Crossing the Limit Line: Sexual Abuse and Whether Retroactive Application of Civil Statutes of Limitation are Legal

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I. Abstract

Sexual abuse is heinous, violative and abhorrent – especially when committed on children. The California legislature has taken notice. This paper sheds light on the unique problems associated with bringing suits against sexual predators of children. It examines the possible avenues of legal recourse for victims of sexual abuse, the role statutes of limitation play in the justice system generally, the role these limitations play in civil tort cases in California, the tolling of the limitations period for special circumstances, and the distinctive disadvantages of pursuing recourse through the justice system. This paper argues that repose should be treated as a vested property interest, but retroactive application should still be deemed constitutional under the Fourteenth Amendment. This paper concludes that retroactive application of civil statutes of limitation for child sexual abuse cases should be constitutionally upheld. However, the rationale the courts have employed, not classifying repose as a vested property interest, is an illogical and inconsistent way to reach that conclusion. Instead, the courts should find that a defendant's right to repose in child sexual abuse cases is a vested property interest, yet still uphold the retroactive

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application based on a "compelling state interest" justification.

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II. Introduction

Sexual abuse is one of the most damaging violations a person can commit against another person. Sexual abuse of a child is even more heinous because of the child's vulnerable position. The Boston Herald wrote, "[t]he stories of childhood sexual abuse are heart-wrenching – tales of innocence shattered, childhoods stolen."[1]

Child sexual abuse is a devastating reality that has received more attention in recent years.[2] The changes in California legislation indicate that at least California is taking notice and is attempting to protect our children. Sexual abuse from any perpetrator has a severe emotional and psychological impact on a child; however, sexual abuse by a perpetrator that the child knows increases the magnitude of the violation.[3] The dilemma with regard to child sexual abuse is that often times the people who are supposed to act as children's mentors and protectors are the very same people who are preying on their vulnerability and trust.[4]

This paper attempts to shed light on the unique problems associated with bringing suits against child sexual predators. Section II of this paper explains the possible avenues of legal recourse for victims of sexual abuse. Section III highlights the role statutes of limitation play in the justice system generally, and then attempts to lay out the role these limitations play in civil tort cases in California. Section IV discusses tolling the limitations period for special circumstances. In California, the conditions meriting tolling for child sex abuse cases includes delayed discovery and reaching the age of majority. Section V focuses in on children's distinctive disadvantages for pursuing recourse

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[1] Editorial, *Bring Abusers to Justice*, BOSTON HERALD, March, 16, 2006.

[2] Andrew Vachss, *Child Sexual Abuse is Not Widespread*, *in* CHILD SEXUAL ABUSE 15 (Paul A. Winters et al. eds., 1998).

[3] *See* David Finkelhor, A SOURCEBOOK ON CHILD SEXUAL ABUSE 144-64 (1986).

[4] Vachss, *supra* note 2, at 16.

through the justice system. Section VI addresses California's civil statute of limitations for child sexual abuses cases. Section VII explores both the federal and California positions on retroactive legislation. Section VIII presents the argument that repose[5] should be treated as a vested property interest, but retroactive application should still be deemed Constitutional under the Fourteenth Amendment. Finally, section IX examines the unstable future of retroactive application of civil statutes of limitation under the doctrine of *ex post facto*.

Ultimately, this paper concludes that retroactive application of civil statutes of limitation for child sexual abuse cases should be constitutionally upheld. However, the rationale the courts have employed, not classifying repose as a vested property interest, is an illogical and inconsistent way to reach that conclusion. Instead, the Court should find that a defendant's right to repose in child sexual abuse cases is a vested property interest, yet still uphold the retroactive application based on a "compelling state interest" justification. Finally, this paper concludes that according to California jurisprudence, California courts may find the retroactive application of civil statutes of limitation to be a violation of the *ex post facto* laws, although the court thus far has not been willingly to extend the doctrine that far.

III. Legal Recourse

Society condemns the heinous conduct of child sexual abuse and provides for both criminal prosecution[6] and civil liability.[7] Many would argue that the current criminal laws are ineffective at punishing child sex offenders and deterring future abuse, and that they provide victims with little relief or support.[8] As a result, an increasing number of childhood

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[5] BLACK'S LAW DICTIONARY 438 (5th ed. 2003) (defining repose as "in civil actions, the maximum time period within which an action may be brought, regardless of injury.").

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

[7] *Id.* at 180.

[8] Gregory G. Gordon, *Adult Survivors of Childhood Sexual Abuse and the*

sexual abuse survivors have "taken matters into their own hands by filing civil lawsuits against their abusers, seeking monetary compensation for their injuries."[9] This avenue provides some recourse for child sexual abuse victims when the criminal system fails.

However, advancing a civil action has proven extremely difficult. The difficulty arises for various reasons, but one significant reason is because the conduct itself "induces psychological trauma in the victim which makes it difficult for the victim to come forward to confront the perpetrator, often until many years have passed, thus tending to bar such actions through the running of a statute of limitations."[10] If the action is so barred, the perpetrator has a complete defense, and the victim is outright prevented from bringing his or her claim.[11]

IV. Statutes of Limitation

A. Brief Background Principles

One of the primary obstacles to prosecuting child sex offenses or assigning civil liability lies in the legal rules regarding statutes of limitation. Our laws are faced with the discord between finality and justice, and the statutes of limitation seek to find that balance. However, striking a perfect balance is impossible.

The United State Supreme Court expertly described statutes of limitation as finding "their justification in necessity and convenience rather than logic."[12] Such limitations are functional and pragmatic instruments to "spare the courts from litigation of stale claims, and the citizens from being put

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Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule, 20 PEPP. L. REV.1359, 1367-68 (1993).

[9] *Id.* at 1368.

[10] Russell G. Donaldson, Annotation, *Running of Limitations Against Action for Civil Damages for Sexual Abuse of Child*, 9 A.L.R.5th 321 (1993).

[11] Carol L. Mithers, *Incest and the Law*, N.Y. TIMES, Oct. 21, 1990, at 6.

[12] Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost."[13] The legislature, not the judiciary, created statutes of limitation as a matter of public policy.

The legislature establishes the period during which a suit may be brought in its courts for particular claims: the federal legislature for federal claims, and each state legislature for state claims. Looking at this from the reverse, no action may be maintained if it is brought outside of the limitation period.[14] There is no individualized consideration given to a particular case or claim, but instead actions must conform to the blanket limitation period. Because the statute of limitations period is arbitrary, and its operation does not discriminate between just and unjust claims, unfortunately, plaintiffs may be barred from merited recovery.[15] However, as one California court noted, the statute of "'limitations period is intended to run against those who are neglectful of their rights and who fail to use reasonable and proper diligence in the enforcement thereof . . . .' It is not the policy of the law to unjustly deprive one of his remedy."[16] While courts recognize the unwanted consequence of dispossessing victims of remedies, they struggle to find a better way to strike the balance between finality and justice.

