders.⁶²

⁵⁷ See Evan McCuish et al., *Criminal Careers of Juvenile Sex and Non-sex Offenders: Evidence from a Prospective Longitudinal Study*, 14 YOUTH VIOLENCE & JUV. JUST. 199 (2016).

⁵⁸ Blues, Moffat and Telford write that "Given the struggles to accept that children sexually abuse children and that women sexually abuse children, acceptance that female children sexually abuse other children requires an enormous shift in thinking and perception ... Approximately 10 percent of victims of child sexual abuse are molested by women and girls." Blues et al., *supra* note 46, at 169.

⁵⁹ "Treatment can be short-term, long-term, limited, individual, group, marital, supportive, psychodynamic, psychoanalytic, cognitive behavior modification, pharmacological, insight oriented, child oriented, client oriented, parent education oriented, specific to sexual abuse, based on hypnosis, or religious. All methods have sometimes achieved success and sometimes resulted in failure." Brandt F. Steele, *Further Reflections on the Therapy of Those Who Maltreat Children*, THE BATTERED CHILD 566, (Mary Edna Helfer et al. eds., 5th ed., revised and expanded 1997).

⁶⁰ See Leonore M. J. Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 44 ARIZ. L. REV. 485, 486 (1999) (citing to Washington and New Jersey laws requiring community notification of convicted sex offenders, concludes that "although such community notification statutes allow parents to advise children to avoid certain individuals and may facilitate community monitoring of released sex offenders, these laws could promote a false sense of security ... when many molesters are in fact trusted authority figures or family members." Fewer than 10%).

⁶¹ Kelly M. Socia & Andrew J. Harris, *Evaluating Public Perceptions of the Risk Presented by Registered Sex Offenders: Evidence of Crime Control Theater?* 22 PSYCH. PUB. POL'Y & L. 375 (2016) ("[M]any members of the public believe a variety of myths surrounding those who are assigned the 'sex offender' designation. These include myths related to the perceived homogeneity of the sex offender population, the extent and nature of re-offense risk ... and the efficacy of treatment and rehabilitation efforts.").

⁶² In cases where the perpetrators are known by the child victims, longer delays in reporting the sexual abuse occurs, whereas in the cases of strangers or no prior relationship exists between the perpetrator and the child victim, more rapid telling of the abuse is more commonplace. Smith et al., *supra* note 3, at 281.

In the event that state legislatures adopt the proposal to eliminate statutes of limitations as applied to cases involving childhood sexual abuse, it may be necessary to incorporate new evidentiary rules if this legal reform is to achieve meaningful results. In the 1980s, states enacted a number of new procedural rules designed to protect young children coming into court to testify against their abusers. Some legislatures allowed victims to be taped in advance of their court appearance in order to minimize the child's anxiety or to permit the child to present their narrative without doing so in the presence of the alleged perpetrator, which often could be a parent.

Additional reforms were enacted that altered the Rules of Evidence to allow juries or judges to hear the child's recorded testimony and restricted hearsay objections when such evidence was presented in court. However, in *Crawford v. Washington*,⁶³ the Supreme Court held that in a criminal case, although a "testimonial" declaration fits within one of the enumerated exceptions or exclusions to the hearsay rule, for it to be admissible against an accused, the accused must have had the advantages of the right of confrontation under the Sixth Amendment to the U.S. Constitution, with the exception of dying declarations.⁶⁴

In addition, the elimination of statutes of limitations for child sex abuse would be applied prospectively, and not retroactively based on the date of the offense and the date of adoption of the statute that eliminates the statute of limitation in question.⁶⁵ In order to avoid violating the constitutional prohibition against Ex Post Facto laws,⁶⁶ there will be a limited time period during which the existing statute of limitations will govern and restrict some victims from bringing civil actions or appearing as victims in criminal proceedings. However, once there has been adequate notification and with the passage of time, the newly created statute of limitations will become effective.

II. INSTITUTIONAL CHILDHOOD SEXUAL ABUSE PERPETRATORS

What benefit may exist to closing the court to victims who have found it unbearable to disclose the most humiliating and overwhelming occurrence of their life?⁶⁷ Why would any legal system place the efficacy and pragmatics

⁶³ *Crawford v. Washington*, 541 U.S. 36 (2004); see Prudence Beidler Carr, *Playing by All the Rules: How to Define and Provide a Prior Opportunity for Cross-Examination in Child Sexual Abuse Cases After Crawford v. Washington*, 97 J. CRIM. L. & CRIMINOLOGY 631 (2007).

⁶⁴ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁶⁵ See *Stogner v. California*, 539 U.S. 607 (2003) (by updating and changing the statute of limitations, the new law cannot be applied retroactively as that would constitute a violation of the Ex Post Facto Clause of the U.S. Constitution).

⁶⁶ The Ex Post Facto Clause of the U.S. Constitution guarantees against arbitrary and capricious retroactive legislation. See U.S. Constitution, art. I, §9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

⁶⁷ The impact of shame and humiliation on childhood victims of sex abuse should not be underestimated. See Candice Feiring et al., *A Process Model for Understanding Adaptation to Sexual Abuse: The Role of Shame in Defining Stigmatization*, 20 CHILD ABUSE & NEGLECT 767 (1996).

of running a system above the object of achieving a just result for innocent victims of childhood sexual abuse that occurred when the victims were too young to defend themselves,⁶⁸ let alone to contact law enforcement or a lawyer to initiate legal action against the perpetrator?⁶⁹ Of course, there will be powerful and well-funded institutions that will oppose the recommended elimination of statutes of limitations for criminal cases. Such institutions include the Catholic Church,⁷⁰ the Boy Scouts,⁷¹ the U.S. Olympics foundation,⁷² schools,⁷³ colleges and universities and other institutions which have a vested financial interest in limiting the time period during which their exposure to either criminal or civil sanctions might be expanded.⁷⁴

Accusations that such institutions have become complicit in these abuse cases should be subject to the scrutiny of the legal system, not foreclosed because of a generic rationale that at best constructs arbitrary time constraints on potential litigants.⁷⁵ If the cases that eventually include such institutions have merit, then they deserve public hearings and judicial consideration.⁷⁶ If the cases are lacking in merit, then the courts will be free to come to that conclusion. But there can be no end result, one way or another, if arbitrary restrictions in the form of statutes of limitations continue to open the door to some while simultaneously preventing other victims from coming forward and seeking justice in the courts.

If statutes of limitations are eliminated, the attractiveness of bringing civil suits against institutional participants in the abuse⁷⁷ would serve as an

⁶⁸ Very young victims of sexual abuse frequently delay in reporting. See Mikaela Magnusson et al., *Pre-schoolers' Disclosures of Child Sexual Abuse: Examining Corroborated Cases from Swedish Courts*, 70 CHILD ABUSE & NEGLECT 199 (2017).

⁶⁹ See David Viens, *Countdown to Injustice: The Irrational Application of Criminal Statutes of Limitations to Sexual Offenses Against Children*, 38 SUFFOLK U. L. REV. 169 (2004).

⁷⁰ See PHILIP JENKINS, *PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS* (Oxford Univ. Press 1996).

⁷¹ Christina Zhao, *Boy Scouts of America Are Covering up a 'Pedophilia Epidemic,' 350 Alleged Abusers Have Been Named in Lawsuit*, NEWSWEEK (Aug. 7, 2019), <https://www.newsweek.com/boy-scouts-america-are-coving-pedophilia-epidemic-350-alleged-abusers-have-been-named-lawsuit-1452933>.

⁷² Juliet Macur, *Olympic Committee Alerted to Sex Abuse in Gymnastics Years Ago, Court Filing Says*, N.Y. TIMES (Nov. 22, 2018), <https://www.nytimes.com/2018/11/22/sports/gymnastics-abuse.html>.

⁷³ Michael Elsen-Rooney, *First Sex Abuse Cases Against Schools Filed Under Child Victims Act*, N.Y. DAILY NEWS (Aug. 14, 2019), <https://www.nydailynews.com/new-york/education/ny-sexual-abuse-schools-child-victims-20190814-tqrz2lcu4fadzaakdgj4fiylbm-story.html>.

⁷⁴ See Scott Malone, *The Catholic Church Is Fighting to Block Bills that Would Extend the Statute of Limitations for Reporting Sex Abuse*, BUSINESS INSIDER (Sep. 10, 2015), <http://www.businessinsider.com/r-as-pope-visit-nears-us-sex-victims-say-church-remains-obstacle-to-justice-2015-9>.

⁷⁵ See generally, JASON BERRY, *LEAD US NOT INTO TEMPTATION, CATHOLIC PRIESTS AND THE SEXUAL ABUSE OF CHILDREN* (Doubleday 1992).

⁷⁶ See TIMOTHY D. LYTTON, *HOLDING BISHOPS ACCOUNTABLE, HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE* (2008).

⁷⁷ Individual victims of child sex abuse would be expected to lack the deep pocket resources to initiate civil litigation against well-funded organizations that might be willing to spend vast sums of money to protect the organization's reputation. See George Joseph, *U.S. Catholic Church Has Spent Millions*

incentive for plaintiff firms to become involved in representing identified childhood victims.⁷⁸ “The sexual abuse of over 13,000 children and adolescents by Catholic priests in the United States since 1950 is an astonishing fact.”⁷⁹ If the courthouse becomes accessible to such victims of abuse without regard to when the victim reported the abuse, the prospect of involving lawyers seeing contingent fee awards for their clients would help solve one of the additional burdens facing victims: payment and funding of their tort actions against tortfeasors.⁸⁰ As long as state ethics codes permit lawyers to advance funds necessary to initiate legal claims by their clients, a major burden of hiring potential expert witnesses, seeking fact witnesses who may have moved to other jurisdictions, and attempting to obtain discoverable evidence from party opponents could be funded initially by the plaintiff’s lawyer, in the same manner that states permit such funding in other types of contingent fee related representation.⁸¹ This might remove yet another barrier to the court system that might otherwise prevent victims who have remained silent for years from coming forward once they are comfortable in bringing such legal actions. In addition to analyzing the costs of litigation, the benefits of litigating cases involving wealthy institutional child sex abuse perpetrators⁸² often includes therapeutic benefits for victims, and sometimes even the perpetrators of the sexual abuse.⁸³ One author notes that:

Clergy sexual abuse litigation has had a significant impact on therapy for both victims and perpetrators. Public disclosure of abuse claims through litigation has improved treatment for victims. Revelations and publicity about the nature and scope of clergy sexual abuse has made it easier for victims to seek out treatment and, once in therapy, more readily make the connection between past abuse and current difficulties. [One therapist indicates], “As a result of the litigation

Fighting Clergy Sex Abuse Accountability, GUARDIAN (May 12, 2016), <https://www.theguardian.com/us-news/2016/may/12/catholic-church-fights-clergy-child-sex-abuse-measures>.

⁷⁸ Current records indicate massive sums of money (\$2.6 billion) paid by the Catholic Church to settle lawsuits or to pay judgments. One estimate made in 2008 of attorney contingent fees for reported civil cases filed by plaintiffs alleging clergy sexual abuse calculated forty percent (or lower) of the \$2.6 billion in payments made by the Catholic Church (roughly \$1.04 billion in legal fees), while victims received approximately \$1.3 billion, and the remainder, about 8 percent of the \$2.6 billion going to pay for treatment of victims. TIMOTHY D. LYTTON, *HOLDING BISHOPS ACCOUNTABLE, HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE* 185 (Harvard Univ. Press 2008).

⁷⁹ Lytton, *supra* note 76, at 190.

⁸⁰ It would be difficult to estimate the numbers of lawsuits that might result from eliminating statutes of limitation in cases involving just the Catholic Church, but “Canon lawyer Thomas Doyle and plaintiffs’ attorney Steve Rubino suggested in a 2004 law review article that ‘since 1984, there have been about 3000 civil cases related to clergy sexual abuse throughout the United States.’” *Id.* at 49.

⁸¹ See ABA Model Rule 1.5 regarding contingent fees, and M.R. 1.8(e)(1) and (2) regarding lawyers being allowed to advance funds for costs and expenses relate to a client’s representation.

⁸² See Tamara Blakemore et al., *The Impacts of Institutional Child Sexual Abuse: A Rapid Review of the Evidence*, 74 CHILD ABUSE & NEGLECT 35 (2017).

⁸³ See Ben Matthews, *Optimising and Implementation of Reforms to Better Prevent and Respond to Child Sexual Abuse in Institutions: Insights from Public Health, Regulatory Theory, and Australia’s Royal Commission*, 74 CHILD ABUSE & NEGLECT 35 (2017).

and the publicity, I have seen great shifts in terms of patients' ability to sort out their lives in therapy." Moreover...patients are less apt to blame themselves, and they are more likely to receive support from family and friends."⁸⁴

Some victims of childhood sexual abuse must confront not just their individual abuser, but the institution in which the abuser is associated, whether that might be a school,⁸⁵ a child-based organization such as the Boy Scouts of America,⁸⁶ U.S.A. Gymnastics,⁸⁷ the national Olympics organization that provided training and medical care for children and young athletes on the national gymnastics team,⁸⁸ or a religious organization such as the Catholic Church.⁸⁹ Children may well be conflicted because of the role their abuser plays in their life and the lives of their family members.⁹⁰ In addition, such organizations generally utilize far greater resources than most childhood victims may access,⁹¹ and sometimes these institutions play active roles in opposing legislative reforms⁹² to grant child victims greater access to the legal system to seek recourse in either civil or criminal proceedings.⁹³ The com-

⁸⁴ Lytton, *supra* note 76, at 176–77.

⁸⁵ See Nick Anderson, *At First, 55 Schools Faced Sexual Violence Investigations, Now the List Has Quadrupled*, WASH. POST (Jan. 18, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/at-first-55-schools-faced-sexual-violence-investigations-now-the-list-has-quadrupled/>.

⁸⁶ See Drew P. Von Bargen II, *Nittany Lions, Clergy and Scouts, Oh My! Harmonizing the Interplay Between Memory Repression and Statutes of Limitations in Child Sexual Abuse Litigation*, 18 MICH. ST. U. J. MED. & L. 51, n. 23 (2014) (referencing the “perversion files,” a record of 1892 alleged child molesters who have been involved with the Boy Scouts).

⁸⁷ Elliott Almond, *Olympic Gymnastics Star Looks for Change After Larry Nasser Episode*, MERCURY NEWS (Apr. 12, 2019), <https://www.mercurynews.com/2019/04/12/olympic-gymnastics-star-looks-for-change-after-larry-nasser-episode/>.

