

Approved: May 23, 1994
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael O'Neal at 3:30 p.m. on February 17, 1994 in Room 313-S of the Capitol.

All members were present except:
Representative Tom Bradley - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
David Holmes, Ph.D. Psychiatry, Kansas University
Pat Wild, Junction City
Howard Fishman
Sue Tucker, Kansas City
Jan Larson, Kansas City
Dean Reeves, Kansas City
Jean Schmidt, Attorney General's Office
Linda Sebastian, Menningers Clinic
Patti VanSlyke, Junction City
Dr. Susan Voorhees, Child Psychologist
Lisa Moots, Kansas Sentencing Commission

Others attending: See attached list

Hearings on **HB 2690** - Statute of limitations on criminal prosecution of childhood sexual abuse, were continued.

Howard Fishman appeared before the Committee in opposition to the proposed bill. He stated that extending the statute of limitations is the tip of an iceberg. The changes in the current statute would not serve equal protection under the law. Issues concerning child abuse are both complex and controversial. The solution to this "problem" will not be found in this bill.

David Holmes, Ph.D. Psychiatry, Kansas University, appeared before the Committee to address the issue of "repressed memory". He stated that "repressed memory" suggests that memories of traumatic or painful events are forced into the unconsciousness and later recalled. Within the last 10 years the evidence concerning the roll of repression has undergone research. Existing evidence, at this time, shows that there are no substantial "repressed memories", but that "repressed memories" are implanted into the person. Because there is no evidence that "repressed memory" actually exists it would be inappropriate to change the statute of limitations to accommodate recovered memories, (see attachment 1). The investigation of repression of memory has been researched for over 70 years and no experiment has validated the "repressed memory" theory.

Those who believe in "repressed memory" have published a paper in which they interviewed 160 women who as children had been sexually abuse and had been taken to a hospital to be treated for the abuse. Therefore there are records that the abuse occurred. 18 years later they interviewed these women and 36% of them did not report the abuse or the treatment in the hospital, and they decided that this was evidence of repression. This study did not ever ask if they had been sexually abused or received treatment but only requested that they tell about the problems in their life. Two years earlier another study had been done using the same procedure, and found that 36% of the females also did not report that they had been abused. However, in this study they did a follow-up question regarding the fact that their medical records showed early hospitalization. 100% of those responded that they knew but try not to talk about the sexual abuse. This suggests that they may not report the abuse but it is also not repressed. When one experiences a overwhelming stressing experience, one does not repress that experience but in fact the memory is heightened.

We as a society do not remember things as they really happen, we tend to distort memories. Distorted memories are totally different than "repressed memories", in that "repressed memories" are very easily implanted. If there is no evidence for repression then there cannot be the return of the memories 20 & 30 years later, or have a delayed time for starting the clock on the statute of limitations.

Representative Carmody stated that when a child is molested, at what point in their life would they be mature enough to be able to deal with the prosecution of the alleged perpetrator. Mr. Holmes stated that the issue of individual differences are so wide that it would be hard to set one age.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY, Room 313-S Statehouse, at 3:30 p.m. on February 17, 1994.

Representative Everhart questioned if he was suggesting that no one ever represses a memory or blocks out a traumatic experience. Mr. Holmes responded that some people choose not to think about the experiences. The difference between avoidance thinking and repression is that with avoidance thinking they know what happened but find other strategies to avoid thinking about the experience.

Chairman O'Neal stated that he was not convinced that the science is there to demonstrate that there is such a thing as "repressed memory". Legally there would be a problem when a child four years old had been sexually abused and the only witnesses are the four year old and the perpetrator. In this event, under current law, the victim would have to bring charges against the perpetrator by the age of nine. Under this bill the victim has to tell the courts at what time the criminal act happened. The Chairman believed that these acts happen but no one represses it but instead would remember it throughout their life, although they may not appreciate that it was a criminal act at the time it happened. He's concern was for those against whom the act was committed and allowing enough time to bring a prosecution against the preparator.

The Chairman stated that Representative Wagnon had given the Committee a handout that shows different statutes of limitations from various states. The majority of the statutes tie the statute of limitations to the age of majority, (see attachment 2).

Pat Wild, Junction City, appeared before the Committee as an opponents to the bill. She stated that their child was under a great deal of stress trying to pay for college and getting prepared for marriage. Someone suggested that she see a therapist. She went and recalled a "repressed memory" of being sexually abused by her parents. She had written a letter to her parents and stated that she didn't know any sexual abuse had happened to her, but she learned about it while she was in therapy. She stated that children hurt just as much as the parents do in these type of cases, (see attachment 3).

Sue Tucker, Kansas City, appeared before the Committee as an opponent to the bill. She stated she lost a sister when that sister called and accused their parents of satanically ritually abusing them as children. This sister has cut off the family and refuses letters, phone calls and visits from family members, (see attachment 4).

Dean Reeves, Kansas City, appeared before the Committee as an opponent to the bill. He stated that he was concerned about satanic ritual abuse and the hysteria that comes with satanic & sexual abuse, (see attachment 5).

Jan Larson, Kansas City, appeared before the Committee as an opponent of the proposed bill. She stated that many cults use satanic rituals and sexually abuse the children of the world. They are a danger to our society.

Dr. Susan Voorhees, Child Psychologist, appeared before the Committee as a proponent of the bill. She stated that she understood that there are concerns about enacting legislation which would allow for prosecution based on potentially old and possibly false memories which are evoked long after the event and therefore cannot be substantiated. There are three important things that should be kept in mind when considering this issue. First, sexual abuse is a distortion of the normal developmental experiences of childhood, in which a child is forced to engage in an adult activity which is beyond their capability of understanding. The second is that sexual abuse always involves power and domination of one individual over another. The last is that chances of malicious prosecution of innocent people falsely accused of sexual abuse are far smaller than the impact of the opportunity for child abuse victims to legally pursue their abuser, (see attachment 6).

Representative Goodwin questioned if she worked with children beyond the age of 16 that had repressed memories. Dr. Voorhees stated that she sometimes sees those children until the age of adolescence.

Jean Schmidt, Attorney General's Office, appeared before the Committee as a proponent of the bill. She stated that the feelings of the Committee tended to lean towards the issue of discovery rather than disclosure. The problem arises when a child does not disclose that he has been sexually abused, but may very well have the awareness of the event. Would this be considered a discovery or would it be at the point when they tell someone that the statute of limitations begins to run. The proposed bill would give prosecutors another tool to enable prosecution in a number of cases that are presently precluded from prosecution, (see attachment 7).

Chairman O'Neal stated the testimony from the proponents of "repressed memory" syndrome was that something happened when they were very young and they didn't discover it until they were in their 20's or 30's. In court there would be a battle of expert witnesses, and the case would probably not be won. The problem is disclosure vs. discovery. Where something happened at a very tender age where disclosure was not possible, there was no appreciation of the criminality or there were threats against disclosure then that individual needs to be protected. He does not, however, buy the idea of "repressed memory" syndrome and being able to file charges 20 - 30 years after the act happened.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY, Room 313-S Statehouse, at 3:30 p.m. on February 17, 1994.

The Chairman stated that most of the states have gone with the statute of limitations running from the age of majority and questioned if that made sense. Ms. Schmidt stated that she had not had the time to look at what other states were doing, however, she does like this idea. Chairman O'Neal stated that there are two options: one would tie the statute of limitations to the age of majority and the other would have a list of things that would need to happen in order to toll the statute of limitations. In these cases there would be a huge emotional loss for both sides if these cases go to trial. The challenge that was suggested today is that there's not a single controlled study that supports the "repressed memory" syndrome. We need to protect those children, who were sexually abused at a young age, but because of their age never got the chance to prosecute because the five year statute of limitations doesn't help them at all.

Linda Sebastian, Menningers Clinic, Patti VanSlyke, Junction City, & Lisa Moots, Kansas Sentencing Commission didn't appear before the Committee but requested that their testimony be included into the Committee minutes, (see attachments 8, 9 & 10).

Hearings on **HB 2690** were closed.

The Committee meeting adjourned at 6:30 p.m. Sub-Committee meetings are scheduled for February 21, 22 & 23. The next meeting as a whole Committee is scheduled for February 24, 1994.

GUEST LIST

HOUSE JUDICIARY COMMITTEE

DATE February 17, 1994

NAME	ADDRESS	ORGANIZATION
Marilynn Ault	Topoka KS.	Battered Women Task Force
Jan Larson	KCMO 64111 3675 Summit St #2	Mailings
Sue Zucker	8335 Valley View Dr. Overland Park KS 66220	Family
Patricia Wild	2521 Walters Drive Mulford, KS 66514	Family
Dean Reeves	4746 E Monte RP KS 66205	Family
Marian Raab	Lawrence, KS	Rep Wagner
Ruth Driver	Topoka	Self
Gylene Fredrick	"	Self & Church Women
Delma Roush	Jola	Hope Unlimited + SA DV
Kathy Roush	Jola	Hope Unlimited + SA DV
Wade Dig	Topoka	intern
Elizabeth Brakes	Lawrence	intern
David S. Holmes	Shawnee Mission	Univ of Kansas/Prod.
Charlie Kim	Lawrence	INTER.
Penny Sue Johnson	Overland Park, KS	Shelks, Coalition, The
KETH R LANDIS	TOPEKA	CHRISTIAN SCIENCE COMM. ON PUBLICATION FOR KS
Susan Voorhees	Topoka KS	

- 94 **Outline of the Opening Statement by David S. Holmes, Ph.D.,
Concerning Repression and the Recovery of Repressed Memories**

Judiciary Committee Hearing, Kansas State Legislature

February 17, 1994

Summary: At the present time, I know of *no* objective evidence that supports the notion that memories of traumatic events (e.g., childhood sexual abuse) are repressed or that "repressed" memories can be recovered. It should be noted that it is impossible to prove that something does *not* happen. That is the case because it is always possible that new evidence might be found. However, the question of repression has been under investigation for over 70 years, and the absence of *any* objective evidence after that amount of effort is compelling. Indeed, even those who argue that repressed memories can be recovered have been *unable* to offer *any* objective evidence for repression or for the recovery of repressed memories.

It is also important to note that the absence of evidence concerning repression in no way denies the fact that childhood sexual abuse occurs and can be a traumatic event. However, in the cases of such abuse, the abuse is *not* forgotten but is *remembered*. Indeed, all of the evidence indicates that if anything, the memory for the trauma is *enhanced* (for example, the posttraumatic stress disorder).

In contrast to the absence of evidence for repression or the recovery of repressed memories, there is a substantial amount of objective evidence that *completely false memories can be implanted* (suggested). An individual with an implanted memory is not lying or in any way dissembling. Instead, the individual truly believes the "memory" to be valid, but the objective evidence clearly indicates that the individual is *incorrect*.

Because there is no objective evidence that repression occurs or that "repressed" memories can be recovered, it would be inappropriate to change the statute of limitations to accommodate "recovered memories."

What is the evidence for repression in general?

1. Laboratory evidence
2. Clinical Evidence (psychogenic amnesia)

What is the evidence for the repression of childhood sexual abuse in specific?

1. Studies in which childhood abuse is documented but not reported later

If the "recovered" memories are not valid, from where do they come?

1. Field research on the implanting of false memories (e.g., false confessions)
2. Laboratory research on implanting of false memories

(please see over)

Biographical Information on David S. Holmes

Ph.D., Northwestern University
Clinical Psychology Internship, Harvard University
Currently Professor of Psychology, University of Kansas

Professor Holmes is the author of over 120 articles on personality and psychopathology, and is the author of **Abnormal Psychology** (a text that is used at over 500 colleges and universities including Stanford, UCLA, Michigan, and Northwestern, and which was cited by the American Psychological Foundation for its "impeccable scholarship").

Professor Holmes was named as "*One of the Outstanding Educators in America*" and has received numerous awards for his research and teaching (e.g., *Award for Distinguished Teaching in Psychology* from the American Psychological Foundation). In addition to his research and teaching, Professor Holmes has held a variety of administrative positions in the scientific community (e.g., Chairperson of the Board of Scientific Affairs of the American Psychological Association).

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TOPEKA

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CHAIRMAN: BOARD OF DIRECTORS,
CORPORATION FOR CHANGE
RANKING MINORITY MEMBER: TAXATION
MEMBER: JUDICIARY

TO: Members of House Judiciary Committee

RE: HB 2690

DATE: February 17, 1994

I am enclosing several pieces of information that might be useful in evaluating HB 2690.

- I. Information and statistics from the National Victim Center on extending criminal statutes of limitation in childhood sexual abuse cases. (supplied by NCSL)
- II. Personal letter from constituent Sharell Jordan advocating the extension of the current statute of limitations. Jordan also praises the Legislature for extending the statute of limitations for civil actions in childhood sexual abuse cases in 1992.
- III. Copy of K.S.A. 60-523.
Limitations on actions for recovery of damages suffered as a result of childhood sexual abuse.

This Legislature has already moved to extend the statute of limitations for civil cases. It is time to also extend the statute of limitations for criminal cases of childhood sexual abuse.

- IV. NOTE: "Retroactive Application of Legislatively Enlarged Statutes of Limitations for Child Abuse: Time's No Ban to Revival," Indiana Law Review, Volume 22, No. 4, 1989, by Thomas G. Burroughs.

EXTENSIONS OF THE CRIMINAL AND CIVIL STATUTES OF LIMITATION IN CHILD SEXUAL ABUSE CASES

Most states have statutes limiting the time during which crimes other than murder may be prosecuted. All states have time limitations for bringing a legal action for damages from the wrongdoing of another -- a civil action. In recent years, many states have adopted extensions to their criminal and civil statutes of limitation for cases of child sexual abuse and in certain other sexual assault cases. The length of the extension varies greatly between the states, and the justifications for extensions are numerous.

LIMITATION OF PROSECUTION FOR OFFENSES.

The majority of states with limits on the time in which criminal prosecutions must be brought extend such limits in the case of sexual offenses against children. Most states have recognized the power imbalance between child victims and their adult - usually paternal - perpetrators. Child victims are more easily intimidated by offenders. The position of authority occupied by the perpetrator also enables the offender to confuse the child, by both assuring the child that the sexual contact is not wrongful, and at the same time threatening the child with terrible consequences if he or she discloses the activity. This makes reporting of offenses very unlikely. Moreover, child victims may be too young to know how or what to report. States also recognize that child victims may suffer memory repression or severe psychological trauma from the nature of the offense. They may even be unaware of the fact that a crime has been committed against them. For all of these reasons, legislatures have extended the limitations period for the prosecution of child sexual offenses.

Some states have recognized that trauma and memory repression from sexual assault can happen to a victim of any age, and so explicitly base their limitations period for prosecution of such crimes to the date the incident is reported to police, or discovered by the

government.¹ Others extend the limitation for prosecution of sexual offenses for any victim when the offender is within a professional or fiduciary relationship at the time of the offense.²

Currently, criminal prosecutions for sexual abuse of a child must be brought within the following time periods:

No limitation:

Alabama (for violent crimes or for sex offenses involving person under 16);
Kentucky (for felonies);
Indiana (rape involving use or threat of deadly force or resulting in serious physical injury);
Maine (incest, rape, or gross sexual assault of victim under 16);
Maryland;
North Carolina;
Rhode Island;
South Carolina;
Vermont (no limitation for aggravated sexual assault);
Virginia (felonies);
West Virginia (felonies); and
Wyoming.

No extension for minors:

D.C.;
Delaware;
Hawaii;
Indiana (but no limitation for some rape charges);
Kentucky (misdemeanors);
New York;
Ohio;
Pennsylvania (generally);
Virginia (misdemeanors); and
West Virginia (misdemeanors).

¹ Arizona's code, for example, limits criminal prosecutions to 7 years "after actual discovery of the offense by the state . . . or discovery . . . which should have occurred with the exercise of reasonable diligence". Arizona Code, § 13-107.

