

Reasonable for Whom? Developing a More Sensible Approach to the Discovery Rule in Civil Actions Based on Childhood Sexual Abuse

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ABSTRACT: Civil actions based on childhood sexual abuse (“CSA”), like all other actions in tort, are subject to fixed limitations periods. A substantial majority of states apply the discovery rule to actions based on CSA, putatively as a tolling mechanism for plaintiffs who reasonably failed to discover their causes of action within the limitations period. In these states, judges often dismiss actions based on CSA after deciding that the plaintiff failed to exercise reasonable diligence and discover his or her action sooner. This Note argues that imposing a traditional standard of reasonable diligence to dispose of CSA cases as a matter of law is a mistake in view of CSA’s unique impact on its victims and the complex factual and legal allegations that typify CSA litigation. This Note contends that a jury is in a much better position to judge the reasonableness of a CSA survivor’s discovery of his or her action, and proposes legislative and judicial reform to preserve such questions for the trier of fact.

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I. INTRODUCTION

Childhood sexual abuse (“CSA”) is a well-recognized epidemic in which older individuals in positions of power exploit and abuse children for sexual gratification.¹ Children, who are tormented with such abuse before reaching an age at which they can fully appreciate the nature of sexual contact,² frequently suffer severe developmental, psychological, and emotional impairments because of such exploitation.³ These injuries can be both short-term and long-term, and may have a delayed onset.⁴ In short, CSA can inflict a lifetime of suffering.

Understandably, CSA survivors often wish to sue their abusers and any third parties that enabled the abuse to demand compensation for their injuries. Civil actions based on CSA serve a number of important functions: They vindicate survivors’ suffering, hold culpable parties accountable, deter the future commission of such intentional or negligent acts, compensate

1. See Marci A. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 BROOK. L. REV. 397, 398–400 (2014).

2. *Id.* at 399–400 (“Social science studies have shown that children in fact do not fully understand (if they understand it at all) what sex is, and certainly have no idea of the lifelong consequences of being sexually assaulted.”).

3. DARKNESS TO LIGHT, CHILD SEXUAL ABUSE STATISTICS: CONSEQUENCES 1–4 (2015), https://www.d2l.org/wp-content/uploads/2017/01/Statistics_5_Consequences.pdf.

4. *Id.*

victims for their ongoing injuries and the expenses of treating such injuries, and educate the public about CSA.⁵ However, because of the unique characteristics of CSA and the injuries it creates, it takes victims decades to report the abuse, and most never do.⁶ CSA thus poses a difficult problem for the legal system, which generally imposes short and inflexible time limits on bringing civil actions.⁷

While civil actions based on CSA were traditionally lumped in with other personal-injury actions, most states have developed an individualized treatment of CSA.⁸ Today, the vast majority of states have a special limitations period for CSA lawsuits.⁹ Moreover, most of these states allow the discovery rule to toll the statute of limitations for survivors who were blamelessly unaware of their claims during the limitations period.¹⁰ Nevertheless, courts still deny many CSA victims the opportunity to prove their allegations.¹¹ This dismissal often occurs when judges applying the discovery rule conclude at the outset that a plaintiff failed to exercise reasonable diligence in the aftermath of the abuse, such that the plaintiff's claims are time-barred.¹²

As this Note will demonstrate, the traditional legal standard of reasonable diligence is entirely inapposite in CSA litigation. CSA lawsuits often present intricate factual and legal allegations, which reflect CSA's extraordinary nature as a social and legal harm.¹³ For instance, psychological defense mechanisms can work in tandem with abusers' manipulation and coercion to block victims' memories of abuse and deter them from reporting.¹⁴ Those victims who eventually do report frequently allege multifaceted injuries and complex theories of liability, especially where negligent third parties enabled the abuse.¹⁵ The traditional discovery rule—which asks a simple yes or no question—was not built to handle these allegations. As a result, judges trying to answer the discovery question as a matter of law invariably oversimplify or

5. See Cynthia Grant Bowman, *The Manipulation of Legal Remedies to Deter Suits by Survivors of Childhood Sexual Abuse*, 92 NW. U. L. REV. 1481, 1481 (1998).

6. See Hamilton, *supra* note 1, at 398 (“[T]he vast majority of [CSA] victims need decades to come forward, and many never do.”); *infra* note 19 and accompanying text.

7. Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 609–10 (2008).

8. See *infra* Part II.B.1.ii.

9. See *infra* Part II.B.1.ii.

10. See *infra* Part II.B.2.

11. See Joshua Lushnat, Note, *Sexual Abuse Memory Repression: The Questionable Injustice of Demeyer*, 13 J.L. SOC'Y 529, 531 (2012) (“Absent a slam-dunk-case brought immediately after the incident, civil vindication for [CSA] victim[s] is rather difficult to obtain.”).

12. See *infra* Part III.A.2.

13. See *infra* Part III.B.

14. See *infra* Part III.B.1.

15. See *infra* Part III.B.2.

blatantly ignore the aspects of a case that do not fit within the shallow parameters of the rule.¹⁶

This Note argues that the timeliness of a plaintiff's discovery in actions based on CSA should be reserved for the jury, a judicial body that is uniquely well-positioned to determine whether a particular plaintiff's discovery of his or her action was reasonable. Part II introduces the social and legal framework of CSA. Specifically, it provides background on CSA as a social epidemic and establishes the legal framework behind the discovery rule. Part III analyzes the problems inherent in deciding the discovery issue as a matter of law. By way of an in-depth case illustration, it highlights the aspects of CSA litigation that cannot be squared with the traditional discovery rule. Finally, Part IV proposes legal reform to preserve the discovery question for the trier of fact. This reform consists of both a model statutory amendment for state legislatures and a reformulation of the discovery rule for the courts.

II. THE SOCIAL AND LEGAL FRAMEWORK OF CSA LITIGATION

A review of the devastating social consequences of CSA is vital to placing the problem in its legal context and exploring how the law should respond to such injuries. A brief summary of the social and legal background of CSA follows.

A. SOCIAL BACKGROUND

CSA is prevalent in our society and causes significant lifelong psychological damage to its victims.¹⁷ Recent research indicates that approximately one in five females and one in twenty males are sexually abused as children.¹⁸ These statistics, though alarming, significantly understate the true magnitude of the problem because the majority of CSA incidents go unreported.¹⁹ Nearly 70% of all reported sexual assaults (involving victims of all ages) are inflicted on children ages 17 and below.²⁰ Sexually abused children suffer severe, long-term emotional damage.²¹ Victims frequently experience anxiety, self-esteem problems, depression, confusion with sexual identity, and suicidal tendencies.²² Other common long-term effects include

16. See *infra* Part III.B.

17. *Child Sexual Abuse Statistics*, NAT'L CTR. FOR VICTIMS CRIME, <https://victimsofcrime.org/media/reporting-on-child-sexual-abuse/child-sexual-abuse-statistics> (last visited Feb. 6, 2018).

18. *Id.*

19. See DARKNESS TO LIGHT, CHILD SEXUAL ABUSE STATISTICS 1 (2017), https://www.d2l.org/wp-content/uploads/2017/01/all_statistics_20150619.pdf ("[O]nly about 38% of child victims disclose the fact that they have been sexually abused.").

20. *Additional Facts and Resources*, NAT'L CTR. FOR VICTIMS CRIME, <https://victimsofcrime.org/media/reporting-on-child-sexual-abuse/additional-facts-and-resources> (last visited Feb. 6, 2018).

21. Guy R. Holmes et al., *See No Evil, Hear No Evil, Speak No Evil: Why Do Relatively Few Male Victims of Childhood Sexual Abuse Receive Help for Abuse-Related Issues in Adulthood?*, 17 CLINICAL PSYCHOL. REV. 69, 72 (1997).

22. *Id.*

Post-Traumatic Stress Disorder (“PTSD”), drug addiction, alcoholism, sex addiction, and sexual dysfunction.²³

Victims of CSA often suppress or repress²⁴ memories of their abuse as a mechanism of self-preservation.²⁵ It is common for victims of CSA to attempt to “block” the abuse out of their minds in order to revert to living a normal life after the abuse has ended.²⁶ It is also common for victims to repress recollections of their abuse to the point that they have no conscious memory of it for long periods of time.²⁷ Survivors who suppress or repress memories of their abuse often experience “triggering event[s]” later in life that bring back horrifying memories of the abuse.²⁸ Such triggering events may prompt

23. DARKNESS TO LIGHT, *supra* note 3, at 1–4; Hamilton, *supra* note 1, at 398; Holmes et al., *supra* note 21, at 72–73. A high-profile example of CSA’s devastating and lifelong effects surfaced recently when Chester Bennington, the lead singer of the band Linkin Park, committed suicide in July 2017. Joe Coscarelli, *Chester Bennington, Linkin Park Singer, Is Dead at 41*, N.Y. TIMES (July 20, 2017), <https://www.nytimes.com/2017/07/20/arts/music/chester-bennington-linkin-park-dead.html>. Bennington was sexually abused between the ages of 7 and 13. *Id.* The abuse “destroyed [his] self-confidence.” *Id.* Like many CSA survivors, Bennington turned to drugs and alcohol to escape memories of the abuse. See Tilly Pearce, *Suffering in Silence: Linkin Park Singer Chester Bennington Revealed Horrific Child Abuse Was Behind His Substance Abuse Issues*, SUN (July 20, 2017, 9:13 PM), <https://www.thesun.co.uk/tvandshowbiz/4064403/linkin-park-singer-chester-bennington-revealed-horrific-child-abuse-was-behind-substance-abuse-issues>. He battled addiction throughout much of his adulthood. *Id.*

24. Courts and commentators frequently use the terms “suppression” and “repression” interchangeably, but they are distinct concepts. In the context of CSA, memory “suppression” refers to a victim who deliberately blocks abuse out of his or her mind. See Drew P. Von Bargen II, *Nittany Lions, Clergy, and Scouts, Oh My! Harmonizing the Interplay Between Memory Repression and Statutes of Limitations in Child Sexual Abuse Litigation*, 18 MICH. ST. U. J. MED. & L. 51, 61 (2014). In contrast to memory suppression, a victim who “represses” memory of abuse involuntarily loses knowledge of the abuse for the period of repression. *Id.*; see also *Doe v. Roe*, 955 P.2d 951, 957 (Ariz. 1998) (“In laymen’s terms, memory repression is the involuntary blocking of memory so that the memory remains stored but inaccessible to the conscious mind.”).

25. Anthony Gray, *Extending Time Limits in Sexual Abuse Cases in Australia, America and Canada*, 10 WHITTIER J. CHILD & FAM. ADVOC. 227, 233 (2011).

26. See, e.g., *Doe v. Boy Scouts of Am.*, 66 N.E.3d 433, 446 (Ill. App. Ct. 2016) (“Plaintiff averred in his affidavit that once the abuse ended, he did everything he could to move past it. He successfully blocked the abuse out of his mind. He did not let it impact his activities or education.”); *Wisniewski v. Diocese of Belleville*, 943 N.E.2d 43, 55 (Ill. App. Ct. 2011) (“Although [the plaintiff] never totally forgot about the abuse, he became successful in blocking it out of his mind. He did not let the abuse impact his daily activities or his psychological health.”); *Steinke v. Kurzak*, 803 N.W.2d 662, 671 (Iowa Ct. App. 2011) (“[The plaintiff’s] testimony . . . describe[s] . . . a deliberate effort on his part to forget the painful thoughts of the alleged abuse.”); *Petersen v. Bruen*, 792 P.2d 18, 19 (Nev. 1990) (“[The plaintiff] averred that he had blocked out the eight years of sexual molestations . . .”).

27. Rebecca Lowe, *Extending Statutes of Limitations for Victims of Child Sexual Abuse Based on the Developmental Model and International Law*, 24 B.U. PUB. INT. L.J. 27, 31–33 (2015).

28. Ann Marie Hagen, Note, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355, 363 (1991); see also *Wisniewski*, 943 N.E.2d at 65 (After the triggering event, the plaintiff “became anxious, uptight, irritable, and overwhelmed with a feeling of guilt that there could have been more victims after he had been abused. [The plaintiff] started having trouble sleeping and began having nightmares. His memories and thoughts of [his] abuse preoccupied his thinking.”).

adult survivors to sue their abusers and/or any other potentially culpable parties.²⁹

B. LEGAL BACKGROUND

In order to fully explore the problems that arise when courts apply the discovery rule in CSA cases, it is necessary to develop an understanding of the purposes and policies behind statutes of limitations and the discovery rule, as well as how these legal rules have functioned in CSA cases.