⁸⁸ Scott Cacciola & Victor Mather, *Larry Nasser Sentencing: ‘I Just Signed Your Death Warrant,’* N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/sports/larry-nasser-sentencing.html>.

⁸⁹ See LEON J. PODLES, *SACRILEGE, SEXUAL ABUSE IN THE CATHOLIC CHURCH* (Crossland Press 2008).

⁹⁰ “The psychologists who interviewed [the victims of one clergy abuser] reported, ‘Consider, if you will, the impact on the child [who] is sexually abused during the week, and on Sundays witnesses his parents bowing, kneeling, genuflecting, praying, receiving the sacraments and graciously thanking the priest for his involvement in their lives. Such events [make] him believe that such sexual activities have been sanctioned by their parents. To an eight-year-old boy, a priest said: ‘Now, look,’ he said, ‘Do you love God?’ Boy: ‘Of course I love God.’ Priest: ‘If you love God, there are certain things you have to do. Are you sure you love God, because he wants you to do some very difficult things. You know when you were born, you were born without clothes. Now, I want you to show your love for God by taking your clothes off, so God will know you’re here like when you were born.’” Podles, *supra* note 89, at 248–49.

⁹¹ See Benjamin D. Wasserman, *Searching for Adequate Accountability: Supervisory Priests and the Church’s Child Sex Abuse Crisis*, 66 DUKE L. J. 1149 (2017).

⁹² Scott Malone, *The Catholic Church Is Fighting to Block Bills That Would Extend the Statute of Limitations for Reporting Sex Abuse*, BUSINESS INSIDER (Sept. 10, 2015), <https://www.businessinsider.com/r-as-pope-visit-nears-us-sex-victims-say-church-remains-obstacle-to-justice-2015-9>.

⁹³ Institutional representatives are rarely held to account for their roles in perpetuating child sexual abuse. See Alexandra Zavis, *Senior Catholic Church Officials Have Rarely Faced Charges in the Sexual Abuse of Children. Here Are a Few Who Did*, L.A. TIMES (June 29, 2017), <http://www.latimes.com/world/europe/la-fg-church-abuse-charges-20170629-htmllstory.html>.

plexity of litigating cases against well-funded organizations adds an additional barrier for these victims to overcome⁹⁴ in the event they seek legal recourse for the abuse they suffered.⁹⁵

III. THE DELAYED REPORTING NORM IN CHILD SEXUAL ABUSE

Assuming that current literature documenting the consistencies of delays in reporting child sexual abuse by victims is accurate,⁹⁶ the drafting of a new rule of evidence that recognizes this dynamic would be appropriate. In much the same way that the Supreme Court took note of the foundational basis of all forms of psychotherapy relying on confidentiality to be effective,⁹⁷ so too the case for recognition of the delay in reporting sexual abuse should be taken into account.

One factor used in cross examining victims of sexual abuse in an effort to discredit their testimony is to trace the time period during which the witness did not report the abuse. The purpose is to suggest to the factfinder that the delay itself is evidence that the event did not occur, that the witness is not to be believed, or that the account lacks credibility.⁹⁸ Had the event occurred, surely the victim would have spoken with someone—anyone—in all the time that transpired.⁹⁹ Such arguments are aimed at inflaming the passions of those who have little or no experience with child sexual abuse. When one of Michael Jackson's siblings made a public accusation that she had been sexually abused by their father,¹⁰⁰ an immediate public outcry and denial came from many sources.¹⁰¹ Some of Jackson's siblings spoke publicly and denounced

⁹⁴ See Thomas P. Doyle, *The Australian Royal Commission into Institutional Responses to Child Sexual Abuse and the Roman Catholic Church*, 74 CHILD ABUSE & NEGLECT 103 (2017).

⁹⁵ Donald Palmer & Valerie Feldman, *Toward a More Comprehensive Analysis of the Role of Organized Culture in Child Sexual Abuse in Institutional Contexts*, 74 CHILD ABUSE & NEGLECT 23 (2017).

⁹⁶ See Kamala London et al., *Review of the Contemporary Literature on How Children Report Sexual Abuse to Others: Findings, Methodological Issues, and Implications for Forensic Interviewers*, 16 MEMORY 29 (2008).

⁹⁷ See Diane Marie Amann & Edward J. Imwinkelried, *The Supreme Court's Decision to Recognize a Psychotherapist Privilege in Jaffee v. Redmond*, 116 S. CT. 1923 (1996): *The Meaning of "Experience" and the Role of "Reason" Under Federal Rule of Evidence 501*, 65 UNIV. CIN. L. REV. 1019 (1997).

⁹⁸ One study found that less than one third of examined sex abuse survivors reported to have disclosed their abuse to another person, usually peers, but more than one third of victims had never disclosed their abuse to a parent. Verena Schönbucher et al., *Disclosure of Child Sexual Abuse by Adolescents: A Qualitative In-depth Study*, 27 J. INTERPERSONAL VIOLENCE 3486 (2012).

⁹⁹ Notwithstanding these arguments, in one study of childhood female rape survivors, nearly half the adult women involved in the study indicated they had waited longer than 8 years to make their first disclosure of their rape. Smith et al., *supra* note 3, at 279-80.

¹⁰⁰ See Mark Hodge, *Like Father, Like Son, Michael Jackson's Sister LaToya Jackson Describes How Monster Dad Joe Sexually Abused Her 'Very Badly' From Age 11*, SUN (Mar. 27, 2019), <https://www.thesun.co.uk/news/8728928/Michael-jackson-latoya-joe-sexually-abused/>.

¹⁰¹ *But see* Reuben A. Lang & Roy R. Frenzel, *How Sex Offenders Lure Children*, 1 ANNALS SEX RES. 303 (1988).

their sister, as they themselves had never been exposed to such misconduct by their father.¹⁰²

Eventually, several males who were not family members made allegations once they became adults that they had been sexually molested by Michael Jackson when they were children, including two men who appeared in the four hour documentary, *Leaving Neverland*.¹⁰³ But Jackson had been publicly accused of molesting children dating back to 1993 when the Los Angeles Police Department began investigating claims that Jackson had molested a 13-year-old boy.¹⁰⁴ Jackson faced going to trial in 1994, but settled the case for \$23 million which resulted in prosecutors dropping the criminal charges after the victim declined to cooperate, and then Jackson actually went to trial in 2005, facing 20 years in prison for child molesting, serving alcohol to a minor, conspiracy and kidnapping. But he was found not guilty of all charges on June 13, 2005, Jackson died four years later at the age of 50.¹⁰⁵

Professionals who work in the field of child abuse, however, recognized that the allegations by Jackson's sibling against her parent were not unusual for child victims of sexual abuse, especially incest survivors.¹⁰⁶ Sexual perpetrators often identify victims who are unlikely to be believed should they come forward and make an accusation against their attacker.¹⁰⁷ The public response—and that of the other Jackson family members—was to be dismissive of the one sibling's accusation against her father.¹⁰⁸ If the parent had victimized one child, why would the other siblings have not been molested? The assumption here is that there is some compulsive disorder that results in every child in the same family becoming a victim of incestuous abuse. Although that may occur in some scenarios, it is not uncommon for one family member to become the victim of incestuous attacks while the other children remain unaware of the sexual abuse. Following the death of the popular entertainer, several adult men have come forward and have been interviewed in a documentary where they disclosed that they had been molested as children

¹⁰² Although occasionally, in some cases a victim's "memory of early abuse can be verified (e.g., the perpetrator may confess; a sibling may independently reveal a similar abuse experience). However, such corroboration is the exception, not the rule. Usually, it comes down to "'she says/he says.'" STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM, A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY* 189 (1995).

¹⁰³ Ben Sisario, *What We Know About Michael Jackson's History of Sexual Abuse*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/2019/01/31/arts/music/michael-jackson-timeline-sexual-abuse-accusations.html> [hereinafter *What We Know*].

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See Thomas A. Roesler & Tiffany W. Wind, *Telling the Secret: Adult Women Describe Their Disclosures of Incest*, 9 J. INTERPERSONAL VIOLENCE 327 (1994).

¹⁰⁷ See Gisela Priebe & Carl Göran Svedin, *Child Sexual Abuse Is Largely Hidden from the Adult Society, an Epidemiological Study of Adolescents' Disclosures*, 32 CHILD ABUSE & NEGLECT 1095 (2008).

¹⁰⁸ See *LaToya Jackson Speaks on Her Family's Anguish*, CNN LIVE LARRY KING, September 12, 1991.

by the adult Michael Jackson.¹⁰⁹ One of the men sued Jackson's estate over the child abuse, but the case was dismissed "for being filed too late."¹¹⁰ The likelihood that intergenerational sexual abuse had occurred within this family seems at least possible, if not probable.¹¹¹ When public reactions to childhood sexual abuse arise, the assumptions embraced by many people is simply inaccurate, yet many remain uninformed about this disturbing form of misconduct. It is difficult enough to accept that children are sexually molested, but it is even more difficult when the accused molester is a popular figure.

IV. THE KAVANAUGH CONFIRMATION HEARING

Following the President's nomination of Judge Brett Kavanaugh in 2019 for the United States Supreme Court, the U.S. Senate scheduled confirmation hearings in their constitutional role of advising and consenting to the President's appointment. Public attention focused for weeks anticipating the testimony of Dr. Christine Blasey Ford¹¹² who sought to describe an incident in the summer of 1982 when she was sexually assaulted by Judge Kavanaugh.¹¹³ One of her acquaintances, Brett Kavanaugh, had been nominated for a seat on the U.S. Supreme Court. Suddenly, the nation braced for a new chapter in the recently declared Me-Too era in which sexual aggressors were being called out and victims were demanding accountability. Judge Kavanaugh had been identified as one of the sexual assault perpetrators while he was completing high school. Accusations included the presence of teenaged peers and

¹⁰⁹ Ben Sisario, *Michael Jackson Documentary Revives Lurid Claims, Imperiling His Thriving Estate*, N.Y. Times (Mar. 3, 2019), <https://www.nytimes.com/2019/03/03/business/media/leaving-neverland-michael-jackson-estate.html?action=click&module=RelatedCoverage&pgtype> [hereinafter *Michael Jackson Documentary*]. "Michael Jackson's damaged reputation began to recover the day he died. The lurid accusations of child molestation that had dogged him for years fell to the background as fans around the world celebrated the entertainer who had gone from pop prodigy to global superstar over a four-decade career ... Now, nearly 10 years after his death, the dark side of Mr. Jackson's legend has returned through a documentary that rocked the Sundance Film Festival and is being championed by Oprah Winfrey. In addition to delivering a hit to his mended reputation, the film poses a significant risk to the Jackson estate, which has engineered a thriving posthumous career, including a Broadway-bound jukebox musical. The four-hour documentary, "Leaving Neverland," ... focuses on the wrenching testimony of two men, Wade Robson and James Safechuck, who say Mr. Jackson abused them for years, starting when they were young boys."

¹¹⁰ *Id.*

¹¹¹ See Jim Newton, *Jackson's Sister Says She Believes He Is a Molester: Scandal: "This Has Been Going On Since 1981, and It's Not Just One Child," LaToya Jackson Tells Reporters in Tel Aviv. She Has Been Estranged from Other Family Members*, L.A. TIMES, (Dec. 9, 1993), <https://www.latimes.com/archives/la-xpm-12-09-me-49-story.html> ("I love Michael very dearly, but I feel even more sorry for these children because they don't have a life anymore," LaToya Jackson said, her voice breaking.)

¹¹² Ford was a professor of psychology at Palo Alto University and a research psychologist at the Stanford University School of Medicine. Transcript, Senate Confirmation Hearing, p. 11.

¹¹³ See generally, Linda Meyer Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Childhood Sexual Abuse*, 62 J. CONSULTING & CLINICAL PSYCH. 1167 (1994).

alcohol abuse¹¹⁴ at the time of the sexual assault.¹¹⁵ The victim's testimony was criticized for inconsistencies and her inability to recall all aspects of the assault.¹¹⁶ The polarized Congressional committee members prepared for live television and high drama on Capitol Hill.¹¹⁷

A Stanford faculty member would be telling her own story of sexual victimization after decades of public silence.¹¹⁸ The Judge was expected to deny the allegations as an attempt to engage in character assassination. As the public discussed the details of what little information had been released prior to the actual confirmation hearing, tension began to build.¹¹⁹ One former United States Supreme Court Justice commented in public after viewing the hearing that he believed Mr. Kavanaugh should not be confirmed, given his demonstrated temperament.¹²⁰

After Dr. Blasey Ford publicly accused Judge Kavanaugh of sexually assaulting her when they were both in high school, Judge Kavanaugh entered an angry denial of her testimony, and then "the Republican-led committee

¹¹⁴ Heavy alcohol abuse is not uncommon in many investigated cases of teenage sexual aggression. See Heather Luz McNaughton Reyes et al., *The Role of Heavy Alcohol Use in the Developmental Process of Desistance in Dating Aggression During Adolescence*, 39 J. ABNORMAL CHILD PSYCH. 239 (2011).

¹¹⁵ Dr. Ford indicated she was 15 years old at the time of the assault, and that "Brett's assault on me drastically altered my life. For a very long time, I was too afraid and ashamed to tell anyone these details. I did not want to tell my parents that I, at age 15, was in a house without any parents present, drinking beer with boys. I convinced myself that because Brett did not rape me, I should just move on and just pretend that it didn't happen. Over the years, I told very, very few friends that I had this traumatic experience. I told my husband before we were married that I had experienced a sexual assault. I had never told the details to anyone—the specific details—until May 2012, during a couples counseling session." SENATE JUDICIARY COMMITTEE HEARING ON THE NOMINATION OF BRETT M. KAVANAUGH TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT, DAY 5, FOCUSING ON ALLEGATIONS OF SEXUAL ASSAULT, at 34, Sept. 27, 2018, Wash. Post, transcript courtesy of Bloomberg Government (Sept. 27, 2018). Transcript, p. 13.

¹¹⁶ Stephen J. Ceci and Maggie Bruck in their groundbreaking book, *JEOPARDY IN THE COURTROOM, A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY* concluded in part that "there is nothing in the scientific literature that proves that if a child incorrectly remembers one aspect of an event, she will be incorrect about everything else as well. Memory is not trait-like or invariant. It changes in response to many factors, and it is common for children as well as adults to accurately report one detail but not another, particularly if the inaccurate details are neither interesting nor important to the child." Ceci & Bruck, *supra* note 102.

