RETRIBUTION AGAINST CATHOLIC DIOCESES BY REVIVAL: THE EVOLUTION AND LEGACY OF THE NEW YORK CHILD VICTIMS ACT

Marie T. Reilly[*]

I. INTRODUCTION

Nearly all tort claims for child sexual abuse against Catholic organizations in litigation today involve abuse that occurred decades ago. 80.5% of incidents of clergy sexual abuse reported to Catholic dioceses before 2002 involved incidents that occurred before 1985.[1] For abuse reported after 2002, only 2.5% of incidents occurred between 2002 and 2019; and only 0.3% of incidents occurred between 2015 and 2019.[2]

Observers have estimated that between 80 to 90% of child sexual abuse claims in the US appear to be time-barred under generally applicable limitations periods.[3] Advocates for claimants have

[*] Professor of Law, Penn State University, Penn State Law.

[1] *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States, 1950-2002*, JOHN JAY COLL. OF CRIM. JUST. 28 (2004) https://tile.loc.gov/storage-services/master/gdc/gdcebookspublic/20/19/66/72/66/2019667266/2019667266.pdf [https://perma.cc/PF8V-JL87] [hereinafter *2004 John Jay Report*]. The number of reported incidents alleged to have occurred per year rose between the mid-1960's through the late 1970's, peaked in the 1980's, and thereafter declined sharply. *Id.* In 2002, the Boston Globe exposed clergy sexual abuse and coverup within the Archdiocese of Boston. *See, e.g.*, Matt Carroll, Sacha Pfeiffer & Michael Rezendes, *Church Allowed Abuse by Priest for Years*, BOS. GLOBE (Jan. 6, 2002), https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/story.html [https://perma.cc/4T8K-4DAX].

[2] *Frequently Requested Church Statistics*, CTR. FOR APPLIED RSCH. IN THE APOSTOLATE (CARA), https://cara.georgetown.edu/frequently-requested-church-statistics/ [https://perma.cc/S5KX-CMK8]. A special investigator retained by the Archdiocese of New York to review its handling of child sexual abuse claims concluded that only two substantiated complaints of sexual abuse of a child were asserted since 2002 and the archdiocese appropriately investigated both complaints. *See, e.g.*, Cindy Hsu, *Archdiocese of New York Concludes Year-Long Review Into Child Sexual Abuse Scandal*, CBS N.Y.C (Sept. 30, 2019, 5:30 PM), https://newyork.cbslocal.com/2019/09/30/archdiocese-concludes-year-of-review-into-church-abuse-crisis/ [https://perma.cc/KE4T-WZRD].

[3] *See* TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE 60 (2008). For child sexual abuse claims asserted in Australia, observers estimate that 96.77% of claims were time-barred under

persuaded some courts to apply the delayed discovery doctrine to provide limitations relief in child sex abuse cases.[4] And, they have persuaded legislatures to amend generally applicable tort limitations statutes to provide relief from the otherwise applicable time bar.[5]

In 2019, New York and eight other states enacted retroactive legislation that revived certain otherwise time-barred child sexual abuse tort claims filed within a designated time period, known as claim revival window legislation.[6] The New York Child Victims' Act (NYCVA) opened a window during which child sexual abuse claimants could sue Catholic and other organizations free of a limitations defense (a claims revival window).[7] Between July 1, 2018 and June 30, 2019, the annual average number of tort claims against Catholic dioceses nationwide was three times the annual average over the previous five years.[8] In 2019, 4,220 persons reported 4,434 allegations of child sexual abuse against Catholic organizations, a

canon law when under asserted. Kieran Tapsell, '*Catastrophic Institutional failure*' *Can Be Fixed*, NAT'L CATH. REP. (Jan. 9, 2018), https://www.ncronline.org/news/accountability/catastrophic-institutional-failure-cataloged-australian-abuse-commission-can-be [https://perma.cc/LA28-TPT6].

[4] *See* discussion *infra* Section V.

[5] *See generally* Marci A. Hamilton et al., *Child Abuse Statutes of Limitation Reform from 2002 to 2019*, CHILD USA (May 5, 2020), https://childusa.org/wp-content/uploads/2020/05/CHILD-USA-2019-Annual-SOL-Report-May-2020.pdf [https://perma.cc/37Z2-X3QR] (describing history of statutory limitations reform for child sexual abuse claims by state).

[6] N.Y. C.P.L.R. § 214-g (McKinney 2020); *see Revival and Window Laws Since 2002*, CHILD USA 27 (Mar. 26, 2021), https://childusa.org/wp-content/uploads/2021/02/US-WindowsRevival-Laws-for-CSA.pdf [https://perma.cc/4Z8P-QA3N]. In 2019, claims revival legislation passed in: New York, Washington, D.C., Montana, New Jersey, Arizona, Vermont, Rhode Island, California, North Carolina. *Revival and Window Laws Since 2002*, *supra.*

[7] *See* discussion of the NYCVA *infra* Section VI.

[8] *2019 Annual Report Findings and Recommendations*, U.S. CONF. OF CATH. BISHOPS (June 2020), http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/2019-Annual-Report-Final.pdf [https://perma.cc/B4RZ-7JQE] [hereinafter *2019 USCCB Report*]; *see also The Relative Success of Civil SOL Window and Revival Statutes State-by-State*, CHILD USA, https://childusa.org/wp-content/uploads/2020/03/child_relativesuccess_june2017_final.pdf [https://perma.cc/HM76-972J] [hereinafter *The Relative Success*] (reporting the number of lawsuits filed after revival window legislation opened in six states and Guam before nine states enacted revival window legislation in 2019); *see generally*, Associated Press, *New Wave of Sexual-Abuse Lawsuits Could Cost Catholic Church More Than $4 billion*, MKT. WATCH (Dec. 2, 2019, 12:30 PM), https://www.marketwatch.com/story/new-wave-of-sexual-abuse-lawsuits-could-cost-catholic-church-over-4-billion-2019-12-02 [https://perma.cc/W3JV-EYRM] (explaining that potentially more than 5,000 new sexual abuse lawsuits cases may be initiated in response to extension or suspension of statute of limitations); Associated Press, C*lergy Sex Abuse Allegations Triple, U.S. Catholic Bishops Report*, L.A. TIMES (June 26, 2020, 12:21 AM), https://www.latimes.com/world-nation/story/2020-06-25/clergy-sex-abuse-allegations-triple-us-roman-catholic-bishops-report [https://perma.cc/XV6U-3RG9] (detailing that in the 2018-2019 audit year there were 4,434 sex abuse allegations against the clergy).

200% increase in reports from 2018.[9] Jeff Anderson & Associates, a law firm representing child sexual abuse plaintiffs nationwide, reported that as of August 3, 2020, it had filed 1,002 child sexual abuse cases against Catholic dioceses in New York.[10] As of February 2021, four of the eight Catholic dioceses in New York have filed for bankruptcy under chapter 11.[11]

This article considers the evolution of limitations relief for time-barred child sexual abuse tort claims in New York culminating with the claims revival window enacted in 2019 as part of the NYCVA.[12] The story of child sexual abuse litigation against Catholic dioceses in New York and the legal and political history of the NYCVA exposes the important but largely unexplored balance of competing policy objectives that limitations laws strike. How child sexual abuse claimants achieved retribution by revival via the NYCVA reveals the fragility of limitations laws and the importance of coherent and consistent policy for revival of other types of time-barred claims.