B. Statutory Limitations Period

Statutes of limitation permit judicial action to be initiated within a specified period of time after the cause of action arises or else be thereafter barred from enforcing them.[17] The interpretation of the statute as applied to torts has been such that the statute does not typically begin to run until

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[13] *Id.*

[14] RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 142 (1971).

[15] *Chase Sec. Corp*, 325 U.S. at 314.

[16] Evans v. Eckelman, 265 Cal. Rptr. 605, 610 (Cal. Ct. App. 1990) (quoting *Manguso v. Oceanside Sch. Dist*., 52 Cal. Rptr. 27, 30 (Cal. Ct. App. 1979)).

[17] BLACKS LAW DICTIONARY 492- 93 (5th ed. 2003).

the tort is complete.[18] In regard to personal injury torts, under which child sexual abuse fits, the tort is "complete" when the abuse itself occurs.[19] Unfortunately, the time when the abuse occurs is the time that the victim is least able to take legal action because of the "youth and ignorance of the victims, as well as the unique duties and authority held by the parent."[20]

Historically, claims for child sexual abuse were subject to a one-year statute of limitation in California.[21] However, in 1986 the California Legislature enacted a special statute to extend the limitations period to three years for sexual abuse of a child under the age of fourteen by a household or family member, but left unaffected the sections dealing with any other perpetrators.[22] As a result of *Snyder v. Boy Scouts of America, Inc.*, the California Legislature completely rewrote the statute pertaining to limitations for childhood sexual abuse. One notable modification was that a plaintiff could bring a case against any perpetrator up until eight years after reaching the age of majority.[23] Moreover, a plaintiff could bring a claim within three years after the "discovery" of sexual abuse.[24] These modifications provided much-needed access to the legal system for victims of tortious behavior when they were in a better position to bring claims. Victims finally were able to confront their abusers through a system that legitimatized their experience, and cast blame where it belonged.

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[18] RESTATEMENT (SECOND) TORTS § 899 cmt. c (1979).

[19] Donaldson, *supra* note 10.

[20] Sellery v. Cresserey, 55 Cal. Rptr. 2d 706, 710 (Cal. Ct. App. 1996).

[21] Tietge v. W. Province of the Servite, Ins., 64 Cal. Rptr. 2d 53, 55 (Cal. Ct. App. 1997).

[22] Snyder v. Boy Scouts of America, Inc., 205 253 Cal. Rptr. 156, 160 (1988) (holding that the claim was time-barred against the Boy Scouts because it was brought more than one year after the victim reached majority).

[23] CAL CIV. PROC. CODE § 340.1 (West 2003).

[24] *Id*.

V. Tolling the Statute of Limitations

A. Generally

When society realizes that the balance between finality and justice is not being struck, resulting in a particularly inequitable situation, the legislature can decide to toll the limitations period.[25] Victims of child sexual abuse being robbed of any recourse is just the type of situation that calls for the implementation of a tolling provision.

Generally there have been three theories put forth to defeat the statute of limitations defense in the context of child sexual abuse cases: delayed discovery, disability, and equitable estoppel.[26] However, not all states have recognized these three theories, while others have permitted additional theories to toll the statute of limitations. Additional theories include tolling the statute during the years of minority, imprisonment, and active military duty, and additionally, tolling may be permitted for actions taken by the defendant that cause duress or equate to fraudulent concealment.[27]

B. Delayed Discovery

The delayed discovery rule allows an action in tort to be deemed to have "accrued not necessarily at the time of the last wrongful act causing injury, but rather when the plaintiff discovers the existence of the elements of that cause of action, or in the exercise of reasonable diligence should have discovered the existence of those elements, whichever comes first . . . ."[28] Thus, a victim of child sexual abuse is able to bring an action against his or her abuser within the limitations period beginning when the victim has knowledge of the abuse.

Courts that recognize a "delayed discovery" exception to the statute of limitations do not view the cause of action as

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[25] 51 AM. JUR. 2d *Limitation of Actions* § 153-57 (2012).

[26] Donaldson, *supra* note 10.

[27] 91 AM. JUR. *Trials* § 151 (2006).

[28] Donaldson, *supra* note 10.

accruing when the last wrongful act occurred, but instead when the plaintiff discovers or should have discovered the existence of the elements that make up a claim for child sexual abuse.[29] The United States Supreme Court first applied the "discovery rule" to delay the accrual of a tort cause of action in *Urie v. Thompson*.[30] In that case, the Court found that the statute of limitations for negligence did not begin to run until the plaintiff was consciously aware that the elements giving rise to the cause of action existed.[31] Therefore, applying this theory, a child's limitation period tolls until the plaintiff discovers that the abuse occurred.

Even though the U.S. Supreme Court has authorized "delayed discovery" for certain types of tort causes of action, only some states – California being one – choose to apply this exception for child sexual abuse cases.[32] California also is a state that has chosen to expand this theory of "delayed discovery" to toll the period for cases where the plaintiff was aware of the abuse, but did not appreciate its wrongfulness.[33] States that adopt this interpretation follow the line of reasoning that the victim of child sexual abuse needs the statute of limitations period to run longer in order to provide an opportunity for the victim to become aware of the "psychological injuries and remain eligible to bring suit against their abusers."[34]

There are three typical situations where applying the delayed discovery exception for child sexual abuse claims is justifiable. The first situation occurs in circumstances where the plaintiff represses the memories of the abuse entirely and later in life recalls the abuse. The second situation arises when the plaintiff is aware that the sexual abuse occurred, but did not immediately appreciate the wrongfulness of the abuse.

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[29] *Id*.

[30] Urie v. Thompson, 337 U.S. 163 (1949).

[31] *Id*.

[32] CAL CIV. PROC. CODE § 340.1 (West 2003).

[33] *Sellery*, 55 Cal. Rptr. 2d at 711.

[34] Tietge v. W. Province of the Servites, Inc., 55 Cal. App. 4th 382, 387 (1997).

The final situation typically covered by this exception is one where the plaintiff is aware of the abuse, but did not fully appreciate the consequences of the harm or did not link the experienced injuries with the abuse because of immaturity, development, or psychological issues.