¹¹⁷ "Judge Brett M. Kavanaugh was confirmed to the Supreme Court on Saturday by one of the slimmest margins in American history ..." Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html>.

¹¹⁸ Although based upon a 2008 estimate, 90% of child victims of sex abuse do not report crimes to the authorities. See MARCI A. HAMILTON, *JUSTICE DENIED: WHAT AMERICA MUST DO TO PROTECT ITS CHILDREN* 13 (2008).

¹¹⁹ See Max Greenwood, *Poll: Voters Split on Whether Senate Should Confirm Kavanaugh*, HILL (July 25, 2018), <https://1.next.westlaw.com/Document/lec-bdf07290b911e8a5b3e3d9e23d7429/View/FullText.html?navigation-Path=Search%2Fv1%2Fresults%2Fnavig>.

¹²⁰ Tal Axelrod, *Retired Justice Stevens: Kavanaugh Should Not Be Confirmed*, HILL (Oct. 4, 2018), <https://thehill.com/homenews/senate/409987-former-justice-stevens-says-kavanaugh-should-not-be-confirmed> ("I've changed my views for reasons that have no relationship to his intellectual ability," Stevens said, noting Kavanaugh's fiery denial of sexual misconduct accusations in a Senate Judiciary hearing."); *Id.*

and the full Senate voted to install the judge to the Supreme Court for life.”¹²¹ Dr. Blasey Ford “received an onslaught of death threats and harassment for speaking up, and she and her family were forced to relocate for security purposes” from their home, but Dr. Blasey Ford indicated that she harbored no regrets for coming forward and telling her story.¹²² The outcome of the confirmation hearing may have been anticipated correctly before the testimony of either Blasey Ford or Kavanaugh before the committee.¹²³ But the public response to the confirmation hearing reflected a widespread misconception about delays on the part of individuals who have been subjected to sexual assault, sexual molestation, and rape when they are children or adolescents. Such victims frequently fail to report the incidents. If they do report the incidents, they tend to confide in a close friend, but they also frequently delay their disclosure of reporting the incident for extended periods of time.¹²⁴ Some people never report their abuse.¹²⁵ Some delay reporting the abuse for many years.¹²⁶

For people in the community of therapy or care providers, the growing body of literature documented the very frequent dynamic of sexual abuse victims delaying for years or decades before disclosing their victimization.¹²⁷ Whatever intuitive reaction people might otherwise embrace, the experiential and evidence-based familiarity of professionals who worked with such victims was quite different from what members of the general public were willing to assume to be the process of victims’ disclosing their childhood abuse. The norm for the majority of victims was the exact opposite of popular opinion. Victims did delay and often the delay would continue for years, if not decades.

¹²¹ Alanna Vagianos, *Kamala Harris Says Christine Blasey Ford ‘Risked Everything’ for the Country*, Huffpost (Apr. 17, 2019), https://www.huffpost.com/entry/kamala-harris-christine-blasey-ford-time-100_n_5cb72060e4b098b9a2dd5b0a.

¹²² *Id.* Blasey Ford has subsequently moved with her family four different times, she has had to pay for a security detail, and she has been unable to return to her job as a professor at Palo Alto University. Tim Mak, *Kavanaugh Accuser Christine Blasey Ford Continues Receiving Threats, Lawyers Say*, NPR-ALL THINGS CONSIDERED (Nov. 8, 2018), <https://www.npr.org/2018/11/08/665407589/kavanaugh-accuser-christine-blasey-ford-continues-receiving-threats-lawyers-say>.

¹²³ Roxanne Jones, *After Kavanaugh, What Have We Learned?*, CNN (Oct. 6, 2018), <https://www.cnn.com/2018/10/06/opinions/supreme-court-brett-kavanaugh-vote-reaction/index.html>. (“For me, Kavanaugh’s confirmation was a forgone conclusion—despite Ford’s testimony—under this current ‘take-no-prisoners’ culture. When President Donald Trump was elected, we should have known it was game-over for compassionate politics. We gave him the power to build a Supreme Court of his liking, knowing that there would be multiple vacancies to fill during his term.”).

¹²⁴ See Schönbucher et al., *supra* note 98.

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See Shinton, *infra* note 160, at 321 (citing Pennsylvania Representative Mark Rozzi’s failure to disclose his sexual abuse for twenty-five years until learning that another victim had committed suicide. Ivey DeJesus, *Mark Rozzi on a Personal Journey: Abuse Victim Determined to Change Laws*, PENNLIVE (Apr. 13, 2016), https://www.pennlive.com/news/2016/04/mark_rozzi_child_sex_abuse_cri.html).

The shame and humiliation suffered by victims of sexual abuse is quite different from other forms of confrontation or aggression.¹²⁸ The victims tended to blame themselves¹²⁹ for the actions which they did not consent to and which they never invited.¹³⁰ But the public would remain unconvinced and unswayed. Surely the experts in this field were overstating the matter and merely seeking to advance their own careers? Because the Kavanaugh confirmation hearing focused widespread public attention on the dynamic of delayed reporting, it is worth considering altering the legal rules that might otherwise prevent abuse survivors from seeking legal redress for their injuries. Nevertheless, the confirmation hearing was not a trial, and thus, legal doctrinal rules such as the statute of limitations and evidentiary rules would not have applied to this process. This was a public confirmation hearing which played out in televised segments—not unlike the Watergate hearings—and so, any attempt to suggest reform of evidentiary rules or statutes of limitations might be somewhat misleading given the context of the testimony. Nevertheless, the decision by the Senate to seat Judge Kavanaugh and the public reaction to Dr. Blasey Ford's testimony opens the door to consider how the legal system fails to take into consideration current research-based knowledge about how victims of sexual abuse delay reporting their assaults and the long term impact of the trauma inflicted upon them.

Many of the participants in the confirmation hearing engaged in making statements rather than posing questions to the various witnesses.¹³¹ Indeed,

¹²⁸ See Martin J. Dorahy & Ken Clearwater, *Shame and Guilt in Men Exposed to Childhood Sexual Abuse: A Qualitative Investigation*, 21 J. CHILD SEXUAL ABUSE 155 (2012); also see Karen G. Weiss, *Too Ashamed to Report: Deconstructing the Shame of Sexual Victimization*, 5 FEMINIST CRIMINOLOGY 286 (2010).

¹²⁹ "A recent study found that trauma symptoms in children were highly associated with the degree of self-blame the child felt about the abuse incident(s) ..." Joyce A. Adams et al., *Updated Guidelines for the Medical Assessment and Care of Children Who May Have Been Sexually Abused*, 29 J. PEDIATRIC & ADOLESCENT GYNECOLOGY 81 (2016) (citing John D. Melville et al., *Assessment for Self-Blame and Trauma Symptoms During the Medical Evaluation of Suspected Sexual Abuse*, 38 CHILD ABUSE & NEGLECT 851 (2014)).

¹³⁰ In writing about Catholic clergy sex abuse of children, one author indicated "[v]ictims often blamed themselves ... [one child concluded that he was the sinner]: 'I not only had sex with a priest, but I caused him to have a nervous breakdown. This was the guilt, the shame, the fear I'd burn in hell. I thought I must deserve it. Why would God do this if I didn't deserve it?' The guilt sometimes led to suicide." LEON J. PODLES, *SACRILEGE, SEXUAL ABUSE IN THE CATHOLIC CHURCH* 265 (2008).

¹³¹ At one point in the confirmation hearing, Sen Durbin stated: "Watching your experience, it's no wonder that many sexual assault survivors hide their past and spend their lives suffering in pained silence. You had absolutely nothing to gain by bringing these facts to the Senate Judiciary Committee ... The FBI should have investigated your charges as they did in the Anita Hill hearing, but they did not ... Judge Kavanaugh, if he truly believes that there is no evidence, no witnesses that can prove your case, should be joining us in demanding a thorough FBI investigation, but he is not. Today, you come before this committee and before this nation alone ... After spending decades trying to forget that awful night, it's no wonder your recollection is less than perfect." SENATE JUDICIARY COMMITTEE HEARING ON THE NOMINATION OF BRETT M. KAVANAUGH TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT, DAY 5, FOCUSING ON ALLEGATIONS OF SEXUAL ASSAULT, at 34, Sept. 27, 2018, Wash. Post, transcript courtesy of Bloomberg Government (Sept. 27, 2018).

these kind of statements surely held the public's interest,¹³² and such political events may shine light on factors worth considering when deciding what to expect when a childhood sexual assault victim offers sworn testimony in a legal proceeding. Because this was not a trial, but a confirmation hearing, there was no statutory assumption that the candidate was innocent until proven guilty, no burden of proof requiring proof satisfying an evidentiary burden beyond a reasonable doubt, and no procedural right to seek relief from a higher court in the event the outcome was unfavorable.

Unless and until state legislatures recognize the delay in responding to sexual abuse as the norm rather than the exception,¹³³ legal remedies will continue to be limited by criminal statutes of limitations and by civil prescription doctrines that prohibit litigating a matter after a period of time has elapsed since the event occurred.¹³⁴ Such legal theories are based upon assumptions that memories fade over time, witnesses become unavailable, and corroborating evidence becomes unavailable as well.¹³⁵ These legal presumptions, however, do not alter the body of evidence amassed by longitudinal studies of victims of sexual abuse.¹³⁶ Because such small numbers of child sex abuse victims actually have genital findings diagnostic of prior trauma from sexual abuse,¹³⁷ initiating litigation years after the abuse occurred is likely not going to impact many such cases based on a concern that physical or medical evidence has "spoiled" over the passage of time.¹³⁸

¹³² See Laurel Wamsley, 'Everyone Is Just Completely Captivated': Americans React to Ford and Kavanaugh, NPR, (Sept. 27, 2018), <https://www.npr.org/2018/09/27/652330874/everyone-is-just-completely-captivated-americans-react-to-ford-and-kavanaugh> ("Across the U.S., people spent the day rapt, watching or listening to the testimony of Christine Blasey Ford and Supreme Court nominee Brett Kavanaugh before the Senate Judiciary Committee ... The proceedings were emotional throughout, as Ford told the story of the sexual assault that she alleges Kavanaugh made against her when the two were in high school, more than 30 years ago.").

¹³³ In one study, 1 out of 5 survivors of childhood sexual abuse NEVER disclosed the abuse; only 21.2% of adults reported prompt disclosure of the abuse—within a month of the first abusive event; while 57.5% delayed disclosure—more than 5 years after the first episode. Martine Hébert et al., *Prevalence of Childhood Sexual Abuse and Timing of Disclosure in a Representative Sample of Adults from Quebec*, 54 CANADIAN J. PSYCHIATRY 631 (2009).

¹³⁴ See The Sean P. McIlmail Statute of Limitations Research Institute at ChildUSA, 2019 *Summary of Child Sexual Abuse Statutes of Limitation (SOLs): Introduced, Signed into Law and State Laws by Category*, <https://www.childusa.org/2019sol> [hereinafter *ChildUSA*].

¹³⁵ See Tyler T. Ochoa & Andrew Wistrich, *The Puzzling Purpose of Statutes of Limitation*, 28 PAC. L. J. 453 (1997) (identifying 7 major rationales for adoption of statutes of limitation: they promote repose; minimize deterioration of evidence; place defendants and plaintiffs on an equal footing; promote cultural values of diligence; encourage the prompt enforcement of substantive law; avoid retrospective application of contemporary standards; and reduce the volume of litigation).

¹³⁶ See Paige H. Smith et al., *A Longitudinal Perspective on Dating Violence Among Adolescent and College-Age Women*, 93 AM. J. PUB. HEALTH 1104 (2003).

¹³⁷ Joyce A. Adams et al., *Examination Findings in Legally Confirmed Child Sexual Abuse: It's Normal to be Normal*, 94 PEDIATRICS 310 (1994).

¹³⁸ As the researchers concluded in one well cited study of over 2000 child sex abuse victims, "[t]he most startling result of this study was to find that such a small percentage of children did have genital findings of prior trauma from sexual abuse." Heger et al., *supra* note 11, at 652. The significance of this lies in the rationale of applying the statute of limitations in order to ensure that evidence which may have "spoiled" over time has limited application in child sex abuse cases where physical evidence of any kind is the

Whether state legislatures are inclined to create exceptions for victims of sexual abuse to initiate legal proceedings for damages against their perpetrators or not, a rule of evidence that permits these victims to testify and to receive the benefit of the doubt in legal proceedings would be one small step towards restoring justice to these victims of abuse that we now recognize destroys the lives of victims in ways we never considered previously.¹³⁹

The outcome of the confirmation hearing of the most recent Supreme Court jurist might have remained unchanged were this proposed elimination of all statutes of limitations and evidence rule enacted, but the legal presumption that it embraces might have reduced or removed the weight of public ignorance and doubt on the testimony of the alleged victim of abuse who came forward to offer a narrative of what happened to her decades earlier. If the collective wisdom of the nominating Congressional committee would have remained unchanged, then so be it, but the recognition that long delays in reporting child sexual abuse might have been appreciated and that might have provided additional weight to Blasey Ford's testimony and to the public's acceptance of her story. Had the public response been different, perhaps additional political pressure might have been exerted on the members of the Senate who voted to reject her testimony as evidence challenging the character of the Supreme Court nominee. In any event, her story serves to help better understand one of the unique manifestations of sexual abuse of children and adolescents.

V. THE STATUTE OF LIMITATIONS RATIONALE

Efficiency in the timely handling of legal causes of action may be one of the more compelling reasons to restrict access to courts after a period of time has elapsed¹⁴⁰ and the alleged victim has failed to initiate any legal proceedings.¹⁴¹ However, some argue that statutes of limitations also promote repose,¹⁴² allow peace of mind, avoid disrupting settled expectations, reduce uncertainty, reduce protective measures and associated costs, minimize deterioration of evidence, reduce litigation costs, preserve the integrity of the legal system, place defendants and plaintiffs on an equal footing, encourage

exception to the rule. Hence, the justification for applying statutes of limitations appears—at least for this purpose—misplaced. *Id.*

¹³⁹ See John N. Briere & Diana M. Elliott, *Immediate and Long-term Impacts of Child Sexual Abuse*, 4 FUTURE CHILD. 54 (1994).