Part II explains organizations' tort liability for child sexual abuse and their limitations defenses under New York law. Part III considers how limitations laws balance plaintiffs' interest in compensation for injury against public interest in the reliability of litigated outcomes. Part IV explains the development of arguments for limitations relief specific to child sexual abuse claims. Part V explains how New York courts evaluated these arguments before the NYCVA opened a claims revival window. Part VI explains the legislative history and content of the NYCVA. Part VII offers a critique of claims revival window legislation for child sexual abuse tort claims, and Part VIII concludes.

---

[9] *2019 USCCB Report*, *supra* note 8, at 27 (reporting on the period between July 1, 2018 and June 30, 2019); *2018 Annual Report Findings and Recommendations*, UNITED STATES CONF. OF CATH. BISHOPS 24 (June 2019), https://www.usccb.org/issues-and-action/child-and-youth-protection/child-abuse-prevention/upload/2018-CYP-Annual-Report.pdf [https://perma.cc/WW8V-DPPU] [hereinafter *2018 USCCB Report*].

[10] Mike Finnegan, *New York Child Victims Act Extended One Year to August 13, 2021*, JEFF ANDERSON & ASSOC. (Aug. 3, 2020), https://www.andersonadvocates.com/new-york-child-victims-act-extended-one-year/ [https://perma.cc/C4TF-PYXJ]; *see also The Relative Success*, *supra* note 8 (summarizing effect of claims revival legislation in states that enacted claims revival legislation before January 2019).

[11] Alex Wolf, *New York Catholic Diocese Bankruptcies Put Abuse Claims in Limbo*, BLOOMBERG L. (Feb. 12, 2021, 6:01 AM), https://news.bloomberglaw.com/bankruptcy-law/new-york-catholic-diocese-bankruptcies-put-abuse-claims-in-limbo [https://perma.cc/RB8Z-DRWX]. The four dioceses are Rochester, Buffalo, Syracuse, Rockville Centre. *Id.*

[12] The term 'limitations law' refers to statutes imposing limitations periods and the judge-made law that interpret the statutes. *See, e.g.*, Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitations*, 28 PAC. L. J. 453, 454 (1997).

II. BASES FOR TORT LIABILITY AND THE LIMITATIONS DEFENSE

Under New York law, an employer of a perpetrator who abuses a child is not vicariously liable for injuries caused by the abuser if the abusive actions are outside the scope of employment.[13] New York courts have held that sexual abuse of a child committed by an employee priest is outside the scope of the priest's employment and thus a diocesan employer is not vicariously liable.[14] An employer can, however, be directly liable for injuries caused by an employee acting outside the scope of employment based on the employer's own negligence in hiring, retaining or supervising the employee.[15] To

[13] *See, e.g.*, LEE S. KRIENDLER ET AL., 14 N.Y. PRAC., NEW YORK LAW OF TORTS § 9:16 (2020). Vicarious liability of an employer for torts committed by an employee allocates risk of harm to third persons intrinsic to the enterprise that the employer ostensibly controls to the employer. *See, e.g.*, JEFFREY J. SHAMPO, 74 AM. JUR. 2D TORTS § 60 (2021).

[14] *See, e.g.*, Kenneth R. v. Roman Cath. Diocese of Brooklyn, 654 N.Y.S.2d 791, 793 (N.Y. App. Div. 1997) ("[t]he plaintiffs' amended complaint alleges that . . . the appellant's codefendant, Enrique Diaz Jimenez, an ordained Roman Catholic priest, sexually abused the infant plaintiffs. Enrique Diaz Jimenez pleaded guilty to sexual abuse in the third degree based upon this conduct. However, as noted by the Supreme Court, that conduct did not fall within the scope of his employment and therefore the appellant is not vicariously liable for his conduct under the theory of respondeat superior") (citing Cornell v. State, 389 N.E.2d 1064 (N.Y. 1979)); Doe v. Rohan, 793 N.Y.S.2d 170, 173 (N.Y. App. Div. 2005) ("[s]ince the bus driver's acts of sexual abuse and molestation were a clear departure from the scope of his employment, committed solely for personal reasons, and unrelated to the furtherance of his employer's business, neither the bus company nor the School District can be held vicariously liable for his acts ") (citing N.X. v. Cabrini Med. Ctr., 765 N.E.2d 844 (N.Y. 2002)); Mazzarella v. Syracuse Diocese, 953 N.Y.S.2d 436, 437 (N.Y. App. Div. 2012) (stating that sexual abuse is a clear departure from scope of employment) (citing Wende C. v. United Methodist Church, 776 N.Y.2d 390 (N.Y. App. Div. 2004)); Doe v. Church of St. Christopher, No. 18551/03, 2006 N.Y. Misc. LEXIS 3076, at *5 (N.Y. Sup. Ct. Oct. 10, 2006) (holding that a sexual assault on a minor by a youth volunteer is outside the scope of duties as a volunteer). *But see*, Fearing v. Bucher, 977 P.2d 1163, 1168 (Or. 1999) (holding that a jury could find that the Archdiocese of Portland was vicariously liable for a priest's sexual abuse of a minor parishioner because whether the sexual abuse was in the scope of the priest's employment should turn not on the intentional nature of the abuse but rather on whether the abuse was "a direct outgrowth of and were engendered by conduct that was within the scope of . . . employment") (citing Chesterman v. Barmon, 753 P.2d 404 (Or. 1988)).

[15] *See, e.g.*, Seiden v. Sonstein, 7 N.Y.S.3d 565, 568 (N.Y. App. Div. 2015) (noting that hospital may be liable for negligent hiring or retention of an employee "to the extent that its employee committed an independent act of negligence outside the scope of employment, where the hospital was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act") (citing Doe v. Guthrie Clinic, Ltd., 5 N.E.3d 578 (N.Y. 2014)). If the employee was acting within the scope of employment when the injury occurred, the plaintiff is limited to a respondeat superior claim against the employer and may not pursue a claim for negligent hiring, retention, or supervision, except when the plaintiff seeks punitive damages for the employer's gross negligence in hiring, retention, or supervision of an employee. Quiroz v. Zottola, 948 N.Y.S. 2d 77, 89 (N.Y. App. Div. 2012) (citing Talavera v. Arbit, 795 N.Y.S.2d 708 (N.Y. App. Div. 2005)); Coville v. Ryder Truck Rental, 817 N.Y.S.2d 179, 180 (N.Y. App. Div. 2006) (quoting Rossetti v. Bd. of Educ., 716 N.Y.S.2d 460, 462 (N.Y. App. Div. 2000)). To support punitive damages against an employer for injury caused by an employee, the plaintiff must prove that the defendant's conduct "evidences a high degree of moral culpability, is so

state a claim under New York law for negligent hiring or supervision, the plaintiff must allege a causal connection between the injury and the employment, and that the employer knew or should have known *before* the injury occurred of the employee's propensity for the conduct which caused the injury.[16]