² Ill. One year after discovery of the offense by the victim. Ill Code 70-806; Okla. Seven years from the discovery of the crime. OK Code, § 22-152.

Number of years after the incident:

Colorado - victim under 15, extended 7 years; misdemeanor 3rd degree sexual assaults, ext. 3½ years;
Georgia - 7 years for victim under 14;
Kansas - 5 years for victim under 16;
Mississippi - 7 years;
Missouri - victim under 18, 10 years for felony, 5 years for misdemeanor;
North Dakota (gross sexual imposition, fornication, or incest when victim between 15 and 18) - 7 years;
Oregon - victim under 18, 6 years for felonies, 4 years for certain misdemeanors;
Texas - 10 years.

Number of years after the child turns 18:

Idaho - 5 years;
Illinois - 1 year;
Iowa - victim under 12, 6 mos.;
Louisiana - limitations begins to run when victim turns 17;
Montana - 5 years;
Nevada - until victim turns 21;
New Hampshire - 22 years;
New Jersey - 5 years;
North Dakota - 7 years after victim turns 15;
Pennsylvania - (for sex offenses involving certain family or household members) 5 years.

Number of years after incident or after child turns 18, whichever is longer:

Michigan - 6 years or 21st birthday;
Nebraska - when victim is under 16, 7 years or 7 years after victim's sixteenth birthday;
South Dakota - 7 years or until the victim turns 19;
Tennessee - 4 years or until the victim turns 18;
Washington - 7 years or 3 years after victim turns 18;
Wisconsin - 3 years or until victim turns 21.

Number of years after incident or after child turns 18, whichever is less:

Connecticut - 7 years or 2 years after attaining majority (but never less than 5 years after offense).

Number of years after child reaches a certain age, or after crime is reported, whichever occurs first:

- Alaska - one year after crime is reported or person reaches 16;
- Arkansas - extension if crime not previously reported and limitations since child turned 18 hasn't run;
- Florida - limitations does not begin until child turns 16 or crime is reported;
- Massachusetts - limitations does not begin until child turns 16 or crime is reported;
- New Mexico - limitations does not begin until child reaches 18 or crime is reported;
- Vermont (other than aggravated sexual assault) - before victim turns 24, or 6 years after reporting crime.

Other:

- Federal - until child turns 25;
- Arizona - 7 years after actual discovery of crime by gov't;
- California - 1 year after report to responsible adult by child under 17;
- Idaho - 3 years after initial disclosure by victim (for Ritualized Abuse of Child);
- Minnesota - 7 years or 3 years after reporting crime, whichever is longer;
- Oklahoma - rape or forcible sodomy, limitations runs from date of discovery of crime;
- Utah - limitations runs after crime is reported.

LEGISLATIVE TRENDS IN EXTENDING CRIMINAL STATUTES OF LIMITATION

The trend in legislatures has been to continue to extend the limitations period for prosecution of sexual offenses against minors. The longest extension of the criminal statute of limitations for such offenses to date is in New Hampshire - 22 years after the victim turns 18.

New Hampshire's law is expected to attract some constitutional challenges, on the grounds of both due process and ex post facto proscription. New Hampshire's extension statute does not limit its applicability to cases in which the old limitations period had not yet expired as of the effective date of the new law. In general, state and federal courts have upheld the constitutionality of new, longer criminal statutes of limitation as applied to previous crimes so long as the earlier prosecution period for those crimes had not yet run. However, where a statute of limitations for prosecution had previously expired, and a law then attempts to reinstitute a limitations period, constitutional prohibitions of ex post facto laws may be violated.

The due process argument is based on the claim that the long delay between the offense and the prosecution will result in deprivation of the right to be free from stale claims. With the passage of time, the fading of memories and similar factors may deprive the defendant of the right to a fair trial. A recent law review article suggested that, in order to show such a violation of due process, the defendant must prove not only that the delay resulted in actual prejudice to his ability to defend against the charges, but that the delay was unrelated to any investigational necessity, and was used only to gain a tactical advantage.³ The acceptance or rejection of the New Hampshire statute in the courts can be expected to impact the continued extension of limitations for prosecution of child sexual offenses by other legislatures.

LIMITATION OF CIVIL ACTIONS FOR DAMAGES FROM SEXUAL ABUSE.

Nearly every state has a basic suspension of the statute of limitations (tolling) for civil actions while a person is a minor. Many states have also adopted extensions of such time limits specifically for actions to recover damages resulting from sexual abuse. Civil extensions for child sexual abuse cases are most often based upon the discovery rule - by the time the victim discovers the wrongdoing or the relationship of the conduct to the injuries, the ordinary time limitation may have expired. This "delayed discovery" is often due to emotional and psychological trauma and 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 often do not even discover the FACT of such abuse until they undergo therapy.

³ Porto, Brian L., "New Hampshire's New Statute of Limitations for Child Sexual Assault: Is It Constitutional and Is It Good Public Policy?", 26 New England Law Review, 141 (Fall 1991).

Ruth Driver
835 SW Randolph Ave.
Topeka, KS 66606-1845
(913) 232-1535

February 14, 1994

The Honorable Mike O'Neal
State Representative
State House
Topeka, KS 66612

Dear Representative O'Neal:

I am writing you as Committee Chairman of the House Federal and State Affairs Committee.

I read an article in today's newspaper about Ruth Driver's crusade for abuse victims and would like to share a personal incident regarding this subject. One of our family members was sexually abused by a step-brother while she was ages 6-8, and these horrible events were suppressed in her memory for YEARS. Suddenly one night in a dream at age 16 (10-12 years later), the vivid details of these incidents came back to her and the nightmare began. Luckily, shortly thereafter, we read in the paper about a bill then Senator Wint Winter, Jr., R-Lawrence, introduced allowing individuals to file civil lawsuits three years AFTER DISCOVERING they had been the victims of childhood sexual abuse. Thank goodness this bill passed and our victim was able to at least bring a civil lawsuit against her perpetrator and receive some money for the damages brought against her.

Had it not been for Senator Winter, she could have done nothing because of the length of time involved since the incidents had occurred, thereby being sexually abused once again, so to speak, by the courts by not being allowed to bring prosecution against him. This was Senate Bill No 662 passed in 1992.

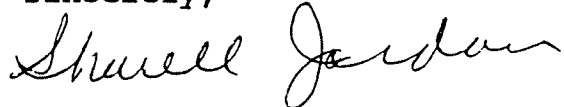
Now I see where Ms. Driver is pushing for the law to be changed on the statute of limitation for prosecution of sexual abuse cases involving children, to within two years from the date the victim DISCOVERS THE CRIME OCCURRED. I strongly urge consideration be given to 3 years and this bill be passed. It took our daughter a lot of intense therapy before she was able to even CONSIDER taking action and then it took quite a bit more time to locate an attorney she felt comfortable with and build a case and take action. Two years would probably not have been enough time to adequately do all of this.

I would also like to respond to the facts in the newspaper that stated you and other committee members are skeptical about the change. In other words, you are far more concerned about giving "fair" treatment to the accused than to the victim!! Sure there are a FEW times when the False Memory Syndrome comes into play and someone is falsely accused, but let me assure you, there are FAR MORE TIMES when the victims are indeed telling the truth and need laws available to them. Why would you think MORE protection should be given to the few falsely accused persons than to the MANY VICTIMS OF SEXUAL ABUSE?? Why would you think more caution and consideration should be given to the accused whose criminal conduct could be raised years after the event at a time when it might be difficult for the "poor guy" (?) to respond, than TO THE VICTIM??? In other words, if it comes back to the victim's memory YEARS after it happened and would pose a hardship for the accused, the victim should have to suffer in silence and not have any legal recourse?? What kind of an archaic and chauvinistic attitude is that?????

I URGE you to study Senate Bill 662 and pattern this bill after it.

Thank you very much for your time and consideration.

Sincerely,



Sharell Jordan

cc: Rep. Joan Wagnon ---THANK YOU!!!!!!!
Rep. Kathleen Sebelius
Rep. Alex Scott
Ruth Driver---THANK YOU!!!!!!!

60-523. Limitations on actions for recovery of damages suffered as a result of childhood sexual abuse. (a) No action for recovery of damages suffered as a result of childhood sexual abuse shall be commenced more than three years after the date the person attains 18 years of age or more than three years from the date the person discovers or reasonably should have discovered that the injury or illness was caused by childhood sexual abuse, whichever occurs later.

(b) As used in this section:

(1) "Injury or illness" includes psychological injury or illness, whether or not accompanied by physical injury or illness.

(2) "Childhood sexual abuse" includes any act committed against the person which act occurred when the person was under the age of 18 years and which act would have been a violation of any of the following:

(A) Indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto; (B) aggravated indecent liberties with a child as defined in K.S.A. 21-3504 and amendments thereto; (C) aggravated criminal sodomy as defined in K.S.A. 21-3506 and amendments thereto; (D) enticement of a child as defined in K.S.A. 21-3509 and amendments thereto; (E) indecent solicitation of a child as defined in K.S.A. 21-3510 and amendments thereto; (F) aggravated indecent solicitation of a child as defined in K.S.A. 21-3511 and amendments thereto; (G) sexual exploitation of a child as defined in K.S.A. 21-3516 and amendments thereto; or (H) aggravated incest as defined in K.S.A. 21-3603 and amendments thereto; or any prior laws of this state of similar effect at the time the act was committed.

(c) Discovery that the injury or illness was caused by childhood sexual abuse shall not be deemed to have occurred solely by virtue of the person's awareness, knowledge or memory of the acts of abuse. The person need not establish which act in a series of continuing sexual abuse incidents caused the injury or illness complained of, but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is a part of a common scheme or plan of sexual abuse.

(d) This section shall be applicable to:

(1) Any action commenced on or after July 1, 1992, including any action which would be barred by application of the period of limitation applicable prior to July 1, 1992;

(2) any action commenced prior to July 1, 1992, and pending on July 1, 1992.

History: L. 1992, ch. 307, § 1; July 1.

Article 6.—VENUE

60-601.

Research and Practice Aids:

Venue \approx 5.

C.J.S. Venue § 26.

Law Review and Bar Journal References:

"Divorce Law: Lis Pendens, Judgment Liens, Homestead Exemptions, and Bankruptcy," John C. Peck, Shala M. Bannister and W. Thomas Gilman, 60 J.K.B.A. No. 2, 25, 26 (1991).

60-602.

CASE ANNOTATIONS

2. Cited; statutes (60-3407, 60-3409, 60-3411) limiting recovery in medical malpractice actions as unconstitutional examined. Kansas Malpractice Victims Coalition v. Bell, 243 K. 333, 335, 757 P.2d 251 (1988).

60-604. Actions against corporations. An action against a domestic corporation, or against a foreign corporation which is qualified to do business in this state, other than an action for which venue is otherwise specifically prescribed by law, may be brought in the county in which:

- (1) Its registered office is located;
- (2) the cause of action arose;
- (3) the defendant is transacting business at the time of the filing of the petition;
- (4) there is located tangible personal property which is the subject of an action for the possession thereof if immediate possession is sought in accordance with K.S.A. 60-1005 and amendments thereto at the time of the filing of the action; or

(5) equipment or facilities for use in the supply of transportation services, or communication services, including, without limitation, telephonic communication services, are located, where the subject of such action relates to transportation services or communication services supplied or rendered, in whole or in part, using such equipment or facilities.

History: L. 1963, ch. 303, 60-604; L. 1965, ch. 355, § 3; L. 1989, ch. 178, § 2; July 1.

CASE ANNOTATIONS

5. Venue where surety company sued on fidelity bond examined. First Hays Banshares, Inc. v. Kansas Bankers Surety Co., 244 K. 576, 589, 769 P.2d 1184 (1989).

60-605. Actions against nonresidents and nonqualified corporations. An action against a nonresident of this state, or against a corporation which is not qualified to do business in

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Time's No Bar to Revival

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Retroactive Application of Legislatively Enlarged Statutes of Limitations for Child Abuse: Time's No Bar to Revival

I. INTRODUCTION

In the United States, child sexual abuse and neglect have reached major, if not epic, proportions.¹ An estimated 200,000 to 400,000 children are sexually abused each year.² A recent study suggests that perhaps one third of the female population experienced some form of sexual abuse as a child.³ Increased societal recognition of child sexual abuse, attributable in part to increased reporting requirements, has reignited an age-old debate over the relative scope of such abuse and society's role in curbing it.⁴

The problem has received legislative and executive attention. For example, numerous state legislatures enacted legislation enlarging the criminal statute of limitations for child sex abuse offenses in an effort to facilitate criminal prosecution.⁵ Additionally, the United States Attorney General's Office recently advocated the extension of such statutes of limitations.⁶ These actions, although well-intentioned, frequently create agonizing dilemmas for the judiciary in applying the revised limitations period, especially where the legislature fails to expressly dictate its intentions as to the revised statute's application. Moreover, the legislation may run afoul of constitutional *ex post facto* prohibitions when applied in accordance with legislative dictates.

Preliminarily, this Note will illuminate the magnitude of the child sexual abuse problem, and the impact of the statute of limitations on

1. ten Bensel, *Child Abuse and Neglect: The Scope of the Problem*, 35 JUV. AND FAM. CT. J. 1 (Winter 1984) [hereinafter *Child Abuse and Neglect*].

2. Middleton, *Plight of the Victim: A Plea for Action*, 66 A.B.A.J. 1190, 1192 (1980).

3. Landis, *Experiences of 500 Children with Adult Sexual Deviation*, 30 PSYCHOLOGY Q. SUPP. 91 (1956).

4. See Myers, *Protecting Children from Sexual Abuse: What Does the Future Hold?*, 15 J. CONTEMP. L. 31, 32 (1989) [hereinafter *Protecting Children*].

5. See, e.g., ALASKA STAT. 12.10.020(c) (Supp. 1988); ARIZ. REV. STAT. ANN. 13-107(B)(1) (Supp. 1988); CAL. PENAL CODE 801 (West 1985); COLO. REV. STAT. 18-3-411 (1986); TEX. CRIM. PROC. CODE ANN. 12.01 (Supp. 1988).

6. *Attorney General's Task Force on Family Violence, Federal Executive and Legislative and State Legislative Action, Recommendations*, U.S. Atty. Gen., Final Report 103 (Sept. 1984) [hereinafter *Task Force on Family Violence*]. The task force recommended extending the statute of limitations to five years, such period commencing at the time the victim attains majority, or the age of sixteen, whichever first occurs.

the states' ability to prosecute child sexual abusers. The Note will then analyze the constitutional ramification of retroactive application of the revised statute. The Note will further address the various judicial approaches to the interpretation and application of a revised statute of limitations for child sexual abuse, especially where the legislature failed to expressly dictate the revised statute's application. Finally, the Note will suggest a uniform approach to interpretation and application of the revised statute, and propose that the states' compelling interest in prosecuting child sex abusers permits the revival of "time-barred" prosecutions.

II. CHILD SEXUAL ABUSE - THE PROBLEM'S PARAMETERS

A. The Scope of The Problem

The painful reality of child sexual abuse has emerged from secrecy at least three times previously, only to retreat under threat to the dark chasms and inner recesses of society's consciousness.⁷ Each time, however, society ignored, suppressed and condemned the enlightened few who dared suggest the existence of widespread child sexual abuse.⁸ Most recently, beginning in 1978,⁹ child sexual abuse recaptured the public spotlight, inducing an avalanche of media and scholarly works.¹⁰ Mass child sexual abuse cases blanket the evening news: *McMartin* in Los Angeles, the *Jordan* case in Minnesota, *Country Walk* in Florida, and others.¹¹ Increased societal cognizance of child sexual abuse is in large part attributable to the implementation of mandatory reporting requirements.¹² Various statutory reporting schemes require medical personnel, educators, relatives, social workers and even attorneys to report abuse.¹³ However, even the increased reporting requirements fail to reveal the true scope of the problem. Incest, the most intimate form of child sexual abuse, is commonly unreported.¹⁴ Often, the perpetrator, if not a family

member, is a relative or an adult known to the victim.¹⁵ An estimated 90% of all cases involving female victims under the age of 12 are not reported to the police.¹⁶ Although estimates of the extent of child sexual abuse vary widely, the problem is unquestionably of major magnitude.