"Traumatic psychological repression of the conscious awareness of intolerable facts" is an important but controversial aspect of the "delayed discovery" rule as it is applied to cases of childhood sexual abuse.[35] Proponents of employing the exception in cases of child sexual abuse argue that the child victim essentially has "literally and excusably forgotten all or critical aspects of the experience," and thus should be dealt with as if he or she never knew these facts until "the conscious awareness of them was restored either by psychotherapy or by some other strong emotional experience which [']triggered['] the memory of the elements of the cause of action."[36] Children who are sexually abused often "dissociate," discarding any consciousness of the experience as a method of coping. As a result, these children, especially if they are very young, may have no memory of what happened to them.[37] Thus, states that are sympathetic to this theory allow for the delayed discovery exception for such memory repression.

Alternatively, some states have actually reduced the period for the statute of limitation due partially to research indicating that "memories of child sexual abuse retrieved in therapy or in survivor groups or as a result of reading certain materials are usually false."[38] Opponents of permitting delayed discovery for repressed memories are primarily skeptical of the methods used such as "age regression, guided visualization, trance writing, dream work, body work, and

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[35] Donaldson, *supra* note 10.

[36] *Id*.

[37] Mithers, *supra* note 11.

[38] DIANA E. H. RUSSELL & REBECCA M. BOLEN, THE EPIDEMIC OF RAPE AND CHILD SEXUAL ABUSE IN THE UNITED STATES 141 (Sage Publications 2000).

hypnosis."[39] Additionally, there is concern about the fairly recent spike in the prevalence of claims of repressed memory.[40] However, simply because there is an increase in the number of accounts or there is skepticism with regard to the methods, it does not necessarily mean that the information recovered is false.

VI. Children's Unique Position Demanding Special Rules

A. Trusted Intrafamilial and Extrafamilial Perpetrators

Children are especially vulnerable to undiscovered and unpunished abuse because the vast majority of abuse encounters are perpetrated by someone the child knows. According to The Russell Study done in 1983, about 30% of child sexual abuse is committed by a family member.[41] The vast majority of those family perpetrators include uncles, accounting for about 25% to 50% of all intrafamilial sexual abuse encounters.[42] Cousins and father figures are the second most prevalent offenders.[43] The majority of the residual offenders are family friends and people of authority in the child's life.[44] These include, but certainly are not limited to, neighbors, parents' friends, mothers' boyfriends, babysitters, teachers, care-givers, coaches, and clergy.[45] These startling figures illuminate the prevalence of children being horrifically violated by their most interior of social circles.

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[39] Elizabeth Loftus, *Recovered Memories of Child Abuse are Unreliable*, *in* CHILD SEXUAL ABUSE 35 (Paul A. Winters et al. eds., 1998).

[40] *Id.* at 41.

[41] REBECCA M. BOLEN, CHILD SEXUAL ABUSE, ITS SCOPE AND OUR FAILURE 114 (Kluwer Academic/Plenum Publishers 2001) (interpreting and consolidating studies done on child sexual abuse); *see* RUSSELL & BOLEN, *supra* note 38, at 147-152 (discussing results of the 1993-94 National Incidence Study—a congressionally mandated effort to collect data regarding child abuse).

[42] BOLEN, *supra* note 41, at 114.

[43] *Id.*

[44] *See* RUSSELL & BOLEN, *supra* note 38, at 209 (containing a table comparing three studies on types of perpetrators of child sex abuse).

[45] BOLEN, *supra* note 41, at 91-112.

Children seeking redress for this kind of sexual abuse confront multiple impediments. First, these children, who are being abused by the very people who are supposed to be protecting them from harm, are personally lacking resources to take action to stop the abuse.[46] Second, unique to intrafamilial sexual abuse, there are typically multiple victims within one family.[47] Studies show that all too common, a mother has been a victim of sexual abuse prior to her daughter becoming a victim of such abuse.[48] Thus, the family dynamics are such that a child may find it difficult to get support from even non-offending relatives.

Additionally, as one attorney from the Support Network for Battered Women concluded "until the 1970's the sexual abuse of children was largely ignored; their stories were doubted and minimized, or they were blamed for encouraging their molestation."[49] Thus, children learn to keep their mouths shut in order to not suffer additional psychological pain. As a result, children are robbed of the opportunity to be heard and to have their suffering taken seriously.

In order to adjust for the gross injustice children face who are victims of child sexual abuse, these children should not be held to the restrictive standards of general tort statutes of limitation. Because the children in these horrific situations cannot often rely on the people who are supposed to be protecting them, society must give them more time to be able to protect themselves, and seek redress at a later date.

B. Memory Repression

The idea of permitting "repressed memory" as a method to overcome the statute of limitations, and ultimately bring a civil suit against the perpetrator is a source of much

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[46] *Id.* at 132.

[47] *Id.*

[48] *Id.* at 126.

[49] Minouche Kandel & Eric Kandel, *Repressed Memories of Child Abuse May Be Valid, in* CHILD SEXUAL ABUSE 27, 28 (Paul A. Winters et al. eds., 1998).

controversy.[50] Research is painfully inconsistent regarding repressed memory in children.[51] However, advocates of the theory of "delayed discovery" due to "repressed memory" as a means to overcome the statute of limitations simply consider it an act of fairness. Advocates question how victims can bring a claim if they have no memory of the event within the time they are supposed to bring the claim.[52]

Opponents of "repressed memory" underscore the incidence of false memories. Some liken it to the witch trials of the sixteenth century.[53] Such challengers to these theories are skeptical due to highly publicized situations like the 1994 case of a Philadelphia man who accused the popular Cardinal Joseph Bernardin of sexually abusing him, but later retracted his accusations, saying that his memories were probably false.[54] Skeptics grasp onto these stories and cast shadows of doubt over the whole theory of repressed memories.[55]

However, research in both psychology and biology bolster the argument that repressing memories is a reality for children subject to abuse, and later in the victim's life it may be recovered.[56] Judith Herman, a Harvard psychiatrist, found that temporarily repressing memories is not too uncommon.[57] In 1987 Herman found that "of 53 women attending incest survivor groups, almost two-thirds reported partial or

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[50] *See* Irene Wielawski, *Unlocking the Secrets of Memory; Recent Tales of Child Abuse Have a Twist – Victims, Now Adults, Say Their Memories of the Horrors were Repressed for Decades. Critics Speak of Fantasy and Distortion*, L.A. TIMES, Oct. 3, 1991, at A1 (discussing the skepticism surrounding the phenomenon of repressed childhood memories).