In a child sexual abuse case based on negligent supervision of a priest asserted against the Diocese of Brooklyn in 1997, the court held that the diocese had no common law duty to investigate a potential employee before hiring him unless the employer knew facts which would lead a reasonably prudent person to investigate the potential employee's history.[17] With respect to the plaintiff's allegation that the diocese negligently supervised the alleged perpetrator, the court declined to dismiss the plaintiff's claim because the plaintiff had alleged facts sufficient to support an inference that the diocese should have known of the perpetrator's propensity for sexual abuse of children.[18] The plaintiff alleged that the perpetrator made statements about his sexual behavior to other priests which, the court concluded, gave the diocese notice of the priest's propensity for abusive conduct.[19] In 2020, in considering child sexual abuse

flagrant as to transcend simple carelessness, or constitutes willful or wanton negligence or recklessness so as to evince a conscious disregard for the rights of others." Evans v. Stranger, 762 N.Y.S.2d 678, 680 (N.Y. App. Div. 2003) (citing Rey v. Park View Nursing Home, Inc., 692 N.Y.S.2d 686 (N.Y. App. Div. 1999)).

[16] *See*, Sheila C. v. Povich, 781 N.Y.S.2d 342, 350–51 (N.Y. App. Div. 2004) ("[a]n essential element of a cause of action for negligent hiring and retention is that the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury") (citing Gomez v. City of New York, 758 N.Y.S.2d 298 (N.Y. App. Div. 2003)); Werner v. Diocese of Rockville Ctr., No. 900012/2019, 2020 N.Y. Misc. LEXIS 2003, at *23 (N.Y. Sup. Ct. May 11, 2020) (quoting Bumpus v. New York City Transit Auth., 851 N.Y.S.2d 591 (N.Y. App. Div. 2008)); Krystal G. v. Roman Cath. Diocese of Brooklyn, 933 N.Y.S.2d 515, 523–24 (N.Y. Sup. Ct. 2011) (noting that while plaintiff must allege a causal connection between the employment and her injury, she need not show that the priest committed the abusive acts on the diocese's premises or with the diocese's property) (citing Mirand v. City of New York, 637 N.E.2d 263 (N.Y. 1994)); s*ee generally*, RESTATEMENT (SECOND) OF TORTS § 302B (AM. L. INST. 1965) (stating liability for negligent supervision exists "where the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.").

[17] *See Kenneth R*, 654 N.Y.S.2d at 795 (stating there is "no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee") (citing Ford v. Gildin, 613 N.Y.S. 2d 139 (N.Y. App. Div. 1994)).

[18] *See id*. at 796.

[19] *See id*. at 795. *But see* Bouchard v. New York Archdiocese, 719 F. Supp. 255, 262 (S.D.N.Y. 2010) (granting archdiocese's motion for summary judgment on negligent supervision claim because plaintiff failed to allege that Archdiocese had prior knowledge of priest's propensity for sexual abuse); *Krystal G.*, 933 N.Y.S.2d at 522 (dismissing the plaintiff's negligent hiring claim on account of missing allegations of facts supporting an inference that at the time of the hiring,

claims brought against the Diocese of Rockville-Centre under the NYCVA revival window, the New York Supreme Court held that an allegation that a diocese knew about clergy sexual abuse generally, absent allegations that a diocese had prior knowledge of the alleged abuser's propensity, was insufficient to support a claim for negligent supervision of a particular priest.[20]

Catholic and other religious organizations have contended that the First Amendment bars litigation against the organization based on its negligent supervision of a clerical employee as a prohibited entanglement in religious doctrine.[21] For example, in 2002, in *Malicki v. Doe*[22], the Florida Supreme Court rejected the Archdiocese of Miami's First Amendment entanglement defense.[23] The Florida Supreme Court held that tort liability "has a secular purpose" and its primary effect "neither advances nor inhibits religion."[24] Five years earlier, a panel of the New York Supreme Court rejected a similar defense by a Catholic diocese in a priest sexual abuse case.[25] Although legal commentators are divided on the issue, a majority of courts that have considered a religious autonomy defense in this context have rejected it.[26]

---

the diocese and school [the employer] should have known that the employee would present a sexual threat to children).

[20] *See* Doe v. Diocese of Rockville Ctr., No. 900010/2019, 2020 N.Y. Misc. LEXIS 1964, at *24 (N.Y. Sup. Ct. May 11, 2020) (holding that plaintiff sufficiently plead facts which, if proven, would establish the requisite knowledge or notice of the allegedly abusive priest's dangerous propensity for child sexual abuse) (citing Shor v. Touch-N-Go Farms, Inc., 933 N.Y.S.2d 686 (N.Y. App. Div. 2011)).

[21] *See* Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020) (holding the ministerial exception to nondiscrimination law applies to teachers at religiously affiliated schools whose job includes some element of religious instruction).

[22] Malicki v. Doe, 814 So. 2d 347 (Fla. 2002).

[23] *See id.* at 350.

[24] *Id.* at 364.

[25] *See* Kenneth R. V. Roman Cath. Diocese, 654 N.Y.S.2d 791, 796 (N.Y. Sup. Ct. 1997) (holding that due care in retention or supervision of a priest employee would not implicate any religious doctrine or inhibit religious practices) (citing Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990)); s*ee also*, Doe v. Congregation of the Mission of St. Vincent De Paul, No. 711854/15, 2016 N.Y. Misc. LEXIS 3940, at *17 (N.Y. Sup. Ct. Sept. 13, 2016) (holding that religious autonomy as defense to liability did not apply to negligent supervision claim against a Catholic religious order).

[26] *See* Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV. 1, 49-50, nn.271-276 (2017) (citing cases decided post-2002). *But see*, Doe v. Marianist Province of the United States, No. ED107767, 2019 Mo. App. LEXIS 2032, at *13 (Mo. Ct. App. Dec. 31, 2019) (First Amendment protects religious organization from tort liability for negligent hiring or supervision of a religious employee); Doe v. Roman Catholic Archdiocese of St. Louis, 347 S.W.3d 588, 595 (Mo. Ct. App. 2011); *see, e.g.*, Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up,* 29 CARDOZO L. REV. 225, 242 (2007) (arguing that a religious organization should be fully subject to tort liability for negligent supervision of its employees because judicial enforcement of reasonable of care does not implicate religious

III. THE PURPOSE OF LIMITATIONS LAW

The term 'statute of limitations' refers to any statute that bars litigation of a claim after a set interval of time after a cause of action accrues.[27] A claim on which the plaintiff fails to sue within the limitations period is subject to a complete defense on limitations grounds (the time-bar).[28] The time-bar creates an incentive for persons diligently to investigate and promptly sue on a claim.[29] And, it designates claims not asserted within the limitations period as inherently unworthy of the investment of judicial resources without regard to validity on the merits.[30] The United States Supreme Court has noted that statutes of limitations are not "a technical defense" but rather are "vital to the welfare of society and are favored in the law."[31] A New York court observed that statutes of limitations "are the result of legislative evaluation of a variety of considerations, not all of which are easily reconcilable."[32]