Child sexual abuse inflicts staggering economic, psychological and social costs on society and its victims. These costs are "taken out of [the victims'] current and future health, happiness, and . . . productivity. . . . In effect, a large mortgage on their future life is taken out when children's legal interests are not satisfied. . . ."¹⁷ The abused child often becomes the abuser.¹⁸ Other long-term effects may include a propensity for promiscuity and prostitution as well as a predisposition to engage in sexually abusive relationships.¹⁹ Various studies indicate other long-term effects including anxiety, pseudo-seductive behavior, substance abuse, sexual dysfunction, homosexuality and various forms of psychosis such as depression and suicidal obsession.²⁰

In response to public outcries over the scope and treatment of the child sexual abuse problem, the criminal justice system initiated numerous

15. LLOYD, CORROBORATION OF SEXUAL VICTIMIZATION OF CHILDREN, CHILD SEXUAL ABUSE AND THE LAW 122, n.88 (A.B.A. Nat'l Legal Resource Ctr. For Child Advoc. And Prot. (5th ed. 1984)).

16. Libai, *Protection of the Child Victim*, 15 WAYNE L. REV. 977, 1016, n.134 (1969) [hereinafter *Protection of the Child Victim*].

17. Miller & Miller, *Protecting the Rights of Abused and Neglected Children*, 19 TRIAL 68, 72 (June 1983) [hereinafter *Protecting the Rights*] (quoting Bross & Munson, *Alternative Models of Legal Representation for Children*, 5 OKLA. CITY U.L. REV. 561 (1980)). Child Abuse & Neglect; *supra* note 1, at 2. The author notes that the initial costs for child protective services is \$10,000 per case, exclusive of legal costs. Psychological care may run as high as \$24,000 per year. Thus, a conservative estimate of \$50,000 a year per case is given. *Id.*

18. DeRose, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long Term Damages*, 25 SANTA CLARA L. REV. 191 (1985) [hereinafter *Adult Incest Survivors*]. The well-documented fact that abused children frequently become child abusers is noted as follows:

In nearly all of the studies of male sexual offenders that have been done to date, well over half or in some cases nearly three-quarters of the men studied who are serving time in prison were found to have been sexually abused as young boys. . . . Therefore . . . from generation to generation, emotional, physical and sexual abuse are behaviors exhibited by men who most likely experienced such abuse in their own childhoods. Sadly, what these men learned from their parents, they learned too well.

Id. at 218, n.139 (quoting S. BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST 67 (1978)).

19. Note, *Sexually Abused Children*, *supra* note 13, at 452.

20. *Id.* See also J. HERMAN, FATHER-DAUGHTER INCEST 105 (1981); B. JUSTICE & R. JUSTICE, THE BROKEN TABOO: SEX IN THE FAMILY 184-5 (1979); S. BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST 121 (1978); *Adult Incest Survivors*, *supra* note 18, at 194; *Child Abuse and Neglect*, *supra* note 1, at 4-5.

7. *Protecting Children*, *supra* note 4, at 32.

8. *Id.* at 31-36.

9. *Id.* at 32.

10. *Id.* Mass child sexual abuse cases blanket the evening news: *McMartin* in Los Angeles, the *Jordan* case in Minnesota, *Country Walk* in Florida, and others.

11. *Id.* The *McMartin* case is reported as *McMartin v. County of Los Angeles*, 202 Cal. App. 3d 848, 249 Cal. Rptr. 53 (1988).

12. Besharov, *Child Protection: Past Progress, Present Problems, and Future Directions*, 17 FAM. L.Q. 151, 153-55 (Summer 1983).

13. Note, *Sexually Abused Children: The Best Kept Legal Secret*, 3 HUM. RTS. ANN. 441, 443-44 (1986) [hereinafter *Sexually Abused Children*].

14. *Id.* at 445.

reforms in an effort to address the needs of child abuse victims.²¹ For example, commentators and critics propose that child abuse victims testify on videotaped recordings, thus reducing the trauma experienced by child abuse victims in testifying.²² Additionally, numerous jurisdictions promulgated mandatory reporting requirements to increase the likelihood that child sexual abuse will be discovered.²³ Thus, increased societal cognizance has encouraged the judiciary and legislature to adopt meaningful measures to assist the child abuse victim.

B. Barriers to Prosecution of Abusers

As a preliminary barrier to prosecution, one must recognize the gross disparity between victim and offender in terms of power, knowledge and resources.²⁴ Adults and older children utilize this disparity to psychologically manipulate the victim.²⁵ In the case of incest, the victim is even more vulnerable, for the differences in power, knowledge and resources are multiplied by the victim's dependence upon the offender for life's basic necessities.²⁶

Very limited force is required to molest a child. The child victim is seldom able to understand the significance or wrongfulness of the perpetrator's conduct.²⁷ Over 75% of reported incest cases involve father-daughter relations.²⁸ The father's position as an authority figure may be utilized to persuade the child to acquiesce. Although the request may seem unpleasant, distasteful, or even frightening, the child may be motivated by a strong desire not to displease the offender.²⁹ In other cases, the child may be assured that the activity is perfectly normal,

21. See Comment, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U.L. REV. 437 (1985). The article deals with proposed and adopted alterations to California's system. Many of the procedures have been adopted by other states, for example, the revision of reporting requirements.

22. See Note, *Sexually Abused Children*, *supra* note 13, at 478-80.

23. See, e.g., CAL. PENAL CODE §§ 11165-11166 (West Supp. 1985). California's bill requires teachers, social workers, probation officers, psychologists, coroners, police, physicians, surgeons, dentists and numerous others to report suspected cases of child abuse. *Id.*

24. ten Bensel, *Child Abuse and Neglect: Definitions of Child Neglect and Abuse*, 35 JUV. & FAM. CT. J. 23, 29 (Winter 1984) [hereinafter *Definitions of Child Neglect*].

25. *Id.*

26. *Id.*

27. Note, *Balancing The Statute Of Limitations And The Discovery Rule: Some Victims Of Incestuous Abuse Are Denied Access To Washington Courts* - Tyson v. Tyson, 10 U. PUGET SOUND L. REV. 721, 727 (1987) [hereinafter *Balancing The Statute Of Limitations*].

28. Note, *Sexually Abused Children*, *supra* note 13, at 445 n.18.

29. Note, *The Crime of Incest Against the Minor Child and the State's Statutory Responses*, 17 J. FAM. L. 93, 96 (1978-79) [hereinafter *Incest Against the Minor Child*].

given the relationship between the adult and child.³⁰ Whether the cause of the offense is a disparity in power, knowledge or resources, the common result is an unwillingness or inability on the part of the child to report the offense.

Most children never tell anyone about the sexual encounter.³¹ An estimated 75% to 90% of incest victims reach adulthood without revealing the incident(s).³² The failure or inability of the child to report the offense may be motivated by one of several factors. First, incest victims may be ashamed or embarrassed, believing themselves to be the cause of the attack.³³ Other incest victims, frightened by the offender's threats, fear that the innocent parent will break-up the family.³⁴ Other children fear that revealing the relationship will encourage the father's anger, rejection or physical harm.³⁵ The child may fear her father will be imprisoned,³⁶ or at a minimum, that her mother will blame her.³⁷

Another major cause of unreported offenses stems from the child's mental defense mechanisms. To cope with undisclosed victimization, children frequently mentally block-out the abuse.³⁸ As a result, the child may not remember or divulge the abuse for years.³⁹ Compounding the problem of non-reporting by child victims is the fact that incest occurs

30. *Id.*

31. *Definitions Of Child Neglect*, *supra* note 24, at 31.

32. *Adult Incest Survivors*, *supra* note 18, at 194.

33. *Definitions Of Child Neglect*, *supra* note 24, at 30.

34. *Balancing the Statute of Limitations*, *supra* note 27, at 727.

35. *Id.*

36. *Id.*

37. *Id.* Dr. Judith Herman, a noted expert in father-daughter incest at Harvard Medical School summarizes such incest as follows:

Incestuous abuse usually begins when the child is between the ages of six and twelve, though cases involving younger children, including infants, have been reported. The sexual contact typically begins with fondling and gradually proceeds to masturbation and oral-genital contact. Vaginal intercourse is not usually attempted until the child reaches puberty. Physical violence is not often employed, since the overwhelming authority of the parent is usually sufficient to gain the child's compliance. The sexual contact becomes a compulsive behavior for the father, whose need to preserve sexual access to his daughter becomes the organizing principle of family life. The sexual contact is usually repeated in secrecy for years, ending only when the child finds the resources to escape. The child victim keeps the secret, fearing that if she tells she will not be believed, she will be punished, or she will destroy the family.

Note, *Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle*, 15 FORDHAM URB. L.J. 709, 716 (1987) (quoting Herman, *Recognition And Treatment Of Incestuous Families*, 5 INT'L J. FAM. THERAPY 81, 82 (C. Barnard Ed. 1983)).

38. *Task Force On Family Violence*, *supra* note 6, at 103.

39. *Id.*

in secrecy and exhibits few outwardly detectable signs.⁴⁰ Thus, if the child does not report, the abuse may continue unnoticed.

Once abuse is reported, the chance of prosecuting the abuser is low. A mere 24% of all child sexual abuse cases result in criminal action.⁴¹ Once reported, familial indecision⁴² or prosecutorial discretion⁴³ may preclude criminal prosecution. Thus, the vast majority of child sexual abuse incidents go unreported or unprosecuted.

A final impediment to prosecution is the tolling of the statute of limitations. Most criminal statutes of limitations accrue from the date of the offense.⁴⁴ Thus, by the time the child becomes emotionally or psychologically capable of confronting the experience and seeks legal redress, the statutory period for prosecution may have expired.⁴⁵ Frequently, disclosure may not occur for one to three years subsequent to the offense.⁴⁶

C. Changing Statutes of Limitations to Increase the Likelihood of Prosecution

The emotional and psychological barriers to reporting child sex abuse frequently foreclose the victim's opportunity for legal redress and preclude societal intervention.⁴⁷ Obviously, the opportunity for legal redress varies

in direct proportion to the length and accrual date of the limitations period. Limitations periods commencing at the date of the offense and expiring within five years are currently the norm.⁴⁸ However, lesser limitations periods still exist.⁴⁹ The statute of limitations in these jurisdictions remains a major impediment to legal redress.

In recognition of the delays common in the reporting of child sex abuse, the United States Attorney General recommended that the states enlarge the statutes of limitations so as to commence from the date of the victim's disclosure.⁵⁰

Where legislatures respond to these concerns by extending the limitations period,⁵¹ retroactive application may become an issue in implementing the revised statute. Several policy considerations support a presumption for retroactive application. First, retroactive application furthers the goal of reducing barriers to the prosecution of offenders and of permitting victims an opportunity for legal redress.⁵² Abused children must recognize that society is concerned with their plight and that children's rights are being actively protected. Retroactive application of enlarged limitations periods channels the benefits of increased societal and legislative awareness to those children who have been abused, rather than merely protecting the abused children of tomorrow. Early societal intervention diminishes the psychological costs children pay by permitting prompt psychological care, and also by preventing additional abuse at the hands of the offender. Children, not adults, are the judges of our present civilization.⁵³

A second policy consideration supporting retroactive application is the need to permit child abuse victims a day in court. The American legal system is designed to channel conflict resolution from the streets into the court system.⁵⁴ Fundamental to the operation of the legal system is the requirement that each litigant have his or her "day in court." Although in the criminal context it is the prosecution, not the victim,

40. Note, *Incest Against The Minor Child*, *supra* note 29, at 96.

41. *Sexually Abused Children*, *supra* note 13, at 446. Even after detection, prosecution is impeded by (1) social skepticism about the reliability of the child's accusations; (2) classification of pedophilia as a mental disorder rather than a criminal offense; (3) procedural systems which traumatize the victim; and (4) reluctance of prosecutors to pursue prosecutions where the case rests primarily upon the content and stability of the child's testimony. *Id.*

42. *Id.* at 448-49.

43. See *supra* note 41.

44. *Task Force on Family Violence*, *supra* note 6, at 103. Of the jurisdictions addressing the issue of retroactive application of the enlarged limitations period within the context of child sexual abuse offenses, the following states have statutes of limitations accruing from the commission of the offense: California, CAL. PENAL CODE §§ 800, 801 (West 1985); Colorado, COLO. REV. STAT. § 18-3-411(2) (1986); Texas, TEX. CRIM. PROC. CODE ANN. § 12.01 (Vernon 1977, 1988 Supp.); Washington, WASH. REV. CODE ANN. § 9A.04.070 (1988). In the remaining two jurisdictions, the limitations period accrues from the time the minor reaches the age of 16: Alaska, ALASKA STAT. § 12.10.030(c) (1984) (The period runs from the earlier of the victim attaining the age of 16, or the report to a peace officer. The section does not extend the limitations period by more than five years.); Massachusetts, MASS. GEN. LAWS ANN. ch. 277, § 63 (West 1972, Supp. 1988) (The limitations period commences at the earlier of the victim attaining the age of 16, or the report to a law enforcement agency).

45. *Task Force on Family Violence*, *supra* note 6, at 103.

46. *Definitions of Child Neglect*, *supra* note 24, at 30.

47. *Task Force on Family Violence*, *supra* note 6, at 103.

48. See, e.g., IDAHO CODE § 19-40 (1987) (prosecution must be commenced within 5 years after offense committed); KAN. CRIM. CODE ANN. § 21-3106 (1971, Supp. 1988) (prosecution must be commenced within 5 years after offense committed).

49. See, e.g., ARK. STAT. ANN. § 5-1-109 (1987) (prosecution must be commenced with 3 years after commission; first degree child sexual abuse is a class C felony per 5-14-108).

50. *Task Force on Family Violence*, *supra* note 6, at 103.

51. See, e.g., *Commonwealth v. Barger*, 402 Mass. 589, 593, 524 N.E.2d 829, 831-32 (1988); *State v. Hodgson*, 108 Wash. 2d 662, 666, 740 P.2d 848, 850 (1987).

52. As well, society obtains an opportunity to deter, rehabilitate or incarcerate the offender.

53. *Protecting the Rights*, *supra* note 17, at 72.

54. See, e.g., H. GRILLIOT, INTRODUCTION TO LAW AND THE LEGAL SYSTEM 3 (2d ed. 1979); I. C. TORCIA, WHARTON'S CRIMINAL LAW 1 (14th Ed. 1978).

who has his "day in court," the victim may experience relief and satisfaction from the defendant's prosecution, and thus indirectly, have his own day in court. The statute of limitations limits this right by forcing the party to bring his or her action in a timely manner or be forever barred. In the civil context, the use of exceptions to the limitations period's accrual such as the "discovery rule," limits the harshness imposed by stringent application of the limitations period.⁵⁵

Retroactive application of revised statutes of limitations can serve a similar function in the context of child sexual abuse.

In the criminal context, the state and not the injured party prosecutes the action. In the civil context, the prospective plaintiff is generally cognizant of the injury when it occurs, and as a result, may bring an action in a timely manner. In the context of child sexual abuse the state is powerless to prosecute the child sex abuse offender until the state is informed of the offense. As discussed above, a variety of physical, emotional and psychological factors prevent the victim from reporting the offense.⁵⁶ As a result of this delay in reporting the offense, the limitations period and the state's right to prosecute may expire prior to the time a child reports the offense.