[51] Kathryn Kuehnle, *Child Sexual Abuse Evaluation*, *in* 11 HANDBOOK OF PSYCHOLOGY; FORENSIC PSYCHOLOGY 437, 442-43 (Alan M. Goldstein ed., 2003).

[52] *See* Gordon, *supra* note 8.

[53] Loftus, *supra* note 39, at 41.

[54] Elizabeth A. Wilson, *Suing for Lost Childhood: Child Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult-Survivors of Child Abuse*, 12 UCLA L. REV. 145, 148 (2003).

[55] Kandel & Kandel, *supra* note 49, at 30.

[56] *See id.* at 29-34.

[57] *Id.* at 28-29.

complete memory lapses at some point after the abuse occurred."[58] Similarly, in the mid-1970's, Linda Meyer Williams, a sociologist at the University of New Hampshire conducted a study that found that of 129 women who were treated for sexual abuse when they were young, more than one-third had no memory of, or chose not to report, the molestation documented in their records.[59]

Another study conducted by John Briere, a psychiatrist at the University of Southern California School of Medicine, shows that the more violent or persistent the abuse was, the more likely the victims were to "block the memory for long periods . . . ."[60] Lenore Terr, a psychiatrist from the University of California in San Francisco, echoed these findings, indicating that children are more likely to repress memories when they have been exposed to repeated traumas rather than one-time traumatic events.[61] The majority of clinical psychologists believe that "children can learn to block memories as a survival mechanism: if physical escape from their tormentors is impossible, psychological escape may become crucial."[62] When children are unable to avoid abuse and realize it will be repeated, some cope by mentally dissociating themselves from the abuse while it is occurring or by later repressing the memory.[63]

Following the theory, once the victim is an adult, repression may cease to be helpful as a coping mechanism. Thus, later in life, away from the traumatic environment, the victim may regain memories of the abuse.[64] The recalling of memories can happen in either a gradual emergence or all at

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[58] *Id.* at 29.

[59] *Id*.

[60] Kandel & Kandel, *supra* note 49, at 29.

[61] *Id*.

[62] Kandel & Kandel, *supra* note 49; s*ee* Kuehnle, *supra* note 51, at 442 (discussing the inconsistency in research in regard to the impact of stress on memory).

[63] Kandel & Kandel, *supra* note 49.

[64] *Id.*

once.[65] Common catalysts for recalled memory for these victims are therapy, support groups, or even news reports of others' abuse.[66] One example of such a reemergence of memory happened to Frank Fitzpatrick, a 38-year-old, married, insurance adjuster who spontaneously recalled being molested by Father James Porter.[67] After Fitzpatrick confronted the priest, Porter admitted to molesting dozens of children. Ultimately, 68 men and women came forward accusing Porter of abuse. Six of these only recalled the abuse after news reports triggered the memory.[68]

Is it right to strip a remedy from these victims whose experiences are so heinous and unthinkable that they had to mentally block any memory of it? The perpetrators would have their cake and eat it too: enjoy the rape and molestation of these children and bask in the protection our system provides when the children do not bring the claim in time because they have repressed the memory as a way to temporarily escape the pain. Our judicial system should be structured in such a way to protect these most vulnerable victims.

C. Limited Legal Access

As we consider the idea of abuse and the availability of legal remedies, we must recognize that children's access to legal recourse is limited at best. First, the child has to recognize what is happening is wrong. Second, the victim needs to be willing to come forward and tell someone about the abuse before any action can proceed, and unfortunately, many children are ashamed and embarrassed about the sexual abuse and, thus, are hindered from coming forward.[69] Third, the child needs to be honestly believed by someone who can

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[65] *Id.*

[66] *Id.*

[67] *Id.*; *see* Wielawski, *supra* note 50 (detailing actor and other entertainment industry victims of sexual abuse who claim to have repressed memories of abuse).

[68] Kandel & Kandel, *supra* note 49.

[69] Michael Krauss, *Fundamental Fairness in Child Sexual Abuse Civil Litigation*, 8 STAN. L. & POL'Y REV. 205, 206 (1997).

do something.[70] Until the 1970's, children reporting abuse were largely disregarded as fabricators. Additionally, juries often are not satisfied without seeing corroborating evidence.[71] Finally, the child has to come up with legal representation if he or she intends to bring a civil suit.

These are large institutional hurdles that a child victim needs to overcome to receive justice. Legislatures in some states have tried to help victims of sexual abuse to overcome some of these obstacles by proposing to extend statutes of limitation, authorize "John Doe" in DNA cases, institute mandated reporting, require officers to visit the residences of sex offenders who fail to file periodic verification forms under Megan's Law, and require high level sex offenders to wear electronic monitoring devices.[72] It would be a great victory for victims of sex predators if more states would accept these types of proposals.

VII. California's Statute of Limitations for Child Sex Abuse Cases

A. Tolling the Statute of Limitations in California

Child sexual abuse is a unique problem requiring unique approaches, and some states recognize that fact. California appears to be one such state that addresses some of the unique problems associated with bringing child sexual abuse claims. Accordingly, it has adjusted its statutory provisions to allow for longer periods within which to bring civil claims. According to California's Code of Civil Procedure section 340.1, California recognizes both the minority and delayed discovery exceptions to the general rule that dictates that the statute of limitations begins to run from the time of injury in tort cases.[73]

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[70] Kandel & Kandel, *supra* note 48, at 28.
[71] 24 AM. JUR. 2d *Proof of Fact* § 26 (2005).
[72] US State News, *Assemblywoman Eddington Acts to Remove Sexual Deviants from our Neighborhoods*. January 23, 2006 (discussing proposals the assembly is making in New York).
[73] CAL. CIV. PROC. CODE § 340.1 (West 2003).

California's Code of Civil Procedure section 340.1(a) reads:

> (a) In an action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within *eight years of the date the plaintiff attains the age of majority* or within three years of the date the plaintiff *discovers or reasonably should have discovered* that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later, ... [emphasis added].[74]

These are two powerful equitable tolling provisions for victims of child sexual abuse: allowing any claim to be brought before age 26 or within three years of discovery.

There are three situations governed by this section of the statute. First, when the victim files against the sexual offender personally.[75] Second, when the victim brings an "action against any person or entity who owed a duty of care to the plaintiff where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse . . . ."[76] Third, it extends to where any person or entity committed an intentional act that was a legal cause of the childhood sexual abuse.[77] However, the victim can only bring a claim in the last two situations before his 26th birthday, unless the entity or person knew or had reason to know of the abuse and failed to take appropriate steps.[78]

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[74] *Id.* at § 340.1(a).