1. Statutes of Limitations

i. *In General*

Statutes of limitations establish periods within which claimants must file their claims.³⁰ A claimant who fails to bring his or her action within the set period loses the opportunity for legal recourse on that claim.³¹ The concept of a statute of limitations dates back millennia, and the English statute upon which most American statutes of limitations are based dates back to 1623.³² In the United States, every state imposes a limitations period on almost every civil claim.³³ The periods allowed for filing claims frequently vary depending on the type of claim. For instance, the law may impose one time limit (e.g., two years) for tort actions, and another (e.g., ten years) for contract claims.³⁴

The law offers a number of justifications for statutes of limitations. One central purpose is evidentiary: As time passes, the memories of witnesses fade and the availability of physical evidence declines.³⁵ A second primary purpose is to grant potential defendants peace of mind after a certain period of time, instead of allowing the threat of a lawsuit to persist forever.³⁶ Further arguments in favor of such statutes emphasize that they reduce litigation, promote diligence among claimants, “place defendants and plaintiffs on an equal footing,” and “encourage the prompt enforcement of substantive law.”³⁷ While various other arguments might be made in favor of a statute of

29. See *Wisniewski*, 943 N.E.2d at 65–68 (indicating that the plaintiff alleged his injuries arose from a triggering event and he sued shortly thereafter); cf. Hagen, *supra* note 28, at 379 (“[CSA] plaintiffs argue that the date injury is discovered to be causally related to emotional problems is the date of the event that triggered awareness.”).

30. Wistrich, *supra* note 7, at 609–10.

31. *Id.*

32. *Id.* at 610.

33. *Id.*

34. These examples are based on IOWA CODE § 614.1 (2017).

35. David Crump, *Statutes of Limitations: The Underlying Policies*, 54 U. LOUISVILLE L. REV. 437, 438–41 (2016).

36. *Id.* at 441–43. As discussed below, this rationale is hardly persuasive in CSA cases. See *infra* Part IV.C.

37. Wistrich, *supra* note 7, at 616–17.

limitations, the primary rationales relate to the quality of evidence and a potential defendant's right to repose.³⁸

These justifications are counterbalanced by a number of criticisms. First, statutes of limitations are inherently arbitrary; common sense dictates that a claim filed on day 364 is not intrinsically less meritorious than a claim filed on day 366, but only the former will survive a one-year limitations period.³⁹ Second, statutes of limitations prevent claims from proceeding on the merits, and for this reason, some courts have described them as “disfavored.”⁴⁰ Another argument against strict statutes of limitations is that it is unfair to impose an unyielding statute of limitations on a claimant who was genuinely unaware of his or her claim during the limitations period.⁴¹

ii. In CSA Cases

As with any other action in tort, a statute of limitations applies to actions based on CSA in almost every state.⁴² Originally, courts applied ordinary personal injury limitations periods to such actions,⁴³ but today the vast majority of states have a customized statute of limitations for actions based on

38. See Crump, *supra* note 35, at 437, 443 (describing “the most salient reasons” for short limitations periods as fresh evidence, peace for defendants, and prevention of unmeritorious claims, although noting that the third reason is not expressly acknowledged by courts); see also *Floyd v. Donahue*, 923 P.2d 875, 877 (Ariz. Ct. App. 1996) (“[S]tatutes of limitations serve the important public policy functions of protecting defendants and the courts from stale claims and from the evidentiary problems such claims generate, and protecting defendants from economic and psychological insecurity.”).

39. See *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (“[Statutes of limitation] are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay.”).

40. *Floyd*, 923 P.2d at 877.

41. Crump, *supra* note 35, at 445.

42. For a full list of each state's statute of limitations for civil actions based on CSA, see *State Civil Statutes of Limitations in Child Sexual Abuse Cases*, NAT'L CONF. ST. LEGISLATURES (May 30, 2017), <http://www.ncsl.org/research/human-services/state-civil-statutes-of-limitations-in-child-sexual-abuse.aspx>. The exceptions are Delaware, Maine, Utah, Alaska, Florida, and Nevada. Delaware and Maine currently impose no statute of limitations for actions based on CSA. See DEL. CODE ANN. tit. 10, § 8145(a) (West Supp. 2017); ME. REV. STAT. ANN. tit. 14, § 752-C(1) (2015). Utah allows claimants to sue their abusers at any time, but imposes a statute of limitations for bringing suits against non-perpetrator defendants. UTAH CODE ANN. § 78B-2-308(3) (LexisNexis Supp. 2017). Alaska has no limitations period for actions based on the “felony sexual abuse of a minor.” ALASKA STAT. § 09.10.065(a)(1) (2016). Florida allows actions based on sexual battery of victims under the age of 16 to be brought at any time. FLA. STAT. § 95.11(9) (2017). Nevada does not impose a statute of limitations where there is “clear and convincing evidence” that the CSA occurred. *Petersen v. Bruen*, 792 P.2d 18, 24–25 (Nev. 1990). This Note expresses no opinion on the partial or wholesale abrogation of CSA statutes of limitations. Rather, this Note is predicated on the assumption (rooted in recent legal trends) that most states would be unwilling to do away with statutes of limitations. As things stand, a substantial majority of states apply the discovery rule to actions based on CSA, see *infra* Part II.B.2.ii, and this Note provides for all such states an easily implementable solution to the problems identified below.

43. See *infra* notes 152–53 and accompanying text; see also Hamilton, *supra* note 1, at 399 (explaining that CSA statutes of limitations traditionally commenced on the date of the alleged abuse).

CSA.⁴⁴ Moreover, almost every state tolls the statute of limitations while a claimant is a minor, such that a statute of limitations cannot start to run until the claimant turns 18 years old.⁴⁵ Thus, a statute of limitations will typically begin running against a victim of CSA upon the victim's 18th birthday.⁴⁶

The parameters of states' statutes of limitations for CSA actions vary tremendously. An extremely liberal example is Delaware, which imposes no limitations period for bringing suit based on CSA.⁴⁷ At the opposite end of the spectrum, Alabama requires claims based on CSA—which the state does not distinguish from other actions based on personal injury—to be brought within two years of the date of the injury.⁴⁸ Other states fall in between these two extremes⁴⁹ and often temper the inherently arbitrary nature of a fixed time limit with certain tolling mechanisms, such as the discovery rule.

2. The Discovery Rule

i. In General

To alleviate the harsh results that a statute of limitations can create, many courts and legislatures employ the discovery rule.⁵⁰ Generally speaking, the discovery rule provides that a limitations period does not start running against a claimant until the claimant discovers, or reasonably should have discovered, the cause of action.⁵¹ The discovery rule is objective: It asks when a reasonable claimant would have discovered a claim, regardless of when the claimant at bar subjectively discovered his or her claim.⁵² Therefore, the focus is on the facts that were at the claimant's disposal; whether the claimant actually knew of such facts or drew the necessary connections between the facts and his or her injuries is not dispositive.⁵³

ii. In CSA Cases

Until somewhat recently, plaintiffs in CSA cases were not afforded the discovery rule.⁵⁴ Instead, a claimant's cause of action would accrue on the date

44. See *State Civil Statutes of Limitations in Child Sexual Abuse Cases*, *supra* note 42 (Only six states—Alabama, Arizona, Hawaii, Michigan, Mississippi, and Nebraska—do not have a special statute of limitations for actions based on CSA. In these states, CSA cases fall under the general statute of limitations for personal injury actions.).

45. *Id.*

46. Hagen, *supra* note 28, at 364.

47. DEL. CODE ANN. tit. 10, § 8145(a).

48. ALA. CODE § 6-2-38 (LexisNexis 2014).

49. See *State Civil Statutes of Limitations in Child Sexual Abuse Cases*, *supra* note 42.

50. Crump, *supra* note 35, at 445–48.

51. *Id.*

52. *Id.* at 445.

53. *Id.*

54. Hagen, *supra* note 28, at 366–69.

of his or her injury.⁵⁵ In the late 1980s, however, courts began applying the discovery rule to actions based on CSA.⁵⁶ A landmark case was *Hammer v. Hammer*, in which a Wisconsin appellate court held that the discovery rule should govern the timeliness of a woman's lawsuit against her father, who had sexually abused her during her childhood.⁵⁷ An affidavit of the plaintiff's psychological counselor averred that the plaintiff had suppressed memories of her father's abuse as a coping mechanism, such that she had been unable to comprehend the wrongful nature of the abuse or its psychological impact on her during the limitations period.⁵⁸ The court reasoned that "the injustice of barring meritorious claims before the claimant knows of the injury" outweighed the policies in favor of imposing a statute of limitations.⁵⁹

Today, most states apply the discovery rule to CSA actions.⁶⁰ In some states, the discovery rule exists as a judicial gloss on the statute of limitations.⁶¹ In most states, however, the state legislature has incorporated the discovery rule into the language of the statute itself.⁶² For instance, Iowa's statute provides

[a]n action for damages for injury suffered as a result of sexual abuse which occurred when the injured person was a child, but not discovered until after the injured person is of the age of majority, shall be brought within four years from the time of discovery by the

55. See *id.* at 366–68.

56. *Id.* In the context of CSA, the discovery rule is often referred to as the "delayed discovery" rule, although this practice is not followed in this Note. See *id.* at 368.

57. *Hammer v. Hammer*, 418 N.W.2d 23, 24 (Wis. Ct. App. 1987).

58. *Id.* at 25.

59. *Id.* at 27 (quoting *Hansen v. A.H. Robins, Inc.*, 335 N.W.2d 578, 582 (Wis. 1983)).

60. Thirty-nine states, in total, apply the discovery rule to civil actions based on CSA. See *infra* notes 61–62 and accompanying text. The remainder of this Note will cite heavily to the statutes and case law of states that apply the discovery rule to actions based on CSA. Because this Note is broadly addressed to all such states, an effort will be made to sample diversely from such states and cite to generally applicable authority.

61. In Arizona, Colorado, the District of Columbia, Louisiana, Pennsylvania, Tennessee, Texas, and Wisconsin, judges have read the discovery rule into CSA statutes of limitations. See *Logerquist v. Danforth*, 932 P.2d 281, 284–85 (Ariz. Ct. App. 1996); *Sandoval v. Archdiocese of Denver*, 8 P.3d 598, 604–05 (Colo. App. 2000); *Cevenini v. Archbishop of Wash.*, 707 A.2d 768, 771 (D.C. 1998) (employing the verbal formulation of the discovery rule without expressly adopting it); *Wimberly v. Gatch*, 635 So. 2d 206, 217–18 (La. 1994); *Dalrymple v. Brown*, 701 A.2d 164, 167–71 (Pa. 1997) (acknowledging the availability of the discovery rule but holding it unavailable to cases involving repressed memories); *Doe v. Catholic Bishop for the Diocese of Memphis*, 306 S.W.3d 712, 722–26 (Tenn. Ct. App. 2008); *Doe v. Roman Catholic Archdiocese of Galveston-Hous.*, 362 S.W.3d 803, 810 (Tex. App. 2012); *Hammer*, 418 N.W.2d at 26–27.