¹⁴⁰ See Yair Listokin, *Efficient Time Bars? A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, YALE LAW SCHOOL FACULTY SCHOLARSHIP SERIES 563 (2002).

¹⁴¹ See generally, WILLIAM BALLANTINE, A TREATISE ON THE STATUTE OF LIMITATIONS (Albany, Packard & Co. 1829).

¹⁴² Because the statute of limitations establishes the period of time within which a claimant must bring an action, the policy of repose, designed to protect defendants, has been recognized by the U.S. Supreme Court. See *Lozano v. Montoya Alvarez*, 572 U.S. 1 (2014).

the prompt enforcement of substantive law, and reduce the volume of litigation.¹⁴³ All of these advantages do not occur with each invocation of the statutes, but over time courts have recognized different procedural justifications for employing the statutes. Tracing the adoption of statutes of limitations back to Roman Law, including Emperors Honorius and Theodosius, writers have found that "obvious considerations of convenience, enacted in 424 A.D. that all actions should be barred within a certain period."¹⁴⁴ Creating rules that provide reliable standards for citizens to have notice about the time restrictions for initiating legal processes also supports the adoption of statutes of limitations.¹⁴⁵ Nevertheless, over one hundred years ago, Oliver Wendell Holmes, Jr. questioned "What is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?"¹⁴⁶

It should be noted, however, that criminal statutes of limitations were not part of the English common law.¹⁴⁷ With few exceptions today, England still recognizes no limitations period for common law offenses.¹⁴⁸ Civil law countries generally have longer periods for limitation than the period for comparable offenses in the United States.¹⁴⁹ Regardless of what jurisdiction imposes a statute of limitations upon specific types of criminal offenses, the actual time requirement appears to be fairly arbitrary.¹⁵⁰

The creation of the legal statute of limitations for civil matters and separate statutes of limitations governing criminal matters was a pragmatic as well as due process response to unlimited legal actions between and against citizens. The pragmatic concerns included the fading of human recall over a period of time, and the various complications of obtaining evidence to present before a tribunal in court years after an event having occurred.¹⁵¹ The due process concerns included the unfairness of compelling a citizen to defend against a criminal accusation brought under the authority of the state and compelling the citizen to search for evidence that might have been readily available shortly after the alleged event's occurrence but evidence which may no longer be available. Identifying alibi defense evidence is one thing when an accusation identifies an event that happened in the recent past, but that

¹⁴³ Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L. J. 453 (1996) (the statute of limitations also ensures accurate fact-finding, prevents fraud, promotes cultural values of diligence, and avoids retrospective application of contemporary standards).

¹⁴⁴ RUDOLF SOHM, *THE INSTITUTES HISTORY AND SYSTEM OF ROMAN PRIVATE LAW* 283 (Ledlie trans., 3d ed. 1970) (Reprint of 1907 ed.).

¹⁴⁵ See Ochoa & Wistrich, *supra* note 135.

¹⁴⁶ Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

¹⁴⁷ Alan L. Adelman, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 253-55 (1995).

¹⁴⁸ *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1179 (1950).

¹⁴⁹ *Id.* at 1179.

¹⁵⁰ "Statutes of limitations ... set arbitrary limits to the time within which the state must bring most ... criminal proceedings." DANIEL W. SHUMAN & ALEXANDER MCCALL SMITH, *JUSTICE AND THE PROSECUTION OF OLD CRIMES: BALANCING LEGAL, PSYCHOLOGICAL, AND MORAL CONCERNS* 4 (2000).

¹⁵¹ See Cathy Spatz Wisdom & Suzanne Morris, *Accuracy of Adult Recollections of Childhood Victimization: Part 2. Childhood Sexual Abuse*, 9 PSYCH. ASSESSMENT 34 (1997).

same event, if examined many years after the occurrence, may not be easily recreated in a court proceeding.

Legal scholars are addressing the extension of statutes of limitations which might otherwise prevent victims of abuse from initiating legal remedies in a timely manner.¹⁵² This is one of the few areas of human misconduct that poses a true barrier to legal responses, i.e. the perpetrators may rest assured that their victim may not respond for years to come, and by then, it may be too late to initiate either criminal charges or to seek civil lawsuits and possible damages or other legal remedies.¹⁵³ Given the increase of studies and publication of literature in the field,¹⁵⁴ the legal system is in a position to create a unique and appropriate alteration to legal process. Most jurisdictions now apply the discovery rule to the recognition of civil statutes of limitations for child sexual abuse cases. The discovery rule generally states that a statute of limitations does not run until a victim discovers, or with reasonable care should discover his or her injury.¹⁵⁵ Despite the application of this rule of interpretation, many jurisdictions have sought to extend their state statutes of limitations to ensure that victims explicitly have additional time within which to initiate their civil suits against identifiable perpetrators.

The elimination of statutes of limitations for both civil and criminal cases involving victims of childhood sexual abuse would give traumatized victims of sexual misconduct access to a legal system that has barred thousands from initiating criminal charges or seeking civil damages¹⁵⁶ for the wrongs they suffered when they were too young to appreciate or to protect themselves.¹⁵⁷ By allowing legal fact finders to consider testimony about an event that may have occurred decades earlier, yet one that may not have been reported or

¹⁵² For an argument advancing the retroactive application of statute of limitations and why such remedies would not violate either the ex post facto clause or the due process clause of the Constitution, see Erin Khorram, *Crossing the Limit Line: Sexual Abuse and Whether Retroactive Application of Civil Statutes of Limitation Are Legal*, 16 U.C. DAVIS J. JUV. L. & POL'Y 391 (2012).

¹⁵³ Rebecca Lowe, *Extending Statutes of Limitations for Victims of Child Sexual Abuse Based on the Developmental Model and International Law*, 24 PUB. INT. L. J. 27, 29 (2015) ("Each year in the United States 237,868 people are victims of sexual assault; 44% of these victims are under age eighteen; 60% never report to the police. Child sexual abuse is particularly severe in the foster care system with a stunning 78,188 reports of sexual abuse in 2003 ...").

¹⁵⁴ See, i.e., Rinke de Jong & Susan Dennison, *Recorded Offending Among Child Sexual Abuse Victims: A 30-year Follow-up*, 72 CHILD ABUSE & NEGLECT 75 (2017) (the evolution of longitudinal studies focused on long term consequences of child sexual abuse is fairly recent in adding to the base of information currently available).

¹⁵⁵ See *Urie v. Thompson*, 337 U.S. 163 (1949).

¹⁵⁶ See Barbara A. Micheels, *Is Justice Served? The Development of Tort Liability Against the Passive Parent in Incest Cases*, 41 ST. LOUIS U. L. J. 809 (1997) (so intense has the search for remedies for these victims become that some have argued that civil actions should be permitted to be brought against the non-abusive parent for their passive role in the child sexual abuse).

¹⁵⁷ Jones, *supra* note 1, at 296 (bearing in mind that "the majority of child victims already know their abuser before abusive sexual activities start").

treated until years after the event, the legal system would permit the merits of claims by victims of this unique and disturbing misconduct to be heard.¹⁵⁸

According to the National Conference of State Legislatures in 2019,

...nearly every state has a basic suspension of the statute of limitation ('tolling') for civil actions while a person is a minor. Many states have also adopted additional extensions specifically for cases involving sexual abuse of children. Extensions for filing civil actions for child sexual abuse are most often based upon the discovery rule—by the time the victim discovers the sexual abuse or the relationship of the conduct to the injuries, the ordinary time limitation may have expired. This 'delayed discovery' may be due to emotional and psychological trauma and is often accompanied by repression of the memory of abuse. Child victims frequently do not discover the relationship of their psychological injuries to the abuse until well into adulthood—usually during the course of psychological counseling or therapy. They may not even discover the fact of such abuse until they undergo such therapy.¹⁵⁹

The complete elimination of state statutes of limitations for civil and criminal acts of childhood sexual abuse is needed so as not to slam shut victims' access to the justice system.¹⁶⁰ While many states have recently extended their statutes of limitation for victims of childhood sexual abuse, many of the extensions have expanded by several years the time period during which victims must initiate legal actions against identified perpetrators. Other jurisdictions have expanded by 5 or more years the time periods during which victims must initiate their legal actions against perpetrators. Still other states have enacted legal reforms expanding the time period during which legal actions may be filed by 10 or more years. While the legislative enactments that increase the time period during which survivors of childhood sexual abuse may be permitted to initiate their causes of action in court proceedings has provided access for some victims, it has also continued the legal process of foreclosing legal relief for many victims of sexual abuse. If the child victim of sexual abuse was a toddler at the time of sexual abuse, then expanding the statute of limitation by as much as ten years might yet result in the young person remaining below the age of majority at the time their access to courts ends under some statutory rules.

¹⁵⁸ Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L. J. 2437, 2466 (1994) (but the elimination of statutes of limitations for child sex abuse victims is not the only area where elimination of statutes of limitations has been proposed as "[t]hieves deserve no repose from the rightful owner's claim").

¹⁵⁹ NCSL, STATE CIVIL STATUTES OF LIMITATIONS IN CHILD SEXUAL ABUSE CASES (2019), <http://www.ncsl.org/research/human-services/state-civil-statutes-of-limitations-in-child-sexua.aspx> (listing each state law and summaries for each statute of limitation among states).

¹⁶⁰ See Symone Shinton, *Pedophiles Don't Retire: Why the Statute of Limitations on Sex Crimes Against Children Must Be Abolished*, 92 CHI. KENT L. REV. 317 (2017).

Perhaps complicating the analysis is the consideration of the doctrine of lesser and included offenses.¹⁶¹ In some instances, an accused might be willing to plead guilty to a lesser offense than the one charged.¹⁶² In some jurisdictions, prosecutors will consult with the victim to obtain their consent to such a plea bargain. If the statute of limitations for the more serious offense is eliminated, but the lesser offense is barred by a shorter statute of limitations, then such legal resolutions are not possible.¹⁶³ In many instances, child sex abuse survivors might prefer to see their perpetrators enter plea bargains rather than placing themselves on the witness stand and having to testify about an event that occurred decades earlier. Studies on the subsequent trauma caused by legal proceedings has documented the very real impact on such victims.¹⁶⁴ If the statutes of limitations are lifted for the more serious sexual offenses committed against child victims, each jurisdiction will have to decide whether they are willing to also extend statutes of limitation that apply to the lesser but included offenses, such as sexual assault or simple assault. From the victim's perspective, obtaining an admission of guilt and a conviction against their perpetrator—even for a lesser offense—might still represent an appropriate outcome from the court system rather than the status quo's restriction of any criminal prosecution.

Assuming that victims may now have access into their twenties or even into their thirties, this may still fail to provide access to the majority of sex abuse victims. The process of enacting legal protocols that prohibit some victims from initiating court remedies while providing access to other victims based on the date the victims initiate their legal actions appears very arbitrary once one is more familiar with the dynamics of child sexual abuse, the reporting of sexual abuse, and the manner in which victims become comfortable and able to utilize their legal rights seeking their day in court. If fifteen or more states have yet to reconsider their statutes of limitations for child sex abuse victim actions, then the process of gaining access to courts depends on the arbitrariness of the residence of the victim. In either event, the result of denying victims access to the court system may result in some victims suffering a disruption of their lives, their livelihoods, their mental health, and

¹⁶¹ Christen R. Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM. CRIM. L. REV. 445, 472, n. 176 (1984) (the majority rule that a defendant may not be convicted on a time-barred lesser offense).

¹⁶² Such outcomes have received approval from the U.S. Supreme Court since *Beck v. Alabama*, 447 U.S. 625, n. 9 (1980) ("At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged.").

¹⁶³ See Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOK. L. REV. 191 (1984).

¹⁶⁴ See Jodi A. Quas et al., *Childhood Sexual Assault Victims: Long-term Outcomes After Testifying in Criminal Court*, 70 MONOGRAPHS SOC'Y FOR RSCH. CHILD DEV. 1 (2005) (this is the follow-up study of the children in a 1992 study, and it found that under certain circumstances, recounting sexual abuse repeatedly in open court may help solidify a trajectory of poor mental health functioning, as measured both via trauma-related symptoms and general mental health problems).

their relationships for the remainder of their life span.¹⁶⁵ Understanding the reasons motivating delayed disclosure of childhood sexual abuse should help guide the reforms needed in individual state systems, even those states where extensions may have recently been enacted but still allow legal barriers to continue to prevent some victims from holding their perpetrators accountable for misconduct that may have altered the lives of the victims.¹⁶⁶ The recent U.S. Senate Judicial Hearings seeking to confirm the nomination of Judge Brett Kavanaugh help to highlight some of the issues surrounding the argument that statutes of limitations should be eliminated for childhood sexual abuse.

VI. STATE REFORMS OF STATUTES OF LIMITATIONS IN CHILD SEX ABUSE CASES

Some jurisdictions have examined the application of statutes of limitations in child sex abuse cases¹⁶⁷ and came to the conclusion that their state rules required revision.¹⁶⁸ The most current compilation of the ever-changing landscape of state laws governing child abuse statutes of limitations is maintained by the Sean P. McIlmail Statutes of Limitations Research Institute at

¹⁶⁵ In the Quas, Goodman study ("Not testifying was also associated with more negative attitudes toward the legal system: Non-testifiers perceived the legal system to be less fair ...").

¹⁶⁶ Although not descriptive of legal reforms that failed, the recent reactions by former child sex abuse victims of Jeffrey Epstein describe the frustration they experienced following Epstein's suicide in a Manhattan jail which denied them the opportunity to tell their story of child sex abuse publicly and to hold their perpetrator accountable: "One by one, the women told a packed federal courtroom in Manhattan on Tuesday how Jeffrey Epstein had sexually abused them and used his power and wealth to silence them, sometimes for years. For many, it was their first time speaking about it in public. A chair at the defense table remained empty: Mr. Epstein hanged himself in his cell at the Metropolitan Correctional Center this month, where he was awaiting trial on sex trafficking charges. 'For that, he is a coward,' said one of his accusers, Courtney Wild, who has said Mr. Epstein sexually abused her when she was 14. It was a moment of catharsis. Never had so many of Mr. Epstein's accusers, from so many places, gathered to tell grotesquely similar stories, laying bare the breadth of the Mr. Epstein's sex trafficking operation. 'The fact that I will never have a chance to face my predator in court eats away at my soul.' Said Jennifer Araoz, who has accused Mr. Epstein of raping her when she was a 15-year-old student as a performing arts high school in New York. 'They let this man kill himself and kill the chance of justice for so many others in the process, taking away our ability to speak.'" Ali Watkins et al., *Jeffrey Epstein's Victims, Denied a Trial, Vent Their Fury: 'He Is a Coward,'* N.Y. TIMES (Aug. 27, 2019), https://www.nytimes.com/2019/08/27/nyregion/jeffrey-epstein-hearing-victims.html?te=1&nl=morning-briefing&emc=edit_NN_p_20190828§ion=to.