A final policy consideration compelling retroactive application of the enlarged limitations period is the need to punish the offender. One of the principal functions of criminal law is to deter the offender and all aspiring offenders.⁵⁷ The deterrence theory is predicated upon the belief that individuals are rational, hedonistic beings.⁵⁸ The unpleasantness of punishment, coupled with its certainty, deter the offender from repeating his lawless conduct.⁵⁹ A secondary benefit of the deterrence theory is the intimidation of potential offenders.⁶⁰ Thus, both the offender and the potential offender, faced with the certainty of severe punishment, will likely refrain from committing a contemplated crime.⁶¹

55. See, e.g., N.Y. CIV. PRAC. L. & R. 214-c (McKinney Supp. 1987). This statute provides in pertinent part:

"[W]here the discovery of the cause of the injury is alleged to have occurred less than five years after discovery of the injury or when with reasonable diligence such injury should have been discovered, whichever is earlier, an action may be commenced . . . within one year of such discovery of the cause of the injury."

Id.

56. See *supra* notes 24-39 and accompanying text.

57. I C. TORCIA, *supra* note 54, § 3. Criminal law may be premised upon any of three theories; deterrence, retribution or reformation. The deterrence theory is particularly appropriate for child sexual abuse offenses because of its focus upon the individual offender. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

Studies reveal that child sex abusers are extremely likely to continue their nefarious conduct, absent societal intervention.⁶² Documentation of unreported sexual assaults against children dramatize the magnitude of the problem.⁶³ A study of first offenders⁶⁴ demonstrated that many offenders commit numerous offenses prior to prosecution or conviction.⁶⁵ Additionally, sexual offenders avoid detection approximately twice as often as they are apprehended.⁶⁶ These figures are conservative estimates, given the fact that the majority of offenses go unreported, while numerous others go unrecognized by the criminal justice system.⁶⁷ Therefore, absent societal intervention, most offenders will continue their activities unimpeded.

The typical pedophile commits his first offense as an adolescent.⁶⁸ Pedophiles are likely to continue their illicit activities once commenced.⁶⁹ Thus, from a societal perspective, the opportunity for societal intervention at the earliest possible juncture is imperative so as to maximize deterrence. To be an effective deterrent, the punishment must be certain and severe.⁷⁰ Retroactive application of the revised statute of limitations maximizes society's opportunities for intervention, and therefore, increases the deterrent effect of criminal punishment. Furthermore, early intervention extirpates the offender from his criminal habitat, protects the child from continued victimization, and terminates the offender's reign of terror.

Critics contend that society has overreacted to the perceived demon, child sexual abuse.⁷¹ Conceivably, this position has merit. However, at either extreme, either over or under reporting, truth seldom resides.⁷² Legislatures mandate longer prison sentences for convicted child sexual offenders, while reducing judicial sentencing discretion.⁷³ Despite these

62. See Groth, Longo, & McFadin, *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME AND DELINQ. 450, 451 [hereinafter *Undetected Recidivism*]; but see B. KARPAN, *THE SEXUAL OFFENDER AND HIS OFFENSES* 276-78 (New York 1954).

63. *Undetected Recidivism*, *supra* note 62, at 453.

64. Here, meaning those who experienced a first conviction, and not necessarily their first offense.

65. *Undetected Recidivism*, *supra* note 62, at 453-54. The study's authors interviewed offenders at correctional facilities in Connecticut and Florida. The number of undetected sexual assaults reported by the subjects ranged from 0 through 250. Undetected assaults averaged 4.7, representing the number of different victims molested, rather than the number of sexual contacts. *Id.* Additionally, sexual offenders avoid detection approximately twice as often as they are apprehended.

66. *Id.* at 456.

67. *Id.* at 457.

68. *Id.* at 450.

69. *Id.* at 451.

70. I C. TORCIA, *supra* note 54, § 3.

71. *Protecting Children*, *supra* note 4 at 39.

72. *Id.*

73. *Id.*

perceived overreactions, increased societal cognizance has resulted in the correction of at least one glaring impediment to criminal prosecution of the child sexual abuser, that is, the short statute of limitations period.

III. STATE COURT APPROACHES TO THE INTERPRETATION AND APPLICATION OF LEGISLATIVELY ENLARGED STATUTES OF LIMITATIONS FOR THE CRIMINAL PROSECUTION OF CHILD SEXUAL ABUSE OFFENSES

Within the criminal context,⁷⁴ the courts of six⁷⁵ jurisdictions have addressed the issue of the interpretation and application of legislatively enlarged statutes of limitations for child sexual abuse offenses. In interpreting and applying these statutes, the courts have applied a variety of procedures.⁷⁶ However, a two-step analysis predominates. First, the court must determine whether the revised statute survives *ex post facto* analysis; then, the court must determine how to interpret and apply the statute.

A. *Ex Post Facto* Analysis

The United States Constitution expressly prohibits the states from enacting *ex post facto* laws.⁷⁷ An *ex post facto* law, to be considered impermissible in the criminal context, "must be retrospective; that is, it must apply to events occurring before its enactment and must disadvantage the offender affected by it."⁷⁸ The classic exposition of *ex*

74. This note is expressly limited to criminal prosecutions for child sex abuse. The statute of limitations is characterized differently within the civil context such that factors including minority or incapacity may apply so as to prevent the running of the statute of limitations until the child attains majority.

75. Those jurisdictions are: Alaska, California, Colorado, Massachusetts, Texas and Washington. A majority of the states have addressed the same issue within the general criminal statute of limitations context. As explained within this note, the state courts have reached diverse results using varied analysis. See, e.g., *State v. Paradise*, 189 Conn. 356, 456 A.2d 305 (1983) (absent clear legislative intent requiring retroactive application, criminal statute of limitations applied prospectively; court did not determine whether the statute of limitations is procedural or substantive); *Rubin v. State*, 390 So. 2d 322, 324 (Fla. 1980) (statute of limitations is a substantive right, and so statute of limitations in effect at time of offense is controlling).

76. Cf. *State v. Creeksbaum*, 732 P.2d 557 (Alaska Ct. App. 1987), *rev'd*, 753 P.2d 1139 (Alaska 1988) (statute of limitations vests a substantive right; therefore, retroactive application of enlarged period prohibited); *Archer v. State*, 557 S.W.2d 244 (Tex. Crim. App. 1979) (statute may be applied to all offenses not time-barred); *State v. Hodgson*, 108 Wash. 2d 662, 740 P.2d 848 (1987) (statute of limitations is procedural; thus, judicial presumption of retroactivity requires retrospective application of revised statute).

77. U.S. CONST. art. I, § 10, cl. 1.

78. *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

post facto laws is found in the seminal case of *Calder v. Bull*,⁷⁹ which states:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.⁸⁰

The *ex post facto* prohibition was intended "to secure substantial personal rights against arbitrary and oppressive legislation, but not to limit legislative control of remedies and modes of procedure which do not affect matters of substance."⁸¹ Thus, although the category of retroactive changes forbidden by the *ex post facto* clause includes more than just the elements and punishment for a crime, the prohibition, as defined in *Calder v. Bull*,⁸² arguably does not extend to a retroactive application of the statute of limitations because extension of the statute of limitations performs none of the impermissibles forbidden by the *Calder* decision.

A fundamental issue in determining whether or not retroactive application of an enlarged statute of limitations is barred by the *ex post facto* prohibition is whether the statute of limitations vests substantive rights in the accused, or is merely a procedural barrier. If the statute vests substantive rights, then retroactive application of the statute of limitations should be prohibited by the *ex post facto* clause. If the statute is merely procedural, and vests no substantive rights, the enlarged statute of limitations survives *ex post facto* scrutiny.

In the context of child sexual abuse, few states have determined that statute of limitations vests substantive rights in the accused.⁸³ However, the "substantive vested rights" analysis is important to understanding the "time-barred" approach, and the argument for more expansive retroactive application of enlarged statutes of limitations. One case which illustrates the substantive versus procedural rights analysis, and the vague-

79. 3 U.S. (1 Dall.) 386 (1798).

80. *Id.* at 390.

81. *Beazell v. Ohio*, 269 U.S. 167, 170-71 (1925).

82. 3 U.S. (1 Dall.) 386 (1798).

83. See, e.g., *People v. Sweet*, 207 Cal. App. 3d 78, 84, 254 Cal. Rptr. 567, 571 (1989). Additionally, both Florida and Alabama have held that the statute of limitations is substantive within the general criminal context.

ness and uncertainty involved in the definition of an *ex post facto* law, is *State v. Creekpau*.⁸⁴ In *Creekpau* the Alaska Court of Appeals held that a criminal statute of limitations vests a substantive right in the defendant;⁸⁵ the Alaska Supreme Court, in overturning the decision, held that the statute of limitations is procedural, and as such, extension prior to the original period's expiration does not violate either the United States or the Alaska Constitution.⁸⁶

The Alaska Court of Appeals determined that to be classified as substantive for purposes of *ex post facto* analysis, a change in the law must merely adversely affect the defendant, and operate so as to place the defendant "at a disadvantage in relation to the substance of the offense charged or the penalties prescribed for that offense."⁸⁷ The Alaska Court of Appeals found *Weaver v. Graham*⁸⁸ dispositive. In *Weaver*, the United States Supreme Court stated that although the "substantive vested rights" theory⁸⁹ is useful for due process analysis, the theory is irrelevant to the question of whether a change is substantive or procedural for *ex post facto* purposes.⁹⁰ Critical to *ex post facto* analysis is

the lack of fair notice and governmental restraint when the legislature increases punishment beyond what is prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.⁹¹

The court of appeals found that retrospective application of the enlarged limitations period disadvantaged the offender affected by the change and was more onerous than the law in effect at the time of the offense. Thus, the Alaska Court of Appeals held that the *ex post facto* clauses of the federal and Alaska Constitutions prohibit retrospective change in a criminal statute of limitations.⁹²

84. 732 P.2d 557 (Alaska Ct. App. 1987), *rev'd* 753 P.2d 1139 (Alaska 1988).

85. 732 P.2d at 569.

86. 753 P.2d at 1144.

87. *Id.* at 560. See *Thompson v. Utah*, 170 U.S. 343 (1898) ("[A] statute is *ex post facto* which . . . in its relation to the offense or its consequences, alters the situation of the accused to his disadvantage.").

88. 450 U.S. 24 (1981).

89. See *Falter v. United States*, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

90. *Weaver*, 450 U.S. at 29-30.

91. *Id.* at 30-31.

92. *State v. Creekpau*, 732 P.2d 557, 568 (Alaska Ct. App. 1987).

After determining that the constitutional prohibition was not limited to retroactive changes in the elements of or punishment for a crime,⁹³ the court of appeals addressed the issue of whether the criminal statute of limitations vests a substantive right upon the accused.⁹⁴ Preliminarily, the court opined that the legislature may not revive an expired statute of limitations.⁹⁵ The court then reviewed historical precedents, noting that Alaskan courts had previously held that a civil statute of limitations was substantive, not procedural.⁹⁶ Additionally, criminal statutes of limitations had been held to be substantive, but only within other decisional contexts and not for purposes of *ex post facto* analysis.⁹⁷ The line dividing "substance and procedure shifts as the context changes . . . [and] implies different variables depending upon the particular problem for which it is used."⁹⁸ The *Creekpau* court recognized that the distinction between a procedural and substantive change "cannot be reduced to a simple formula," but must be determined on a "case-by-case basis."⁹⁹ The *Creekpau* court rejected the argument that the statute of limitations is a mere limitation upon the remedy,¹⁰⁰ instead finding that because the statute of limitations limits the circumstances under which guilt can be found and is intended to preserve the accuracy and basic integrity of the adjudicatory process in criminal procedure, the statute operates as a substantive right for purposes of *ex post facto* analysis.¹⁰¹ Thus, without directly addressing the issue of legislative intent, the court forbade retroactive application of legislatively enlarged criminal statutes of limitations.¹⁰²

93. *Creekpau*, 732 P.2d at 563-64.

94. *Id.* at 564.

95. *Id.* at 560-61. See also *Falter v. United States*, 23 F.2d 420 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or if it does, the stake forgives it.

Id. at 425-26.

96. *Creekpau*, 732 P.2d at 566. See *Nolan v. Sea Air Motive, Inc.*, 627 P.2d 1035 (Alaska 1981).

97. See *State v. Frech Funeral Home*, 185 N.J. Super 385, 448 A.2d 1037 (1982).

98. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). A court may seek to ascertain the differences between substance and procedure in the following contexts: conflict of laws, retrospective application of statutes and law-making. *Butik v. Levine*, 63 N.J. 351, 364-65, 377 A.2d 571, 582-79 (1975).

99. *Creekpau*, 732 P.2d at 562.

100. *Id.* at 567.

101. *Id.* at 565.

102. *Id.*

The appellate court premised its decision to classify the statute of limitations as substantive largely upon the belief that, because the enactment of the statute serves notice to the accused of the period for which he must be prepared to defend his act, "basic fairness militates against requiring the accused to defend his acts once the period . . . has expired."¹⁰³ Although the decision is laudable for its effort to preserve the rights of the criminally accused, the court failed to consider or address the legislature's intent or the child victim's right to legal redress.

On appeal, the Alaska Supreme Court reversed, holding that criminal statutes of limitations are procedural¹⁰⁴ and as such, extension of the statute prior to the original period's expiration does not violate the United States or Alaska Constitutions.¹⁰⁵ Like both lower courts, the Alaska Supreme Court found *Weaver v. Graham*¹⁰⁶ dispositive.¹⁰⁷ In *Weaver*, the petitioner challenged, on *ex post facto* grounds, a change in Florida's statutory formula for the accrual of good time reductions in prisoners' sentences. The change made accrual of good time reductions more difficult, thus increasing the quantum of punishment suffered by each inmate. The Supreme Court held that the statute violated the *ex post facto* prohibition because it "makes more onerous the punishment for crimes committed before its enactment."¹⁰⁸

Creekpaum argued that the *Weaver* decision introduced a new analytic approach to *ex post facto* analysis.¹⁰⁹ In place of the vested rights approach,¹¹⁰ the court should focus upon only two criteria: (1) whether the law was retrospective, and (2) whether the change disadvantaged the offender affected by the change.¹¹¹ The Alaska Supreme Court rejected Creekpaum's argument, noting that the *Weaver* decision did not nullify existing *ex post facto* precedent.¹¹² Instead, the *Creekpaum* court found that the holding in *Weaver* fell within the traditional prohibition announced in *Calder v. Bull*¹¹³ because "it focused on the change in the

quantum of punishment Weaver suffered as a result of the new law."¹¹⁴

The *Creekpaum* court then applied a two-step test. First the court noted that the revised statute of limitations was explicitly retroactive.¹¹⁵ Second, the court rejected Creekpaum's argument that the new law was more onerous simply because Creekpaum remained liable for prosecution when he would have been immune under the old statute.¹¹⁶ The court determined that the extension of the statute of limitations was a mere procedural change¹¹⁷ and, applying the *Calder v. Bull* test,¹¹⁸ found that retroactive application did not violate the *ex post facto* clause because the change neither made conduct criminal which was innocent when undertaken, aggravated a crime, permitted more severe punishment than permissible when the crime was committed, nor altered the rules of evidence to permit conviction on different or lesser testimony than permissible when the crime was committed.¹¹⁹

B. Analysis of Court's Interpretation and Retroactive Application of Enlarged Statutes of Limitation

If the enlarged statute of limitations survives a facial *ex post facto* analysis (i.e., the statute does not vest the defendant with a substantive right), the issue becomes whether the enlarged statute of limitations should be retroactively applied, and if so, whether the application is limited solely to offenses not time-barred as of the statute's effective date. The determinative question is whether prosecution is legally permissible as of the new statute's effective date.