62. See *State Civil Statutes of Limitations in Child Sexual Abuse Cases*, *supra* note 42 (describing every state's statute of limitations and reproducing the statutory language of 29 state statutes that expressly adopt a discovery standard); see also IDAHO CODE § 6-1704 (2017); W. VA. CODE ANN. § 55-2-15 (West 2016).

injured party of both the injury and the causal relationship between the injury and the sexual abuse.⁶³

Other state legislatures provide discovery as an alternative measure to the normal limitations period. For instance, the Illinois statute of limitations for CSA claims provides that

an action for damages for personal injury based on childhood sexual abuse must be commenced within 20 years of the date the limitation period begins to run . . . or within 20 years of the date the person abused discovers or through the use of reasonable diligence should discover both (i) that the act of childhood sexual abuse occurred and (ii) that the injury was caused by the childhood sexual abuse.⁶⁴

States articulate the discovery rule in various ways. For instance, unlike the above formulations of the rule in Iowa and Illinois, which expressly require discovery of the abuse and the causal link between injury and abuse, a Wyoming statute provides that “a civil action based upon sexual assault . . . against a minor may be brought within the later of: (i) Eight (8) years after the minor’s eighteenth birthday; or (ii) Three (3) years after the discovery.”⁶⁵ Differently still, Arkansas provides that “any civil action based on sexual abuse which occurred when the injured person was a minor but is not discovered until after the injured person reaches the age of majority shall be brought within three (3) years from the time of discovery of the sexual abuse by the injured party.”⁶⁶

Despite states’ disparate formulations of the discovery rule, those varying formulations have certain persistent characteristics. Namely, the inquiry under the discovery rule is always when the victim of CSA discovered or *reasonably should have discovered* certain facts giving rise to the cause of action.⁶⁷ The test is objective⁶⁸ and imposes a reasonable person standard of diligence

63. IOWA CODE § 614.8A (2017).

64. 735 ILL. COMP. STAT. 5/13-202.2(b) (2016).

65. WYO. STAT. ANN. § 1-3-105(b) (2015).

66. ARK. CODE ANN. § 16-56-130(a) (2016). The statute goes on to define “[t]ime of discovery” as “when the injured party discovers the effect of the injury or condition attributable to the childhood sexual abuse.” *Id.* § 16-56-130(c)(3).

67. Crump, *supra* note 35, at 445; *see also* Clay v. Kuhl, 727 N.E.2d 217, 220–21 (Ill. 2000) (“Under the discovery rule, a party’s cause of action accrues when the party knows or reasonably should know of an injury and that the injury was wrongfully caused. . . . In the present case, . . . the [alleged CSA victim] had sufficient information about her injury and its cause to require her to bring suit long before the date of discovery alleged in the complaint.”); Steinke v. Kurzak, 803 N.W.2d 662, 667 (Iowa Ct. App. 2011) (“[I]n a child sexual-abuse case . . . a claim ‘does not accrue until the plaintiff knows or in the exercise of reasonable care should have known both the fact of the injury and its cause.’” (quoting Callahan v. Iowa, 464 N.W.2d 268, 273 (Iowa 1990))); McCreary v. West, 971 P.2d 974, 981 (Wyo. 1999) (“[The] question clearly is when [the survivor] discovered or in the exercise of reasonable diligence should have discovered the [injury].”).

68. Crump, *supra* note 35, at 445.

on CSA claimants.⁶⁹ Unfortunately, as commentators have observed, imposing a default reasonable person standard on survivors of CSA is a task that courts are ill-advised and ill-equipped to do.⁷⁰

III. THE PROBLEMS INHERENT IN DECIDING THE DISCOVERY QUESTION AS A MATTER OF LAW

As one court has remarked, the facts that plaintiffs allege in CSA cases are “disturbingly similar.”⁷¹ As this Part demonstrates, CSA cases often involve allegations that the defendant(s) psychologically coerced and manipulated the victim; allegations that the victim repressed or suppressed memories of abuse; allegations of several distinct injuries, some of which developed long after the abuse; and complex theories of liability against multiple defendants. Meanwhile, courts tend to greatly oversimplify these complex allegations to dispose of CSA cases as a matter of law. To illustrate these common factual and legal characteristics, this Part proceeds by first providing a case description. Through the lens of this case, the following discussion analyzes the abnormal characteristics of CSA lawsuits, all of which counsel against applying the discovery rule’s traditional reasonable person standard. Finally, this Part highlights the legal community’s longstanding discontent with the status quo in CSA litigation, which further demonstrates the pressing demand for a solution to this problem.

A. THE PROBLEM IN ACTION: PARKS V. KOWNACKI

The Illinois Supreme Court’s decision in *Parks v. Kownacki*⁷² reveals the type of heinous factual allegations that actions based on CSA frequently involve, and demonstrates how courts tend to apply the discovery rule to dismiss such actions as a matter of law. In 1995, Gina Parks brought a lawsuit against Reverend Raymond Kownacki,⁷³ St. Martin of Tours Roman Catholic Church (“the Parish”), and the Catholic Diocese of Belleville (“the Diocese”),

69. *Id.*

70. Gray, *supra* note 25, at 247–48.

71. *Doe v. Catholic Bishop for the Diocese of Memphis*, 306 S.W.3d 712, 714 (Tenn. Ct. App. 2008). The court in *Diocese of Memphis* was referring specifically to CSA actions against the Catholic Church, *id.*, but CSA actions in other contexts share uncanny similarities as well. See Jocelyn B. Lamm, Note, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189, 2192–95 (1991) (explaining in detail how “[t]he pattern of child incestuous abuse is strikingly consistent”).

72. *Parks v. Kownacki*, 737 N.E.2d 287 (Ill. 2000). Although the facts of *Parks* may seem exceptionally outrageous, this Note utilizes *Parks* primarily to demonstrate certain pervasive factual and legal aspects of CSA litigation. To this end, Part III frequently draws parallels between *Parks* and other cases.

73. *Id.* at 289. Raymond Kownacki’s sexual abuse of children has been the subject of multiple lawsuits. Jesse Bogan, *No End in Sight for Damages Caused by Illinois Priest*, ST. LOUIS POST-DISPATCH (Oct. 19, 2011), http://www.stltoday.com/news/local/crime-and-courts/no-end-in-sight-for-damages-caused-by-illinois-priest/article_08609a17-4bb1-518c-af63-9a42fdo36d36.html.

for injuries arising from Kownacki's sexual abuse of Parks in the early 1970s.⁷⁴ The court dismissed the action as barred by the statute of limitations in effect when Parks turned 18 years old in 1973.⁷⁵ In reviewing the motion to dismiss, the court was required to accept as true all factual allegations in Parks's complaint.⁷⁶

1. The Facts

Parks alleged the following facts in her complaint.⁷⁷ Parks was 15 years old in 1970 when she first met Kownacki.⁷⁸ At the time, she and her family were members of the Church of St. Francis Xavier in St. Francisville, Illinois, where Kownacki worked.⁷⁹ Kownacki employed Parks as a housekeeper at the church rectory.⁸⁰ One day, while Parks was cleaning at the rectory, Kownacki interrupted to perform a "little voodoo trick" for her.⁸¹ Kownacki then turned off the lights and raped her.⁸² Afterward, Kownacki told her that she could trust him, and that he loved her.⁸³ Kownacki told her that if she told anyone what he had done, the Roman Catholic Church would excommunicate her and her family.⁸⁴ Because of this threat, Parks felt for a long time that she could not report what had happened.⁸⁵

In 1971, Kownacki was transferred to the Parish in Washington Park, Illinois.⁸⁶ Kownacki convinced Parks's parents that she should accompany him to the new church and go to a better school in the new location.⁸⁷ Parks did not want to go with Kownacki, but she acquiesced because Kownacki had total psychological control over her.⁸⁸ Parks moved into the rectory at the Parish with Kownacki.⁸⁹ The Diocese supervised the Parish, and the Parish employed Kownacki.⁹⁰ While living with Kownacki at the Parish, Parks was Kownacki's

74. *Parks*, 737 N.E.2d at 289-92.

75. *Id.* at 294-95.

76. *Id.* at 290.

77. The allegations in Parks's complaint are substantially corroborated by evidence that was presented in another action against the Diocese of Belleville, which involved allegations of Kownacki's abuse of another parishioner. *See Wisniewski v. Diocese of Belleville*, 943 N.E.2d 43, 49-52 (Ill. App. Ct. 2011).

78. *Parks*, 737 N.E.2d at 290.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

housekeeper, and she attended St. Paul's Catholic High School.⁹¹ Kownacki assumed responsibility for her care and education as her unofficial guardian.⁹² To induce obedience, Kownacki threatened to send nude photographs of Parks to her parents if she should report the abuse or reject his sexual advances.⁹³

One day in 1973, Parks and a boy she had been dating for more than a year had sexual intercourse.⁹⁴ Afterward, she returned to the rectory to find Kownacki drunk and irate, claiming that she had violated his instruction that she not have sexual contact with anyone else.⁹⁵ Parks told Kownacki that she would no longer have sex with him, at which point Kownacki held a knife to her throat.⁹⁶ He then forced Parks to go driving, holding her at gun point.⁹⁷ In the car, he made threats to kill both himself and her.⁹⁸ After returning home, Kownacki raped Parks and instructed her to never visit the boy again.⁹⁹

Parks later learned she was pregnant.¹⁰⁰ Because Kownacki had told her that he had undergone a vasectomy, she surmised that the boy she had been dating had impregnated her.¹⁰¹ Parks informed the boy, who responded he would marry her and look after her and the baby.¹⁰² When she returned to the rectory later that day, Kownacki "flew into a drunken rage" and "beat her head against the wall and beat her with a metal chair."¹⁰³ Parks told Kownacki that she was pregnant and that she intended to marry the boy.¹⁰⁴ She swore not to reveal Kownacki's sexual abuse of her to anyone.¹⁰⁵ Kownacki again became angry and administered a liquid quinine mixture to her for the purpose of aborting the baby.¹⁰⁶

Parks next remembered waking up "in a pool of blood."¹⁰⁷ After waking up, she managed to find her way to her parents' house.¹⁰⁸ Upon arriving at

91. *Id.*

92. *Id.* Kownacki told Parks to tell anyone who asked about their relationship that she was Kownacki's distant cousin. *Id.*

93. *Id.* at 290-91.

94. *Id.* at 291.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

her parents' house, "she aborted a dead fetus."¹⁰⁹ Parks later underwent a dilation and curettage at a hospital.¹¹⁰ She also received treatment for endometriosis and toxemia.¹¹¹ Parks was informed that she would have died if she had arrived at the hospital any later.¹¹² The following month, Parks and her parents returned to the Parish to gather her belongings.¹¹³ During this visit, Kownacki told them that no one would believe her story and that he was untouchable.¹¹⁴ He told Parks that she would not be able to escape him.¹¹⁵

Meanwhile, Father Dean J. Braun, a Diocese employee, had replaced Kownacki at St. Francis Xavier.¹¹⁶ Braun arranged for Parks and her parents to meet with Bishop Albert Zuroweste, another Diocese employee.¹¹⁷ Parks told Zuroweste about Kownacki's abuse.¹¹⁸ Zuroweste told Parks that he would resolve the matter.¹¹⁹ After their meeting with Bishop Zuroweste, Braun informed Parks and her parents that Zuroweste would not discipline Kownacki.¹²⁰ Zuroweste told Parks that she should forget the abuse and forgive Kownacki.¹²¹ As Braun claimed, Father Zuroweste did not discipline Kownacki.¹²² Instead, he transferred Kownacki to a parish in Salem, Illinois, where Kownacki continued to exploit his position of authority in the church

109. *Id.*

110. *Id.* A dilation and curettage is a surgical procedure often performed in connection with a miscarriage or abortion. *Dilation and Curettage (D&C)*, MAYO CLINIC (Oct. 26, 2016), <http://www.mayoclinic.org/tests-procedures/dilation-and-curettage/home/ovc-20259331>.

111. *Parks*, 737 N.E.2d at 291. Endometriosis "is an often painful disorder in which tissue that normally lines the inside of [the] uterus . . . grows outside [the] uterus." *Endometriosis*, MAYO CLINIC (Aug. 20, 2016), <http://www.mayoclinic.org/diseases-conditions/endometriosis/home/ovc-20236421>. Toxemia, also known as "preeclampsia," "is a pregnancy complication characterized by high blood pressure and signs of damage to another organ system, most often the liver and kidneys." *Preeclampsia*, MAYO CLINIC (Apr. 21, 2017), <http://www.mayoclinic.org/diseases-conditions/preeclampsia/home/ovc-20316140>.

112. *Parks*, 737 N.E.2d at 291.