[75] *Id.* at § 340.1(a)(1).

[76] *Id.* at § 340.1(a)(2).

[77] *Id.* at § 340.1(a)(3).

[78] CAL. CIV. PROC. CODE §340.1(b) (West 2003).

B. Retroactive Application to Revive Stale Claims in California

An additional protection California provides for victims of childhood sexual abuse is the revival of stale claims in some situations. A victim of child sexual abuse is permitted to bring a claim, even though expired, if the claim is ripe under the law as it stands after the 1990 and 1994 amendments. California Code of Civil Procedure section 340.1(r) reads:

> (r) The amendments to this section enacted at the 1990 portion of the 1989-90 Regular Session shall apply to any action commenced on or after January 1, 1991, including any action otherwise barred by the period of limitations in effect prior to January 1, 1991, thereby reviving those causes of action which had lapsed or technically expired under the law existing prior to January 1, 1991.[79]

This revival statute applies retroactively to bring life back to the claims that were previously time-barred.[80] The legislature placed this section in the statutory scheme to clarify that the prior sections were to have retroactive effect. This is an extremely bold and clear message from California's legislature stating it believes victims of child sexual abuse deserve relief.

C. Special Windows to Revive Stale Claims in California

In addition to the method of reviving civil causes of action that were once time-barred under section 340.1(r), California also grants victims of childhood sexual abuse a method of recourse through a special time window statute. California Code of Civil Procedure section 340.1(c) reads:

> Notwithstanding any other provision of law, any claim for damages described in paragraph

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[79] *Id.* at § 340.1(r).

[80] Lent v. Doe, 40 Cal. App. 4th 1177, 1183 (1995).

> (2) or (3) of subdivision (a) that is permitted to be filed pursuant to paragraph (2) of subdivision (b) that would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired, is revived, and, in that case, a cause of action may be commenced within one year of January 1, 2003. Nothing in this subdivision shall be construed to alter the applicable statute of limitations period of an action that is not time barred as of January 1, 2003.[81]

This special window applies to claims that would have been brought under paragraph (2) or (3) of subdivision (a) if the statute of limitations would not have already run.

Paragraph (a)(2) of section 340.1 assigns liability to "any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff."[82] Paragraph (a)(3) of section 340.1 assigns liability to "any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff."[83]

This special window in California was enacted in the face of the clergy sex abuse scandals. Even though "the temporary lifting of the statute of limitations covers any institution where a known child molester was allowed to continue working and abused another child, the majority of cases filed in 2003 appeared to have been filed against Catholic archdioceses . . . "[84] Over 800 cases were brought under this provision that would have otherwise been time-barred.[85] The window of opportunity California provided for child sex abuse victims in 2003 gave recourse and resolve for

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[81] CAL CIV. PROC. CODE § 340.1(c) (West 2003).

[82] *Id.* at § 340.1(a)(2).

[83] *Id.* at § 340.1(a)(3).

[84] Michael Gougis, *New Deadline for Justice; Old Cleric Abuse Claims Allowed in '03*, DAILY NEWS OF L.A., Jan. 26, 2004.

[85] *Id.*

the once remediless.[86]

VIII. Legality of Retroactive Application

A. Supreme Court Due Process Precedent

The possible claims described herein predominantly fall within state jurisdiction, however state legislation is still subject to constitutional restraints. Retroactive legislation surfaces Fourteenth Amendment due process problems as well as potential *ex post facto* violations. Since 1885, Supreme Court jurisprudence authorized the revival of some time-barred claims.[87] In *Campbell v. Holt*, the court held constitutionally permissible the retroactive revival of time-barred claims so long as it does not interfere with vested title to real or personal property.[88]

The rationale employed in *Chase Securities Corp. v. Donaldson* is that the shelter, given by the limitations period, is not a fundamental right.[89] A defendant has the protection while it exists, but the protection is merely a product of "legislative grace and to be subject to a relatively large degree of legislative control."[90] Therefore, the legislature may extend or shorten the period during which a plaintiff can bring his or her claim. In addition to the ability to change the limitation period, the legislature can apply the period retroactively, thus allowing previously time-barred claims to be revived.

Affirming the constitutionality of reviving claims of action that were previously barred, the *Chase* Court

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[86] Petition for review has been granted by the California Supreme Court to determine whether the decision in *Roe 58 v. Doe 1*, 120 Cal. Rptr. 3d 311 (Cal. Ct. App. 2011), should be upheld. The Court of Appeal held that a sexual abuse victim who had reached age 26 as of January 1, 2003, and who did not bring a claim during the one-year revival period pursuant to California Code of Civil Procedure section 340.1(c), but who had not discovered or should have discovered the cause of the injuries is barred from bringing a claim.

[87] Campbell v. Holt, 115 U.S. 620, 627-28 (1885).

[88] *See id*.

[89] Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

[90] *Id.*

explained:

> The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Some rules of law probably could not be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin. Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.[91]

The Court underscored that the statute of limitations defense was legislature-given, and that it can be taken away, even retroactively, without violating the Constitution.

B. California Due Process Jurisprudence

States may be more restrictive than the federal government, and find retroactive revival of time-barred claims impermissible.[92] In California, the jurisprudence regarding time-barred civil claims has been classified as "unsettled."[93] Over the past fifteen years, California courts have given more guidance on this matter, but the area of law is still quite murky.[94]

In 1989, in the seminal case *Liebig v. Superior Court*, the California Supreme Court firmly declared that the "[l]egislature has the power to expressly revive time-barred

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[91] *Id.* at 315-16.

[92] U.S. CONST. amend. X.

[93] 3 WITKIN, CAL. PROC. 4th § 435 (1997).

[94] *Id.*

civil common-law causes of action."[95] The *Liebig* court said that the "holding is consistent with the niche in our civil law occupied by statutes of limitations. 'The principle is . . . well established that "[s]tatutorily imposed limitations on actions are technical defenses which should be strictly construed to avoid the forfeiture of a plaintiff's rights . . . . "'"[96] The court emphasized the strong public policy in favor of disposing of claims on the merits when possible.[97]

Even though *Liebig* opened up the possibility for the Legislature to revive time-barred claims, the general rule endures in California prohibiting the retroactive application of substantive civil statutes.[98] The California courts only recognize retroactive application of some procedural statutes. In *Liebig*, the court stated that statutes of limitation were procedural and not substantive, thus they are not subject to the general rule against statutory retroactivity.[99] In *Nelson v. Flintkote Co.*, the court reaffirmed the importance of the statute of limitations being a procedural law; stating that "a statute of limitations is *procedural*; it affects the remedy only, not the substantive right or obligation."[100]

According to California's revival jurisprudence, in order for the retroactive application of lengthened limitations period to be upheld, the reopening of previously extinguished claims must not affect a vested property right or fundamental right.[101] However, even if it did interfere with a vested property right or fundamental right, the court indicated that it would still permit retroactive application if there was an important state interest at stake.[102]

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[95] Liebig v. Superior Court, 257 Cal. Rptr. 574, 578 (Cal. Ct. App. 1989).