Typically, courts' analysis rests upon what has become a fundamental precept of criminal law, that is, the legislature may not extend the statute of limitations so as to revive an offense already time-barred.¹²⁰ However, unless prospective application is expressly mandated, a statute which extends the limitations period applies to all offenses not time-barred as of the statute's effective date, "so that a prosecution may be commenced at any time within the newly established period, although the old period of limitations has then expired."¹²¹ Thus, the principal consideration is

103. *Id.* The court further stated that the statute of limitations defines "the outer limit of delay, beyond which prosecution will not be tolerated, even where the government has exercised good faith in attempting to file . . . and when the accused is incapable of identifying prejudice . . . from the delay." *Id.*

104. *State v. Creekpaum*, 753 P.2d 1139, 1144 n.13.

105. *Id.* at 1144.

106. 450 U.S. 24 (1981).

107. *Creekpaum*, 753 P.2d at 1140.

108. 450 U.S. at 36.

109. 753 P.2d at 1141.

110. See *Falter v. United States*, 23 F.2d 420, 425 (2d Cir.), cert. denied, 277 U.S. 590 (1928).

111. *Creekpaum*, 753 P.2d at 1141.

112. *Id.*

113. 3 U.S. (1 Dall.) 386, 390 (1798).

114. *Creekpaum*, 753 P.2d at 1142.

115. *Id.*

116. *Id.*

117. *Id.* at 1144, n.13.

118. 3 U.S. (1 Dall.) 386, 390 (1798).

119. *Creekpaum*, 753 P.2d at 1143.

120. See *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir.) cert. denied 277 U.S. 590 (1928) *Sobick v. Superior Ct.*, 28 Cal. App. 3d 846, 850, 106 Cal. Rptr. 516, 519 (1972).

121. *Atcher v. State*, 577 S.W.2d 244. See *Hill v. State*, 146 Tex. Crim. 333, 171 S.W.2d 880 (1943). Thus, the principal consideration is whether the accused had acquired a vested right to avoid prosecution as of the new statute's effective date.

whether the accused had acquired a vested right to avoid prosecution as of the new statute's effective date.¹²² Traditionally, the new statute will be applied only where the accused does not own a vested right to avoid prosecution.¹²³ However, legislative intent, the doctrine of strict construction, and judicial presumptions may limit the statute's application. Generally, courts refuse to apply the statute to those defendants against whom the right to prosecute has expired prior to legislative extension, regardless of legislative intent.¹²⁴

In discerning legislative intent as to the statute's retroactive application, courts use three different approaches. In the first approach, the revised statute applies prospectively in the absence of manifest legislative intent to the contrary.¹²⁵ In the second approach, the revised statute applies retrospectively in the absence of manifest legislative intent to the contrary.¹²⁶ Finally, where legislative intent is unclear, the courts apply the statute either prospectively or retrospectively, depending upon judicial presumptions and the judiciary's perception of legislative intent.¹²⁷

In the first approach, the revised statute applies prospectively in the absence of manifest legislative intent to the contrary. The bare determination that there is no *ex post facto* barrier to retroactive application does not, without clear legislative intent, permit retroactive application.¹²⁸ Clear legislative intent is necessary because, as a general rule, changes

in criminal statutes operate prospectively.¹²⁹ This presumption of prospectivity is premised upon several maxims fundamental to criminal law. A cardinal rule of statutory interpretation requires criminal statutes to be strictly construed in favor of the accused¹³⁰ and against the government.¹³¹ Second, criminal limitations statutes are interpreted liberally in favor of repose.¹³² However, despite the existence of these two maxims, it is commonly held that the words of a statute should be given their fair meaning,¹³³ and the statute interpreted in relation to the entire enactment purpose.¹³⁴

A desire to protect the rights of the accused against disadvantageous procedural changes which could result in abuse or attainder may underlie the presumption for prospectivity.¹³⁵ Today, however, statutes of limitations are more likely to be liberally rather than strictly construed,¹³⁶ and as a result, the presumption for prospectivity should carry less weight. Where there is a presumption of prospective application, the court may apply the presumption in the absence of clear legislative intent to the contrary.

By rotely applying a presumption for prospective application, this approach fails to address the victim's right of legal redress. Although the presumption for prospectivity may have valid application where both

122. See, e.g., *Archer v. State*, 577 S.W.2d 244 (Tex. Crim. App. 1979); *Hill v. State*, 146 Tex. Crim. 333, 171 S.W.2d 880 (1943).

123. *Sobiek*, 28 Cal. App. 3d at 850, 106 Cal. Rptr. at 519.

124. The majority opinion did not address Legislative intent in either Texas case. In *People v. Smith*, 171 Cal. App. 3d 997, 217 Cal. Rptr. 634 (1985), the court addressed the issue of legislative intent, citing *People v. Smith*, 161 Cal. App. 3d 1053, 208 Cal. Rptr. 318 (1984) for the proposition that the revised statute may be retroactively applied without express legislative intent. This proposition is premised on the existence of established precedents permitting application of extended limitations periods to crimes committed before the enactments and a legislative awareness of the court's existing judicial precedents. Thus, the judiciary may infer that the legislature enacted the statute with the knowledge and purpose that the revised statute would apply to all cases not time-barred. A presumption of prospectivity "is to be applied only after considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." *Smith*, 171 Cal. App. 3d at 1003, 217 Cal. Rptr. at 637.

125. See, e.g., *People v. Whitesell*, 729 P.2d 985 (Colo. 1986); *People v. Midgley*, 714 P.2d 902 (Colo. 1986); *People v. Holland*, 708 P.2d 119 (Colo. 1985).

126. See, e.g., *State v. Hodgson*, 44 Wash. App. 592, 722 P.2d 1336 (1986), *aff'd in part, rev'd in part, remanded in part*, 108 Wash. 2d 662, 740 P.2d 848 (1987).

127. See, e.g., *Commonwealth v. Pellegrino*, 402 Mass. 1003, 524 N.E.2d 835 (1988); *Tigges v. Commonwealth*, 402 Mass. 1003, 524 N.E.2d 834 (1988); *Commonwealth v. Barger*, 402 Mass. 589, 524 N.E.2d 829 (1988).

128. *Holland*, 708 P.2d at 120. See also *United States v. Richardson*, 512 F.2d 105 (3d Cir. 1975); *State v. Paradise*, 189 Conn. 346, 456 A.2d 305 (Conn. 1983).

129. See *State v. Jones*, 132 Conn. 682, 685, 47 A.2d 185, 187 (1946); *Yates v. General Motors Acceptance Corp.*, 356 Mass. 529, 531, 254 N.E.2d 785, 786 (1969).

130. *Holland*, 708 P.2d at 120. See also *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 94-95 (1820).

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. . . . The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially, in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. See 1 C. TORCIA, *supra* note 54, § 12.

131. *United States v. Emmons*, 410 U.S. 396, 411 (1973) ("this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity").

132. *United States v. Scharton*, 285 U.S. 518, 522 (1932); *Waters v. United States*, 328 F.2d 729, 742 (10th Cir. 1965).

133. *Singer v. United States*, 323 U.S. 338 (1945).

134. 1 C. TORCIA, *supra* note 54, § 12.

135. See Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425, 464-65 (1982). The author suggests that retroactive changes in the statute of limitations are impermissible because the changes carry a risk of abuse and attainder and also because the changes are "unlikely to meet the special burden of justification applicable to all retroactive laws affecting personal liberties." *Id.*

136. E. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 349 (1940).

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victim and accused are of majority, and are equally competent to protect their own rights, this presumption overcompensates for the accused's perceived disadvantages within the criminal justice system and awards the accused a decided advantage at the expense of the minor victim. This is because prospective application guards against disadvantageous procedural changes which operate to the detriment of the accused, but prevents the victim, an individual who is often unaware of his rights or powerless to protect them, from exercising his right to redress.¹³⁷

The second approach mandates retroactive application of the revised statute in the absence of manifest legislative intent to the contrary.¹³⁸ In *State v. Hodgson*,¹³⁹ the Washington Court of Appeals, although recognizing that penal statutes are to be strictly construed in favor of the accused, stated that the strict construction doctrine should not be rote applied, but instead, the judiciary should examine the rationale behind the doctrine to determine proper classification and application of the revised limitations statute.¹⁴⁰ The strict construction doctrine applies to penal statutes because "it is unjust to convict a person without clear notice to him that (1) his contemplated conduct is unlawful, and (2) certain penalties will attach to that conduct."¹⁴¹ The effect of strict construction is to raise a judicial presumption of prospectivity.¹⁴² However, where a statute relates to practice, procedures or remedies and does not affect a substantive or vested right, Washington courts reverse the presumption, and apply a general rule whereby procedural statutes are presumed to apply retroactively.¹⁴³ Therefore, to determine which presumption is applicable, a court must determine whether the statute of limitations operates as a substantive right or merely performs a procedural function.¹⁴⁴ The *Hodgson* court, however, rejected a strict substantive-procedural classification, finding that labeling the statute of limitations as one or the other tends to obscure rather than clarify the law.¹⁴⁵ The court therefore undertook to classify the statute of limitations based upon definition and function rather than mere label.¹⁴⁶

137. See *supra* notes 24-56 and accompanying text.

138. See, e.g., *State v. Hodgson*, 44 Wash. App. 592, 722 P.2d 1336 (1986), *aff'd in part, rev'd in part, and remanded in part*, 108 Wash. 2d 662, 740 P.2d 848 (1987).

139. *Id.*

140. *Hodgson*, 44 Wash. App. at 602, 722 P.2d at 1342.

141. *Id.* See *Commonwealth v. Broughton*, 257 Pa. Super. 369, 377, 390 A.2d 1282, 1286 (1978).

142. *Hodgson*, 44 Wash. App. at 602, 722 P.2d at 1342.

143. *Id.* See *Johnston v. Beneficial Management Corp.*, 85 Wash. 2d 637, 641, 538 P.2d 510, 514 (1975).

144. *Hodgson*, 44 Wash. App. at 602, 722 P.2d at 1342.

145. *Id.*

146. *Id.*

Emphasizing the fact that statutes of limitations are subject to the will of the legislature,¹⁴⁷ the *Hodgson* court found that retroactive application did not impair vested or substantial rights, provided however, that the offense was not time-barred as of the statute's effective date.¹⁴⁸ This is so because "the statute is a mere regulation of the remedy, subject to legislative control, and does not become a vested right until the offense becomes time-barred."¹⁴⁹

Because the statute of limitations approximates a procedural remedy rather than a substantive right, the *Hodgson* court determined that retroactive application did not violate the *ex post facto* clause. Applying the equivalent of the *Calder v. Bull* test,¹⁵⁰ the court permitted retroactive application because increasing the limitation period neither aggravated the crime, increased the punishment nor permitted the accused to be convicted under rules permitting "lesser" testimony.¹⁵¹ In the absence of contrary legislative intent, the presumption of retroactivity applies to the revised limitations statute.¹⁵² Thus, because the statute of limitations is not substantive, the *ex post facto* clause permits retroactive application of the enlarged limitations period in accordance with the judicial presumption of retroactive application.

The *Hodgson* court recognized the policy considerations underlying the legislature's extension of the limitations period.¹⁵³ Although failing to cite the policy considerations as a factor in the decision permitting retroactive application, the court at least recognized the legislature's intentions in extending the statute.¹⁵⁴ Thus, although not premising a decision for retroactive application upon policy considerations, the court

147. *Id.* The court characterized statutes of limitations as "matters of legislative grace . . . [and] a surrendering by the sovereign of its right to prosecute." *Id.*

148. *Id.* Therefore, until the right to a dismissal is absolutely vested, the legislature may change or repeal the limitations period. *Id.* See also *Waters v. United States*, 328 F.2d 739, 743 (10th Cir. 1964); *Clements v. United States*, 266 F.2d 397, 399 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959); *Falter v. United States*, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

149. *Hodgson*, 108 Wash. 2d at 668, 740 P.2d at 851.

150. See *supra* text accompanying note 80; *Calder v. Bull*, 3 U.S. (1 Dall.) 386, 390 (1798).

151. *Hodgson*, 108 Wash. 2d at 669, 740 P.2d at 852.

152. *Id.*

153. *Id.* at 665, 740 P.2d at 850. The court, citing the legislature's final reports, noted that the limitations period was extended based upon experience showing that victims of child abuse, due to fear, lack of understanding or manipulation by the offender, often fail to report the abuse within the shorter limitations period. Although failing to cite the policy considerations as a factor in the decision permitting retroactive application, the court at least recognized the legislature's intentions in extending the statute.

154. *Id.* at 666, 740 P.2d at 850.

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nonetheless adopted a position which maximizes the protection of the child abuse victim.

In the final approach, the legislature's intent is not manifestly expressed, and as a result, the court resorts to judicial presumptions and the judiciary's perception of legislative intent to determine the revised statute's application.

The mere fact that the legislature extends the statute of limitations may support a presumption for retroactive application.¹⁵⁵ Where the legislature fails to clearly express an intention as to the application of the revised statute, a court may look to the various steps in the enactment process to resolve any ambiguity.¹⁵⁶ In *Commonwealth v. Barger*, the Massachusetts Supreme Court applied a two-step test to determine whether the revised limitations statute could be retroactively applied.¹⁵⁷ Noting that retroactive statutes are not *per se* unconstitutional,¹⁵⁸ the court applied the *Calder v. Bull* test,¹⁵⁹ determining that extension of the statute merely extends the time in which the government may prosecute, and as such, extension did not violate the *ex post facto* prohibition.¹⁶⁰ The court noted the absence of any express language evidencing the legislature's intent for retroactive application.¹⁶¹ The court noted however, that the omission did not foreclose retrospective application.¹⁶² Retroactive statutes are unconstitutional only when, on a balancing of opposing considerations, the statute is unreasonable.¹⁶³ A court may consider "the precise evil which is targeted in legislation under review."¹⁶⁴ The intent of the legislature, ascertained "from all the words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the

purpose of its framers may be effectuated,"¹⁶⁵ determines the reasonableness of retroactive application and the legislature's intent. Thus, the court in *Barger* held there was no constitutional or statutory barrier to retroactive application of the revised statute.¹⁶⁶

The court in *Barger* concluded that the mere extension of the limitations period for child sex abuse offenses furnished adequate indication of the legislature's intention to permit retroactive application of the revised statute.¹⁶⁷ The court reasoned that the Massachusetts legislature, recognizing the delays associated with a child's report of sexual abuse, may have sought to accommodate such delays by extending the limitations period.¹⁶⁸ The court, lauding the legislature for addressing the child sexual abuse issue, determined that "it is not reasonable to assume that the Legislature intended to delay the application of the new . . . statute of limitations which would eventuate if the amendment applied only to crimes occurring after its enactment."¹⁶⁹ Thus, the court reasoned that retroactive application best reflected the legislature's intentions in passing the revised statute. Moreover, the court buttressed the decision in favor of retroactive application by noting that the statute of limitations is procedural, and as such, the judicial presumption of retroactivity which applies to non-substantive rights permits retroactive application.¹⁷⁰ Thus, although the legislature omitted language requiring retroactive application, the court found sufficient basis to permit retrospective application through the use of a judicial presumption for retroactivity, and the mere act of the legislature extending the limitations period.

IV. THE PROPOSAL: A UNIFORM APPROACH TO THE INTERPRETATION AND APPLICATION OF A REVISED LIMITATIONS STATUTE

Where the legislature acts to extend the criminal statute of limitations for child sex abuse offenses, strong policy considerations compel a presumption of retroactivity, absent manifest legislative intent to the contrary. This Note proposes that courts adopt an approach which realistically balances the needs of both offender and victim in light of the victim's inability to effectively protect his or her legal rights. Further, this Note suggests that retroactive application of an enlarged statute of limitations does not violate the *ex post facto* prohibition, even if applied

155. See, e.g., *Commonwealth v. Barger*, 402 Mass. 589, 524 N.E.2d 829 (1988).

156. *Commonwealth v. Collett*, 387 Mass. 424, 433, 439 N.E.2d 1223, 1229 (1982).