113. *Id.*

114. *Id.* Although the opinion is silent on the matter, Parks's parents presumably first learned of the abuse when she escaped to their home after the forced abortion. A relevant question is why Parks's parents never reported the abuse externally. The opinion does not answer this question.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* The opinion contains no explanation for his failure to do so. *See id.*

121. *Id.*

122. *Id.*

to sexually abuse children.¹²³ At no point did Zuroweste or Braun contact law enforcement authorities about Kownacki's behavior.¹²⁴

After meeting with Parks and her parents, Braun took Parks to St. Mary's Church in Mount Carmel, Illinois, where he anointed the girl with oil and again instructed her to forget the abuse and forgive Kownacki.¹²⁵ Braun's objective in performing this ceremony was to make Parks forgive and forget the abuse and to prevent Parks from suing Kownacki and the Diocese.¹²⁶

In 1994, more than 20 years after the ceremony, Parks became aware that Marjorie Menson of Catholic Social Services was attempting to reach her.¹²⁷ When Parks talked with Menson in early 1995, Menson told Parks that she was reaching out as a representative of the Diocese.¹²⁸ Menson asked Parks if Kownacki had abused her, and Parks confirmed that he had.¹²⁹ This contact with Menson reawakened Parks's recollections of the abuse and "led her to relive the experiences of the abuse."¹³⁰

By the time she filed the lawsuit, Parks had developed PTSD.¹³¹ The abuse had also caused her other injuries, including physical injuries resulting from the forced abortion, psychological distress and anguish, depression, nightmares and insomnia, low self-esteem, and loss of happiness.¹³² These injuries caused her to lose income and earning potential and prevented her from cultivating her artistic talents.¹³³ The abuse also had an adverse effect on her relationships with her husband, siblings, and parents.¹³⁴

To substantiate allegations relating to her psychological condition, Parks submitted an affidavit from Dr. Frank Ochberg,¹³⁵ a psychiatrist and

123. *Id.*; *Wisniewski v. Diocese of Belleville*, 943 N.E.2d 43, 53–54 (Ill. App. Ct. 2011). Kownacki's subsequent acts of sexual predation were the subject of a successful lawsuit, filed several years after the dismissal of *Parks*. *See id.* at 48 ("[The plaintiff] alleged that the Diocese knew that Kownacki had molested other children at other parishes before transferring him to St. Theresa's school and church in Salem, Illinois. On August 27, 2008, a jury awarded Wisniewski \$2.4 million in compensatory damages and \$2.6 million in punitive damages, and the circuit court entered a judgment upon the jury's verdict . . . [W]e affirm.").

124. *Parks*, 737 N.E.2d at 291.

125. *Id.*

126. *Id.* at 291–92.

127. *Id.* at 292.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* Parks's injuries track those of other CSA survivors. *See* Hamilton, *supra* note 1, at 398 ("[CSA] . . . often lead[s] to lifelong effects including Post Traumatic Stress Disorder, drug addiction, alcoholism, sex addiction and disorders, difficulties with personal relationships, a failure to fulfill one's potential at school or on the job, and a disproportionate number of suicides.").

135. Dr. Frank Ochberg is a psychiatrist and "renowned expert" on PTSD. *Frank Ochberg*, MSU TODAY, <http://msutoday.msu.edu/journalists/expert/frank-ochberg> (last visited Feb. 6, 2018). He earned his medical degree at Johns Hopkins University and has "served in the

neurologist.¹³⁶ In his affidavit, Ochberg averred that Parks was under the psychological power of Kownacki throughout the period of sexual abuse.¹³⁷ According to Ochberg, Parks “‘regained her ability to report . . . her victimization’ after the abortion, but Zuroweste’s ‘promise to take care of the problem’ and Braun’s ‘ritualistic ceremony’ combined to ‘psychiatrically prevent[.]’” her from seeking legal redress.¹³⁸ Braun’s ceremony rendered Parks incapable of making decisions or exercising judgment regarding Kownacki’s sexual abuse.¹³⁹ Therefore, Parks was “psychiatrically incapable of taking any action” against Kownacki or the Diocese from the date of the ceremony until the Diocese contacted her in 1995.¹⁴⁰ Parks experienced symptoms of PTSD before the Diocese contacted her, but after the contact she developed “full blown” PTSD.¹⁴¹ For 21 years, Parks did not understand the causal connection between Kownacki’s abuse and her disorder.¹⁴² She “suffered from a limited degree of mental incompetence between the time that Father Braun anointed her with oil and told her to forgive and forget Father Raymond Kownacki in 1973 and her conversation with the social worker, hired by the Diocese of Belleville, in early 1995.”¹⁴³ Ochberg concluded that Parks “suffered a ‘legal disability resulting in [her] psychiatric inability to pursue a legal remedy.’”¹⁴⁴

2. The Lawsuit

Based on the factual allegations recited above, Parks sued Kownacki, the Diocese, and the Parish (collectively “defendants”) in 1995 on several theories of liability.¹⁴⁵ Against Kownacki, Parks asserted claims of CSA, breach of fiduciary duty, intentional infliction of emotional distress, negligence, and willful and wanton conduct.¹⁴⁶ Against the institutional defendants, Parks advanced claims of breach of fiduciary duty, respondeat superior, failure to warn, negligence, negligent supervision and retention, willful and wanton conduct, and negligent infliction of emotional distress.¹⁴⁷ The defendants moved to dismiss Parks’s complaint, relying chiefly on a statute of limitations

administrations of the National Institute of Mental Health and the Michigan Department of Mental Health.” *Id.*

136. *Parks*, 737 N.E.2d at 293.

137. *Id.*

138. *Id.* (alterations in original) (quoting Ochberg affidavit).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* (alteration in original) (quoting Ochberg affidavit).

145. *Id.* at 292–93.

146. *Id.* at 292.

147. *Id.*

defense.¹⁴⁸ The defendants alleged that Parks was aware of her claims when she turned 18 years old, but failed to bring them for over 20 years, with the result that her claims were time-barred under the two-year statute of limitations in effect when she turned 18 years old.¹⁴⁹ In response, Parks argued that the statute of limitations did not start running until 1995, when she first discovered the connection between the sexual abuse and her injuries.¹⁵⁰

The Illinois Supreme Court held that Parks's claims against the defendants were time-barred.¹⁵¹ The court relied on the Illinois statute of limitations for personal injury actions,¹⁵² which required all personal injury actions to "be filed 'within 2 years next after the cause of action accrued'" (although the court noted that a cause of action cannot accrue before a plaintiff turns 18 years old).¹⁵³ The court further concluded that the discovery rule did not toll the statute of limitations for Parks.¹⁵⁴ The court described the discovery rule as follows:

Under the discovery rule, the limitations period begins to run when the party seeking relief "knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused." The limitations period begins running even if the plaintiff does not know that the misconduct was actionable. When a plaintiff alleging childhood sexual abuse was aware of the abuse as it occurred and does not allege that she repressed the memories of that abuse, the limitations period begins to run at the time the plaintiff reaches the age of majority.¹⁵⁵

Using this formulation of the discovery rule, the court found that Parks (1) knew of *an* injury; and (2) knew that this injury was "wrongfully caused" by the time she turned 18 years old, such that the accrual of her cause of action was coterminous under the statute of limitations and the discovery rule.¹⁵⁶ Although Parks alleged that her psychological injuries did not fully manifest until 1995 (and Dr. Ochberg substantiated such allegations), the court found that Parks was aware of at least one injury when she turned 18

148. *Id.* at 293.

149. *Id.* at 293-94.

150. *Id.*

151. *Id.* at 296.

152. In 1991, Illinois adopted a special statute of limitations for CSA cases. *See* 735 ILL. COMP. STAT. 5/13-202.2 (2016). Because the court found that Parks discovered her cause of action in 1973, it did not apply the new statute. *See Parks*, 737 N.E.2d at 294-95.

153. *Parks*, 737 N.E.2d at 294 (quoting 735 ILL. COMP. STAT. ANN. 5/13-202 (West 1998)).

154. *Id.* at 294-95.

155. *Id.* at 294 (citations omitted) (quoting *Knox Coll. v. Celotex Corp.*, 430 N.E.2d 976, 980 (Ill. 1981)).

156. *Id.* at 294-95.

years old—the forced abortion, which resulted in her hospitalization.¹⁵⁷ Moreover, while Parks pled “that she did not know that the sexual relationship was wrong[ful]” at the time, the court found that “her actions—telling her parents, reporting Kownacki to Zuroweste—[revealed] that she knew” of the wrongfulness of the abuse at the time.¹⁵⁸ Because Parks “reasonably should have been aware of” her injury from the forced abortion “at that time as well as its likely cause,” and “was also aware that Kownacki had done something wrong to her,” the court concluded that her “failure to understand the connection between the abuse and other injuries [did] not toll the statute of limitations.”¹⁵⁹

B. THE COMPLICATIONS OF CSA AND CSA LITIGATION

The Illinois Supreme Court’s decision in *Parks* has generated criticism.¹⁶⁰ In harmony with such criticism, this Note proffers *Parks* as a quintessential example of how many courts apply the discovery rule in CSA cases in a way that ignores the atypical characteristics of CSA and CSA litigation. To unpack the problems inherent in applying the discovery rule in CSA cases, it is necessary to explore: (1) the unique effects of CSA on the victim, and (2) the level of factual and legal complexity that is typical of CSA lawsuits. Both features counsel against the conventional application of the discovery rule in CSA litigation.

1. The Unique Effects of CSA on the Victim

CSA is unique in that survivors often consciously or subconsciously choose to avoid memories of the abuse after it occurs.¹⁶¹ Experts in psychology teach us that avoiding or forgetting memories of abuse is a self-preservation mechanism.¹⁶² In other words, forgetting the events of CSA is *necessary* for a survivor to continue with his or her life. One extreme, but not uncommon, example of forgetting abuse is memory repression.¹⁶³ Victims who repress memories of their abuse involuntarily lose access to such memories for

157. *Id.* at 295.

158. *Id.* at 294–95.

159. *Id.* at 295.

160. *See id.* at 299 (Harrison, C.J., dissenting) (arguing that “[w]here a defendant uses duress to prevent [a] plaintiff from” bringing legal action, as occurred in *Parks*, such duress should toll the statute of limitations); *see also* Chrissie F. Garza, *Adult Survivors of Childhood Sexual Abuse Seeking Compensation from Their Abusers: Are Illinois Courts Fairly Applying the Discovery Rule to All Victims?*, 23 N. ILL. U. L. REV. 317, 334–37 (2003) (arguing against the Illinois Supreme Court’s refusal to apply the discovery rule in cases like *Parks* where plaintiffs do not comprehend the causal relationship between their abuse and their psychological injuries).

161. *See* Gray, *supra* note 25, at 229.

162. JENNIFER J. FREYD, *BETRAYAL TRAUMA: THE LOGIC OF FORGETTING CHILDHOOD ABUSE* 25 (1996).

163. *See* Gray, *supra* note 25, at 229.

extended periods of time.¹⁶⁴ Other CSA victims consciously attempt to block the abuse from their minds in hopes of salvaging a normal life in the aftermath of the abuse.¹⁶⁵ In still other cases, obedience or fear can motivate CSA victims to forget about the abuse. For instance, Gina Parks's primary reasons for failing to report the abuse were her fear of Kownacki and the repeated instructions from authorities in the Catholic Church to "forget" the abuse.¹⁶⁶ In short, many factors lead CSA victims to make every effort to avoid memories of their abuse after it occurs.¹⁶⁷

CSA is also atypical insofar as CSA perpetrators and other liable parties tend to exert immense psychological control over victims. Children are highly vulnerable to psychological manipulation, particularly at the hands of those whom they rely on and trust.¹⁶⁸ Tragically, the majority of CSA perpetrators are either family members or people whom a victim's family trusts.¹⁶⁹ Gina Parks's family trusted the Church and Kownacki to such an extent that her parents allowed Parks to move to a different city and live with Kownacki.¹⁷⁰ Fathers Braun and Zuroweste, as authorities of the Diocese, exploited their positions of trust and control over Parks by manipulating her into forgetting the abuse.¹⁷¹ As is common in CSA cases, the perpetrator himself (Kownacki) went much further by making an array of violent and non-violent threats to Parks to coerce her into silence.¹⁷² Such psychological manipulation can

164. Lushnat, *supra* note 11, at 532–33.

165. *See supra* note 26.

166. *Parks v. Kownacki*, 737 N.E.2d 287, 291–92 (Ill. 2000). Fear can deter reporting in many ways. Chester Bennington, the lead singer of Linkin Park, who committed suicide in July 2017, explained his failure to report the abuse he suffered as a child: "[The abuse] destroyed my self-confidence . . . *Like most people, I was too afraid to say anything.* I didn't want people to think I was gay or that I was lying. It was a horrible experience." Coscarelli, *supra* note 23 (emphasis added).