¹⁶⁷ Durga M. Bharam, *Statute of Limitations for Child Sexual Abuse Offenses: A Time for Reform Utilizing the Discovery Rule*, 80 J. CRIM. L. & CRIMINOLOGY 842, 843 (1989).

¹⁶⁸ See Monica L. Hayes, *The Necessity of Memory Experts for the Defense in Prosecutions for Child Sexual Abuse Based Upon Repressed Memories*, 32 AM. CRIM. L. REV. 69 (1994) (many states extended or created tolling rules for the limitations period for sexual offenses committed against child victims.).

ChildUSA,¹⁶⁹ which documents eighteen jurisdictions where statute of limitations reform became effective in 2019;¹⁷⁰ twenty jurisdictions which adopted statute of limitations reforms in 2019;¹⁷¹ forty-six jurisdictions which eliminated at least some parts of criminal statutes of limitations for child sex abuse cases;¹⁷² ten jurisdictions which have no civil statutes of limitations for select child sex abuse cases;¹⁷³ and seventeen jurisdiction which revived their civil statutes of limitations so as to expand the timelines when civil cases may be filed in state courts by child sex abuse survivors.¹⁷⁴ For some of these jurisdictions, efforts were made to extend the number of years during which legal civil actions could be initiated against identified sex abuse perpetrators. In some states, these extensions were limited to criminal matters, and in some civil matters, while still other jurisdictions extended the statute of limitations in both types of legal actions.

The problem left unresolved is that group of victims who lacked the resilience to come forward during the extended time periods that now form the basis of statute of limitations. Even after some states adopted extensions of their statutes of limitations, the new statutory provisions continue to exclude some victims of abuse from gaining admission to either criminal or civil remedies designed to hold perpetrators accountable and to offer remediation to the victims. Additionally, for those individuals who are now unable to litigate their cases even after extensions have been enacted into state legal systems, the new extensions of statutes of limitation continue to protect some sex abuse perpetrators.¹⁷⁵

Despite the best of intentions by these state legislatures, the extension of statutes of limitations only serves those victims who now are able to initiate

¹⁶⁹ ChildUSA, *supra* note 134 (this web based database provides updated information listing summaries of each state's law, the dates of changes made to the laws, and provides categories of jurisdictional changes to these laws).

¹⁷⁰ The 18 jurisdictions which passed reform laws include Alabama, Arizona, Connecticut, Iowa, Maine, Montana, Nebraska, New Jersey, New York, North Dakota, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, and Washington, D.C. *Id.*

¹⁷¹ The 20 jurisdictions which passed SOL reforms included Alabama, Arizona, Connecticut, Illinois, Iowa, Maine, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, and Washington, D.C. There is clearly some overlap in the categorization of states' efforts to reform or alter their SOL laws. *Id.*

¹⁷² The 46 jurisdictions which eliminated at least part of their criminal statute of limitations include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, Washington, D.C., and the Federal Government. *Id.*

¹⁷³ The 10 states that have no civil SOLs for at least some claims by child sex abuse victims include Alaska, Connecticut, Delaware, Florida, Illinois, Maine, Minnesota, Nebraska, Utah, and Vermont. *Id.*

¹⁷⁴ These 17 jurisdictions include Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Oregon, Rhode Island, Utah, Vermont, and Washington, D.C. *Id.*

¹⁷⁵ Rebecca Lowe, *Extending Statutes of Limitations for Victims of Child Sexual Abuse Based on the Developmental Model and International Law*, 24 B.U. PUB. INT. L. J. 27, 34 (2015) ("[p]edophiles don't retire.").

legal claims within the new deadlines.¹⁷⁶ For those victims who remain inadequately prepared to initiate legal action based on the recently extended statutes of limitation, the doors to the courthouse remain closed to those individuals. The question to be addressed is whether the policy objectives that were once used to create generic statutes of limitations apply to this relatively small group of people who were abused at a time in their life when they were completely dependent upon their caretakers for all of their daily needs, yet in many instances these very adults were their abusers, and in other instances, the child victims felt that they could not disclose to their adult caretakers the fact that they were being abused.¹⁷⁷ The fact that some jurisdictions have extended the statutes of limitation by one, five, or even ten years seems so completely arbitrary, and it serves only to protect the very people who perpetrated the abuse in the first place. Surely this was not the desired effect of enacting the statutes of limitation by state lawmakers.

VII. EVIDENCE-BASED LEGAL REFORMS TO ELIMINATE STATUTES OF LIMITATION IN CHILD SEX ABUSE CASES

Given the work and literature of social science that identifies the various manifestations of resilience in sex abuse victims, it is helpful to understand that reporting childhood sexual abuse is not a one-size-fits-all phenomenon. While some victims of sex abuse might report their victimization as soon as it occurs, many others might delay in disclosing their victimization for many years, if not decades.¹⁷⁸ When the legal system's adoption of statutes of limitation prevents any victims of sexual abuse from entering the system—whether as crime victims or as plaintiffs in tort actions—one must question whether the outcome is fair and just?¹⁷⁹ Additionally, one might ask whose interests are being best served by adhering to the legal protocol? If the purpose of a legal system is to encourage citizens and legal entities to resort to the courts to resolve all legal disputes, then in cases where victims of misconduct are unable or unwilling to come forward for years or decades, justice is not achieved if the statutes of limitations serves mainly to protect the interests of the accused perpetrators.¹⁸⁰

¹⁷⁶ The state legislatures must take the lead on any legitimate effort to extend the statutes of limitation, or else fall prey to the U.S. Supreme Court's holding in *Stogner v. California*, which rejected states' attempts to expand shorter statutes of limitations in child sex abuse prosecutions as violative of the Constitution's Ex Post Facto Clause. *Stogner v. California*, 123 S. Ct. 2446, 2462 (2003).

¹⁷⁷ Sarah M. Tashjian et al., *Delay in Disclosure of Non-Parental Child Sexual Abuse in the Context of Emotional and Physical Maltreatment: A Pilot Study*, 58 CHILD ABUSE & NEGLECT 149, 150 (2016).

¹⁷⁸ JUDITH CASHMORE ET AL., THE IMPACT OF DELAYED REPORTING ON THE PROSECUTION AND OUTCOMES OF CHILD SEXUAL ABUSE CASES 32, 2016.

¹⁷⁹ See Jessica Grose, *Why Are There Statutes of Limitations in Child Rape Cases?* SLATE (Dec. 21, 2011), <https://slate.com/human-interest/2011/12/bill-conlin-alleged-sexual-assault-the-tational-behind-statutes-of-limitations-in-child-rape-cases.html>.

¹⁸⁰ Shinton, *supra* note 160, at 326–27 (“The law as it stands in sixteen states protects predators instead of victims.”).

There are legitimate policy concerns that gave rise to the adoption of statute of limitations in the first place, and those doctrinal arguments should be examined with the understanding of what is now understood about this specific form of criminal misconduct¹⁸¹ as well as its probable impact which may last for the entire lifetime of a victim.¹⁸²

It seems unlikely that extending or eliminating the statute of limitations for victims of sexual abuse might result in a massive wave of litigation throughout the country that could overwhelm state legal systems.¹⁸³ The following is not based upon any empirical evidence and remains speculative at this point. First, many victims will have already sought out legal representation and will have either sought a civil remedy or made themselves available to law enforcement authorities to hold the perpetrators accountable in the criminal law system. Second, some victims may have reached a point where they no longer feel compelled to seek resolution in either a criminal or civil proceeding. But for those victims who have had the court house doors closed to them, such individuals deserve to have the right to either testify as a victim in a criminal case, or to file their own civil cases against alleged perpetrators of childhood sexual abuse.¹⁸⁴ For example, the state of New York recently passed the Child Victims Act, which provides one additional extra year to file suits that would otherwise have been barred by the statute of limitations.¹⁸⁵ Under the Act, that additional year has passed,¹⁸⁶ a claim is valid until the victim reaches the age of 55.¹⁸⁷ Prior to the adoption of the New York legislation, most claims were only available until the corresponding victims reached 23 years of age.¹⁸⁸ In the Act's first effective day, over 400 new lawsuits were filed in New York, mostly against the Catholic Church.¹⁸⁹

¹⁸¹ See Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115 (2008).

¹⁸² See Brian L. Porto, *New Hampshire's New Statute of Limitations for Child Sexual Assault: Is It Constitutional and Is It Good Public Policy?* 26 NEW ENG. L. REV. 141 (1991).

¹⁸³ Even if such extension of rights were to cause clogged court dockets, then the problem would be to identify sufficient resources to permit the litigation to go forward, *not* to prevent the cases from being filed. Granting victims access to the courts is a just and proper result.

¹⁸⁴ See Elizabeth A. Wilson, *Child Sexual Abuse, the Delayed Discovery Rule and the Problem of Finding Justice for Adult-Survivors of Child Abuse*, 12 UCLA L. REV. 145 (2003) (some jurisdictions have adopted delayed discovery rules in an effort to expand the time period during which abuse survivors might access the legal system for relief.).

¹⁸⁵ Matthew Laviertes & Jonathan Allen, *As New York Legal Window Opens, Child Sex Abuse Victims Sue Catholic Church, Others*, REUTERS (Aug. 14, 2019), <https://www.reuters.com/article/us-usa-abuse-law-suits/as-new-york-legal-window-opens-child-sex-abuse-victims-sue-catholic-church-others-idUSKCN1V40XH>.

¹⁸⁶ Caroline Kitchener, *'There's a Ticking Clock': Adult Victims of Child Sex Abuse in N.Y. Have One Year to Sue. That Might Not Be Enough Time.*, WASH. POST: THE LILY (Aug. 16, 2019), <https://www.the-lily.com/theres-a-ticking-clock-adult-victims-of-child-sex-abuse-in-ny-have-one-year-to-sue-that-might-not-be-enough-time/>.

¹⁸⁷ Laviertes & Allen, *supra* note 185.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

Other defendants include the Boy Scouts of America,¹⁹⁰ schools,¹⁹¹ hospitals, and individual abusers, such as Jeffrey Epstein.¹⁹²

Criminal statutes of limitations that bar such prosecutions serve to allow sex abusers to continue abusing other victims. Even if the prosecutors are not successful in obtaining criminal convictions in every case, the process of bringing an alleged perpetrator into the criminal system, forcing them to be held accountable, and requiring them to undergo public scrutiny because of the criminal charges, may have an impact on the perpetrators, and it may help to spare other potential victims from similar abuse.¹⁹³ Some studies have concluded that many child sex abusers engage in multiple acts of sexual abuse, not all targeting single victims, but sometimes targeting multiple victims over a period of time.¹⁹⁴

The dispute surrounding revelations from victims of sexual abuse has centered on the delay in their reporting such events,¹⁹⁵ oftentimes taking years, or decades to disclose the incidents.¹⁹⁶ Today, longitudinal studies document the phenomenon and conclude that this long period of delay appears to be the rule rather than the exception. The humiliation, shame, guilt and embarrassment which accompany the sexual victimization¹⁹⁷ often cause the victims to simply withdraw and keep the events to themselves.¹⁹⁸ Victims often indicate that they feel as though they themselves are to blame for the events, and this is reinforced by abusers, and often by their families as well.¹⁹⁹

¹⁹⁰ Nina Feldman & Nicholas Pugliese, *New Lawsuit Reveals More Sexual Abuse Allegations Against Boy Scouts of America*, NPR (Aug. 7, 2019), at <https://www.npr.org/2019/08/07/749041591/new-lawsuit-reveals-more-sexual-abuse-allegations-against-boy-scouts-of-america>.

¹⁹¹ Zachary Matson, *Bishop Gibbons School Named amid Flood of Catholic Child Sex Abuse Lawsuits*, DAILY GAZETTE (Aug. 14, 2019), <https://dailygazette.com/article/2019/08/14/bishop-gibbons-school-named-amid-flood-of-catholic-child-sex-abuse-lawsuits>; Joshua Rhett Miller, *Choir Director, National Guard Band Leader Accused of Sex Abuse at LI Home*, N.Y. POST (Aug. 15, 2019), <https://nypost.com/2019/08/15/choir-director-national-guard-band-leader-accused-of-sex-abuse-at-li-home/>.

¹⁹² Anna North, *What Jeffrey Epstein's Case Says (and Doesn't Say) About Human Trafficking in America*, VOX (Aug. 16, 2019), <https://www.vox.com/2019/8/16/20805431/jeffrey-epstein-sex-trafficking-human-definition>.

¹⁹³ See MICHAEL C. SETO, PEDOPHILIA AND SEXUAL OFFENDING AGAINST CHILDREN: THEORY, ASSESSMENT, AND INTERVENTION (2008).

¹⁹⁴ See Barry M. Maletzky & Cynthia Steinhauer, *A 25-year Follow-Up of Cognitive Behavioral Therapy with 7,275 Sexual Offenders*, 26 BEHAV. MODIFICATION 123 (2002).

¹⁹⁵ Smith et al., *supra* note 3.

¹⁹⁶ The delay phenomenon is not unique to female victims of sexual violence, one study documented an average delay of 21 years—if reporting at all—for males who had been victimized before they disclosed the incidents. Elisa Romano et al., *Men with Childhood Sexual Abuse Histories: Disclosure Experiences and Links with Mental Health*, 89 CHILD ABUSE & NEGLECT 212 (2019).

¹⁹⁷ Dorahy & Clearwater, *supra* note 128.

¹⁹⁸ In one study, researchers concluded that “formal help resources are generally not favored by adolescents and young adults” who have been victimized by dating violence, and that “the majority of youth had never sought professional help.” Mylène Fernet et al., *Meeting the Needs of Adolescent and Emerging Adult Victims of Sexual Violence in Their Romantic Relationships: A Mixed Methods Study Exploring Barriers to Help-Seeking*, 91 CHILD ABUSE & NEGLECT 41, 49 (2019).