In 1828, Justice Story observed that legislatures intend limitations statutes to "suppress fraud, by preventing fraudulent and unjust

doctrine); Jeffrey R. Anderson et al., *The First Amendment: Churches Seeking Sanctuary for the Sins of the Fathers*, 31 FORDHAM URB. L.J. 617, 618 (2004) (describing Catholic organizations' assertion of the first amendment as the basis of ecclesiastical immunity as "an act of unparalleled audacity and brazen legal maneuvering."). *But see*, Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089, 1115 (2003) (noting that judicial determination of the reasonableness of a diocese's hiring or supervision of a priest required a court to consider questions of internal religious beliefs, risks subtle alternation of a church's internal structure, and necessarily offends the First Amendment).

[27] *See Statute of Limitations*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/statute_of_limitations [https://perma.cc/D35J-9SSD]; *see generally*, Geoffrey C. Hazard, Jr., *Judicial Redress for Historical Crimes: Procedure*, 5 INT'L L. F. DU DROIT INT'L 36, 39 (2003) (noting that all legal systems include a procedural mechanism to deal with undue delay in prosecution, of criminal or civil claims known as statute of limitations in common law systems). In contrast, a statute of repose makes filing a claim within a particular time period a required substantive element of a claim and recognizes a substantive defense rather than a purely procedural defense. RESTATEMENT (SECOND) OF TORTS § 899, cmt. g (AM. L. INST. 1979).

[28] *See Statute of Limitations*, JRANK, https://law.jrank.org/pages/10502/Statute-Limitations [https://perma.cc/6A3M-HS7D].

[29] *See* Wood v. Carpenter, 101 U.S. 135, 139 (1879) (stating that the effect of limitations laws is to stimulate plaintiffs to activity and punish their negligence and slumber) (citing United States v. Kubrick, 444 U.S. 111 (1979); *see, e.g.*, *Toussle*, 397 U.S. at 115 (noting that, in a criminal case, a time-bar "may also have the salutary effect of encouraging law enforcement officials [to] promptly . . . investigate suspected criminal activity"); Hovis v. United Screen Printers (*In re Elkay Indus.*), 167 B.R. 404, 40809 (D. S.C. 1994) ("limitations periods discourage plaintiffs from sitting on their rights.").

[30] See *Wood*, 101 U.S. at 139.

[31] United States v. Oregon Lumber Co., 260 U.S. 290, 299 (1922) (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)).

[32] Bassile v. Covenant House, 575 N.Y.S.2d 233, 235 (N.Y. Sup. Ct. 1991); s*ee generally* Ochoa & Andrew, *supra* note 12, at 454 (describing limitations laws as a public policy puzzle).

claims from starting up at great distances of time."[33] Story's observation, and the often-repeated statement that limitations laws bar claims "after memories have faded, witnesses have died or disappeared, and evidence has been lost,"[34] reveals an enduring judicial intuition that time degrades the reliability of evidence and correspondingly, the reliability of litigated outcomes and the judicial system.[35] The US Supreme Court has noted that stale claims are inherently suspect on the merits.[36] Persons tend not to neglect suing on valid claims and the lapse of years without a suit on the claim "creates . . . a presumption against its original validity."[37]

Limitations laws protect defendants from the burden of litigating claims based on time-degraded evidence because any outcome based on that evidence is inherently unreliable.[38] Potential defendants benefit from a stable and discernable endpoint to their potential liability.

An endpoint to potential liability has a social value as well.[39] Without statutes of limitations, tort liability would persist from the time the cause of action accrues until the plaintiff releases it by agreement or dies, and after death by wrongful death or survivor actions.[40] The endpoint to liability that limitations laws provide facilitates the stability and value of relationships and investments

[33] Sherwood v. Sutton, 21 F. Cas. 1303, 1307 (D. N.H. 1828).

[34] *See, e.g.*, Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (citing Order of R.R. Tel. v. Ry. Express Agency, Inc., 321 U.S. 342 (1944)); Toussle v. United States, 397 U.S. 112, 114 (declaring that a limitations period for a criminal prosecution "is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time").

[35] *See* Stogner v. California, 539 U.S. 607, 615 (2003) (noting that statutes of limitation protect the reliability of evidence); United States v. Eliopoulos, 45 F. Supp. 777, 781 (D. N.J. 1942) (noting that, in a criminal case, "prosecutions should not be allowed to ferment endlessly in the files of the government to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability").

[36] Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 390 (1869).

[37] *Id.* (observing the purpose of statute of limitations laws generally and holding that parties to an insurance contract may agree to a notice of claims period to govern their contract rights).

[38] *Id.* (noting that as evidence degrades with the passage of time "it might be impossible to establish the truth"). *See generally*, *Developments in the Law Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) ("[t]he primary consideration underlying such legislation is undoubtedly one of fairness to the defendant.").

[39] *See, e.g.*, Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (noting that statutes of limitations reflect public policy about the privilege to litigate and do not create a right in the defendant); Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987) ("[s]tatutes of limitation . . . are primarily instruments of public policy and of court management . . . "); Anthony v. Koppers Co., 425 A.2d 428, 441 (Pa. Super. Ct. 1980), *rev'd on other grounds*, 436 A.2d 181 (Pa. 1981) (noting that limitations laws serve a public purpose by providing repose and protecting the judicial system from dissipation of resources on adjudication of stale claims based on stale evidence).

[40] *See Anthony*, 425 A.2d at 441.

made in reliance on it.[41] An endpoint to liability in the form of a limitations defense focuses investment in law enforcement and civil litigation on recent or current wrongdoing. Focusing on recent or current claims likely yields a higher social return than investment in redress of historic wrongdoing.[42]

The incentive the time bar creates to sue promptly after an injury occurs protects the reliability of the legal system from the evidence-degrading effect of the passage of time, "when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth."[43] The limitations period sets the time after which a judicial outcome on the merits of the claim is likely to be less reliable than a random determination.[44]

To prove a claim for negligence against a defendant responsible for a perpetrator of child sexual abuse, the plaintiff must show that that the defendant was on notice of the perpetrator's propensity for child sexual abuse before the abuse occurred.[45] He must also prove that the perpetrator abused him causing his damages.[46] Priest personnel records maintained by Catholic dioceses have provided reliable documentary evidence of what the diocese knew about accusations of child sexual abuse against clergy and when it knew it.[47] This type of archival documentary evidence is remarkably impervious to the passage of time. With respect to proof of the abuse, and the damages caused by that abuse, however, relevant evidence is highly vulnerable to degradation over time.[48] The defendant's ability to challenge the plaintiff's testimony on these issues, and its insurers'

[41] *See* John P. Dawson, *Estoppel and Statutes of Limitation*, 34 MICH. L. REV. 1, 4 (1935) (noting that actors take statutes of limitations into account in their conduct and relationships and "to disturb or disentangle them after a considerable lapse of time is socially undesirable") *See* Hazard, *supra* note 27, at 39; Potts v. Celotex Corp., 796 S.W.2d 678, 684 (Tenn. 1990) (noting that limitations laws promote stability in personal and business relationships).