[96] *Id.* (quoting *Steketee v. Lintz, Williams & Rothberg*, 694 P.2d 1153, 1158 (Cal. 1985)).

[97] *Id.*

[98] Arques v. National Superior Co., 155 P.2d 643, 651 (Cal. 1945).

[99] *Liebig*, 257 Cal. Rptr. at 577 (1989).

[100] Nelson v. Flintkote Co., 218 Cal. Rptr. 562, 565 (Cal. Ct. App. 1985) (citing 3 WITKIN, CAL. PROC. 3d § 308 (1985)).

[101] *Campbell*, 115 U.S. at 627-28.

[102] 3 WITKIN, CAL. PROC. 4th § 435 (1997); *Liebig*, 257 Cal. Rptr. at 577-78.

The *Liebig* court did not find repose to constitute a vested property interest or a fundamental right.[103] However, the court stated that assuming that a vested right exists in repose of a cause of action, that right is not immune from retroactive laws when an important state interest is at stake.[104] The court said that:

> In this case, the important state interest espoused by §340.1 is the increased availability of tort relief to plaintiffs who had been the victims of sexual abuse while a minor . . . . The language of the retroactivity provision of §340.1 indicates a clear legislative intent to maximize claims of sexual-abuse minor plaintiffs for as expansive a period of time as possible. The public policy is manifest from the text of the law.[105]

This passage indicated that even if a defendant's repose was considered a fundamental right or vested property right, the court said that if there was a manifest state interest at stake it would still apply the statute retroactively.[106] Protecting children by allowing victims of child sex abuse to seek recourse from their perpetrators is a significant state interest. Consequently, retroactive application of civil statutes of limitations for child sex abuse cases would likely be upheld even if the courts determine repose is a vested property interest.

C. Ex Post Facto Laws Applied to Civil Suits

California courts interpret the California constitutional *ex post facto* provision in the same manner as their federal counterpart.[107] The seminal definition of *ex post facto* for United States courts as supplied by *Calder v. Bull* reads:

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[103] *See Liebig*, 257 Cal. Rptr. at 577-78.

[104] *Id.* at 577 (citing community property cases).

[105] *Id.* at 578.

[106] *Id.* at 577.

[107] People v. Superior Court, 128 Cal. Rptr. 2d 794 (Cal. Ct. App. 2002).

> The prohibition, in the letter, is not to pass any law concerning, and after the fact; but the plain and obvious meaning and intention of the prohibition is this; that the Legislatures of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it.[108]

The Court highlighted that it placed a high value on the personal security of an individual who believes that the period for bringing prosecution lapsed.[109]

In *Roman Catholic Bishop of Oakland v. Superior Court*, the court said that it is "well settled that legislation reviving the statute of limitations on civil law claims does not violate constitutional principles."[110] The court relied upon the Court's holding in *Chase Securities,* which stated that in regard to repose that "their shelter has never been regarded as . . . a 'fundamental' right."[111] The *Roman Catholic Bishop of Oakland* court followed by citing *DeLonga v. Diocese of Sioux Falls*[112] which held in regard to child sex abuse that "a South Dakota statute reviving lapsed civil sanctions based on such conduct did not violate the ex post facto doctrine."[113] These holdings are in opposition to the general trend against retroactively applying legislation.

However, later the same court indicated that "[a]ccording to *ex post facto* doctrine, the fact that a statute is labeled as civil is not dispositive. If the effect of a statute is to impose punishment that is criminal in nature, the *ex post facto* law is implicated."[114] Up until this point, the courts have

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[108] Calder v. Bull, 3 U.S. 386, 390 (1798).

[109] *Id.*

[110] Roman Catholic Bishop of Oakland v. Superior Court, 28 Cal. Rptr. 3d 355, 359 (Cal. Ct. App. 2005).

[111] *Roman Catholic Bishop of Oakland*, 28 Cal. Rptr. 3d at 359.

[112] Delonga v. Diocese of Sioux Falls, 329 F. Supp. 2d 1092 (D.S.D. 2004).

[113] *Roman Catholic Bishop of Oakland*, 28 Cal. Rptr. 3d at 360.

[114] *Id.*

upheld retroactive legislation as not violative of the *ex post facto* laws by rationalizing that the statute was civil in nature. The court in *Roman Catholic Bishop of Oakland* hinted that there could be a situation where the civil consequence almost has a penal result – thus, a retroactive application in that situation could potentially violate the *ex post facto* laws.

The court in *Roman Catholic Bishop of Oakland* gave the example of punitive damages mirroring criminal sanctions, saying that they are designed to punish and deter, thus they serve a very similar function to criminal penalties.[115] In *Landgraf v. USI Film Products*, the Supreme Court remarked that punitive damages share significant characteristics with criminal sanctions.[116] California courts have also recognized these similarities between criminal sanctions and civil penalties before.[117]

While most courts agree that the potential for punitive damages may be sufficient to invoke the protection for the *ex post facto* doctrine, in *Roman Catholic Bishop of Oakland*, where an alleged sex abuse victim brought suit against a priest and the bishop for certain lapsed acts under the revived statute of limitations, the court nevertheless held the priest could not be protected by the doctrine of *ex post facto* even though punitive damages were at issue.[118] The court concluded that a punitive damages award in connection with a common-law tort claim was not "punishment" for purpose of the prohibition against *ex post facto* laws.[119]

Nevertheless, the *Roman Catholic Bishop of Oakland* court said that they still could find "an *ex post facto* violation if the statutory scheme is so punitive in purpose or effect that it negates the Legislature's intentions [to establish civil

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[115] *Id.*

[116] Landgraf v. USI Film Products, 511 U.S. 244, 281 (1994).

[117] *See* Adams v. Murakami, 813 P.2d 1348, 1350 (Cal. 1991); Dyna-Med, Inc. v. Fair Emp't & Hous. Com., 743 P.2d 1323 (1987); CAL. CIV. CODE § 3294(a) (West 2012) (punitive damages may be recovered "for the sake of example and by way of punishing the defendant").