167. Relatedly, victims often blame themselves or downplay the severity of the abuse. Hamilton, *supra* note 1, at 404.

168. Jessica Dixon Weaver, *The Principle of Subsidiarity Applied: Reforming the Legal Framework to Capture the Psychological Abuse of Children*, 18 VA. J. SOC. POL'Y & L. 247, 260–61 (2011); *see also* UTAH CODE ANN. § 78B-2-308(1) (LexisNexis Supp. 2017) ("The Legislature finds that . . . child sexual abuse is a crime that hurts the most vulnerable in our society[;] . . . often the abuse is compounded by the fact that the perpetrator is a member of the victim's family and . . . even when the abuse is not committed by a family member, the perpetrator is rarely a stranger and, [may be] in a position of authority . . ."); *cf. Doe v. Boy Scouts of Am.*, 66 N.E.3d 433, 459 (Ill. App. Ct. 2016) ("Any organization that accepts youth members, especially for purposes of moral guidance, is in a unique position of superiority and influence over those youths.").

169. *See* DARKNESS TO LIGHT, *supra* note 19, at 3 (reporting that approximately 30% of children are abused by family members, and 60% of CSA victims suffer abuse at the hands of people whom the victim's family trusts); *see also* Marci A. Hamilton, *Child Sex Abuse in Institutional Settings: What Is Next*, 89 U. DET. MERCY L. REV. 421, 428 (2012) ("It seems counterfactual, but children need to be protected from adults who are trusted.").

170. *Parks*, 737 N.E.2d at 290.

171. *Id.* at 291–92.

172. *Id.* at 290–92. Parks made abundantly clear in her pleadings that a primary reason for her failure to disclose or pursue legal action was fear of Kownacki. *Id.* Abusers' use of threats to deter disclosure or legal action is common in CSA cases. *See* Hamilton, *supra* note 1, at 400

prevent victims from fully comprehending the wrongfulness of the abuse at the time, and can deter them from disclosing the abuse or pursuing legal action for many years.¹⁷³

In view of the unique effects of CSA, courts applying the discovery rule should refrain from imposing the traditional standard of reasonable diligence on CSA survivors. In the aftermath of abuse, victims consciously or subconsciously avoid recollections of the abuse in the interest of survival.¹⁷⁴ Nevertheless, courts applying the discovery rule—a tolling mechanism that putatively operates to benefit plaintiffs who excusably did not discover their cause of action earlier—punish such victims by deciding, as a matter of law, that they failed to investigate their claim in a timely manner. Effectively, courts penalize CSA plaintiffs for optimistically hoping and trying *not* to develop compensable injuries. Moreover, courts—as in *Parks*—completely disregard circumstances where CSA victims have been brainwashed into forgiving and forgetting the abuse, or have been violently coerced into foregoing legal action.¹⁷⁵ Commentators have noted that the traditional reasonable person standard is entirely inappropriate in CSA cases,¹⁷⁶ and the time has come for courts to listen.

2. The Factual and Legal Complexity of CSA Cases

As *Parks* exemplifies, CSA cases often involve intricate factual allegations that are complex from both a psychological and legal standpoint. Namely, CSA plaintiffs present evolving and multifaceted injuries and assert various grounds of liability against multiple parties. As the following discussion will demonstrate, such complexities render the traditional discovery rule ill-suited to CSA cases.

(“Abusers commonly threaten the child to maintain the silence. Where the abuser is a family member, the child is often charged, consciously or subconsciously, with keeping the secret to hold the family together. In the institutional setting, the adult exercises power through the structure of the organization. Thus, at Penn State, Coach Jerry Sandusky held power over the boys he abused because he had the capacity to ‘make’ their football careers by getting them into Penn State; in religious institutions, the priest or rabbi holds spiritual power that can be every bit as compelling as the power of the parent; and in schools, teachers have power over grades and advancement.”).

173. *Parks*, 737 N.E.2d at 292–93; accord *Wisniewski v. Diocese of Belleville*, 943 N.E.2d 43, 54 (Ill. App. Ct. 2011) (“[The plaintiff] believed that what he was doing was okay because of what [his abuser] told him. [A psychologist] testified that [the abuser] overwhelmed [the victim] and programmed him to accept the behavior as good.”).

174. See *supra* note 162 and accompanying text.

175. See *supra* Part III.A.

176. Gray, *supra* note 25, at 244–48; see also William A. Gray, Note, *A Proposal for Change in Statutes of Limitations in Childhood Sexual Abuse Cases*, 43 BRANDEIS L.J. 493, 496 (2005) (“[T]he applicability of the delayed discovery rule to childhood sexual abuse victims results in a clumsy application of rules which were not designed to address the intense complexities of the psychological damage resulting from such abuse.”).

i. Injury

It is hard to pinpoint a CSA victim's singular "injury," as there are frequently several distinct injuries that collectively constitute the net damage that a victim suffers. For instance, a victim will frequently sustain a physical injury at the time of the abuse.¹⁷⁷ This physical injury may be the pain or bleeding that results after the abuser rapes the child.¹⁷⁸ In other scenarios, the physical injuries may be manifold, as in *Parks* where Kownacki raped Parks, beat her, and forcibly performed a near-lethal home abortion on her.¹⁷⁹ However, physical injuries are seldom the only injuries that arise from CSA.¹⁸⁰ Rather, sexual abuse often causes victims serious short-term and long-term psychological injuries.¹⁸¹ In some cases, a victim may suffer no psychological damage until much later in life.¹⁸² In other cases, a victim may experience some emotional distress in the aftermath of the abuse but develop more serious psychological disorders decades later, as in *Parks*.¹⁸³ Moreover, a victim's level of awareness of his or her injuries and their causes can vary over time. Like Gina Parks, many CSA survivors do not discover the causal link between their psychological injuries and the abuse they suffered for long periods of time.¹⁸⁴

177. See, e.g., *Steinke v. Kurzak*, 803 N.W.2d 662, 669 (Iowa Ct. App. 2011) ("[The plaintiff] found himself on the commode in pain and bleeding from the rectum.").

178. See, e.g., *Doe v. Boy Scouts of Am.*, 66 N.E.3d 433, 446 (Ill. App. Ct. 2016) ("Plaintiff experienced intense physical pain during [the abuser's] first act of anal penetration and bled afterwards."); *Steinke*, 803 N.W.2d at 669.

179. *Parks v. Kownacki*, 737 N.E.2d 287, 291 (Ill. 2000).

180. See DARKNESS TO LIGHT, *supra* note 3, at 3 (reporting, for instance, that more than 70% of male survivors of CSA seek psychological treatment for issues such as substance abuse, suicidal thoughts, and attempted suicide).

181. *Id.*

182. See, e.g., *Wisniewski v. Diocese of Belleville*, 943 N.E.2d 43, 65–66 (Ill. App. Ct. 2011) (stating that the plaintiff did not suffer any psychological problems for more than 20 years after the abuse, but developed PTSD in response to a triggering event later in life). This scenario differs from related situations in which a victim experiences psychological problems but does not comprehend the problems until they confront the abuse and its impact on them. See, e.g., *Boy Scouts of Am.*, 66 N.E.3d at 451 ("[Plaintiff] has a long adult history of emotional and behavioral problems. He did not understand these symptoms as resulting from childhood sexual abuse but rather thought of them as the 'way he was.'").

183. *Parks*, 737 N.E.2d at 293 ("[According to Dr. Ochberg, the p]laintiff suffered symptoms of post-traumatic stress disorder before December of 1994 but since the Diocese contact has developed 'full blown' post-traumatic stress disorder.").

184. *Id.* at 292; see also Susan M. Basham, Note, *Forging the Causal Link: Reasonable Delay in Commencing Action for Childhood Sexual Abuse*, 27 SUFFOLK U. L. REV. 749, 759 (1993) ("Because childhood sexual abuse survivors have difficulty linking long-term psychological effects with their causes, these plaintiffs often find that they must rely on mental health professionals to guide the discovery process.").

Courts and legislatures often oversimplify the injuries that CSA victims experience in order to create and apply broad legal rules.¹⁸⁵ Although there is often no way to conceptually characterize a victim's injuries as one compensable "injury," courts and legislatures routinely frame a plaintiff's discovery of his or her action in relation to discovery of the "injury."¹⁸⁶ The result is that a court applying the discovery rule may oversimplify a plaintiff's injury by equivocating between a plaintiff's *first* injury or series of injuries and the totality of a plaintiff's injuries.¹⁸⁷ Such equivocation can create absurd results, as it did in *Parks*. Despite the fact that Gina Parks claimed, and an expert in psychology verified, that she did not develop PTSD until 1995, her

185. It is, of course, entirely appropriate for judges and legislatures to use broad language when expounding the law. Legislatures cannot foresee every outcome, and must speak in vague language. Kathryn J. Parsley, Note, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children*, 44 VAND. L. REV. 441, 449 (1991). Appellate courts, too, must establish rules that apply broadly, and trial courts have a duty to follow these rules. As Justice Antonin Scalia explained, "what appellate courts do . . . [is] set forth principles that govern an immense number of other cases. So what I'm concerned about as an appellate judge is a legal principle that will produce justice in the sense of giving the fairest interpretation of the statute over a large number of cases." Patrick Ishmael, *Antonin Scalia and Stephen Breyer Debate the Constitution*, YOUTUBE (May 14, 2012), https://www.youtube.com/watch?v=_4n8gOUzZ8I&t=6m53s. This Note does not critique these firmly established practices, but argues that general legal principles have no business trying to answer the nuanced and fact-specific question of when a CSA plaintiff should have discovered his or her claims.

186. See, e.g., FLA. STAT. § 95.11(7) (2017) ("An action founded on alleged abuse . . . or incest . . . may be commenced at any time within 7 years after the age of majority, or within 4 years after the injured person leaves the dependency of the abuser, or within 4 years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the abuse, whichever occurs later."); IOWA CODE § 614.8A (2017) ("An action for damages for injury suffered as a result of sexual abuse which occurred when the injured person was a child, but not discovered until after the injured person is of the age of majority, shall be brought within four years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the sexual abuse."); MO. REV. STAT. § 537.046(2) (2016) ("Any action to recover damages from injury or illness caused by childhood sexual abuse in an action brought pursuant to this section shall be commenced within ten years of the plaintiff attaining the age of twenty-one or within three years of the date the plaintiff discovers, or reasonably should have discovered, that the injury or illness was caused by childhood sexual abuse, whichever later occurs."); see also *Parks*, 737 N.E.2d at 294 ("Under the discovery rule, the limitations period begins to run when the party seeking relief 'knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused.'" (quoting *Knox Coll. v. Celotex Corp.*, 430 N.E.2d 976, 980 (Ill. 1981))). The reference to "discovery" in each of the above authorities refers to objective, rather than subjective, discovery.

187. See, e.g., *Parks*, 737 N.E.2d at 295 ("Although plaintiff was not aware of her post-traumatic stress disorder until recently, one particular injury that plaintiff claims, the forced abortion, obviously was apparent when plaintiff went to the hospital and was given a dilation and curettage Because . . . plaintiff was aware of both the cause and some injury, we hold that plaintiff's failure to understand the connection between the abuse and other injuries does not toll the statute of limitations."); *Doe v. Roman Catholic Archbishop of the Archdiocese of Detroit*, 692 N.W.2d 398, 403–04 (Mich. Ct. App. 2004) ("The discovery rule applies to the discovery of an injury, not to the discovery of a later realized consequence of the injury." (quoting *Moll v. Abbott Labs.*, 506 N.W.2d 816, 825 (Mich. 1993))).

claim based in part on her PTSD injury was considered untimely by 1975.¹⁸⁸ It defies logic to hold that a plaintiff's claim for compensation based on an injury was time-barred 20 years before that injury developed. Thankfully, some courts take a less reductive view and acknowledge that the injuries for which a particular plaintiff is suing, such as later-developing PTSD, may be separate and distinct from injuries that occurred simultaneously to the abuse, such as physical harm, for which the plaintiff may not have wished to sue.¹⁸⁹ Given the complex and multifaceted nature of CSA injuries, courts and legislatures should stop equivocating and oversimplifying claimants' injuries for the sake of applying broad legal rules.

ii. Liability

Another complex dimension of many CSA cases is liability. In some cases, the victim will sue only the abuser.¹⁹⁰ In others, the victim will forego litigation against the abuser and sue only third parties, such as the abuser's allegedly negligent employer.¹⁹¹ Commonly, a victim will join both the abuser and any non-perpetrator defendants in a single suit.¹⁹² In *Parks*, for instance, the defendants were Kownacki (the abuser), the Parish (where Kownacki was employed, and where Kownacki lived with Parks and abused her), and the Diocese (the institution that supervised the Parish).¹⁹³ Moreover, a victim may assert different theories of liability against different parties. Where

188. *Parks*, 737 N.E.2d at 293–95.