[42] Hazard, *supra* note 27, at 39 (noting that a legal system's "higher priority" is "dealing with more recent wrongs that disturb the community's peace").

[43] United States v. Oregon Lumber Co., 260 U.S. 290, 300 (1922) (quoting Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 390 (1869)).

[44] *See* Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 UNIV. CHI. L. REV. 1175, 1181 (1986) (stating that the time interval between the events that generate tort liability and the legal imposition of it by judgment affects the reliability of a litigated liability decision on the merits relative to other means of accomplishing the social goals of tort laws).

[45] *See, e.g.*, cases cited *supra* note 16.

[46] *See, e.g.*, cases cited *supra* note 16.

[47] *See, e.g.*, *Introduction to the Archives*, BISHOPACCOUNTABILITY.ORG, http://www.bishop-accountability.org/ma-boston/archives/PatternAndPractice/sample-documents.htm [https://perma.cc/L6ZF-8J85] (archiving of diocesan and other documents online that were made public in connection with sexual abuse complaints).

[48] *See* discussion, *supra* Part III.

ability to ascertain coverage, depend on the eyewitness accounts of the abuse, evidence which notoriously degrades in availability and reliability over time.[49] Evidence relevant to the plaintiff's damages and the causal link between those damages and the alleged abuse is similarly at risk of degradation over time.[50]

The degradation of evidence over time likely increases the social costs of litigation. As the reliability of evidence declines over time, the cost of evidence-based litigation increases, and the likelihood of settlement decreases.[51] A particular limitations period ideally assigns the risk of an erroneous judicial outcome due to time-degraded evidence to the plaintiff (via the time-bar effect) at the point in time where the risk to the reliability of the judicial system (from an unreliable outcome) outweighs the value of giving plaintiff access to the judicial system.

The private and social value of a limitations period is relatively simple. The difficulty is in the details. To maximize the value of the incentive to sue promptly after an injury occurs, the ideal length of a limitations period applicable to a certain kind of cause of action should be the average time it takes a plaintiff acting reasonably to investigate and file a complaint. The time necessary to sue varies depending on the circumstances, ostensibly reflecting the legislatures' perceptions of how the passage of time affects the plaintiffs' capacity to investigate and commence suit, and the reliability of litigation, on various types of claims.

Of course, when a limitations period ends depends on when it begins to run. A limitations period typically beings to run when the plaintiff's cause of action accrues.[52] The adoption of this starting point for the limitations clock reflects an implicit assumption that the plaintiff is aware of the injury when it occurs and from that moment is able to control whether and when to assert a claim.[53] In tort actions for damages due to intentionally or negligently caused

[49] *See* discussion, *supra* Part III.

[50] *See* discussion, *supra* Part III.

[51] *Id.* at 1182.

[52] *See* United States v. Kubrick, 444 U.S. 111, 117 (1979); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945); Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp., 73 F.3d 971, 973 (9th Cir. 1996); Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988); Gates Rubber Co. v. USM Corp., 508 F.2d 603, 610 (7th Cir. 1975); *see also* Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982).

[53] Murphy v. Merzbacher, 697 A.2d 861, 864 (Md. 1997) (citing Harig v. Johns-Manville Products, 394 A.2d 299, 303 (1978)) ("Ordinarily, our statute of limitations begins to 'accrue' on the date of the wrong. The assumption, of course, is that 'a potential tort plaintiff is immediately aware that he [or she] has been wronged [and] is therefore put on notice that the statute of limitations" is running.'") (alteration in original).

injury, a cause of action for injury of which the plaintiff is immediately aware (traumatic injury) accrues when the injury occurs.[54] For injuries that occur without the plaintiff's awareness (latent injuries), the premise that the plaintiff can from the occurrence control the cause of action is invalid, and a question arises as to when the limitations period should begin to run.

Courts have recognized and applied what has come to be known as the delayed discovery doctrine to toll the limitations period for injuries that the plaintiff cannot discover until later.[55] The premise for delaying the commencement of the limitations period in these circumstances is that the plaintiff should not be subject to the time-bar until she has or should have the capacity to control whether and when to assert a claim for compensation for injury.[56] Put another way, tolling the limitations period until the plaintiff has reason to know of her injury and its cause eliminates the inefficient incentive to undertake continuous investigation of all possible claims to avoid the time-bar effect that would otherwise arise.

The delayed discovery doctrine first appeared in tort actions where, the plaintiff could not reasonably have discovered that she had been injured until sometime after the injury occurred because of the defendant's fraud.[57] Courts reasoned that until the plaintiff reasonably could discover the defendant's fraud, the running of the limitations clock would reward a defendant who managed to conceal the injury he inflicted by fraud until after the limitations period expired.[58]

---

[54] *E.g.*, Dana v. Oak Park Marina, 660 N.Y.S.2d 906, 910 (App. Div. 1997) (stating that the limitations period begins to run in a tort action upon injury).

[55] *See, e.g.*, 1 CACI 455 (2020) (stating, in form jury instruction, when the plaintiff reasonably should have discovered that she was harmed by another person's wrongful conduct).

[56] *E.g.*, Gabelli v. SEC, 568 U.S. 442, 450–51 (2013) ("Most of us do not live in a state of constant investigation; absent any reason to think we have been injured, we do not typically spend our days looking for evidence that we were lied to or defrauded.").

[57] *E.g.*, Sherwood v. Sutton, 21 F. Cas. 1303, 1307 (D. N.H. 1828) (delaying the commencement of the limitations period in a tort action for fraud until the plaintiff reasonably could have discovered the fraud); Veazie v. Williams, 49 U.S. 134, 158–59 (1850) (recognizing an equitable exception to the commencement of a limitations period for a tort action for a fraudulent bidding scheme until the plaintiff reasonably could have discovered the fraud); Rosenthal v. Walker, 111 U.S. 185, 186–88 (1884) (recognizing equitable exception to a limitations defense to a fraudulent transfer action until the bankruptcy trustee discovered the fraudulent transfer because the transferee hid the transfer from the trustee). *See generally*, JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA 740 (9th ed. 1866) ("In cases of fraud or mistake, [the limitations period] will begin to run from the time of the discovery of such fraud or mistake, and not before."); William Trickett, THE LAW OF LIMITATIONS OF ACTIONS IN PENNSYLVANIA 248 (1888) ("In cases in which fraud is the fact out of which a cause of action arises, the commencement of the statutory term will be postponed until the discovery of this fact.").