[118] *Roman Catholic Bishop of Oakland*, 28 Cal. Rptr. 3d at 361.

[119] *Id.*

proceedings]."[120] The court indicated that in order to find it violative of the *ex post facto* doctrine, it would require "the 'clearest proof,' however. Only '[i]n those limited circumstances [will we] consider the statute to have established criminal proceedings for constitutional purposes.'"[121]

IX. Repose Should Be a Vested Property Interest But Retroactive Application is Still Constitutional Under the Fourteenth Amendment

A. Statutes of Limitation

Statutes of limitation serve a critical function of enforcing timely filing of civil suits. They act as protective tools for defendants from "being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost."[122] Additionally, they force defendants to more quickly face the wrongs committed. Ideally, this will assist a defendant to seek rehabilitation or allow others in contact with him or her to make accommodations to keep the defendant from hurting future victims.

Additionally, they "spare the courts from litigation of stale claims."[123] It is a waste of judicial resources to bring claims that have inadequate evidence. In the civil arena there is not the filter of prosecutorial discretion, without statutes of limitation the courts would be filled with cases that do not have enough evidence to meet the burden the court requires. Additionally, there is a concern about judicial integrity. Witnesses, even well intentioned, are more likely to misperceive the past the farther in time from actual events. Even though the jury acts as a filter to rule on the veracity of the witnesses, the jury would not be able to catch the misperceptions of witnesses, because the witnesses may

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120 *Id.* at 367.

121 *Id.* (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).

122 Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

123 *Id*.

believe these misperceptions themselves.

Further, these limitation periods encourage victims to bring their claims in a timely fashion, which is beneficial for both the victim and society as a whole. We incentivize bringing claims early in pursuit of justice because a victim, in most situations, can begin his or her healing process earlier. Additionally, the sooner the societal wrongs are identified, the sooner society can respond – through legislation, policies, or activist groups.

As a result of the strong policy reasons behind statutes of limitation, our justice system has embraced limitation periods for all acts besides murder.[124] Statutes of limitation are embedded in our jurisprudence. Thus, people have grown to rely on these limitation periods, and have a relied-upon interest in being free from litigation as a result. Therefore, revival destroys reliance interests – property interests.

B. Repose Afforded by Statutes of Limitation is a Property Interest

The right to due process found in the Fourteenth Amendment finds its origin in the words "nor shall any State deprive any person of life, liberty, or property without due process of law."[125] This clause was intended to protect valuable rights a man has against state action.[126] Substantive due process guarantees protection of an individual's life, liberty or property interests – the three main subdivisions of civil rights.[127] Substantive due process, through the word "liberty" in the due process clause, protects substantive values or rights and allows the court to review the substance of the law for infringement of these values.[128]

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[124] David Stout, *The Supreme Court: Sexual Abuse; Court Limits the Prosecution of Sexual Abusers of Children*, N.Y. TIMES, June 27, 2003, at A16.

[125] U.S. CONST. amend. XIV, § 1.

[126] Campbell v. Holt, 115 U.S. 620, 630 (1885) (Bradley, dissenting).

[127] *Id.*

[128] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing

There has been significant debate about the scope of the rights protected by the substantive due process clause and the level of scrutiny applied.[129] The Supreme Court recognizes implied rights, some fundamental and some not rising to that standard, requiring substantive protection. While many different theories have been advanced as to how to determine what a fundamental right is, the Supreme Court often looks to history and tradition to determine fundamental rights outside the text of the Constitution.[130]

Justice Bradley dissenting in *Campbell v. Holt* said, "[t]he term 'property,' in this clause, embraces all valuable interests which a man may possess outside of himself; that is to say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested right."[131] Thus, there are significant property interests that are not tangible property that should receive constitutional protection. However, the Court has found that the right to be immune from suit in the context of civil sexual abuse cases does not constitute such a property interest. Even though it is a very valuable interest that a defendant likely has come to rely upon, the Court has not decided that it is a protectable property interest under substantive due process.

The "immunity from suit which arises by operation of the statute of limitations is as valuable a right as the right to bring the suit itself."[132] This right was established for "just and wise policy reasons."[133] "Memories fade, and witnesses can die or disappear," Justice Breyer wrote in *Stogner v. California*. "Such problems can plague child abuse cases, where recollection after so many years may be uncertain, and 'recovered' memories faulty . . . ."[134] In *Chase Securities*, the

judicial review over acts of legislature and executive branches).

129 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 765 (Aspen Law & Bus. 2d ed. 2002).

130 *Id.*

131 *Campbell*, 115 U.S. at 630.

132 *Id.* at 631.

133 Stogner v. California, 539 U.S. 607, 631 (2003).

134 *Id.*

Supreme Court recognized that the extension of an expired civil limitations period can unconstitutionally infringe upon a "vested right."[135] The statute, once it has vested, is a "species of property which the fourteenth amendment of the constitution was intended to protect from adverse state legislation."[136] Chief Justice Sharkley in 1835 said, "[a] bar created by the statute of limitations, is as effectual as payment; and a defendant cannot be deprived of the benefit of such payment, nor of the evidence to support it; and having provided himself with evidence sufficient and legal at the time of payment, no law can change the nature, or destroy the sufficiency of the evidence."[137] Justice Sharkley masterfully demonstrates the connection between being immune from suit and receiving something tangible.

Despite how much society detests child sexual abuse, there is no disputing that the right to not be brought into court for such a heinous crime has value. In the situation of a defendant accused of child sexual abuse, knowing that he or she is free from such a horrible accusation has value, which has likely created reliance. To bolster this argument, there is a property interest, if not a liberty interest, in being free from the stigma of being a child sexual abuser.[138] There is also a tangible property interest at stake as a result of the litigation: the damages from these suits can be extremely costly.

With regard to the innocent who are accused, they may not be able to protect themselves from this deprivation of property when the claims are old. The defendant may not have retained valuable evidence or kept in contact with pertinent witnesses, and may only have faded memories of events making him appear less credible. There is a strong case that the right to be immune from suit is a vested property right. Accordingly, this valuable right should be protected

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135 Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945).

136 *Campbell*, 115 U.S. at 630.

137 Davis v. Minor, 2 Miss. (1 Howard) 183, 189.

138 Goss v. Lopez, 419 U.S. 565 (1975) (holding that kids who were suspended from school without a hearing were deprived of their liberty interest in their reputation and their property interest in going to school).

from capricious state legislation.