189. See, e.g., *Doe v. Boy Scouts of Am.*, 66 N.E.3d 433, 465 (Ill. App. Ct. 2016) (“[P]laintiff clearly had no desire to initiate legal proceedings against [his abuser] based on these [physical] injuries alone Because the injuries for which plaintiff is suing far exceed the injuries that plaintiff was aware of during the limitations period, [plaintiff’s claim is not time-barred].”).

190. Suing only the abuser is common where no other potentially culpable parties exist, as in cases of incest. See, e.g., *Farris v. Compton*, 652 A.2d 49, 51 (D.C. 1994) (involving adult plaintiffs who sued an older brother for CSA); *Hearndon v. Graham*, 767 So. 2d 1179, 1181 (Fla. 2000) (involving an adult plaintiff who sued her stepfather for CSA); *Tyson v. Tyson*, 727 P.2d 226, 227 (Wash. 1986) (involving an adult plaintiff who sued her father for CSA), *superseded by statute*, WASH. REV. CODE § 4.16.340 (2016).

191. See, e.g., *Boy Scouts of Am.*, 66 N.E.3d at 436 (involving an abuser who was voluntarily dismissed from the lawsuit). A claim that is untimely against an abuser is not necessarily untimely against the abuser’s employer—especially where that employer fraudulently concealed its culpability from the victim. See, e.g., *id.* at 464 (“[T]he Boy Scout defendants do not explain how this knowledge regarding [an abusive scoutmaster’s] wrongful conduct somehow placed plaintiff on notice of defendants’ negligence, especially when plaintiff alleges that he did not discover this cause of action because the Boy Scout defendants were fraudulently concealing the facts giving rise to it.” (emphasis omitted)).

192. See, e.g., *M.H.D. v. Westminster Sch.*, 172 F.3d 797, 799–802 (11th Cir. 1999) (involving a former high school student who sued a school and a former teacher for the teacher’s alleged sexual abuse); *Pettengill v. Curtis*, 584 F. Supp. 2d 348, 353–54 (D. Mass. 2008) (involving a former Boy Scout plaintiff who sued his scoutmaster, the Boy Scouts of America, the Boy Scouts’ local council, and five current or former Boy Scouts executives); *Steinke v. Kurzak*, 803 N.W.2d 662, 666 (Iowa Ct. App. 2011) (involving a plaintiff who sued the Diocese of Sioux City and two priests who allegedly abused him).

193. *Parks*, 737 N.E.2d at 292.

institutional defendants are present, it is common for the plaintiff to allege certain torts against the abuser (e.g., sexual abuse, battery), and other torts against the institutional defendants (e.g., negligence, fraud).¹⁹⁴ By way of example, Gina Parks sued Kownacki for childhood sexual abuse, breach of fiduciary duty, intentional infliction of emotional distress, negligence, and willful and wanton conduct.¹⁹⁵ Against the institutional defendants, she brought additional counts of failure to warn, negligence, and negligent supervision and retention.¹⁹⁶ She also brought a claim of negligent infliction of emotional distress against the Diocese.¹⁹⁷

In the same way that many courts and legislatures ignore the nuanced nature of CSA victims' injuries, they conceptually oversimplify plaintiffs' claims against multiple parties. Both judges and legislatures applying the discovery rule use reductive terms like "cause of action" and "claim" to refer collectively to CSA victims' often multifaceted theories of recovery.¹⁹⁸ Moreover, as *Parks* demonstrates, courts frequently equivocate between a victim's cause of action against the abuser and his or her cause of action against third-party defendants.¹⁹⁹ The apparent rationale of such reductive treatment is that when a CSA claimant is on notice of the facts giving rise to one claim (e.g., a claim for sexual abuse against the abuser), the claimant is under a duty to investigate the claim and discover other potential claims (e.g., a claim for negligence against an institutional defendant).²⁰⁰ This Note has already demonstrated that imposing a duty of investigation on CSA victims in the aftermath of their abuse is misguided in light of the unique psychological effects of CSA.²⁰¹ But the putative rationale for such equivocation suffers from another defect: Forcing CSA victims to choose between investigating any possible third-party liability and foregoing legal action forever may require victims to *presume* that institutions they have been raised to trust and respect have betrayed them. As some courts have commented, CSA is reasonably

194. See generally Jeffrey R. Anderson et al., *When Clergy Fail Their Flock: Litigating the Clergy Sexual Abuse Case*, 91 AM. JURIS. TRIALS 151 (2004) (providing an overview of litigating CSA claims against clergy).

195. *Parks*, 737 N.E.2d at 292.

196. *Id.*

197. *Id.*

198. See, e.g., WASH. REV. CODE § 4.16.340 (2016); *Hardwicke v. Am. Boychoir Sch.*, 845 A.2d 619, 627–28 (N.J. Super. Ct. App. Div. 2004).

199. See generally *Parks*, 737 N.E.2d 287 (holding that the plaintiff's claims against the Diocese and the Parish were concomitantly time-barred after deciding that her claims against her abuser were time-barred).

200. *Doe v. Catholic Bishop for the Diocese of Memphis*, 306 S.W.3d 712, 722 (Tenn. Ct. App. 2008) ("A majority of courts considering lawsuits [involving separate claims against the abuser and the abuser's church employer] have held that the plaintiff, at the age of majority and in the exercise of reasonable diligence, would have learned that the employer church had knowledge of the clergy member's prior sexual abuse, and that therefore, as a matter of law, the statute of limitations was not tolled.").

201. See *supra* Part III.B.1.

viewed as behavior that trusted institutions—e.g., the Catholic Church, the Boy Scouts—would “never tolerate.”²⁰² This minority of courts refuses to decide the discovery question as a matter of law in such situations,²⁰³ and other courts should follow suit. The complex nature of liability that arises in CSA cases counsels against using broad and reductive legal rules to dispose of such cases as a matter of law.

C. THE DEMAND FOR A SOLUTION

The legal community’s widespread discontent with dismissing CSA actions as untimely has been apparent for decades. Academics have proposed a plethora of alternatives that would allow more CSA claims to proceed to the merits.²⁰⁴ Courts have expressed frustration at the results they feel compelled to reach under the traditional law in CSA cases.²⁰⁵ State legislatures have evidenced their disdain for time-barring CSA claims in a variety of ways. Some states have elongated the statutory limitations period in apparent recognition

202. *Matthews v. Roman Catholic Diocese of Pittsburgh*, 67 Pa. D. & C.4th 393, 407 (Pa. Ct. Com. Pl. 2004) (“The case law upon which defendants rely holds that the discovery rule may not be invoked because a person injured by an employee should have reason to suspect that the employer may also have independent responsibility for the injury. I do not find this rationale to be persuasive when the employer is a church which the plaintiff attends and the employee is engaging in activity that may be reasonably viewed as conduct that the church could never tolerate. A jury may find that there is a loud ring of truth to plaintiff’s statement that he and his family never approached Diocesan officials to ask whether they had knowingly assigned to their church, to work directly with the parishioners, including young boys, a priest with a history of sexually molesting children, because it would never cross their minds that the church would do so.”); *accord Doe v. Boy Scouts of Am.*, 66 N.E.3d 433, 462 (Ill. App. Ct. 2016) (“[A] reasonable jury could find that plaintiff was not required to ‘presume unfaithfulness’ on the part of [the Boy Scouts] and investigate their knowledge about [the abuser’s] history of sexual abuse.”); *Wisniewski v. Diocese of Belleville*, 943 N.E.2d 43, 84 (Ill. App. Ct. 2011) (“[I]n the present case, the evidence was sufficient for the jury to conclude that [the plaintiff] was under no obligation to search for wrongdoing by the Diocese when [the abuser] was engaged in activities that may be reasonably viewed as conduct that the Diocese would never tolerate.”).

203. *Catholic Bishop for the Diocese of Memphis*, 306 S.W.3d at 722 (“A minority of courts . . . hold[] that a fact issue exists as to whether the plaintiff, in the exercise of reasonable diligence, would have discovered the church’s alleged knowledge of [an abuser’s] prior sexual abuse.”).

204. *See, e.g., Gray, Proposal for Change, supra* note 176, at 509 (“All statutes of limitations applicable in childhood sexual abuse case[s] should be repealed.”); *Lowe, supra* note 27, at 30–31 (arguing, in part, that courts “should take into consideration lessons from the developmental model in acknowledging that the traumatized child lacks the capacity to act independently in vindicating their rights”); Lonnie Brian Richardson, Comment, *Missing Pieces of Memory: A Rejection of “Type” Classifications and a Demand for a More Subjective Approach Regarding Adult Survivors of Childhood Sexual Abuse*, 11 ST. THOMAS L. REV. 515, 516 (1999) (arguing that courts should “move toward a more subjective approach to the claims of sexual abuse survivors”).

205. *See, e.g., Steinke v. Kurzak*, 803 N.W.2d 662, 671 (Iowa Ct. App. 2011) (“[The plaintiff’s] allegations, if true, expose despicable acts by a priest and a seminarian who used their positions of power and trust to manipulate and damage teenage boys who ardently believed in the tenets of their church and even aspired to be priests,” but “[w]e are constrained by prior judicial interpretations of Iowa’s discovery rule to find that the statute of limitations prevents [the plaintiff] from pursuing his accusations of egregious behavior on the part of [the abusers].”).

of the fact that CSA claimants often develop injuries decades after abuse.²⁰⁶ Other state legislatures have enacted “window legislation,” which revives previously time-barred claims for a short window of time.²⁰⁷ A few states have gone as far as abolishing the statute of limitations for CSA cases.²⁰⁸ Nevertheless, the large majority of states continue to apply a fixed limitations period and the discovery rule to actions based on CSA.²⁰⁹ This Note argues that the solution for such states is not to arbitrarily elongate limitations periods, but to apply the existing tolling mechanisms—namely, the discovery rule—in a more sensible manner.

IV. A PROPOSAL FOR REFORM

Thus far, this Note has focused on identifying the problems inherent in employing the discovery rule to dispose of CSA cases as a matter of law. This Part proposes legal reform to address and alleviate these problems. The following discussion proceeds by first demonstrating why a jury²¹⁰ is in a better position to decide when a CSA plaintiff discovered or should have discovered his or her cause of action. This Part then concludes with a proposal for implementing a system in which such questions are reserved for the jury.

A. THEORY

It is rudimentary that judges decide questions of law, while juries decide questions of fact.²¹¹ There is no empirical distinction between what constitutes

206. A dozen or more states have extended the civil limitations period for CSA survivors. *See State Civil Statutes of Limitations in Child Sexual Abuse Cases*, *supra* note 42. Illinois, for example, has exponentially increased the statute of limitations period for CSA claims since its supreme court decided *Parks* in 2000. *Compare* 1990 Ill. Laws 2687–88 (providing a two-year limitations period for actions based on CSA), *with* 735 ILL. COMP. STAT. 5/13-202.2 (2016) (providing a 20-year limitations period for actions based on CSA); *see also* CONN. GEN. STAT. § 52-577d (2015) (providing a 30-year limitations period for actions based on CSA); Hamilton, *supra* note 169, at 432 (“[M]any states have been working to extend their child sex abuse [statutes of limitations], because there is always a new victim with a compelling story that shows lawmakers the folly of having any [statute of limitations] for the crime of child sex abuse.”).

207. Hamilton, *supra* note 169, at 433 (“Minnesota, California, Hawaii, Delaware, and Guam have all enacted various windows of time that allow victims to file suits against their abusers, even if the original [statute of limitations] had expired under the old law.”); *see also* GA. CODE ANN. § 9-3-33.1(d)(1) (Supp. 2017).