[58] *Sherwood*, 21 F. Cas. at 1305. *See also* Bailey v. Glover, 88 U.S. 342, 349 (1874):

By the beginning of the twentieth century, courts expanded the delayed discovery doctrine beyond tort actions for fraud.[59] For example, in *Urie v. Thompson*,[60] the Supreme Court applied the delayed discovery doctrine as federal common law to delay the running of the limitations period under the Federal Employer's Liability Act until the plaintiff reasonably should have discovered that thirty years of inhaling silica dust in his workplace caused his silicosis.[61] Courts began to use the term "latent injury" (contrast "traumatic injury") to describe a "self-concealing" injury, to which the delayed discovery doctrine applies."[62] Delaying the start of the limitations period until the plaintiff should have discovered the injury in latent injury cases similarly withheld the benefit of the time-bar from a defendant whose tortious conduct, although not fraudulent, happened by its nature to be self-concealing.[63]

In cases of latent injury, as for cases of fraud, courts hold that the limitations period begins to run at the earlier of: 1) the plaintiff's actual discovery of the injury; or 2) the time when the plaintiff with reasonable diligence should have discovered the injury.[64] A cause of action accrues when, in the exercise of reasonable diligence, a plaintiff should have discovered both the injury and its cause,

---

> To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

[59] *See* CALVIN CORMAN, LIMITATIONS OF ACTIONS §§ 11.1.2.1, 11.1.2.3, 136–42, and nn.6–13, 18–23 (1991) (collecting cases). *See generally*, Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965, 972–74 (1988) (noting a latency period between the exposure and the injury, and uncertainty about the causal relationship between the harm and the injury).

[60] 337 U.S. 163 (1949); *see also*, United States v. Kubrick, 444 U.S. 111, 113, 123–24 (1979) (applying federal common law to a latent injury); Simmons v. United States, 805 F.2d 1363, 1366 (9th Cir. 1986) (same).

[61] *Urie*, 337 U.S. at 168–71 (1949); *see also*, Merck & Co. v. Reynolds, 559 U.S. 633, 645 (2010) ("[S]tate and federal courts have applied forms of the 'discovery rule' to claims other than fraud.").

[62] *See, e.g.*, Albertson v. TlJ. Stevenson & Co., 749 F.2d 223, 229 (1984) (using the phrase "latent injury" to refer to an injury "which either is not or cannot be discovered until long after the tortious act that caused the injury has occurred"); St. John v. Arkansas Lime Co., 8 Ark. App. 278, 279 (1983) (noting that under the "latent injury theory" the limitations period begins to run when the plaintiff discovers the "substantial character" of the injury).

[63] *E.g.*, Gabelli v. SEC, 568 U.S. 442, 450 (2013) (noting that "when the injury is self-concealing, private parties may be unaware that they have been harmed.").

[64] *See id.*; Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946); *see, e.g.*, Rotella v. Wood, 528 U.S. 549, 560–61 (2000).

without regard to when the plaintiff subjectively knows of all facts regarding the injury and its causes.[65]

IV. LIMITATIONS DEFENSES IN CHILD SEXUAL ABUSE CASES

The development of legal arguments to justify delayed discovery of a child sexual abuse claim as an exception to the time-bar effect of a statute of limitations mirrored developments in psychological theories regarding memory and cognition of childhood sexual trauma. Although their scientific bases are controversial, psychological theories have been remarkably successful in distinguishing injury from child sexual abuse from injury from other forms of traumatic abuse and as bases for arguments in favor of limitations relief for child sexual abuse claimants.

A. Repressed Memory Theory

During the late 1980's and early 1990's, the number of adults asserting tort claims against their parents for incestuous sexual abuse they experienced as children rose significantly.[66] The surge may be attributable in part to public fascination with child sexual abuse stimulated by national media attention to the McMartin pre-school criminal sexual abuse trial that began in 1984.[67] In 1988, in

[65] *See* 37 AM. JUR. 2D *Fraud and Deceit* § 347 (2021 Update) (noting that in applying the discovery rule, courts charge a plaintiff with discovery of an injury once a reasonably diligent party would be in a position that they should have sufficient knowledge or information to discovery the defendant's fraud).

[66] *See* Mark MacNamara, *The Rise and Fall of the Repressed Memory Theory in the Courtroom*, 15 CAL. LAW. 36, 38 (1995) (estimating 800 repressed memory childhood incestuous abuse cases between the mid-1980s and 1995); James A. McClear, *New Therapy Leads Families to Court*, DET. NEWS, May 12, 1993, at A1 (describing rise in lawsuits for childhood sexual abuse); Gary Hood, *The Statute of Limitations Barrier in Civil Suits Brought by Adult Survivors of Child Sexual Abuse: A Simple Solution*, 1994 UNIV. ILL. L. REV. 417, 417 (1994) (noting that incestuous child sexual abuse has "become an issue of great public concern in recent years" and that the "incidence of known child sexual abuse has reached staggering proportions").

[67] *See generally*, Clyde Haberman, *The Trial that Unleashed Hysteria Over Child Abuse*, N. Y. TIMES, (March 9, 2014) https://www.nytimes.com/2014/03/10/us/the-trial-that-unleashed-hysteria-over-child-abuse.html [https://perma.cc/BE24-GG4S] (describing New York Times coverage of the McMartin Preschool abuse trial and noting that media coverage "unleashed nationwide hysteria about child abuse and Satanism in schools"); Robert Reinhold, *The Longest Trial- A Post-Mortem; Collapse of a Child Abuse Case: So Much Agony for So Little*, N. Y. TIMES, Jan. 24, 1990, at A1 (describing the trial); Debbie Nation, *The Ritual Sex Abuse Hoax,* THE VILLAGE VOICE, January 12, 1990, at 36–44, *reprinted* in Debbie Nathan, *Women and Other Aliens: Essays from the U.S. Mexico Border* (Cinco Puntos Press 1991) (describing the criminal trials against individuals associated with a California pre-school charged with child sexual abuse).

Johnson v. Johnson,[68] a federal district court in Illinois noted that childhood incest was "a major social problem."[69]

During this period, father/daughter incestuous sexual abuse was a topic of intense interest among feminist theorists and psychotherapists as a cause of adult women's depression and other emotional and psychological disorders.[70] In *The Courage to Heal*,[71] a best-selling book in 1988, the authors, a college creative writing instructor and her student, neither of whom had scientific or psychiatric training,[72] asserted that women who presented symptoms of psychological or emotional dysfunction as adults were likely victims of incestuous abuse as children.[73] The authors posited that women with these symptoms who did not remember any incidents of

[68] 701 F. Supp. 1363 (E.D. Ill. 1988).