C. If Repose is Considered a Property Interest, Courts Should Still Find Retroactive Legislation Permissible because of State Special Needs

The Tenth Amendment provides for states to regulate their own affairs.[139] The Fourteenth Amendment allows the states to regulate for the benefit of the health, safety, and welfare of the states. As a result, even if repose is rightly considered a property interest, there is such an extreme "health, safety and welfare" state interest in allowing recourse for victims of sexual abuse that the state should be able to legislate in such a way that may infringe on that right. If the state regulated for this compelling reason, it would cease to be capricious.

These victims have often been subjected to sexual abuse within the boundaries of their own homes, and even worse, by people they trusted and relied upon for protection. Justice Kennedy says that when a "child molester commits his offense, he is well aware the harm will plague the victim for a lifetime."[140] By depriving the victim of civil recourse, the victim will have no opportunity within the justice system to hold the defendant responsible for his actions and subsequent injuries his abuse caused. Additionally, the victim will not have this system – our government – ever validate the experience of the abused child.

As discussed above, children are extremely disadvantaged in the process of bringing civil actions against their perpetrators. It is the responsibility of the state to try to protect these children, and when it fails, to at least assist in the children's healing process. The state cannot penalize a child for missing the limitations period when it was likely the very act of the sexual abuse that caused the repressed memory. That would be absolutely unjust.

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139 U.S. CONST. amend. X.

140 Stogner v. California, 539 U.S. 607, 651 (2003).

X. Retroactive Application of Civil Statutes of Limitation for Child Sex Abuse Cases May Violate Ex Post Facto Laws in the Future

The presumption against retroactive legislation is firmly rooted in the United States' history and tradition. The *Ex Post Facto* Clause of the Constitution of the United States, provides that "No . . . *ex post facto* law shall be passed."[141] In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, Justice Scalia in the concurring opinion expressed that the presumption against civil retroactive legislation is deeply rooted in our jurisprudence, underscoring that the legal doctrine is centuries older than the Republic.[142] "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[143] In *Kaiser*, Justice Scalia reasoned that because settled expectations should not be lightly infringed upon the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."[144] Therefore, regardless of what the wrong is, there is an underlying theme that a person should know what the consequences would be for the actions before they are done.

In the situation of child sexual offenders, the standard should not be any different. The Constitution of United States and the respective state constitutions do not discriminate between whom they protect. If the statute of limitations was permitted to act retroactively reviving the claim, the result could be penal in effect. In *Roman Catholic Bishop of Oakland*, the court indicated that under certain circumstances *ex post facto* laws could be violated if the retroactive application of civil statutes of limitation resulted in a criminal

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141 U.S. CONST. art. 1, § 9, cl. 3.

142 Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994) (citing Justice Scalia's concurrence in Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 855 (1990)).

143 *Id.*

144 *Kaiser Aluminum*, 494 U.S. at 855 (Scalia, concurring).

effect.[145] Therefore, it is not inconceivable that California could find that retroactively applying civil statutes of limitation violates the *ex post facto* laws.

The recent criminal case, *Stogner v. California*, lends credence to this possibility.[146] If the California courts latch on to the language and rationale espoused from the majority in *Stogner*, civil limitation periods could be affected in the future. In *Stogner*, the Court held that retroactively applying statutes of limitation in criminal cases was a violation of the *ex post facto* doctrine.[147] The *Stogner* Court reasoned that the retroactive application of statutes of limitation "literally falls within the categorical descriptions of the *ex post facto* laws" set forth in *Calder v. Bull* 200 years ago.[148] This category includes any "law that aggravates a crime, or makes it greater than it was, when committed."[149] The *Stogner* Court wrote that the California statute fits within this category as long as "those words are understood as Justice Chase understood them – *i.e.*, as referring to a statute that 'inflict[s] punishments, where the party was not, by law, liable to any punishments.'"[150] The Court held that retroactive application of the statute of limitations with that understanding aggravated the crime. "Long ago Justice Chase pointed out," Justice Breyer wrote in *Stogner*, "that the Clause protects liberty by preventing governments from enacting statutes with 'manifestly *unjust and oppressive'* retroactive effects."[151]

Similarly, a court could find that the retroactive application of civil statutes of limitation violates the *ex post facto* doctrine because the result for a civil defendant sued for child sexual abuse "inflicts punishment where the party was

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[145] Roman Catholic Bishop of Oakland v. Superior Court, 28 Cal. Rptr. 3d 355, 360 (Cal. Ct. App. 2005).

[146] Stogner v. California, 539 U.S. 607, 607 (2003).

[147] *Id*. at 632-33.

[148] *Id*. at 612.

[149] Calder v. Bull, 3 U.S. 386, 390 (1798).

[150] *Stogner*, 539 U.S. at 613 (quoting Justice Chase in *Calder*, 3 U.S. 386).

[151] *Id*. at 611.

not, by law, liable to any punishment."[152] The stigma, family upset, reputational damage, and other consequences of a civil sex abuse trial could be considered a "criminal penalty." However, this writer would find it a tragedy if the courts determined this to be an *ex post facto* violation because victims of child sexual abuse need some way to obtain recourse for the injuries they sustained.

XI. Conclusion

By reading the newspaper, watching the news, or perusing the Megan's Law website, one can see that sexual abuse is rampant. In an age unfortunately plagued with sexual deviance, especially targeted at children, both society and the states need to make protecting children a priority. Harvard psychiatrist, Judith Herman noted: "'Until recently the sexual abuse of children was the perfect crime. The perpetrator was fairly guaranteed that he would never be caught or successfully prosecuted. Now women – and men – have begun to use the courts to hold them accountable . . . .'"[153] California's legislature has demonstrated a commitment to assisting in this transformation. The legislation enacted in California over the past fifteen years is progressive compared to its peers, providing for a real opportunity for victims to seek recourse against their perpetrators.[154]

At the same time, this writer does not believe that courts should ignore the fact that immunity from civil suit is a vested property right, and a deprivation of such is a violation of the Fourteenth Amendment without a compelling state interest. Notwithstanding, and even more importantly, it is necessary that the state continues to move forward in its progress toward providing better safety for children and permitting victims legal recourse. Protecting children through granting legal access is a compelling state interest that should be trumpeted as such. In fact, by redefining the source of

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[152] *Id*. at 640 (quoting Justice Chase in *Calder*, 3 U.S. 386).

[153] Minouche Kandel & Eric Kandel, *supra* note 49, at 34 (quoting Herman at an American Psychiatric Association meeting in 1993).

[154] *See* Gordon, *supra* note 8, at 1391-94.

permissible retroactive legislation as a compelling state interest, the state may be giving the victims additional validation that they clearly deserve.