¹⁹⁹ Verena Schönbucher et al., *Disclosure of Child Sexual Abuse by Adolescents: A Qualitative In-depth Study*, 27 J. INTERPERSONAL VIOLENCE 3486, 3505 (2012).

Controlling a child or young adult is not especially challenging and may be as simple as threatening the victim with disclosing to their parent the behavior in which they engaged.²⁰⁰ For young child victims this may be a frequent tactic researchers document used by perpetrators.²⁰¹ If the child is a victim of intrafamilial incest, then the child may be completely dependent upon her abuser, thus making it unlikely that the victim would report the abuse and place herself in what may appear to be even greater jeopardy with no means of support.²⁰² For non-familial childhood sexual abuse, sexual exchanges with young children can be painful as well as confusing for these victims, and the prospect of disappointing their parents compounds the emotional complications confronting these individuals.²⁰³ Among adolescents and young adults, sexual violence in dating relationships²⁰⁴ has been documented as a prevalent problem.²⁰⁵ As sexually abused victims mature, they often develop mental health difficulties,²⁰⁶ posttraumatic stress,²⁰⁷ problems in interpersonal and sexual functioning,²⁰⁸ suicidal ideation,²⁰⁹ and many resort to substance abuse²¹⁰ as a coping mechanism.²¹¹

²⁰⁰ Clinicians working with child sex abuse survivors report such tactics anecdotally based on patient disclosures, however, some studies dispute this process and have concluded that victims are just as likely to report as to not report once the perpetrator engages in threats against the victim in order to ensure nondisclosure of the abuse.

²⁰¹ Ceci and Bruck, however, dispute that threats made to the child victims successfully cause victims to delay or to simply not report abuse stating “there is little empirical basis to this claim...the likelihood of disclosure was unrelated to claims of threats by the offender. When the offender used aggressive methods to gain the child’s silence, children were equally likely to tell about the abuse immediately following the event or to never disclose the abuse at all.” Ceci & Bruck, *supra* note 102, at 301.

²⁰² As families become more inclusive and defined by non-traditional relationships, it is important to not overlook intrafamilial violence in non-heterosexual families. See Clare Cannon et al., *Re-Theorizing Intimate Partner Violence Through Post-Structural Feminism, Queer Theory, and the Sociology of Gender*, 4 SOC. SCIS. 668 (2015).

²⁰³ Weiss, *supra* note 128.

²⁰⁴ See Marie E. Karlsson et al., *Changes in Acceptance of Dating Violence and Physical Dating Violence Victimization in a Longitudinal Study with Teens*, 86 CHILD ABUSE & NEGLECT 123 (2018).

²⁰⁵ Mylène Fernet et al., *Meeting the Needs of Adolescent and Emerging Adult Victims of Sexual Violence in Their Romantic Relationships: A Mixed Methods Study Exploring Barriers to Help-Seeking*, 91 CHILD ABUSE & NEGLECT 41, 42 (2019).

²⁰⁶ See Scott D. Easton & Jooyoung Kong, *Mental Health Indicators Fifty Years Later: A Population-Based Study of Men with Histories of Child Sexual Abuse*, 63 CHILD ABUSE & NEGLECT 273 (2017).

²⁰⁷ Sarah E. Ullman, *Relationship to Perpetrator, Disclosure, Social Reactions, and PTSD Symptoms in Child Sexual Abuse Survivors*, 16 J. CHILD SEXUAL ABUSE 19 (2007).

²⁰⁸ See Rinke de Jong et al., *Transition to Adulthood of Child Sexual Abuse Victims*, 24 AGGRESSION & VIOLENT BEHAV. 175 (2015).

²⁰⁹ Federico M. Daray et al., *The Independent Effects of Child Sexual Abuse and Impulsivity on Lifetime Suicide Attempts Among Female Patients*, 58 CHILD ABUSE & NEGLECT 91 (2016).

²¹⁰ See Romano et al., *supra* note 196 (“Men may also turn to substance as one way of coping with maltreatment-related distress. In a systemic review of 18 studies of clinical and community-based men with sexual abuse histories, Butt, Chou, and Browne (2011) found a link between sexual abuse and substance use in terms of earlier onset and greater frequency and variety of drug use.”); *Id.* at 213.

²¹¹ See Romano et al., *supra* note 196, at 213.

A coping mechanism is simply adaptive behavior that helps an individual cope with their pain, trauma, or painful memories. Should a sex abuse survivor resort to substance abuse as a result of their traumatic experiences,²¹² they become vulnerable in court proceedings in that their credibility may easily be undermined due to substance addiction. Fact finders might have a difficult time recognizing that the witness' substance abuse is related to their childhood sexual abuse, in much the same manner that their multiple divorces may be related to their childhood traumatization, or their underperformance academically may be related to their sexual abuse, or their depression²¹³ or perhaps their suicidal ideation may be related to their childhood abuse.²¹⁴

This is not to suggest that all sex abuse survivors manifest the exact same symptoms.²¹⁵ They do not. But many abuse survivors are now known to engage in behaviors that violate criminal statutes precisely in response to their childhood sexual trauma exposure.²¹⁶ This is also not to suggest that anyone demonstrating substance abuse or addiction, suicidal ideation, depression or poor academic performance must have been sexually abused as a child. That would be an improper conclusion. Nevertheless, studies now exist to identify a correlation between childhood sexual abuse and such coping and often dysfunctional behaviors exhibited by survivors of childhood sexual abuse.²¹⁷

The first concern is allowing the victim the legal right to enter the court system in civil cases and to seek redress for the perpetrator's alleged misconduct.²¹⁸ Such testimony might then be assumed to be truthful and accurate, until and unless it is successfully rebutted by the alleged perpetrator.²¹⁹ The body of literature from the community of therapists, physicians, and care providers consistently demonstrates that victims of sexual violence frequently

²¹² See D.G. Kilpatrick et al., *Risk Factors for Adolescent Substance Abuse and Dependence* 68 J. CONSULTING & CLINICAL PSYCHOL. 19 (2000).

²¹³ See Richard J. Kavoussi et al., *Psychiatric Diagnoses in Juvenile Sex Offenders*, 27 J. AM. CHILD & ADOLESCENT PSYCHIATRY 241 (1988).

²¹⁴ See Joseph C. Sabboth, *The Suicidal Adolescent: The Expendable Child*, 8 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 272 (1969).

²¹⁵ "It has been well established that child sexual abuse (CSA) is associated with a variety of negative outcomes (citations omitted). Non-clinical samples of adolescents and adults who have experienced CSA have symptoms and stressors across a range of domains, including psychopathology ... interpersonal problems ... and additional victimization ... However, there is extensive variation in outcomes, and not all sexually abused children will experience similar levels of types of distress." Steven M. Kogan, *The Role of Disclosing Child Sexual Abuse on Adolescent Adjustment and Revictimization*, 12 J. CHILD SEXUAL ABUSE 25, 26 (2005).

²¹⁶ See GAIL RYAN & ET AL., *JUVENILE SEXUAL OFFENDING, CAUSES, CONSEQUENCES, AND CORRECTION* (2d ed. Jossey-Bass, Inc., Pub. 1997).

²¹⁷ See K.A. Tackett et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 PSYCHOL. BULL. 164 (1993).

²¹⁸ See Erin Khorram, *Crossing the Limit Line: Sexual Abuse and Whether Retroactive Application of Civil Statutes of Limitation Are Legal*, 16 U.C. DAVIS J. JUV. L. & POL'Y 391 (2012).

²¹⁹ Such an evidentiary rule could only be adopted in civil proceedings, as it would likely be seen as reversing the burden of proof in criminal prosecutions, causing the accused to prove their innocence.

delay reporting such events.²²⁰ These reporting delays often result in waiving important legal remedies because the statutes of limitations may run in both civil and criminal causes of action.²²¹

Perhaps enacting a rule of evidence that creates a rebuttable presumption that delays in reporting sexual abuse is commonplace should be considered in jurisdictions which eliminate all statutes of limitation.²²² By adopting a new evidentiary rule in conjunction with the elimination of the statute of limitations, sex abuse victims might have credibility in the minds of the fact finder rather than having their testimony discounted due to ignorance or unfamiliarity of the phenomenon of delayed reporting. The crafting of a rule of evidence that took into consideration this well documented behavior pattern would help obtain testimony in court proceedings by reducing the arbitrary restrictions placed upon victims of sexual abuse that might make sense when applied in other scenarios, but which makes little sense when applied to victims of sexual abuse. Compiling information from various studies suggests “that about 25% of women and 9% of men worldwide experience some form of CSA [Child Sexual Abuse] before the age of 18.”²²³ Nevertheless, adopting an evidentiary rule that might benefit victims of early childhood sexual abuse in and of itself would not give victims access to testify, if the statute of limitations precludes bringing such actions.²²⁴

While contemplating the phrasing of an evidentiary rule, it must be recognized that some testimony in childhood sexual abuse cases might result from suggestive interview techniques or from suggestive interviews.²²⁵ These suggestive interview techniques, however, require repeated interviews over an extended period of time in order to be effective in manipulating a

²²⁰ Interestingly, one study reported that non-reporting episodes of sexual abuse actually resulted in fewer instances of the child victim being revictimized. Delayed disclosures were worse off than non-disclosures, leading the authors to theorize that the decision to not disclose may be a useful option, but further research on this issue is needed. Kogan, *supra* note 215, at 42.

²²¹ See Elizabeth A. Wilson, *Suing for Lost Childhood: Child Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult-Survivors of Child Abuse*, 12 UCLA L. REV. 145 (2003).

²²² Most published work on evidentiary issues involving child sexual abuse tends to focus on propensity evidence or character evidence to demonstrate deviant sexual interests or antisocial personality disorders to be used against perpetrators of abuse. See Charles H. Rose, *Caging the Beast: Formulating Effective Evidentiary Rules to Deal with Sexual Offenders*, 34 AM. J. CRIM. L. 1 (2006); Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 AM. J. CRIM. L. 327 (2012).

²²³ Maria Larsen Brattfjell & Anna Margrete Flåm, “*They Were the Ones That Saw Me and Listened.*” *From Child Sexual Abuse to Disclosure: Adults’ Recalls of the Process Towards Final Disclosure*, 89 CHILD ABUSE & NEGLECT 225 (2019).

²²⁴ Hershkowitz et al., *Exploring the Disclosure of Child Sexual Abuse with Alleged Victims and Their Parents*, 31 CHILD ABUSE & NEGLECT 111 (2007).

²²⁵ Ceci and Bruck indicate that “children’s reporting accuracy can be influenced by a number of different interviewing techniques. Techniques that induce the child to imagine scenarios that might not have occurred, that encourage children to think repeatedly about fictional events, or that provide negative stereotypes that are paired with repeated suggestions can result in a substantial diminution of children’s testimonial accuracy. Ceci & Bruck, *supra* note 102, at 295.

child's testimony, and the same research shows that few children would fabricate detailed claims of sexual abuse.²²⁶

Unlike reporting patterns in many other forms of criminal victimization, sexual abuse reporting may take decades, and we are not always in a position to know exactly why and how some victims are able to report their abuse while others never do so.²²⁷ If the public perception is that delays in reporting suggest the victim is not a reliable witness, then it may be worth considering adopting a new rule of evidence—at least in civil proceedings—that creates a rebuttable presumption to benefit those victims who might become eligible to initiate proceedings against their abusers, assuming that the statutes of limitation for child sex abuse are eliminated in every jurisdiction.²²⁸

The elimination of statutes of limitation perhaps coupled with the adoption of an evidentiary rule—at least in civil cases—that reverses the presumption that delayed reports of childhood sexual abuse are less than credible²²⁹ would not completely eliminate all legal barriers currently faced by sex abuse victims. First, responding police officers must exercise discretion and elect to initiate cases.²³⁰ Some victims of child sex abuse describe filing multiple police complaints, sometimes even filing complaints with the FBI, only to have no response, or investigation by law enforcement authorities.²³¹ Second, assuming law enforcement has elected to bring charges against an accused predator, prosecutors, must screen cases and use their discretion in determining whether a criminal charge will be filed.²³² Prosecutors handling

²²⁶ *Id.* at 299.

²²⁷ See Hershkowitz et al., *supra* note 224.

²²⁸ Only civil litigation scenarios would be appropriate for adoption of a new rule of evidence as anything that might be viewed as reversing the burden of proof in a criminal matter would likely be unconstitutional. Adopting new jury instructions to explain the current literature about delayed reporting of sexual abuse would also be worthwhile should the states all eliminate statutes of limitation. Such jury instructions might help emphasize any proffered testimony from expert witnesses who might explain the process of delay in reporting sexual abuse.

²²⁹ This is not a legal presumption, but one embraced by the public and documented by the reaction to Dr. Blasey Ford's testimony as well as the public reaction to the accusations brought against Michael Jackson including the two criminal cases brought in California, and then the accusations contained in the four hour documentary, *Leaving Neverland*.

²³⁰ "Incestuous fathers have little to fear from the law ... The odds in favor of fathers may be judged from a study of 250 police reports of sexual assaults on children in New York City. In the majority of cases (75 percent), either no arrest warrant was made (31 percent) or the accused was arraigned but never brought to trial (44 percent) ... Of these 53 men convicted (21 percent), over half (30) received fines or suspended sentences with or without probation. Twenty-three men, or nine percent of the total, were sentenced to prison, the majority for one year or less ... [T]he punishment for sexual abuse of children may be severe, but in practice they are almost never carried out." JUDITH LEWIS HERMAN, *FATHER-DAUGHTER INCEST* 167 (1981).

²³¹ See Mike Baker, *The Sisters Who First Tried to Take Down Jeffrey Epstein*, N.Y. TIMES, (Aug. 26, 2019), <https://www.nytimes.com/2019/08/26/us/epstein-farmer-sisters-maxwell.html?action=click&module=RelatedLinks&pgtype=Article> (describing the Farmer sisters' attempt to bring charges in several states and the FBI only to see Epstein remain uncharged by authorities for the next 9 years).