157. *Barger*, 402 Mass. at 590, 524 N.E.2d at 830. Although the defendant was not charged with sexual abuse of a minor, the court's reasoning was applied to two other cases decided on the same date, both of which involved child sex abuse charges and application of the revised limitations period.

158. *League v. Texas*, 184 U.S. 156, 161 (1902).

159. See *supra* text accompanying note 80; *Calder v. Bull*, 3 U.S. (1 Dall.) 386, 390 (1798).

160. *Barger*, 402 Mass. at 591, 524 N.E.2d at 830.

161. *Id.* at 592-93, 524 N.E.2d at 831.

162. *Id.* at 592, 524 N.E.2d at 831. See *Commonwealth v. Greenberg*, 339 Mass. 557, 578-79, 160 N.E.2d 181, 195 (1959).

163. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976); *American Mfrs. Mut. Ins. Co. v. Commissioner of Ins.*, 374 Mass. 181, 189-90, 372 N.E.2d 520, 525 (1978).

164. *Barger*, 402 Mass. at 593, 524 N.E.2d at 832. See *Commonwealth v. Collett*, 387 Mass. 424, 432, 439 N.E.2d 1223, 1228-29 (1982).

165. *Hanlon v. Rollins*, 286 Mass. 444, 447, 190 N.E. 606, 608 (1934).

166. *Barger*, 402 Mass. at 594, 524 N.E.2d at 832.

167. *Id.* at 591-94, 524 N.E.2d at 831-32.

168. *Id.* at 593, 524 N.E.2d at 831-32.

169. *Id.* at 594, 524 N.E.2d at 832.

170. *Id.*

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to offenses "time-barred" at the extension date. The difficulty of child victims in obtaining legal redress, the need to afford the child victim a day in court, and the need to prevent offenders from escaping prosecution, collectively compel the application of a judicial presumption of retroactivity. Moreover, the mere fact that the legislature has addressed the issue by extending the statute of limitations may be construed as intending retroactive application.¹⁷¹

A. Uniform Approach: A Presumption of Retroactivity

Retroactive application of a legislatively enlarged criminal limitations period does not violate the constitutional prohibition against *ex post facto* laws. The majority of jurisdictions addressing the issue held that, for purposes of *ex post facto* analysis, the statute of limitations is procedural.¹⁷² The statute of limitations, in criminal contexts, is an act of legislative grace¹⁷³ and a surrendering of the sovereign's right to prosecute.¹⁷⁴ At common law, criminal limitations periods were nonexistent.¹⁷⁵ The statute of limitations is clearly a reflection of public will and a matter of grace at least until such time as the limitations period expires.¹⁷⁶ In *Chase Securities Corp. v. Donaldson*,¹⁷⁷ the Supreme Court expounded upon the origin and application of statutes of limitations, stating that:

[s]tatutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from

being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the [a]voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.¹⁷⁸

However, mere categorization of the statute of limitations as substantive or procedural sidesteps the central question of the enlarged limitations period's effect.¹⁷⁹ Instead, courts should look to the nature and function of criminal statutes of limitations.¹⁸⁰ *Ex post facto* laws, as pronounced in *Calder v. Bull*,¹⁸¹ are those laws which (1) make an act criminal which was innocent when done; (2) aggravate a crime or make it greater than when committed; (3) increase the punishment; or (4) alter the rules of evidence and require lesser or different evidence to convict than that required at the time of the offense.¹⁸² The statute of limitations' extension performs none of these impermissibles. The statute's extension merely extends the time in which prosecution is permissible. As such, the legislature presumably could free an offense of any limitations period or could provide for successive extensions of finite periods.¹⁸³ However, statutes should not be given a construction which destroys or impairs a vested right.¹⁸⁴ Obviously, when the legislature extends the statutory period prior to the expiration of the original period, the accused has not obtained a vested right to be free from prosecution. If expressly directed, the legislature may even apply the extended lim-

171. See *Barger*, 402 Mass. 589, 524 N.E.2d 829 (1988). "[I]t is not reasonable to assume that the Legislature intended to delay the application of the new ten-year statute of limitations which would eventuate if the amendment applied only to crimes occurring after its enactment." *Id.* at 593, 524 N.E.2d at 832.

172. See, e.g., *United States ex rel. Massarella v. Elrod*, 682 F.2d 688, 689 (7th Cir.), cert. denied, 460 U.S. 1037 (1982); *Clements v. United States*, 266 F.2d 397, 399 (9th Cir.), cert. denied, 359 U.S. 985 (1959); *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir.), cert. denied, 277 U.S. 590 (1928); *State v. Ferrie*, 243 La. 416, 144 So. 2d 380 (1962); *State v. Merolla*, 686 P.2d 244 (Nev. 1984); *Rose v. State*, 716 S.W.2d 162, 163 (Tex.App. 1986). But see, e.g., *Stoner v. State*, 418 So. 2d 171, 178 (Ala. Crim. App. 1982) (statute of limitations in criminal context vests substantive right); *Rubin v. State*, 390 So. 2d 322 (Fla. 1980) (statute of limitations vests substantive right in criminal context).

173. *State v. Hodgson*, 108 Wash. 2d 662, 667, 740 P.2d 848, 851 (1987).

174. *Id.*

175. 1 C. TORCIA, *supra* note 54, § 90.

176. See *Falter v. United States*, 23 F.2d 420, 425 (2d Cir.), cert. denied, 277 U.S. 590 (1928).

177. 325 U.S. 304 (1945).

178. *Id.* at 314 (citation omitted).

179. *Hodgson*, 108 Wash. 2d 662, 667, 740 P.2d 848, 851 (1987). See also *State v. Frech Funeral Home*, 185 N.J. Super 385, 389-90, 448 A.2d 1037, 1039 (quoting *Busik v. Levine*, 63 N.J. 351, 364, 307 A.2d 571, 578 (1973)) ("it is simplistic to assume that all law is divided neatly between 'substance' and 'procedure.' A rule of procedure may have an impact upon the substantive result and be no less a rule of procedure on that account. . . .").

180. *Hodgson*, 108 Wash. 2d at 667, 740 P.2d at 851.

181. 3 U.S. (1 Dall.) 386 (1798).

182. *Id.* at 390.

183. *People v. Smith*, 171 Cal. App. 3d 997, 1003, 217 Cal. Rptr. 634, 637 (1985).

184. E. CRAWFORD, *supra* note 136, § 278.

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itations period to revive "time-barred" claims.¹⁸⁵ The extension therefore, does not divest the accused of a vested right. Thus, neither the *Calder ex post facto* test, nor the vested rights theory prohibit retroactive application of the enlarged period.

The strict construction doctrine is frequently utilized as a judicial procedure, limiting retroactive application unless clearly required by express language or necessary implication.¹⁸⁶ Strict construction of penal statutes is favorable because the legislature owes the citizenry a duty to clearly state those acts for the commission of which a citizen may lose his life or liberty.¹⁸⁷ Although the citizenry may rely upon existing elemental definitions or proof requirements,¹⁸⁸ the accused cannot reasonably develop a reliance or expectation as to the time limit for prosecution. Even if developed, is there any societal interest to be served by protecting the reliance? When the accused has committed all of the elements of an offense, the statute of limitations functions only to restrain prosecution within legislatively prescribed temporal limits. Logic rejects the argument that altering the statute of limitations affects the expectations of the citizenry as to the lawfulness of their conduct. At most, only the perpetrator develops a reliance upon the statute of limitations, purposefully evading detection until the legislatively prescribed period expires. Numerous jurisdictions recognize this phenomena and by statute, prevent the tolling of the limitations period during the period when the accused is out of state or beyond the sovereign's jurisdiction.¹⁸⁹

The statute of limitations serves as a buffer, preventing the expenditure of judicial resources where logically, evidentiary items such as testimony and documents, have disappeared, grown stale, or been destroyed, and can no longer perform the necessary evidentiary function.¹⁹⁰ Thus, at worst, extension or elimination of the limitations bar results in reduced judicial efficiency by forcing the court to determine the validity of a prosecution, rather than rotely applying the limitations period to bar the same. Granted, the accused must be protected from the retroactive application of a definitional alteration of the criminal

185. See *infra* notes 195-246 and accompanying text.

186. *Kopczynski v. County of Camden*, 2 N.J. 419, 424, 66 A.2d 882, 884 (1949) "[w]ords in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intent of the Legislature cannot otherwise be satisfied."; N. SINGER, *SUTHERLAND STAT. CONSTRUCTION* § 41.04 (4th Ed. 1986).

187. N. SINGER, *supra* note 186, § 59.03.

188. For a discussion of the citizen's reliance interest and the need to protect such interests, see Note, *Retroactive Application Of Statutes: Protection Of Reliance Interests*, 40 MICH. L. REV. 183 (1988).

189. I. C. TORCIA, *supra* note 54, § 94.

190. See *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

elements.¹⁹¹ However, retroactive application of the enlarged statutory period does not prevent the citizenry from making everyday decisions with reasonable certainty, and does not alter the definition of unlawful conduct.

The strict construction doctrine provides that penal statutes should not apply retroactively without clear notice that one's contemplated conduct is unlawful and that certain penalties will attach.¹⁹² The strict construction doctrine is not an impediment to retroactive application of a legislatively enlarged statute of limitations because retroactive application of the enlarged period neither affects the definition nor the penalty for the crime.¹⁹³ Moreover, retroactive application does not breach *ex post facto* prohibitions because extending the period prior to prosecution neither aggravates the crime, increases the punishment nor alters the rules of legal testimony necessary for conviction.¹⁹⁴ Thus, there are no constitutional or doctrinal barriers to retroactive application of a legislatively-enlarged limitations period.

B. Reviving Time-Barred Claims

Courts which permit retroactive application of an enlarged criminal limitations period deny application to offenses "time-barred" at the extension.¹⁹⁵ However, revival of a time-barred offense does not offend *ex post facto* prohibitions. The *ex post facto* prohibition has long been confined to the criminal context¹⁹⁶ but has never been defined with great clarity. Instead, vague notions of "justice and fair play"¹⁹⁷ are used to support judicial restraints on perceived *ex post facto* legislation. Courts suggest that a right, if either "substantial" or "vested," may not be altered after the fact.¹⁹⁸

Nineteenth century treatise writers like Judge Cooley first coined the notion of "substantial rights."¹⁹⁹ Cooley opined that legislatures may

191. Alteration of the definitional elements of the crime is a classic example of *ex post facto* legislation and would be prohibited.

192. *Commonwealth v. Broughton*, 257 Pa. Super. 369, 377, 390 A.2d 1282, 1286 (1978).

193. *State v. Hodgson*, 44 Wash. App. 592, 603, 722 P.2d 1336, 1342 (1986) *aff'd in part, rev'd in part, and remanded in part*, 108 Wash. 2d 662, 740 P.2d 848 (1987).

194. See *United States ex rel. Massarella v. Elrod*, 682 F.2d 688 (7th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983).

195. See, e.g., *People v. Smith*, 171 Cal. App. 3d 997, 217 Cal. Rptr. 634 (1985); *State v. Hodgson*, 108 Wash. 2d 662, 740 P.2d 848 (1987).

196. See Note *Ex Post Facto Limitations on Legislative Power*, 73 MICH. L. REV. 1491, 1492 n.4 (1975) [hereinafter *Ex Post Facto Limitations*].

197. See *Falter v. United States*, 23 F.2d 420, 425-26 (2d. Cir.), *cert. denied*, 2 U.S. 590 (1928).

198. See, e.g., *Kring v. Missouri*, 107 U.S. 221, 232 (1882).

199. See F. COOLEY, *CONSTITUTIONAL LIMITATIONS* 272 (1868).

prescribe different forms of criminal procedure but may not dispense with any substantial protections which existing criminal law affords the accused.²⁰⁰ This vague notion of a substantial right "vested" in the defendant, unlawfully taken away by legislative change, formed the foundation for the Supreme Court's decision in *Kring v. Missouri*.²⁰¹ *Ex post facto* analysis and the propriety of retroactive application require consideration of three factors: reliance, legislative function, and potential for legislative abuse.²⁰² *Ex post facto* legislation is objectionable because purportedly, citizens rely upon the law currently in effect to shape their conduct. Certainly, this premise is supportable with respect to the elements of a crime. However, few alleged criminals know the law, much less rely on it.²⁰³ Certainly, ignorance of the law will not excuse conduct in violation of current statutes.²⁰⁴ Reliance should be protected only if reasonable. If an individual commits a crime, the mere passage of time should not endow the individual with a vested right to escape punishment for the alleged wrong. An alleged defendant can not reasonably rely upon the statute of limitations to shelter his wrongful conduct, and society owes him no such guarantee.

Ex post facto laws are also undesirable because they fail to serve their primary purpose, deterrence.²⁰⁵ This concept of *ex post facto* laws assumes that criminal legislation is promulgated primarily for deterrent effect. However, statutes of limitations are mere procedural limitations and purport to serve no deterrent purpose. The statute of limitations has no measurable impact on allegedly criminal behavior, neither encouraging nor deterring such conduct.

Finally, *ex post facto* laws are objectionable because they represent a potential for legislative abuse.²⁰⁶ No legislative vindictiveness exists where the legislature extends the statute of limitations, unless directed principally to one individual. Unlike the enactment of legislation directed specifically toward a single individual or group, extension of child sexual abuse limitation periods neither suggests nor represents an abuse of legislative process.

In the civil context, courts have upheld the legislature's power to revive time-barred actions.²⁰⁷ In *Chase Securities Corp. v. Donaldson*,²⁰⁸

200. *Id.*

201. 107 U.S. 221, 232 (1882).

202. *Ex Post Facto Limitations*, *supra* note 196, at 1497-1501.

203. *Id.* at 1497.

204. See, e.g., *United States v. Casson*, 434 F.2d 415, 422 (D.C. Cir. 1970).

205. *Ex Post Facto Limitations*, *supra* note 196, at 1498.

206. *Id.* at 1500-01.

207. See, e.g., *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945); *Campbell v. Holt*, 115 U.S. 620 (1885); *Liebig v. Superior Court*, 209 Cal. App. 3d 828, 257 Cal. Rptr. 574 (1989).

208. 325 U.S. 304 (1945).

the Supreme Court ruled that revival of a personal cause of action, where the lapse of time did not vest the party with title to real or personal property, did not offend the fourteenth amendment.²⁰⁹ Statutes of limitations are arbitrary, and their shelter has never been recognized as a fundamental right.²¹⁰ Furthermore, statutes of limitations are measures of legislative grace, subject to legislative control.²¹¹ "[S]tatutes of limitation go to matters of remedy, not to destruction of fundamental rights."²¹²

In *Campbell v. Holt*,²¹³ the progeny of *Chase Securities*, the Supreme Court found that the right to defeat a debt by the statute of limitations was not a vested right, and the legislature's determination that time shall be no bar did not violate any right.²¹⁴ Man has no "property in the bar of the statute as a defense to his promise to pay."²¹⁵ "It is no natural right, . . . but the creation of conventional law."²¹⁶ No right is destroyed when the law restores a remedy which has been lost.²¹⁷

Similarly, logic suggests that revival of the statute of limitations in the criminal context violates no constitutional barriers. The majority of jurisdictions have found the statute of limitations to be procedural, not substantive.²¹⁸ However, courts have suggested that the defendant acquires a right not to be prosecuted when the statute expires.²¹⁹ Supposedly, the defendant's full liberty has been restored in a manner analogous to the acquisition of property through adverse possession.²²⁰ The distinction between extension and revival in the criminal context can only be justified on the premise that only when a right to prosecute is revived does an act which could not have been punished without the statute become punishable.²²¹ Such reasoning begs the question and only tortures an initially weak definition of the *ex post facto* prohibition.²²²

If the statute of limitations were classified as substantive, a prohibition against revival would mold a consistent, though improper, train

209. *Id.* at 311-12.