208. *See supra* note 42 (describing laws eliminating or partially eliminating statutes of limitations in Delaware, Maine, Utah, Alaska, Florida, and Nevada). As discussed above, this Note does not propose the wholesale abolition of statutes of limitations in CSA cases. *See supra* note 42.

209. *See supra* Part II.B.

210. By “jury,” this Note refers to the factfinder, which of course can also be a judge. The word “jury” is employed for the sake of developing a contrast with “judges” who decide cases as a matter of law. *See infra* notes 230–40 and accompanying text. As will become clear, however, there are reasons for CSA plaintiffs to prefer juries over judges acting as factfinders. *See infra* notes 230–40.

211. Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1131 (2003).

a question of law versus a question of fact in every case.²¹² Certain questions clearly fall into one category or another. For instance, questions about what law applies (e.g., contributory negligence or comparative negligence) are for the judge, while historical facts (e.g., was the stoplight green or red?) are for the jury.²¹³ In between these extremes are mixed questions of law and fact.²¹⁴ Here the line is more difficult to draw.²¹⁵ History or precedent may dictate the categorization.²¹⁶ Where there is no clear answer, “functional considerations also play their part in the choice between judge and jury.”²¹⁷ As the Supreme Court has noted, “when an issue ‘falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.’”²¹⁸ Notwithstanding the distinct provinces of jury and judge, it is equally well-recognized that a judge will allow a question to proceed to a jury only where evidence exists to support a jury verdict in either direction.²¹⁹ “If a question could be answered only one way because the evidence is either absent or overwhelming, the judge simply decides it accordingly.”²²⁰

It is generally accepted in the courts that a plaintiff’s discovery of an action under the discovery rule presents a question of fact.²²¹ Theoretically, a plaintiff’s subjective discovery of his or her cause of action is a historical fact. In application, however, the discovery rule is objective (due to the impossibility of proving subjective discovery).²²² The inquiry asks when a reasonable plaintiff would have discovered the cause of action.²²³ Questions

212. See *id.* at 1127–29, 1128 n.13.

213. See *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (positing one end of the spectrum as “a pristine legal standard” and the other as “simple historical fact”).

214. *Id.* at 113–14.

215. *Id.*

216. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996).

217. *Id.*

218. *Id.* (quoting *Miller*, 474 U.S. at 114).

219. *Kirgis*, *supra* note 211, at 1152–53.

220. *Id.* at 1152.

221. See, e.g., *Riley v. Presnell*, 565 N.E.2d 780, 783 (Mass. 1991) (“[T]he question when a plaintiff knew or should have known of his cause of action is one of fact which in most instances will be decided by the trier of fact.”); *Dig. Design Grp., Inc. v. Info. Builders, Inc.*, 24 P.3d 834, 842 (Okla. 2001) (“[T]he question of when the plaintiff knew or should have known [is] a question of fact and a determination for the jury.”); *Matthews v. Roman Catholic Diocese of Pittsburgh*, 67 Pa. D. & C.4th 393, 397 (Pa. Ct. Com. Pl. 2004) (“Since the discovery rule’s application involves a factual determination as to whether the plaintiff exercised reasonable diligence in discovering the cause of the injury, ordinarily a jury must decide whether the discovery rule applies.”).

222. *Crump*, *supra* note 35, at 445.

223. *Id.*

of what is reasonable are generally sent to the jury.²²⁴ Accordingly, characterizing the discovery rule as a question of fact is consistent with traditional notions of fact questions.

Although courts generally acknowledge that the issue of when a CSA plaintiff discovered his or her cause of action is a question of fact,²²⁵ many courts erroneously decline to let such questions proceed to a jury. Courts who make this determination conclude that the evidence does not support reasonable disagreement on the issue.²²⁶ In *Parks*, for instance, the Illinois Supreme Court dealt with the timeliness of Parks's claim as a matter of law.²²⁷ Most courts categorically preclude the question from going to the jury in certain common circumstances.²²⁸ As the previous Part demonstrated at length, deciding the issue as a matter of law required the *Parks* court to both oversimplify and ignore various aspects of Parks's allegations.²²⁹ When it comes to the "sound administration of justice,"²³⁰ judges acting on questions as a matter of law are almost never well-positioned to decide the timeliness of a CSA claimant's cause of action. As *Parks* demonstrates, judges are often forced to conform their decisions to broad legal rules.²³¹ The factual and legal complexity of CSA cases, as well as the unique effects of CSA, strongly counsel against such sweeping treatment.²³² The question of timeliness in an action based on CSA "often . . . depends on the resolution of a host of factual predicates,"²³³ which will be different in every case.

Courts and legislatures should treat the issue of discovery as a question of fact, and should be very hesitant to withhold juries from CSA plaintiffs or to disturb the decisions of juries. Juries decide cases based on their unique

224. *DeVaux v. Am. Home Assurance Co.*, 444 N.E.2d 355, 358 (Mass. 1983) ("The application of the reasonable person standard is uniquely within the competence of the jury."); Kirgis, *supra* note 211, at 1162.

225. Hagen, *supra* note 28, at 379.

226. See, e.g., *Clay v. Kuhl*, 727 N.E.2d 217, 221–22 (Ill. 2000) (acknowledging that "whether an action was brought within the time allowed by the discovery rule is generally resolved as a question of fact," but concluding "that the plaintiff's action must be considered untimely under the discovery rule").

227. *Parks v. Kownacki*, 737 N.E.2d 287, 295 (Ill. 2000).

228. *Doe v. Catholic Bishop for the Diocese of Memphis*, 306 S.W.3d 712, 722 (Tenn. Ct. App. 2008) ("[A majority of courts in CSA cases against the church] hold as a matter of law that the plaintiff, in the exercise of reasonable diligence, would have discovered the defendant church's knowledge of the clergy member's prior acts of abuse, and that the plaintiff's lawsuit against the church is time-barred.").

229. See *supra* Part III.A–B.

230. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996) (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)).

231. See *supra* Part III.A.2; see also *Steinke v. Kurzak*, 803 N.W.2d 662, 670 (Iowa Ct. App. 2011) ("Under the test articulated by our supreme court . . . [the plaintiff's] cause of action accrued at the time he allegedly suffered the abuse because he was 'aware of the existence of a problem.'" (quoting *Borchard v. Anderson*, 542 N.W.2d 247, 251 (Iowa 1996))).

232. See *supra* Part III.B.

233. *Doe v. Boy Scouts of Am.*, 66 N.E.3d 433, 466 (Ill. App. Ct. 2016) (Lampkin, J., dissenting).

facts.²³⁴ Juries do not need to oversimplify claims or factual allegations in order to conform to broad legal rules.²³⁵ Instead, juries can consider every piece of evidence and make a comprehensive determination based on all facts adduced.²³⁶ A jury's ignorance of the traditional reasonable person standard is precisely what recommends it for this role.²³⁷ Imposing the traditional duty of "reasonable diligence" and investigation on a CSA victim in the aftermath of abuse is insensitive to the subtleties of CSA.²³⁸ It is bad enough that CSA victims are often ignored or distrusted by the adults to whom they disclose their abuse.²³⁹ It is equally regrettable that our courts of law characterize them as lazy or insinuate that their claims are meritless because victims choose not to confront their abusers or accuse trusted institutions of betrayal in the aftermath of abuse. Juries, unlike judges, are the conscience of the community²⁴⁰ and, as common-sense factfinders, are uniquely well-equipped to decide when a particular plaintiff should have discovered his or her cause of action.

B. IMPLEMENTATION

We now turn to the logistics of legal reform. There are two natural governmental bodies that possess the authority to effect change in this area: the legislatures and the courts. As law-making bodies, state legislatures have

234. See Hagen, *supra* note 28, at 379 ("A trier of fact . . . can determine on a case-by-case basis [when] the plaintiff should have reasonably discovered the injuries . . .").

235. See *id.*

236. See *id.*; see also N.Y. PATTERN JURY INSTRUCTIONS—Civil 1:37 (1965) (COMM. ON PATTERN JURY INSTRUCTIONS ASS'N OF SUPREME COURT JUSTICES, updated 2016) ("As the jurors, your fundamental duty is to decide, from all the evidence that you have heard and the exhibits that have been submitted, what the facts are. You are the sole, the exclusive judges of the facts. In that field you are supreme and neither I nor anyone else may invade your province. As the sole judges of the facts, you must decide which of the witnesses you believed, what portion of their testimony you accepted, and what weight you give to it.").

237. Cf. Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1266 (2014) ("[B]y removing fact determination from the province of the judge, the civil jury eliminates any bias that may be introduced through the judge's preferences.").

238. See *supra* Part III.B.

239. See, e.g., *Hammer v. Hammer*, 418 N.W.2d 23, 24–25 (Wis. Ct. App. 1987) ("At the age of fifteen, [the plaintiff] reported [her abuser's] acts to her mother. [The abuser], along with [the abuser's] mother, denied such conduct and trivialized it. He convinced [the plaintiff] that she was not injured by the conduct but that she was at fault for her problems and for the family's problems. [The abuser] also influenced her brother and sister to blame her, and to blame the family's problems on her having revealed his actions."); see also *Kestel v. Kurzak*, 803 N.W.2d 870, 872 (Iowa Ct. App. 2011) ("[The plaintiff] recalls being so distraught [after the seminarian performed oral sex on him] that he 'ran to the confessional' at his home parish the next afternoon. He told his priest, Father Divine, about the sexual contact with an older seminarian. [The plaintiff] alleges Father Divine told him that 'it takes two to tango' and that [the plaintiff] must have done something to entice [the seminarian].").

240. Whitehouse, *supra* note 237, at 1268 ("Juries infuse community values into the adjudication of civil suits and ensure that judgments are based on the principles of a representative selection of the parties' peers.").

overwhelmingly been the agents of legal reform in the realm of CSA.²⁴¹ Judges, by contrast, have tended to apply statutes of limitations and the discovery rule in traditional ways in CSA cases.²⁴² As such, proposals for reform in this arena are most valuable in the hands of state legislatures. Nevertheless, state legislatures, like state judiciaries, face certain (arguably self-imposed) limitations. Namely, legislatures often enact only prospective reform.²⁴³ Thus, notwithstanding significant legislative reform, survivors who suffered abuse decades ago may still be subject to the now-superseded statutes of limitations that were in effect at the time of their abuse.²⁴⁴ As such, this Part also proposes judicial reform to encourage judges to interpret these older statutes in a manner that reflects awareness of the unique characteristics of CSA litigation.

1. Legislative Reform

This Note proposes not a model statute, but a model statutory amendment. As noted above, the majority of states today employ the discovery rule by statute in CSA cases.²⁴⁵ Accordingly, a statutory amendment that clarifies the nature of the discovery inquiry would be a practical and much-needed addition to such statutes. Each state applying the discovery rule by statute should append the following italicized language to their statutes:

[An action for damages based on childhood sexual abuse must be brought within [X] years from the date on which the injured party discovered, or reasonably should have discovered, his or her cause of action.] *Whether the injured party acted reasonably is a question of fact, to be determined from the point of view of a reasonable person in the injured party's situation.*²⁴⁶

This model amendment has two main objectives. First, it reinforces the vital premise that discovery is a fact question. In theory, courts do not need this reminder, but this legislative command should solidify what is taken for granted but seldom honored in many courts. Second, and perhaps most importantly, the proposed amendment establishes that the factual determination of objective reasonableness is infused with subjective elements. Again, recognition of the inherently case-specific nature of the objective

241. See *supra* Part II.B.1.ii.

242. See *supra* Part III.A–B.

243. See Jenna Miller, Note, *The Constitutionality of and Need for Retroactive Civil Legislation Relating to Child Sexual Abuse*, 17 CARDOZO J.L. & GENDER 599, 601 (2011).