²³² Simon indicates that only those cases that pass muster with the police will be considered by the prosecutor, and that even if the case results in a complaint, that conviction is not guaranteed. Prosecutors are

criminal cases are generally elected officials in state systems, and they must answer to the public when they seek re-election. Developing successful conviction records may motivate some of these public officials when they seek to demonstrate to the electorate that they have been effective prosecutors.²³³ As a result, some prosecutors may be reluctant to initiate criminal cases that may present evidentiary challenges and might reduce overall conviction rates.²³⁴ Understanding that physical evidence is rarely available to present to juries or judges is crucial to appreciating why delayed reporting doesn't necessarily impede a trial process in which there is no physical evidence to spoil over time.²³⁵

Trying cases ten, twenty, thirty years after the crime allegedly occurred presents more than a few challenges for a trial attorney handling the prosecution.²³⁶ Physical evidence—assuming it ever existed—may be difficult to find. In a majority of sex abuse cases, the state prosecutor must rely on the testimony of the victim alone, as many cases have no corroborating physical evidence.²³⁷ But the passage of thirty years—in addition to the routine difficulties anticipated in such prosecutions—will make the cases all the more problematic.²³⁸ Recognizing that a majority of child sex abuse cases involve perpetrators known to the victims does not make the trial preparation any easier.²³⁹ Many parents are in denial when informed that their child may have

generally not required to state reasons for the decision to dismiss or downgrade a case, but often indicate that cases are dismissed because they would have been lost at trial. Simon, *supra* note 60, at 490.

²³³ “One study of prosecutorial discretion to reject rape cases in two West Coast communities in 1989 and 1990 concluded that prosecutors screen out ‘unwinnable’ cases in order to improve their conviction rates and thus achieve political capital.” *Id.* at 490.

²³⁴ See Walsh et al., *Prosecuting Child Sexual Abuse: The Importance of Evidence Type*, 56 CRIME & DELINQ. 436 (2010).

²³⁵ “Decades of research into the medical diagnosis of child sexual abuse indicate that most children remain free of any medical findings diagnostic of penetrating trauma. This finding is supported by our review of 2384 cases, where only 4% of all children presented with medical findings that were diagnostic of abuse. These findings were primarily acute injuries, sexually transmitted diseases, positive forensics, or genital scarring such as complete hymenal transections and included one child with an anal scar. Heger et al., *supra* note 11, at 653.

²³⁶ See Emilie Emberg et al., *Prosecutors' Reflections on Sexually Abused Preschoolers and Their Ability to Stand Trial*, 57 CHILD ABUSE & NEGLECT 21 (2016) (comparing Sweden's estimated rate of prosecuting reported cases (10%) with the rate of prosecuting reported cases in the U.S. (52%)).

²³⁷ “Regardless of when the children are evaluated, most children will have normal examinations. . . Most children are not abused in a way to leave permanent physical findings.” Heger et al., *supra* note 11, at 654.

²³⁸ One study found that positive medical findings resulted in increasing the probability of criminal prosecution 2.5 times, and the physical findings were the single most important factor in the finding of guilt, while another study found that perpetrator confessions combined medical evidence were the strongest predictors of prosecution of child sex abuse cases. *Id.* at 655.

²³⁹ Judith Herman's chilling description of prosecuting a case of incest compares the relative inequalities of the accused and the accuser: “As a defendant charged with a sexual offense, [the father] has vastly greater legal protection than the child who accuses him. First, he has the constitutional rights, guaranteed to all criminal defendants, to be considered innocent until proven guilty, to confront his accuser in a public trial, and to cross-examine any witness against him. These safeguards, designed for adversary proceedings between adults, give an enormous advantage to the defendant, where the only witness for the prosecution is a child, dependent on [defendant's] care and habitually obedient to [defendant's] authority. In addition,

been molested by another family member, or a close friend, or an authority figure such as a clergy member or a Scout leader.²⁴⁰ Children are often conflicted in disclosing the abuse for this reason.²⁴¹ The lawyer who takes such a case to trial would have to provide credible explanation to a jury as to why the delay dragged out for so many years.²⁴²

Some jurisdictions have sought to initiate sex abuse cases despite the evidentiary problems these matters present, and they have elected to take a proactive approach thinking that it is the right thing to do, regardless of the eventual conviction rate they are able to secure.²⁴³ If they take an aggressive posture in handling such cases, perhaps there would be fewer results similar to the Jeffrey Epstein case in Florida, and the current federal charges against Epstein in Manhattan.²⁴⁴ Mr. Epstein, a hedge fund manager, plead guilty in state court in Florida in 2008 after federal prosecutors agreed to shield him from federal charges.²⁴⁵ Epstein was exceptionally wealthy, had a great many resources, and apparently utilized some political connections to help reduce his overall exposure to criminal sanctions for sexual misconduct with underage girls.²⁴⁶ At least one of Epstein's under-age victim's cases has embroiled the former U.S. Labor Secretary, Alex Acosta,²⁴⁷ along with the President of the United States, Donald Trump.²⁴⁸ The most recent federal indictment of

many states require corroboration of the victim's testimony against any person accused sex offenses. Since the incestuous relationship almost always occurs in secrecy, this requirement makes conviction of the father virtually impossible." JUDITH LEWIS HERMAN, *FATHER-DAUGHTER INCEST* 164-65 (1981).

²⁴⁰ See Simon, *supra* note 60, at 498.

²⁴¹ Ellen R. DeVoe & Kathleen Coulborn Faller, *The Characteristics of Disclosure Among Children Who May Have Been Sexually Abused*, 4 CHILD MALTREATMENT 217 (1999).

²⁴² Presenting expert testimony to explain the dynamics of child sexual abuse may be crucial in many instances, but identifying such experts is often challenging. See Joyce A. Adams et al., *Diagnostic Accuracy in Child Sexual Abuse Medical Evaluation: Role of Experience, Training, and Expert Case Review*, 36 CHILD ABUSE & NEGLECT 383 (2012); See also Sandra L. J. Johnson, *Paediatric Expert Witness*, 49 J. PAEDIATRIC CHILD HEALTH 611 (2013).

²⁴³ See Theodore P. Cross & Debra Whitcomb, *The Practice of Prosecuting Child Maltreatment: Results of an Online Survey of Prosecutors*, 69 CHILD ABUSE & NEGLECT 20 (2017).

²⁴⁴ "Epstein, 66, is accused of exploiting dozens of girls as young as 14 in his homes in Manhattan and Palm Beach, Fla., enticing them with cash and recruiting them to give him 'massages' that turned sexual. The new charges against him (sex trafficking and sex trafficking conspiracy, to which he pleaded not guilty) relate to incidents that allegedly took place from 2002 to 2005." Katie Reilly, *What Revived the Case Against Jeffrey Epstein*, TIME, (July 22, 2019), <https://www.scribd.com/article/416654605/What-Revived-The-Case-Against-Jeffrey-Epstein>.

²⁴⁵ Ali Watkins, *Jeffrey Epstein is Indicted on Sex Charges as Discovery of Nude Photos is Disclosed*, N.Y. TIMES (July 8, 2019), <https://www.nytimes.com/2019/07/08/nyregion/jeffrey-epstein-charges.html>.

²⁴⁶ See Vivian Wang, *Why the Trump White House is Caught Up in the Jeffrey Epstein Scandal*, N.Y. TIMES (July 7, 2019), <https://www.nytimes.com/2019/07/07/nyregion/jeffrey-epstein-trump.html>.

²⁴⁷ Acosta resigned from his position as Secretary of Labor in the Trump Administration following public criticism of his handling of the Epstein case in Florida which Acosta oversaw in his capacity as the U.S. Attorney in Miami. Acosta was criticized because of the seemingly lenient plea arrangement for Epstein. *Id.*

²⁴⁸ "Donald Trump has not only been accused of rape and sexual misconduct by more than 20 women over the past several decades, but he regularly uses his power to threaten survivors who come forward and to protect and promote men who abuse women ... And Trump's connections to Epstein's sex trafficking may go beyond merely superficial. In 2016, 'Jane Doe' filed a lawsuit against Trump alleging a 'savage

Epstein in the Southern District of New York refers to child abuse incidents dating back to 2002 to 2005 (or as far back as seventeen years ago):

The intervening years don't mean it's too late for Epstein to face his day in court. No statute of limitations applies—the 2006 law that eliminated the federal statute of limitations for child sex trafficking applies to incidents that occurred as early as 2001—and prosecutors in New York say they aren't bound by a 2008 plea deal Epstein reached with federal prosecutors in Florida after he was accused there of abusing dozens of girls.²⁴⁹

By expanding the ability of jurisdictions to hold perpetrators of child sexual abuse accountable,²⁵⁰ the lives of children not victimized by abusers may be spared the indignity and pain of other victims.²⁵¹ The Epstein case is indicative of a pattern by some child molesters of continuing to offend even after pleading guilty to earlier cases of abuse.²⁵² This behavior cycle may respond well to therapeutic interventions,²⁵³ but for many abusers, there is no guarantee that even after serving a sentence perpetrators will cease and desist their molestation of children.²⁵⁴ Mr. Epstein committed suicide while jailed

sexual assault' in 1994, when she was 13 years old, in which he tied her to a bed at Epstein's house, raped her, and struck her in the face. The account was corroborated by a witness who claimed to have seen the child perform sexual acts on both Trump and Epstein." Laura Bassett, *When Does America Reckon with the Gravity of Donald Trump's Alleged Rapes?*, GQ (July 11, 2019), <https://www.gq.com/story/donald-trump-jeffrey-epstein>; See also *Katie Johnson v. Donald J. Trump and Jeffrey E. Epstein*, Case No. 5:16CV00797, No. ED CV16-00797 DMG (KSX) (Apr. 26, 2016), at 2016 WL 1697795 (Plaintiff alleges that when she was 13-years-old, her federal civil rights were violated—under 42 USC 1983—by Trump and Epstein under 18 U.S.C. 2241, and 42 U.S.C. 1985 “by making her their sex slave” and claiming to have had four nonconsensual sexual encounters with Trump at Epstein's New York residence, along with being raped and sodomized by Epstein, then being threatened with death should she reveal how she had been sexually abused.); See also Matt Ford, *The 19 Women Who Accused President Trump of Misconduct*, ATLANTIC (Dec. 7, 2017), <https://www.theatlantic.com/politics/archive/2017/12/what-about-the-19-women-who-accused-trump/547724/> [[https://perma/unl.edu/Y796-9B7S](https://perma.unl.edu/Y796-9B7S)].

²⁴⁹ Reilly, *supra* note 244.

²⁵⁰ Today, accountability includes the prospect of civil commitment for sexual predators in some jurisdictions. See Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437 (1995).

²⁵¹ See Joseph J. Romero & Linda M. Williams, *Recidivism Among Convicted Sex Offenders: A 10 Year Followup Study*, 49 FED. PROB. 1 (1985) (69% of adult sex offenders convicted and serving probation have been diagnosed with a personality disorder).

²⁵² Richard Behar, *Jeffrey Epstein Spent Time Alone with Young Woman in Prison's Attorney Room*, FORBES (Aug. 15, 2019), <https://www.forbes.com/sites/richardbehar/2019/08/15/jeffrey-epstein-spent-time-alone-with-young-female-prison-visitor/#372d5cb3185b>.

²⁵³ See D. Finkelhor & L. Berliner, *Research on the Treatment of Sexually Abused Children: A Review and Recommendations*, 34 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1408 (1995).

²⁵⁴ See Ryan C.W. Hall & Richard C.W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 MAYO CLINIC PROC. 457 (2007).

in a Manhattan facility,²⁵⁵ so his victims must now attempt to seek civil damages from his estate,²⁵⁶ even though there is no further opportunity for Mr. Epstein to avail himself of any therapeutic assistance.

VIII. SEEKING RESTORATIVE JUSTICE OR THERAPEUTIC JURISPRUDENCE?

The Kavanaugh confirmation hearing brought to light the divisive nature of public accusations of child and adolescent sexual abuse. It also demonstrated how unfamiliar we are with the dynamics of child sex abuse. The hearing was not a trial seeking a judicial resolution, but rather a public hearing investigating one incident of sexual abuse decades after the alleged incident occurred.²⁵⁷ The nation was riveted to the TV, but likely learned very little about the current body of literature on this difficult subject matter since no professionals or experts were called to testify or provide any form of clarification following the witness testimony.²⁵⁸ Perhaps this was because of the political confirmation protocol,²⁵⁹ but the judicial system that actually handles child sex abuse cases can and must provide greater clarity, and such clarity requires that litigants gain entry to the court system in the first place.

Over the past several decades, legal scholars and mental health service providers have created a loose association to focus on creating legal solutions to human problems that employ therapeutic benefits to involved parties.²⁶⁰ A global network has evolved that utilizes blog sites, web pages, and internet resources seeking to link professionals in law and mental health, in medicine and in related fields attempting to build a better intervention system that promotes just outcomes for parties involved in legal disputes.²⁶¹ "Therapeutic Jurisprudence 'seeks to provide a foundation for law reform designed to reshape legal rules and practices in ways that minimize their antitherapeutic

²⁵⁵ Carol D. Leonnig & Aaron C. Davis, *Autopsy Finds Broken Bones in Jeffrey Epstein's Neck, Deepening Questions Around His Death*, WASH. POST (Aug. 15, 2019), https://www.washingtonpost.com/politics/autopsy-finds-broken-bones-in-jeffrey-epsteins-neck-deepening-questions-around-his-death/2019/08/14/d09ac934-bdd9-11e9-b873-63ace636af08_story.html.

²⁵⁶ Amy Julia Harris, *Epstein Accuser Sues His Estate, Saying He Groomed Her for Sex at 14*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/2019/08/14/nyregion/epstein-lawsuit-jennifer-araoz-rape.html>.

²⁵⁷ For a discussion of the political nature and the process of and limitations of congressional investigations, see James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115 (2007).

²⁵⁸ Congress does have the power to subpoena witnesses to appear and testify before congressional committees ever since the Supreme Court's decision in *McGrain v. Daugherty*, 273 U.S. 135, 174-75 (1927). See Christopher F. Corr & Gregory J. Spak, *The Congressional Subpoena: Power, Limitations, and Witness Protections*, 6 BYU J. PUB. L. 37 (1992).

²⁵⁹ See Sen. Dennis DeConcini, *Examining the Judicial Nomination Process: The Politics of Advice and Consent*, 34 ARIZ. L. REV. 1 (1992).

²⁶⁰ See Carolyn S. Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children's Law Clinic*, 17 ST. THOMAS L. REV. 623 (2005).