210. *Id.* at 314.

211. *Id.*

212. *Id.*

213. 115 U.S. 620 (1885).

214. *Id.* at 628.

215. *Id.* at 629.

216. *Id.* The court noted that the phrase "vested rights" is not found in the Constitution. *Id.* at 628. The Court's opinion suggests that the *ex post facto* prohibition was designed principally to protect constitutionally guaranteed rights. *Id.* at 629.

217. *Id.*

218. See *supra* note 172.

219. See *supra* notes 120 through 170 and accompanying text.

220. See *Ex Post Facto Limitations*, *supra* note 196, at 1512 n.78.

221. *Id.*

222. *Id.*

of logic. If the statute of limitations is initially substantive, then the *ex post facto* prohibition should prevent retroactive application, and revival is impossible from the onset. However, as noted, classification of the statute of limitations as substantive is arbitrary and decidedly improper.

The majority of jurisdictions classify the statute of limitations as procedural.²²³ However, magically, courts hold that, upon expiration of the right to prosecute, the statute of limitations vests the defendant with a substantive right. How can a purely procedural device suddenly bestow upon the defendant a substantive right? An example will expose the inconsistent and illogical nature of the reasoning. Assume the existence of a two year statute of limitations. X commits a crime on December 30, 1984. Y commits a crime on January 1, 1985. On December 31, 1986, the legislature abolishes the statute of limitations and decrees retroactive application. The time-barred theory would hold that X could not be prosecuted while Y could.²²⁴ Why should X have a substantive right to avoid prosecution while Y does not, when within a two day time span, both committed the same offense? Either the statute of limitations is procedural or substantive, but it is no chameleon! Weak justifications couched in terms of offending "our instinctive feelings of justice and fair play"²²⁵ explain little and do not justify the transformation.

If the courts are attempting to protect the defendant's reliance on the statute of limitations which existed at the time the crime was committed, then the *ex post facto* prohibition should prohibit not only revival, but extension as well. In *Kring v. Missouri*,²²⁶ the Supreme Court concluded that the *ex post facto* prohibition should apply to all changes enhancing the position of the state in criminal trials at the expense of the defendant.²²⁷ However, in *Thompson v. Utah*,²²⁸ the Supreme Court narrowed the application of the *Kring*, concluding that changes in criminal procedure could be, but are not necessarily, *ex post facto*.²²⁹ The Court held that the defendant had a right to a twelve person jury trial at the time of his offense and that right could not be taken from him at a second trial.²³⁰ The logical implication of the decision is that rights vest

in the defendant upon the commission of the offense. However, subsequent Supreme Court decisions suggest that the decision in *Thompson* did not limit the power of the legislature to make changes in "non-constitutional" procedural rights.²³¹ The determination whether a non-constitutional right could be a "substantial right" was left unresolved.²³²

If, as suggested by the *Thompson* decision, the *ex post facto* prohibition is designed to protect constitutional rights and not non-constitutional rights,²³³ then clearly the defendant's right to avoid prosecution cannot rise to the level of a constitutionally guaranteed right. Assuming the *ex post facto* prohibition is designed to protect the defendant's reliance interest, the defendant is in effect alleging he acted on the premise that the prosecution would face certain obstacles which were subsequently removed. Thus, the interest the defendant wants elevated to the level of a constitutionally guaranteed right is a dubious interest in avoiding prosecution after committing a criminal offense.²³⁴

Revival of a cause of action is an extreme exercise of legislative power²³⁵ and should be done only in rare circumstances. Some procedural rules should not be applied retroactively.²³⁶ Ideally, a court should balance the state's public policy and interest in prosecution against the defendant's right to a technical defense. Rather than a prophylactic rule against retroactive application, revival should be permitted unless the rule was widely relied upon, the revised rule cannot serve its purpose if retroactively applied, or a vindictive legislative motive pervades.²³⁷

In *Liebig v. Superior Court of Napa County*,²³⁸ the California Court of Appeals permitted the revival of plaintiff's time-barred tort action for sexual molestation against her grandfather.²³⁹ Holding that "vested

231. See, e.g., *Beazell v. Ohio*, 269 U.S. 167 (1925) (upholding change permitting judicial discretion in granting separate trials); *Mallett v. North Carolina*, 181 U.S. 589 (1901) (upheld statute permitting state to appeal grant of new trial); *Thompson v. Missouri*, 171 U.S. 380 (1898) (defendant had no vested right in rule of evidence prior to passage of Missouri statute).

232. *Beazell*, 269 U.S. at 171. The court noted that "[j]ust what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree." *Id.*

233. For example, the prohibition may protect constitutionally guaranteed rights such as the right to a jury trial in a criminal proceeding.

234. *Ex Post Facto Limitations*, *supra* note 149, at 1513.

235. *People v. Robinson*, 140 Ill. App. 3d 29, _____, 487 N.E.2d 1264, 1266 (1986); *Hopkins v. Lincoln Trust Co.*, 233 N.Y. 213, 213, 135 N.E. 267, 267 (1922).

236. For example, those rules upon which the defendant may reasonably rely, and which directly shape his conduct. For example, the interspousal testimonial privilege.

237. See *Ex Post Facto Limitations*, *supra* note 149, at 1513-16.

238. 208 Cal. App. 3d 828, 257 Cal. Rptr. 574 (1989).

239. *Id.* at _____, 257 Cal. Rptr. at 578.

223. See *supra* note 172.

224. The substantive rights theory would hold that the revised statute could not apply retroactively.

225. See *Falter v. United States*, 23 F.2d 420, 426 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

226. 107 U.S. 221 (1882).

227. *Id.* at 232.

228. 170 U.S. 343 (1898).

229. *Id.* at 352.

230. *Id.*

rights" are not immune from retroactive laws where an important state interest is at stake, the court found that maximizing, for as expansive a period of time as possible, the sexual abuse claims of minor plaintiffs was an overriding state interest.²⁴⁰ Similarly, in the criminal context, the state's interest in prosecuting and punishing child sexual abusers overrides defendant's interest in freedom from prosecution and permits the revival of time-barred actions. In *Chase Securities Corp. v. Donaldson*,²⁴¹ the Supreme Court noted that a multitude of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice and if the obstacle in the way of the creation seemed small.²⁴² Thus, where the state interest is great, the legislature may revive a time-barred action. However, revival should not be presumed and should only be permitted where the legislature expressly prescribes such application.

Courts frequently rely on the Fourteenth Amendment of the United States Constitution²⁴³ to forbid revival of a time barred claim.²⁴⁴ However, the Supreme Court in both *Campbell v. Holt*,²⁴⁵ and *Chase Securities Corp. v. Donaldson*²⁴⁶ determined that revival of an action not vesting a real or personal property right does not offend the fourteenth amendment. How can an alleged defendant obtain a vested right to be free from prosecution when he commits an act criminal at the time of performance? To justify this conclusion for the reason that the defendant's act could not have been punished but for the statute ignores logic, escapes reason and is but an exercise in semantic circumlocution. The state's interest in prosecuting child sex abusers overrides any "vested substantial right" the defendant may have acquired.

240. *Id.*

241. 325 U.S. 304 (1945).

242. *Id.* at 315.

243. The amendment provides in pertinent part that, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . ." U.S. CONST. amend. XIV, § 1.

244. See, e.g., *Board of Education v. Blodgett*, 155 Ill. 441, 40 N.E. 1025 (1895); *Sanchez v. Access. Associates*, 179 Ill. App. 3d 961, 535 N.E.2d 27 (1989); *Markley v. Kavanagh*, 140 Ill. App. 3d 737, 489 N.E.2d 384 (1986).

245. 115 U.S. 620 (1885).

246. 325 U.S. 304 (1945).

V. CONCLUSION

Children have been described as the largest indigent class on earth.²⁴⁷ Children are uniquely unable to protect their own rights.²⁴⁸ Given this inability to protect their own rights, it is imperative that we, as a society, endeavor to protect those who are unable to protect themselves. It is the mark of a civilized society. Statutes of limitations safeguard the accused against stale claims by discouraging victims from sleeping on their rights. Although child sex abuse victims may have a moral obligation to report the offense in a timely manner, the public derives no benefit by shielding the offender from prosecution while simultaneously penalizing the victim for his or her inability to report the offense. The offender should not be permitted to control his destiny by allowing him to manipulate the victim, impeding reporting and preventing prosecution. Certainly, neither logic nor public policy require that society maintain a helpless, silent vigil, permitting the child sexual abuser to avoid prosecution by unlawfully detaining his victim, thus preventing the victim's report and the state's prosecution of the offense. Yet, stringent application of the statute of limitations inflicts a similar injustice upon the child sex abuse victim.

The child victim, subject to unique reporting impediments, deserves an opportunity for legal redress. Child sexual abusers must be deterred and punished. Retroactive application of legislatively enlarged statutes of limitations accomplishes each of these desirable objectives. The mere extension of the limitations period, when mated with legislative purpose, supports a presumption for retroactive application. Given the minor's decided disadvantage in knowledge, power and resources, fairness demands that the child victim be given every opportunity for legal redress. Thus, absent manifest legislative intent to the contrary, the needs of society and the child sexual abuse victim are best served by retroactive application of the enlarged limitations period, and where expressly decreed, the revised limitations period may be applied to revive a time-barred claim.

THOMAS G. BURROUGHS

247. Bross & Munson, *Alternative Models of Legal Representation for Children*, 5 OKLA. CITY U.L. REV. 561, 565 (1989).

248. For example, many states provide that children under the age of ten are presumptively incompetent to testify. States also vary as to the threshold below which child is deemed automatically incompetent to testify. See e.g., *Kellum v. State*, 396 A.2d 166 (Del. 1978) (3 years old); *State v. Thrasher*, 223 Kan. 1016, 666 P.2d 772 (1983) (4 years old).

OK - J

February 16, 1994

PLEASE READ COURAGE TO
SO CALLED "BIBLE" OF THIS TYPE
OF THERAPY

-94

THE DESTRUCTION OF THE WILD FAMILY TO FALSE MEMORIES.

John, father, born 1920, Barnard, Kansas, grew up on farm.
Patricia (Pat) born 1926, London England.
Seven children, three boys, four girls.

Late 1990 we lost two daughters to False Memories. By the Autumn we lost the third daughter. Two went into therapy for marriage problems, the third I had encouraged into therapy. Almost overnight they went from being loving, caring (adults) to vicious, cruel strangers.

The letters were simply devastating. At first like everyone else this has happened to we felt as if we were the only people in the world this has happened to. It was sheer shock. July 12, 1992 we found we were not alone when a copy of the Kansas City Star was given to us with an article by the False Memory Syndrome Foundation, which was formed in March of 1992. I was the first person in Kansas to call them.

In the midst of this horror I went out to Las Vegas to bring my son home to die of Aids. He died in May, 1992.

We have one daughter and two sons left who think their sisters are crazy.

From loving carings, letters, phone calls, gifts, it went to this:

To Dad: "To call you an inadequate father is the kindest thing I can say. You did horrible things to me. You raped me, I was three years old and you forceably raped me. You allowed another member to rape me. You set up the system. My brother repeatedly raped me. How dare you do this. How dare you think there is something wrong with me. You no longer have any rights to my children. There will be no contact in any form."

To Mom: "I am only now remembering some of the horrible things you have done to me. I was unwanted. You had evil intentions - that I be used for your enjoyment. You left me to be raped repeatedly. You hurt me too. You molested me. You allowed others to molest me. Inadequate mother ~~simply~~ does not describe it. Our lives were without emotion." *Simply*

To Brother who was already dying of Aids: "I was severely abused as a child. A lot of things happened to me that until recently I had no earthly idea had occurred! My childhood was horrendous. Dad brutally raped me when I was three. Mom molested me. I recall outright hate and violence. I was raped in the shower repeatedly by you (we had no shower). It hurt terribly. You were abused but don't remember. You were in high school when you did this. I just recently remembered all this."

The above is just a few of the examples of the letters we have received.

House Judiciary
Attachment 3
2-17-94

My sister was my closest friend for 34 years. We shared the same room growing up; we wrote frequently through college years: we had our babies at approximately the same time; we spent much of our adult years in very close contact.

In August 1990, my sister called me to tell me we had been satanically ritually abused as children and it was her therapist who said so. What she was apparently talking about was this multigeneration cult of secret satanists...so secret nobody knows about them. They drink blood and eat babies.

Upon further questioning, she said that she had been told by her therapist that my parents were nice as part of the deception; that they stressed education in order to learn satanic verse; that they were teachers to be near children; and that they took us to church in order to cover up the rituals. I told her that if her therapist told her what happened to her before doing therapy with her this was malpractice,, and she hung up on me.

Contact was severed within two days but reestablished and continued for about 9 months. During this time she told me her therapist had suggested to her to read "Michelle Remembers", to see if it jogged any memories. She told me she had been told that her parents could trigger her to kill herself with a simple gesture. One day she said, "Sue, do you know anything about fires? My therapist told me to think about fires."

In June, 1991, my parents received an angry letter accusing them of "incomprehensible actions", unspecified.

At that time I told my family what my sister believed, in order to get help for her.

We attempted many things. My mother contacted the therapist, and told the therapist she hadn't been abused and attempted to make an appointment but was refused. My parents attempted to make contact with a psychologist in an attempt to make contact with the therapist but was refused. My mother attempted to make contact through my sister's minister but was refused.

I personally contacted the therapist via phone and told her that if she was treating my sister for satanic ritual abuse that she was treating her for the wrong thing.

Also we have hired consultants to effect a reconciliation but have not been successful to date.

My sister has cut off totally from the entire family, refuses all letters, refuses all phone calls, and .parent's

letters get returned.

My sister refuses all contacts with us and now fully believes to my knowledge my parents are satanic ritual abusers.

We come from a close family and no one of all her four brothers and sisters or parents believe she was satanically ritually, or in any way abused.

She and I were raised together literally in the same room down through the years, and I know with certainty nothing like this ever happened.

Susan J. Zucker

INFECTED WITH HYSTERIA - ENTERING THE SYSTEM

Belief system transmission to potential patients

- * By someone who is a "true believer in widespread satanic ritual abuse.
- * Via sensational daytime programs
- * By satanic sensationalistic literature such as escaping cults with sacrifice of children, etc.
- * By "educational programs" on SRA given broadly throughout the community.

Origin of suspicion of "repressed abuse" in adult or child

- * Unexplained physical complaints (Usually pain, very common in general population)

Origin of suspicion of "repressed abuse" in child

- * "Inappropriate" sexual comments
- * "Strange pictures"

Pressure to contact therapist by adult

Never be "whole" until you find out why you are having these symptoms, assuming there is some dark reason

Pressure to contact therapist on behalf of a child

- * If you really cared about your child you would look into the possibility of abuse causing these symptoms.

A true believer therapist is encountered with certain belief system IE:

- * Unexplained symptoms usually indicate abuse
- * Strange pictures usually indicate abuse

"Probable" perpetrator identified on basis of

Parent if adult child, usually father with mother allowing

- * Husband or ex-husband if young child, especially if some marital discord.

Therapy kept secret from "probable perpetrator" so that they

- * don't suspect. (Creating a closed system without critical input)

MOVING TOWARD A "MEMORY"

Pressure applied by therapist on children or adult "victims"

- * Repetitive themes of adults, and mommies and daddies that can hurt children
- * The therapist is the only one who can be trusted
- * What awful thing has happened
- * Ignoring the negative (IE records in less than 1/4 sessions)

Pressure applied by therapist to adult "passive parents"

- * Child is not sharing because she cannot trust the mother
- * If you want your child normal again, you must search yourself and undergo therapy.