[69] *Id.* at 1370. The court cited a law student note for the proposition that "[m]uch of the sexual abuse of children occurs within the family." *Id.* (citing Melissa G. Salten, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189 (1984)). *See* E. SUE BLUME, SECRET SURVIVORS: UNCOVERING INCEST AND ITS AFTEREFFECTS IN WOMEN xxi (1st trade paperback ed. 1997) (claiming that "incest is so common as to be epidemic. . . . At any given time *more than three quarters of my clients* are women who were molested in childhood by someone they knew.") (alteration in original); BEVERLY ENGLE, THE RIGHT TO INNOCENCE: HEALING THE TRAUMA OF CHILDHOOD SEXUAL ABUSE 21 (1st ed. 1989) (citing three studies purporting to estimate frequency of childhood incestuous sexual abuse). Measuring frequency of childhood sexual abuse is notoriously difficult because: 1) what acts or experiences constitute "sexual abuse" are not consistently defined and counted; 2) officially reported incidents of abuse may not account for all abuse; and 3) reporting periods are not consistent across studies. *See also* Emily M. Douglas & David Finkelhor, *Childhood Sexual Abuse Fact Sheet*, UNIV. OF N.H. CRIMES AGAINST CHILD. RSCH. CTR., http://www.unh.edu/ccrc/factsheet/pdf/CSA-FS20.pdf [https://perma.cc/GQ2J-2MW7] (discussing statistics of frequency of childhood sexual abuse); DAVID M. FERGUSON & PAUL E. MULLEN, CHILDHOOD SEXUAL ABUSE: AN EVIDENCE BASED PERSPECTIVE 35–36 (Sage Publications 1999); ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY 142 (St. Martin's Press 1994) (noting that the premise that incest is critical social problem is "[t]he first and most forcefully stated principle of the incest-survivor movement").

[70] *See, e.g.*, DIANA E. H. RUSSELL, THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN (Basic Books, 1986 and 2d ed. 1999) (arguing that childhood incest was a widespread national crisis based on a survey of 930 adult women, 16% of which reported having been sexually abused by a relative before age 18); Richard P. Kluft, *Ramifications of Incest*, 27 PSYCHIATRIC TIMES 2011 (2011), https://www.psychiatrictimes.com/view/ramifications-incest [https://perma.cc/Z2Y3-LQZF] (noting the contribution of feminist authors and traumatologists in raising awareness within the psychiatric profession regarding the prevalence of father-daughter incest).

[71] ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILDHOOD SEXUAL ABUSE (1st ed. 1988). Bass and Davis published three subsequent editions of THE COURAGE TO HEAL, most recently a 20th anniversary edition in 2008; *see also*, Elizabeth Loftus, *The Reality of Repressed Memories,* 48 AM. PSYCHOLOGIST 518, 537 (1993) (noting that "all roads on the search for popular writings inevitably lead to [the book]."). The book was described as "the bible of the []survivor[']s[] movement." B. Tully, *Recovered Memories of Childhood Sexual Abuse: A Concise Social History of the Phenomenon, and the Key Psychological Concepts Relevant to Understanding the Disputes Concerning Such Claims,* J. CLINICAL FORENSIC MED. 73, 74 (1996).

[72] BASS & DAVIS, *supra* note 71, at 14.

[73] *Id.* at 20.

incestuous abuse likely had unconsciously repressed their memories as a protective response to the trauma of the abuse.[74] The authors encouraged women who experienced symptoms of depression or emotional disorders to uncover their repressed memories of childhood incest through therapy and thereby overcome them.[75]

One aspect of the recommended therapy was a civil tort action against a parent incest-perpetrator.[76] A best-selling book in 1990 about incestuous child abuse, *Secret Survivors*, included a section titled "Suing Perpetrators," in which the author noted the psychological benefit to an incest survivor of suing the perpetrator, and that settlements can pay for "large medical and psychotherapy expenses."[77] Access to coverage under parents' homeowners' insurance policies may have also been a factor in the increase in tort claims for childhood incestuous abuse against parents.[78]

The use of psychological memory repression theory as basis for application of the delayed discovery doctrine in child incest legal cases sparked controversy.[79] There is no practical way to distinguish between unconsciously repressed memories of actual abuse revived through therapy and false "memories" of abuse suggested by a

[74] *Id.* at 22.

[75] *Id.*; *see also*, ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY 21-22 (1994) (describing psychotherapeutic techniques to stimulate "memories" of childhood sexual abuse among women patients); PAUL. R. MCHUGH, TRY TO REMEMBER: PSYCHIATRY'S CLASH OVER MEANING, MEMORY, AND MIND 252 (2008) (noting that repressed memory theory advanced in THE COURAGE TO HEAL was used primarily by "incompetent therapists").

[76] *See* BASS & DAVIS, *supra* note 71, at 307, 308.

[77] *See* E. SUE BLUME, SECRET SURVIVORS: UNCOVERING INCEST AND ITS AFTEREFFECTS IN WOMEN 284 (1st ed. 1990); *see also*, LOFTUS & KETCHAM, *supra* note 75, at 173-74 (describing how authors of popular incest survivor self-help books encouraged lawsuits against perpetrators).

[78] *See, e.g.*, S.V. v. R.V., 933 S.W.2d 1, 13 (Tex. 1996) (noting that adult daughter's allegation against father for incestuous abuse based on negligence rather than intentional tort presumably was to access the parents' homeowner's policy coverage) (citing Boyles v. Kerr, 855 S.W.2d 593, 601 (Tex. 1993)); *Boyles*, 855 S.W.2d at 601, 604 (Tex. 1993) (Gonzalez, J. concurring) (reasoning that plaintiff's counsel's strategy in pursuing a claim based on negligent infliction of emotional distress was to preserve access to defendants' homeowner's insurance); *see also*, Ralph Slovenko, *The "Revival Of Memory" of Childhood Sexual Abuse: Is the Tolling of the Statute of Limitations Justified?*, 21 J. PSYCHIATRY & L. 7, 8, 20 (1993) (noting that "with the demise of parental immunity," childhood incest suits "mushroomed" usually with settlement from insurance coverage, and notwithstanding denial of liability by the policyholders, their insurance carrier controls settlement); Mary Hull, *Family Secrets*, 7 TEX. LAW. 2, 2–3 (1991) (noting that after a Texas court held that homeowners' insurance covered a claim for incestuous sexual abuse, child versus parent incest claims increased).

[79] *See* Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Case of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 132 (1993) (concluding that repressed memory theory raised questions of the reliability and authenticity of evidence particularly in childhood sexual abuse cases in which the plaintiff's testimony regarding recovered memories of the abuse was uncorroborated).

therapist.[80] The plaintiff's testimony regarding her recent recovery in therapy of previously repressed memory of abuse was typically uncorroborated except by her treating therapist.[81] Theories about how persons remember—or do not remember—experiences of childhood sexual abuse has been described as the "memory wars"[82] and "one of the most bitter controversies in psychiatry and psychology . . . ."[83] Memory repression theory provided an explanation for adult psychological problems such as depression, suicidal behavior, eating disorders, sleep disturbances, drug or alcohol abuse, sexual dysfunction, tendencies towards promiscuity, and a vulnerability towards revictimization.[84] As one court noted, however, although these maladies may be prevalent among people who experienced prior traumas,[85] the presence of such maladies does not establish the occurrence of the trauma it presupposes, what kind of trauma occurred, or who caused it.[86] Nonetheless, some courts

[80] *See* S.V. v. R.V., 933 S.W.2d at 17 (citing American Psychiatric Ass'n, *Statement on Memories of Sexual Abuse* (1993), reprinted in 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 261, 261 (1994)) ("It is not known how to distinguish, with complete accuracy, memories based on true events from those derived from other sources."); American Medical Ass'n, Council on Scientific Affairs, *Report on Memories of Childhood Abuse* 3, 43–45 (1994), reprinted in 43 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 114, 116 ("there is no consensus about the extent or sources of [memory malleability]").