244. See *supra* note 152.

245. See *supra* note 62.

246. Statutory specifications about the logistics of deciding when a plaintiff discovered a cause of action are not novel in CSA statutes. See, e.g., GA. CODE ANN. § 9-3-33.1(b)(2)(B) (Supp. 2017) (“When a plaintiff’s civil action is filed after the plaintiff attains the age of 23 years but within two years from the date that the plaintiff knew or had reason to know of such abuse and that such abuse resulted in injury to the plaintiff, the court shall determine from admissible evidence in a pretrial finding when the discovery of the alleged childhood sexual abuse occurred.”).

discovery inquiry is not an innovation.²⁴⁷ As one court has emphasized, “[t]he test of reasonableness for the discovery rule is objective but nonetheless fact-specific, as it relies not on a reasonable person who had not been abused, for whom 20 years may be unreasonable, but on one in the plaintiff’s position.”²⁴⁸ More commonly, however, the partially subjective nature of a CSA plaintiff’s discovery is swept aside by courts that conclude that a plaintiff was not reasonably diligent.²⁴⁹ As Part III demonstrated, holding CSA plaintiffs to an ordinary standard of reasonableness is often illogical and inadvisable as a matter of policy. The proposed command to judge reasonableness on a case-by-case basis—taking due notice of the atypical effects of CSA on its victims, the immense psychological control that perpetrators exert over victims during and after abuse, and the evolving nature of psychological injuries that arise from CSA—will discourage courts from imposing the traditional standards of reasonableness to dispose of CSA cases as a matter of law. Instead, such cases can proceed to the merits in front of a trier of fact that is well-positioned to decide, based on the array of evidence adduced at trial, when a particular plaintiff reasonably should have discovered a particular claim against a particular defendant.

2. Judicial Reform

Alternatively—or additionally—judges should judicially adopt the above language as part of their interpretation of the discovery rule in CSA cases. Namely, judges—whether applying a common-law discovery rule or interpreting a statutory formulation of the discovery rule—should emphasize that whether an injured party acted reasonably “is a question of fact, to be determined from the point of view of a reasonable person in the injured party’s situation.” This judicial formulation will have the same benefits as the proposed statutory amendment insofar as it will preserve the discovery question for the jury in the vast majority of cases. Legislatures have widely

247. Although a “reasonableness” standard implies objectiveness, examples of reasonableness standards with subjective elements abound in the law. *See, e.g.*, *Torres v. Pisano*, 116 F.3d 625, 632–33 (2d Cir. 1997) (applying a reasonable Puerto Rican woman standard for a Title VII claim); MODEL PENAL CODE § 210.3(1)(b) (AM. LAW INST. 2016) (Murder can be mitigated to manslaughter where it “is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”); RESTATEMENT (SECOND) OF TORTS § 283A (AM. LAW INST. 1965) (“If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.”).

248. *Pettengill v. Curtis*, 584 F. Supp. 2d 348, 363 (D. Mass. 2008).

249. Gray, *supra* note 25, at 234 (“The legal system must be slow to judge the reasonableness of the survivor’s actions in coming forward years later, until it fully digests and understands the psychological literature in this area. . . . [I]n many of these cases, decisions appear to be made without express reference to such material.”).

recognized that CSA deserves unique treatment,²⁵⁰ and judges should follow suit.

Undoubtedly, such judicial action may require a departure from precedent, but such a departure is overwhelmingly justified. Overturning precedent is permissible where “facts have so changed, or come to be seen so differently, as to have robbed [an] old rule of significant application or justification.”²⁵¹ As indicated above, some courts have already adopted a formulation of the discovery rule in CSA cases that expressly recognizes its necessarily subjective elements,²⁵² but many have not. Courts that feel constrained by the force of prior judicial decisions should abandon these decisions if the rules they stand for are no longer justifiable. In recent years, experts in psychology have revolutionized the legal community’s knowledge of CSA.²⁵³ Due to the immense psychological control that perpetrators and other culpable parties exert over abused children, as well as the human psyche’s complex psychological reaction to CSA, “the vast majority of victims need decades to come forward, and many never do.”²⁵⁴ Moreover, we now understand that CSA is not rare—it is a widespread epidemic, for which trusted individuals and institutions are most often to blame.²⁵⁵ In short, the legal community has more than enough information to classify CSA as a unique injury that deserves individualized treatment. This information justifies a departure from outdated legal rules that are premised on now-obsolete notions of CSA as an injury.

C. POTENTIAL OBJECTIONS

With these proposals for legislative and judicial reform on the table, it is provident to address potential counterarguments. First, some may argue that treating the discovery rule differently in CSA cases would require a complete overhaul of the discovery rule across legal contexts. This Note proposes no such overhaul, but restricts the argument to civil actions based on CSA. The unique treatment of CSA cases is nothing new. For example, almost every state has a special statute of limitations for actions based on CSA.²⁵⁶ Moreover, the few state legislatures and judiciaries that have abolished statutes of limitations

250. See *supra* Part II.B.1.ii.

251. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

252. See *supra* note 248 and accompanying text.

253. Hamilton, *supra* note 1, at 397–98; see also UTAH CODE ANN. § 78B-2-308(1)(e) (LexisNexis Supp. 2017) (“[I]n 1992, when the Legislature enacted the statute of limitations requiring victims to sue within four years of majority, society did not understand the long-lasting effects of abuse on the victim and that it takes decades for the healing necessary for a victim to seek redress”); *Petersen v. Bruen*, 792 P.2d 18, 22 (Nev. 1990) (“We think it is safe to assume that the attitudes and policies reflected by our statute of limitations were formulated without concern for the comparatively recent and growing public cognition of CSA and its long-term effects.”).

254. Hamilton, *supra* note 1, at 398.

255. *Id.* at 397–98.

256. *State Civil Statutes of Limitations in Child Sexual Abuse Cases*, *supra* note 42.

for actions based on CSA have not felt a need to abandon statutes of limitations across the board.²⁵⁷ Rather, the unique treatment of CSA is predicated on the unique characteristics of CSA as an epidemic.²⁵⁸

On a similar note, it might be argued that this Note's proposal leaves no room for the judicial mechanisms that prevent baseless or unsupported claims—namely, motions to dismiss and motions for summary judgment. This Note does not propose to limit a judge's authority to dismiss claims or grant summary judgment where the evidence genuinely warrants it. Instead, this Note proposes a reformulation of the discovery rule that emphasizes its highly factual and partially subjective nature. Because the discovery question is factual, it should go to the factfinder as long as there is *some* evidence from which a jury could conclude that the plaintiff's delay was reasonable in view of all the circumstances. While concerns about frivolous or fraudulent CSA claims are largely chimerical,²⁵⁹ a judge under the proposed regime would still have full authority to dismiss actions or grant summary judgment if there is actually no evidence from which a jury could find that the plaintiff's delay was reasonable. As demonstrated above, however, this Note is premised on the opposite fear, which is grounded not in speculation, but in the reality of CSA litigation: Judges are so quick to dismiss actions based on CSA that they ignore evidence establishing that a plaintiff was psychologically incapable of suing any earlier.²⁶⁰

Another potential counterargument is that the proposed reform would frustrate the policies behind statutes of limitations. As noted at the outset, the two principal justifications for statutes of limitations relate to the defendant's right to repose and the reliability of evidence.²⁶¹ As states have already started to recognize, however, the underlying policies of statutes of limitations do not apply with equal force in CSA cases.²⁶² First, it is highly dubious that a CSA perpetrator's interest in peace of mind could ever outweigh a CSA survivor's interest in justice and compensation. Moreover, it would be deeply ironic and manifestly unjust to permit an abuser to benefit from a statute of limitations

257. Compare, e.g., DEL. CODE ANN. tit. 10, § 8145 (West Supp. 2017) (statute of limitation for CSA), with DEL. CODE ANN. tit. 10, §§ 8101–43 (2008) (listing statutes of limitations for other actions).

258. See, e.g., UTAH CODE ANN. § 78B-2-308(1) (enumerating the unique characteristics of CSA that warrant abrogation of a limitations period).

259. Hamilton, *supra* note 169, at 430–31.

260. See *supra* notes 135–44, 151 and accompanying text.

261. See *supra* note 38 and accompanying text.

262. See, e.g., *Petersen v. Bruen*, 792 P.2d 18, 24 (Nev. 1990) (“[A]dult survivors of CSA present unique circumstances and injuries that do not readily conform to the usual constructs upon which periods of limitations are imposed.”); see also *Hammer v. Hammer*, 418 N.W.2d 23, 27 (Wis. Ct. App. 1987) (“The policy justification for applying the statute of limitations to protect defendants from ‘the threat of liability for deeds in the [distant] past’ is unpersuasive in incestuous abuse cases.” (quoting Margaret J. Allen, Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U. L. REV. 609, 631 (1983))).

where, as often happens, the abuser's psychological control, manipulation or coercion was a central reason for the delay.²⁶³ Second, the policy of ensuring reliable evidence also gives way in CSA cases. If the evidence presented is genuinely unreliable, a jury will be competent to discredit it. Similarly, rules of evidence will weed out proffered proof that is truly untrustworthy or prejudicial.²⁶⁴ More importantly, however, the reality suggests the opposite problem: A CSA survivor's decision to sue his or her abuser is often preceded by a triggering event, which brings back lucid and tormenting recollections of the abuse.²⁶⁵ The discovery rule, by its very nature as a tolling mechanism, recognizes that the policies behind statutes of limitations are not absolute. Such policies are arguably least persuasive in CSA cases.

Finally, it could be argued that juries are expensive,²⁶⁶ and so this Note's proposal would be an administrative burden.²⁶⁷ First, it is far from clear if net costs would actually increase substantially. As should be apparent by now, there is widespread disagreement about how best to treat claims based on CSA, and the law has undergone large changes in the past few decades.²⁶⁸ This disagreement is pervasive not only from state to state,²⁶⁹ but also from court to court in a given state. In *Parks*, for example, the trial court, intermediate appellate court, and Illinois Supreme Court all came to different conclusions about whether a question of fact existed.²⁷⁰ Clearly, disagreement among courts already produces an enormous waste of time and judicial resources. An easily comprehensible rule—i.e., send the discovery question to the jury—would promote consistency and reduce disagreement among courts. Moreover, a clear preference for preserving jury questions might reduce litigation altogether by prompting defendants to settle rather than gamble that a court will find a claim time-barred. Second, even if extra costs are

263. Cf. Richardson, *supra* note 204, at 527 ("A victim's natural reaction to sexual abuse is the dissociation and repression of the unbearable memories. This psychological numbing allows the perpetrator to escape civil responsibility for his actions. *The very harm the perpetrator has inflicted thus shields him from punishment.*" (emphasis added)).

264. Hagen, *supra* note 28, at 375.

265. See *supra* note 28 and accompanying text.

266. On the costs of a civil jury, see *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1424-25 (1997).

267. A partial solution worth mentioning is a bifurcated trial, in which a judge could separate the fact questions of timeliness and liability. On the virtues of bifurcated trials, see John P. Rowley III & Richard G. Moore, *Bifurcation of Civil Trials*, 45 U. RICH. L. REV. 1, 2-14 (2010) (discussing the function and application of bifurcated trials and specifically naming a statute of limitations defense as an appropriate issue for bifurcation). However, proving the timeliness of a plaintiff's action may often require the presentation of a great deal of evidence, in which case a bifurcated trial could be duplicative. Ultimately, a judge can decide whether or not bifurcation would be appropriate in a given case.

268. See *supra* Part II.B.

269. Hamilton, *supra* note 1, at 400-01 (describing the patchwork treatment of CSA cases among the 50 states).

270. *Parks v. Kownacki*, 737 N.E.2d 287, 289-90, 295 (Ill. 2000).

incurred, such costs are justified. The legal community's disdain for tossing CSA claimants out of court has been apparent for decades.²⁷¹ If the cost of a jury is warranted anywhere, it is warranted here.

V. CONCLUSION

The discovery rule is a tolling mechanism that exists for the benefit of plaintiffs who have excusably failed to file their claims within the limitations period. CSA is a widespread social harm that has a distinct and well-documented impact on its survivors. Based on the unique effects of CSA, the decision to delay filing suit for decades after the abuse is commonly excusable, if not unavoidable. Indiscriminate application of the discovery rule, with its generic standard of reasonableness, is accordingly inapposite. As past practice has shown, it is impossible to apply broad legal standards to actions based on CSA without reducing the factual and legal elements of claims or simply ignoring aspects of a case that do not fit. CSA victims who wish to sue their abusers, or parties that enabled their abuse, deserve more individualized treatment—the type of treatment that a trier of fact is well-suited to perform on a case-by-case basis.

271. See *supra* Part III.C.