Therapists explain away inconsistencies

- * If family member does not seem capable of abuse remember that they could have multiple personality disorder, so they appear to be a good father, and instead have a "bad side" that would abuse children.
- * If mother had to be involved but does not remember it then she was likely mind-controlled or drugged during abuse episodes.

Therapists employ hypnotism and group therapy

- * If no memory, hypnotism (Usually without recording and with suggestive leading)
- * Other "victims" that have come up with memories share them with the patient in peer groups.

Once memory develops, cut off perpetrator and warn others

- * Confront and cut-off communication with the alleged perpetrator
- * Inform others about the perpetrator that may be in "danger".
- * To help with memory retrieval and protect other family members, share memories with them and encourage them to get counseling as well for repressed memories.
- * If the other family member can begin recalling abuse also, go to authorities.

System reinforces belief system of accuser because of

- * Guilty until proven innocent approach of social service with complete cutoff from children.
- * Hospital admissions with non-standardized tests for "dissociative personality" which diagnose "dissociative disorder, possible MPD.
- * Allows shift of blame to another individual for all shortcomings of patient.

OUTCOMES

Usual outcome

Opposite of healing, with rifts in communication which cannot heal because the alleged perpetrator is "not willing to admit their guilt"

Bonds in family broken: IE via divorce, grandchildren cut off or children cut off from parent

Ongoing therapy for years in "victim" with development of further dependency of patient on therapist

True believers remain true believers

Costs of care astronomical with so much money directed to adult victims that true victims of child abuse will have less funds available.

Actual outcome

Mother of "victim" child asked by court to change counselors

Mother saw psychiatrist, (As opposed to MSW counselor) who is expert on hypnotism and educates mother about how hypnotism can be misused.

Actions of previous therapist questioned

IE: Acting as investigator and working from hypothesis to prove it right. Using suggestion during therapy.

IE: Overdiagnosing MPD and mind control to explain away inconsistencies

IE: Encouraging sharing of information between family members.

IE: No records

IE: Sharing of false information

Johnson County Mental Health saw children and Father. No evidence of abuse found.

District Court returned custody of children to parents.

The Father's parents were acting as temporary guardians.

Mother and Father enter joint counseling to repair the damage to their relationship.

Johnson County Mental Health to cease therapy on the children because they were normal as best as could be determined.

Testimony on HB2690 (February 17, 1994)

Thank you for the opportunity to testify before this committee in support of HB2690.

I am Dr. Susan Voorhees. I am a licensed Psychologist and in my capacity as a Child Psychologist have worked extensively with child abuse victims and their families, as well as with many organizations and public and private agencies which are involved in the care and treatment of abused children.

I understand that there is concern in the committee about the concept that individuals can carry within themselves the memory of an experience as traumatic as sexual abuse for many years without sharing this with others, and in some cases without apparently remembering the abuse experience themselves until many years after it has occurred. I can understand the concern about enacting legislation which would allow for prosecution based on potentially old and possibly false memories, or memories of a trauma which are evoked long after the event and therefore cannot be substantiated.

However, I urge the committee not to throw the baby out with the bath water in trying to protect from the exception of falsely created memories, rather than the rule that the revelation of sexual abuse is a difficult process involving many factors which takes many victims years to accomplish, often through no fault of their own.

Memories are maintained by individuals in a variety of ways and accessed in a variety of ways. I would ask the committee members to remember their own experiences of early childhood which are triggered by a particular smell (the wax and chalk dust of the elementary school; a aroma of freshly baked bread or cookies or a particular casserole; freshly cut grass), or feelings (the wind in your face on a summer day, the hug of your favorite relative), or adult memories which are not part of your every day awareness but are triggered by particular sights, sounds, or touches. I would ask the committee members to think of unpleasant memories, which can become vivid when evoked but are held away from our daily lives: the pain of childbirth or the death of a parent, the fear of a medical procedure or the dread of dental work. These may not be events that you think about until they are triggered by a particular stimulus, or until you have enough physical or emotional distance that you are not overwhelmed by the memory. Memories of childhood trauma are the same. They are often not remembered consciously until triggered by an event, sight, or sound which evokes part of the earlier experience and provides a context within which to understand the memory but they are still part of who we are and how we respond to the world.

However, there are other circumstances under which a memory of childhood trauma would not be "remembered" or consciously available until adulthood or well after the event. Let me offer a few for your consideration:

- Children are not supposed to know about sex, to talk about sex, or think about sex. It is not supposed to be part of their life experience. When it is, it is abnormal or bad or wrong. Therefore, it is difficult for them to talk about it and for adults to hear them talk about it.
- Many children are not believed when they tell of abusive experiences, particularly within the family, and they learn to accommodate to the abuse until they are able to leave the situation, sometimes because of their age, sometimes because their behavior deteriorates to a point where they can no longer remain in the home. Disbelief stems from several places: lack of physical evidence, denial of the perpetrator, denial on the part of other family members, emotional disturbance of the child which leads to questioning their credibility; emotional disturbance of the adults.
- In many situations of abuse, threat and intimidation are elements of the abuse and the child is afraid to tell what has happened to them for fear of retribution against themselves, other family members, beloved animals, or in some instances even the abuser.
- In many situations of abuse the opposite exists, where bribery, special treatment, and gifts are involved and the child is afraid to tell for fear of loss of the "special" things.
- Children learn to accommodate to things in their lives that they cannot change. There are many children who have learned that adults do not care for them, the "system" will not protect them and they are on their own to survive as best they can. Often this means finding a way to tolerate the intolerable.
- In many instances of abuse, the abuse is confused by the child, and the abuser, with love and affection, particularly when other adults in the child's life are emotionally unavailable or harsh and cruel. It is not uncommon that an abuser is actually in love with the child victim and the abuse is perpetrated within this context of a "love affair."
- Many children risk losing the love and support of other family members; mothers, fathers, aunts and uncles, grandparents, siblings, when they tell of abuse and the threat of the breakup of the family, abandonment, or expulsion are real.
- Many victims of abuse blame themselves for the abuse and are ashamed to tell anyone about what they have "done," thus keeping their secret to themselves for years.

I think there are three important things to keep in mind when considering this issue. The first is that sexual abuse is a distortion of the normal developmental experience of childhood, in which a child is forced to engage in adult activities which are beyond their capability of understanding and beyond their capacity for consent. This is true of abuse whether the child tells at the time of abuse or years later. This

distortion has impact on the future course of development, emotionally and interpersonally. Thus for the victim of abuse subsequent life experiences will be altered and will not be dealt within the same way as a developmental schemas has been protected and is allowed to follow the normal path.

Secondly, sexual abuse always involves power and domination of one individual over another. This power may not always be physical, it is more often the power of inherent authority as an adult or as a significantly older person, over a smaller, younger, more vulnerable child. Adults, by their very being, have inordinate power over a child. They do not have to threaten children, they do not have to physically hurt them, to hold over a child the dominion of adult authority. It is this authority which allows adults to parent children, to teach children, to coach children, to minister to children, to guide children, to govern children, to abuse children. Many victims of abuse cannot understand that their experiences of abuse do not have to be the status quo of their lives until this power inequity is modified, by age, by life circumstances, by understanding of oneself as an adult, or by physical distance from the abuser. Many victims of abuse accommodate to the experience of abuse, repeating it in their other relationships or in their treatment of themselves, until they can gain understanding of the developmental deviation in their lives and the impact this has had on them.

Thirdly, the chances of malicious prosecution of innocent people falsely accused of sexual abuse are far smaller than the impact of the opportunity for child abuse victims to legally pursue their abuser, regardless of when they are capable of doing so.

Many victims of abuse do not understand the damage of abuse until they see it perpetrated against people they love, their children or their siblings. While they were powerless as a child victim themselves, they become empowered when they see a loved one hurt, or realize the threat the perpetrator poses to those they love.

The process of understanding abusive experiences as a adult when they may have occurred in childhood is not an easy one nor a simple one to explain. It is excruciatingly painful, can lead to the dissolution of families and the loss of important support systems. The psychological measures individuals take to make sense of these experiences which have no sense to be made also can lead to painful self recriminations, serious problems in relationships and failure of self-esteem. It can be that in the treatment for these problems, the abuse is uncovered and within the relative safety of a therapeutic relationship the individual is freer to remember the abuse. But, it is also important to remember that not all memories of abuse are recaptured in therapy. Sometimes the victim needs the safety and distance of their own adulthood and emancipation to speak about their experiences and to be heard. Sometimes the victim needs the experiences of adulthood, which recapitulate to experiences of abuse to understand the developmental deviation and to put words, names, actions to things they could not understand as children.

I urge the committee not to consider this legislation as only pertaining to adults. This is also legislation to protect children and to allow for opportunities to break the cycle of abuse which destroys families. I sincerely hope that you will pass this important and humane legislation which will have significant importance to the many victims of sexual abuse who for a myriad of reasons feel revictimized repeatedly by the system, as well as for innocent potential victims of abusers who can currently escape prosecution.

Thank you.



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**Testimony of
JEAN M. SCHMIDT
Assistant Attorney General
Re: H.B. 2690
Before the Committee on Judiciary
February 17, 1994**

Mr. Chairman and Committee Members:

I am here today on behalf of Attorney General Stephan to urge your support of House Bill No. 2690, which would further enhance a victim's ability to seek redress within the criminal justice system. In 1986, the Legislature extended the statute of limitations to five years on certain offenses where the victim is less than sixteen.

The proposed amendment would further the cause of justice by allowing prosecution in cases where various factors prevented the crime from being made known to the victim and law enforcement. Examples of such situations include scenarios where a child is unable to put a conscious image to a traumatic event until several years later. Often this discovery is realized through therapeutic intervention.

The desire and need to seek redress through the criminal system is just as important to many victims as the discovery

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itself. Our communities have consistently recognized and supported the need to protect its citizens from sexual predators and to punish those who victimize the community.

This amendment would not significantly or unwisely add to the caseload of the criminal system. It would however give prosecutors another tool to enable prosecution in a number of cases that are presently precluded from prosecution.

Any questions that may arise regarding the reliability and methodology of the discovery should be fact issues resolved by the judge or jury. This bill would provide access for cases that need resolution within the criminal system. The office of the Attorney General urges passage of this bill.



Menninger

February 11, 1994

Joan
Dear Representative:

I am writing in support of HB2690. As Director of the Women's Program at Menninger, I work with women who have been sexually abused as children. I utilize group therapy as well as individual therapy.

Childhood sexual abuse takes a devastating toll on the victims. The development of the child is impaired. The trauma is often so overwhelming the child copes by repressing or keeping the memories away.

Women often begin to remember the abuse as they reach a stage of developmental maturity as an adult. The process of healing goes in stages. The last stage is to confront the perpetrator, if the woman chooses to do this. Most women do not choose to prosecute their abusers; but, for those who do, this should remain an option.

I would encourage your support on this bill. I would prefer that there be an unlimited statute of limitations because the recovery process is often many years.

If you have any questions, please me a call.

Sincerely,

Linda Sebastian, MN, ARNP
Director, Women's Program
The Menninger Clinic

Joan - call me if you have any questions
L

Patti Van Slyke
515 S. Adams
Junction City, KS 66441
(913) 223-6182 (home)

February 17, 1994

Rep. Mike O'Neal, Chair
House Judiciary Committee
Kansas Legislature
State Capitol Building
Topeka, KS 66612

Dear Chairman O'Neal and Members of the Committee:

I am writing in support of HB 2690 which would extend the statute of limitations for sex abuse crimes involving children. As a member of Senator Bud Burke's staff for almost seven years, I know citizens must get involved in issues of concern to them.

The current 5-year statute is woefully inadequate. Many victims of sexual molestation are too young to understand what has happened to them. Even when a victim is older and has some idea of the nature of the crime, they may remain silent for many years due to fear, shame and guilt.

We know that those who commit sex crimes against children -- sexual predators -- do not generally molest one or two kids and then stop; it becomes a pattern of behavior for life. The predator is not always the creepy guy in a car offering candy that your parents warned you about. It may be a family friend, a neighbor or someone even closer. These ties further complicate a child's willingness to tell. If a child is victimized at age 4 and understands this by age 9, they may still be too young and still feel too vulnerable to tell, let alone withstand the stress of filing charges and testifying in court. A five-year statute is simply inadequate to provide protection or relief to the youngest, most innocent victims of sexual abuse.

I understand there is concern about the latest psychiatric trend involving sudden recovery of memories of abuse. I believe this may genuinely occur but I share your skepticism at the validity of some such revelations. Charges of sexual abuse are devastating -- one need only see tabloid headlines at the grocery store to see that. Anyone who would maliciously or misguidedly bring charges against an innocent person should in turn be harshly penalized. And any therapist who would encourage the development of false memory should likewise be sanctioned.

In most cases, however, I believe memories of sexual abuse

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are valid, accurate, legitimate. For many victims, these are not memories suddenly and shockingly recalled through therapy; these are dark, shattering memories that have been kept silently for years, that resurface at odd times to again inflict pain and fear, to again consume with shame.

No matter how young the victim at the time of the crime, no matter how old the victim when they come to understand what happened to them, they are victims for life. And the bottom line is that unless charges have been brought against the abuser, chances are there have been many, many more little victims.

Please give these innocents the time to grow and find their own voices to speak out against those who have abused them sexually. Time does not heal or erase the memory for the victim, and time does not correct the behavior of the sexual predator. In fact, a five year limit on prosecution may simply encourage predators to seek younger targets, secure in the knowledge the child will not be able to understand or react in time to bring charges.

A five year limit assures that more sexual predators remain on the street, undetected, continuing to prey on children. And the questions you must answer are, "Whose child will be next?" and "Could I have helped to prevent it?" Please act now to change the law. **Abolish the statute of limitations on prosecuting sex crimes against children.**

Sincerely,

Patti Van Slyke
Patti Van Slyke

P.S. On a final note, I would like to express my frustration that today's hearing was limited to opponents of the measure. You know as well as I that supporters of the bill did not have adequate notice of the earlier hearing, so many of us did not have an opportunity to come out and testify. I am very unhappy that, following the excellent article in the Topeka Capital-Journal that brought this issue to public attention, you decided to restrict testimony at today's hearing. I have to wonder whether you truly want to hear both sides.

9.2



State of Kansas
KANSAS SENTENCING COMMISSION

House Bill 2690
House Judiciary Committee
February 17, 1994
Comments of Lisa Moots, Kansas Sentencing Commission

This bill extends the statute of limitations beyond the five year period after commission for certain enumerated sex offenses against victims of less than sixteen years of age to allow prosecution to be commenced up to two years after the victim discovers or reasonably should have discovered that the crime occurred.

However, the statute of limitations for rape (K.S.A. 21-3502) or aggravated criminal sodomy (K.S.A. 21-3506) remains five years in Section (4), and the crime of criminal sodomy (K.S.A. 21-3505) is not mentioned at all.

I simply wanted to point out that the recodification of the part of the criminal code dealing with sex crimes that took effect along with the sentencing guidelines moved some of the sex offenses against children into the rape, sodomy, and aggravated sodomy statutes. K.S.A. 21-3502 (1993 Supp.) now makes sexual intercourse with a child under 14 a rape; K.S.A. 21-3505 (1993 Supp.) now contains the prohibition against sodomy with a child under 14 years of age as well as the prohibition against causing a child who is 14 or 15 years old to engage in sodomy; K.S.A. 21-3506 (1993 Supp.) now contains the prohibition against sodomy with a child under 14 years of age as well as the prohibition against causing a child who is 14 or 15 years old to engage in sodomy. Consequently, I thought you might also want to include these crimes in the extension of the statute of limitations provided for in Section (2).

I might also just suggest that you make it clear that the requirement in Section (2) that "...the victim is less than 16 years of age,..." means at the time of the commission of the crime rather than at the time of discovery of the crime.