²⁶¹ See David B. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JURIDICA UNIVERSIDAD DE PUERTO RICO 691 (1999).

effects and maximize their potential to enhance the emotional well-being of the individual and society.”²⁶² Rather than focusing on “appropriate” legal resolutions, the movement focuses on defining outcomes that offer therapeutic value to parties.²⁶³ Many court systems have adopted “problem-solving courts” which often have more relaxed rules of procedure or limited jurisdiction in order to focus on resolving cases involving veterans, citizens with addiction disorders, or other specific legal matters.²⁶⁴ For many victims of child sex abuse, such theoretical applications of how the justice system could better meet the needs of some litigants did not exist. Today, however, our justice system has entered the conversation about how and when therapeutic considerations should play a role in legal problem solving.

In most litigation, at least one party does not prevail—and in some matters both parties may be disappointed with the outcome—yet the parties might still feel that the court process provided some catharsis. They did all they could in order to find resolution and closure, and their involvement in the process has afforded them an opportunity to begin or continue whatever healing process they may need.²⁶⁵ Legal solutions to human conflict often prioritize stability or consistency above just results, and the notion of a “just” outcome might be viewed as highly subjective. However, it’s worth a serious consideration to help parties achieve a therapeutic outcome, by seeking legal remedies that are infused with the knowledge and experiential input of other professions that place the highest priority on assisting the harmed party. Interest in therapeutic jurisprudence seems to increase annually. The idea of eliminating statutes of limitations for all cases involving delayed reporting of childhood sexual abuse falls within the scope of therapeutic jurisprudential remedies.

While this comingling of legal and therapeutic models may not be appropriate for resolving all forms of legal disputes, it certainly offers great promise when understanding the human reaction to the trauma of sexual abuse, especially when the victims are children or adolescents.²⁶⁶ Victims of sexual abuse might seek more traditional objectives in the criminal justice system

²⁶² Salisbury, *supra* note 260, at 681 (citing Bruce J. Winick & Ginger Lerner-Wren, *Do Juveniles Facing Civil Commitment Have a Right to Counsel? A Therapeutic Jurisprudence Brief*, 71 U. CIN. L. REV. 115 (2002)).

²⁶³ One example has been the development of over 2,500 so-called “problem solving courts” in the U.S. where a “growing body of research literature has begun to validate their effectiveness.” Robert V. Wolf, Center for Court Innovation, Bureau of Justice, *Principles of Problem-Solving Justice* 1 (2007).

²⁶⁴ This concept is not without critics. See Morris B. Hoffman, *Problem-Solving Courts and the Psychological Error*, 160 U. PA. L. REV. 129 (2011) (focusing concerns about judge-driven drug courts and veteran’s courts).

²⁶⁵ When the victims of Jeffrey Epstein’s sexual abuse were allowed to speak before the federal judge in open court following Epstein’s suicide, it was described as a “moment of catharsis.” See Watkins et al., *supra* note 166.

²⁶⁶ See David Finkelhor & Angela Browne, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, 55 AM. J. ORTHOPSYCHIATRY 530 (1985).

resulting in the offender's conviction and incarceration.²⁶⁷ For some victims, justice might be conviction and incarceration, or it might be receiving compensation from the offender, or the state to help offset expenses of securing safe housing, affording counseling or repairing property damage, or it might simply be having the "opportunity to tell one's story to the community or perhaps directly to the offender."²⁶⁸ The Piaget-identified stages of human development²⁶⁹ help explain why this form of sexual misconduct and early victimization is so destructive.²⁷⁰ The abuse occurs when a person's brain functions have not yet matured and completely developed.²⁷¹ It disrupts their childhood development, and it inflicts pain both physical and emotional that they are not capable of handling, of comprehending,²⁷² and the consequences may plague them for the remainder of their lives.²⁷³ We know from studies and research that many of these victims suffer post-traumatic stress disorder,²⁷⁴ major depression,²⁷⁵ unsuccessful interpersonal relationships,²⁷⁶ failed marriages, substance abuse²⁷⁷ and personal lives often in disarray.²⁷⁸ The intimate nature of this criminal misconduct does not suddenly end when the

²⁶⁷ See Bruce Feldthusen, *The Civil Action for Sexual Battery: Therapeutic Jurisprudence?* 25 OTTAWA L. REV. 203, 210 (1993) ("[D]amages do not always seem central to the action. Frequently, plaintiffs have litigated sexual battery actions knowing that there would be virtually no prospect of collecting on the judgment.").

²⁶⁸ Amy Kasparian, *Justice Beyond Bars: Exploring the Restorative Justice Alternative for Victims of Rape and Sexual Assault*, 37 SUFFOLK TRANSNAT'L L. REV. 377, 378 (2014).

²⁶⁹ JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (London: Routledge & Kegan Paul ed., 1932); JEAN PIAGET, *ORIGINS OF INTELLIGENCE IN THE CHILD* (London: Routledge & Kegan Paul ed., 1936) (discussing the 4 stages of childhood development).

²⁷⁰ Consider the coping strategies employed by young children who have been victimized. See Mark Chaffin et al., *School Age Children's Coping with Sexual Abuse: Abuse Stresses and Symptoms Associated with Four Coping Strategies*, 21 CHILD ABUSE & NEGLECT 227 (1997).

²⁷¹ One study in the 1980s by the National Center on Child Abuse and Neglect and the American Humane Society found that 28.5% of child sexual abuse victims were under the age of five, and therefore had no idea of the wrongfulness of the sexual acts perpetrated against them. HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 19 (1985).

²⁷² See Margaret C. Cutajar et al., *Psychopathology in a Large Cohort of Sexually Abused Children Followed Up To 43 Years*, 34 CHILD ABUSE & NEGLECT 813 (2010).

²⁷³ See David M. Fergusson et al., *Childhood Sexual Abuse and Psychiatric Disorders in Young Adulthood: Part II: Psychiatric Outcomes of Childhood Sexual Abuse*, 35 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1365 (1996).

²⁷⁴ See Raul R. Silva & Lena Kessler, *Resiliency and Vulnerability Factors in Childhood PTSD*, in POSTTRAUMATIC STRESS DISORDERS IN CHILDREN & ADOLESCENTS HANDBOOK 18 (Raul R. Silva ed., 2004).

²⁷⁵ Roberto Maniglio, *Child Sexual Abuse in the Etiology of Depression: A Systemic Review of Reviews*, 27 DEPRESSION & ANXIETY 631 (2010).

²⁷⁶ See David M. Fergusson et al., *CHILDHOOD SEXUAL ABUSE AND ADULT DEVELOPMENTAL OUTCOMES: FINDINGS FROM A 30-YEAR LONGITUDINAL STUDY IN NEW ZEALAND*, 37 CHILD ABUSE & NEGLECT 664 (2013).

²⁷⁷ See Kenneth S. Kendler et al., *Childhood Sexual Abuse and Adult Psychiatric and Substance Abuse Disorders in Women*, 57 ARCHIVES GEN. PSYCHIATRY 953 (2000).

²⁷⁸ Approximately 55% of rape victims develop PTSD while only 7.5% of accident victims develop PTSD, and evidence overwhelmingly supports that PTSD is more often associated with other psychiatric disorders than occurring as the sole diagnosis in PTSD patients. Richard A. Bryant & Terence M. Keane,

sexual abuse ends. Many victims continue to suffer the consequences throughout the remainder of their lives.²⁷⁹

This is not the same reaction that victims of other forms of crime may have, although there certainly are other crimes that have similar lifetime impacts on the victims. This particular crime, however, is hidden away. It occurs in secret and is intended never to be divulged.²⁸⁰ It does not result in accumulation of money or property, but of sexual gratification. The intimacy of the crime helps to ensure that witnesses will not be present, and that evidence will not be created. And if the victim is a child, then that child will have to testify in a court of law against a fully developed and mature minded adult.²⁸¹ How much more could the deck be stacked?²⁸² These cases are difficult to prove even under the best of circumstances:

The U.S. Supreme Court noted that “child abuse is one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim.” Although most children are competent to testify, some cannot take the witness stand because they are too young or too frightened. When a child is asked to testify against a familiar person, the experience can be overwhelming. Yet, without the child’s testimony, criminal prosecution is typically stymied.²⁸³

Parents of the victims are usually uninformed about the dynamics of sexual abuse.²⁸⁴ Judges, lawyers and lawmakers are often equally ignorant about the specifics of this misconduct. This is an area where the members of the legal profession should listen to the professionals from other fields, learn from their research, and then consider what legal reforms would best benefit the community and the victims of these crimes.²⁸⁵ Whatever merit statutes of

Posttraumatic Stress Disorder, in *PSYCHOPATHOLOGY: FROM SCIENCE TO CLINICAL PRACTICE* 172, 178 (2013).

²⁷⁹ David M. Fergusson et al., *Childhood Sexual Abuse and Adult Developmental Outcomes: Findings From a 30-Year Longitudinal Study in New Zealand*, 37 *CHILD ABUSE & NEGLECT* 664 (2013).

²⁸⁰ See Jon R. Conte et al., *What Sexual Offenders Tell Us About Prevention Strategies*, 13 *CHILD ABUSE & NEGLECT* 293 (1989).

²⁸¹ Preparing a child witness to testify in court can be a complex process. See DEBRA A. POOLE & MICHAEL E. LAMB, *INVESTIGATIVE INTERVIEWS OF CHILDREN* (1998).

²⁸² Presenting a young child’s testimony is a delicate process with potentially case-ending consequences. If a child witness is unable to clearly identify the sexual body parts involved in offending, perhaps because they are unfamiliar or rely upon colloquial terms, that alone could undermine the child’s testimony before a jury or judge. See Kimberlee S. Burrows et al., *Children’s Use of Sexual Body Part Terms in Witness Interviews About Sexual Abuse*, 65 *CHILD ABUSE & NEGLECT* 226 (2017).

²⁸³ JOHN E. B. MYERS, *A HISTORY OF CHILD PROTECTION IN AMERICA* 392 (2004) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987)).

²⁸⁴ In fact, half of the studied victims of childhood sexual abuse do not disclose to their parents because they fear or are ashamed of their anticipated parents’ expected reactions, and the study showed a strong correlation between predicted and actual parental reactions. Hershkowitz et al., *supra* note 224.

²⁸⁵ Just as importantly, however, as listening to professionals in other fields is remaining informed about the effectiveness of treatment programs involving sex offenders. See Eric S. Janus, *The Use of Social*

limitation might otherwise achieve, in the instance of child sex abuse victims, those merits are far outweighed by the consequences of shutting the court house doors and preventing victims from responding to unthinkable misbehavior that they suffered when they were children or when they were too young and immature to appreciate the options that might have existed at the time they were being molested.²⁸⁶

The legal reforms initiated by those states that have extended their statutes of limitations can be seen as a positive move in the right direction,²⁸⁷ but many of them have only marginally expanded the right of victims to file suit or to initiate criminal cases against their abusers. The statutes are less restrictive than the previous laws, but what purpose or legal objective is accomplished by placing any restriction on this group of victims? Pragmatically, many of these victims will choose not to become involved with the legal system for various reasons, as indicated by Dr. Blasey Ford's testimony in the Kavanaugh nomination hearing.²⁸⁸ Other victims, such as the men who accused Michael Jackson of molesting them, might become involved in criminal prosecutions only to withdraw their complaints, or they might be offered civil settlements with nondisclosure agreements if they withdraw their actions.²⁸⁹ Still other victims perhaps view litigation as being too onerous, or too disruptive of the lives they currently enjoy. But not all victims will view the new opportunities to access the courts in that manner, as evidenced by the recent expansion of rights in New York for child sex abuse victims.²⁹⁰

This proposal seeks to provide a therapeutic jurisprudential remedy to the most vulnerable members of our society, children and young people.²⁹¹ The Supreme Court has at times ratified efforts by states to create legal systems that attempt to protect child victims from sex offenders as best possible,²⁹² but without overriding fundamental Constitutional concepts of due process²⁹³ and equal protection that any accused may invoke.²⁹⁴ Striking the

Science and Medicine in Sex Offender Commitment, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 347 (1997).

²⁸⁶ See Michael Krauss, *Fundamental Fairness in Child Sexual Abuse Civil Litigation*, 8 STAN. L. & POL'Y REV. 205 (1997).

²⁸⁷ Jessica E. Mindlin, *Child Sexual Abuse and Criminal Statutes of Limitation: A Model for Reform*, 65 WASH. L. REV. 189 (1990).

²⁸⁸ See Senate Judiciary Hearing, *supra* note 131.

²⁸⁹ See Michael Jackson Documentary, *supra* note 109.

²⁹⁰ See Reuters, *supra* note 185.

²⁹¹ See Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251 (2005) (discussing the history of restorative justice).

²⁹² The Court upheld the Kansas Sexually Violent Predator Law. *Kansas v. Hendricks*, 521 U.S. 346 (1997) (holding that state sexual predator civil commitment laws are constitutional).

²⁹³ The Due Process Clause indicates that "[n]o state shall ... deprive any person of life, liberty, or property without due process of law ..." U.S. CONST. amend. XIV, §1.

²⁹⁴ But see Eli M. Rollman, "Mental Illness": *A Sexually Violent Predator Is Punished Twice for One Crime*, 88 J. CRIM. L. & CRIMINOLOGY 985 (1998).

right balance is not an easy task.²⁹⁵ But by eliminating state statutes of limitations for child sexual abuse victims, those victims who delayed in reporting and who behaved in ways that child abuse professionals have come to realize as the norm will have an opportunity to rely on the justice system for the very thing that has been denied them since their childhood—a just outcome.²⁹⁶ Even if the cases do not result in damages for victims or convictions in criminal prosecutions, the victims may feel that they have been vindicated and that they have at long last been able to come forward, disclose the abuse that was inflicted upon them, and regain some control over their lives.²⁹⁷ This proposal is not about redistributing wealth to victims of crime, but about permitting sex abuse victims to regain their sense of dignity, to tell their stories in a public forum, and to attempt to hold their abusers accountable regardless of the amount of time that has passed since they were abused. This should serve as more than sufficient justification for the proposed legal reform.

²⁹⁵ See Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437 (1995).

²⁹⁶ For alternatives to traditional concepts of conviction and incarceration for victims seeking justice in the court system, see Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?* N.Y. TIMES (Jan. 6, 2013), <https://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html> (considering restorative justice for homicide victims).

²⁹⁷ See Ilene Seidman & Jeffrey J. Pokorak, *Justice Responses to Sexual Violence*, in VIOLENCE AGAINST WOMEN AND CHILDREN 137 (Koss, White & Kazdin eds., 2011) (examining restorative justice alternatives to traditional civil and criminal justice system outcomes).