[81] *See, e.g.*, Johnson v. Johnson, 701 F. Supp. 1363, 1370 (N.D. Ill. 1988) (noting that the proof offered to show plaintiff's delayed discovery was the plaintiff's and her therapist's affidavit testimony of plaintiff's memory repression). In *Johnson v. Johnson*, the Illinois federal district court predicted that the Illinois Supreme Court would recognize the delayed discovery rule in a childhood incest repressed memory case and that when the plaintiff should have discovered her injury and its cause was a question of fact for the jury. *Id.* at 1370.

[82] *E.g.*, FREDERICK CREWS ET AL., THE MEMORY WARS: FREUD'S LEGACY IN DISPUTE 33–34 (1995); Lawrence Patihis et al., *Are the "Memory Wars" Over? A Scientist-Practitioner Gap in Beliefs about Repressed Memory*, 25 PSYCHOL. SCI. 519, 528, 528 tbl.5 (2014) (study concluding that clinicians had a greater tendency to believe that people repress memories than researchers did, that greater critical thinking ability was associated with heightened skepticism about repressed memories, and that clinicians in 2014 were more skeptical about repressed memory theory than clinicians in the 1990s).

[83] Richard J. McNally, *Dispelling Confusion About Traumatic Dissociative Amnesia*, 82 MAYO CLINIC PROC. 1083, 1083 (2007) (arguing that the evidence that repressed memory theorists give in support of their theory—to that a sizeable minority of survivors of childhood sexual abuse are unable to remember their trauma—is subject to other, more plausible interpretations.); s*ee* Roland Summit, *Recognition and Treatment of Child Sexual Abuse*, 116 (1983); Judith L. Herman & Emily Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma,* 4 PSYCHOANALYTICAL PSYCHOL. 1, 7–8 (1987) (stating that people who experience sexual abuse as children tend to remember both the abuse and the identity of the perpetrator); Jill Blake–White & Christine Madeline Kline, *Treating the Dissociative Process in Adult Victims of Childhood Incest*, J. CONTEMP. SOC. WORK 394, 397 (1985).

[84] *See* Carolyn B. Handler, *Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle*, 15 FORDHAM URB. L. J. 709, 716–17 (1986).

[85] *See, e.g.*, *id.*; Child *Sexual Abuse Statistics: Consequences*, DARKNESS TO LIGHT, 1–4 (2015), https://www.d2l.org/wp-content/uploads/2017/01/Statistics_5_Consequences.pdf [https://perma.cc/59C8-FWGE] (citing to studies).

[86] *See, e.g.*, S.V. v. R.V., 933 S.W.2d 1, 19 (Tex. 1996).

were persuaded to delay commencement of the limitations period via the delayed discovery doctrine on grounds of repressed memory theory in child sexual abuse cases.[87]

B. Trauma and Delayed Connection of Injury and Consequences

In 1983, Roland Summit, a psychiatrist studying the effects of child sexual abuse, asserted that the nature of child sexual abuse combined with psychological responses to it (shame, embarrassment, sense of responsibility and allegiance to the perpetrator) may explain why abused children adapt to accept the abuse, fail to remember the abuse they experience, and either fail to or delay in reporting the abuse.[88] Summit asserted that this adaptive reaction, which he coined the "sexual abuse accommodation syndrome," may explain why children react to sexual abuse differently than adults do.[89] Lawyers for child sexual abuse claimants offered expert psychological testimony on the syndrome with mixed results to argue that a plaintiff's testimony about memory of child sexual abuse is uniquely reliable (if the child claims to have been abused) or unreliable (if the child denies having been abused), and as a basis for limitations relief to justify the plaintiff's delay in suing for compensation.[90]

Adults alleging tort claims for childhood sexual abuse relied on research on the psychological and emotional repercussions of child

---

[87] *E.g.*, Martinelli v. Bridgeport Roman Catholic Diocesan, Corp., 10 F. Supp. 2d 138, 143 157, 160 (D. Conn. 1998) (noting that the plaintiff's repressed memories of childhood sexual abuse were recovered during a conversation decades later with a childhood friend); Hearndon v. Graham, 767 So.2d 1179, 1181 (Fla. 2000) (applying delayed discovery rule to postpone accrual of cause of action due to plaintiff's "traumatic amnesia" caused by childhood sexual abuse); Vesecky v. Vesecky, 880 S.W.2d 804, 807 (Tex. App. 1994) (applying discovery rule to delay accrual on evidence that plaintiff had no knowledge of her father's sexual abuse when it occurred during her childhood and could not reasonably have discovered the abuse until less than two years before she filed).

[88] *See* Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 181 (1983).

[89] *Id.* at 181.

[90] *See, e.g.*, Commonwealth v. Dunkle, 602 A.2d 830, 834–35 (Pa. 1992) (in a criminal case, admission of expert testimony on the syndrome was reversible error because the theory was not scientifically valid or generally accepted among child psychiatrists), *superseded by statute*, 42 PA. CONS. STAT. § 5920(a)(1)–(2), (b)(1)–(2) (2012). *But see* Wheat v. State, 527 A.2d 269, 270, 272, 275–76 (Del. 1987) (holding that admission of expert testimony on the syndrome was not reversible error because it offered an explanation other than deceit for behavior perceived as inconsistent with a valid claim for child sexual abuse). *See generally* Michele Meyer McCarthy, *Admissibility of Expert Testimony on Child Sexual Abuse Accommodation Syndrome in Kentucky*, 81 KY. L. J. 727, 729 (1992); Arthur H. Garrison, *Child Sexual Abuse Accommodation Syndrome: Issues of Admissibility in Criminal Trials*, 10 INST. PSYCHOL. THERAPIES (1998); Kenneth J. Weiss & Julia Curcio Alexander, *Sex, Lies, and Statistics: Inferences from the Child Sexual Abuse Accommodation Syndrome*, 41 J. AM. ACAD. PSYCHIATRY & L. 412, 415 (2013).

sexual abuse to support an alternative to repressed memory theory, or sexual abuse accommodation syndrome as a basis for limitations relief.[91] The alternative theory asserted that although plaintiffs were aware of the abuse when it occurred and thereafter, plaintiffs could not perceive *the connection between the abusive incidents and their emotional and psychological injury* until later, through therapy or via some other triggering event.[92] Application of the discovery doctrine was warranted, proponents argued, because although they knew they were injured at the time the abuse occurred, the unique nature of child sexual abuse caused unique psychological trauma, the harmful consequences of which could remain hidden from the plaintiff long after the abusive incidents occurred.[93] The limitations period should therefore be tolled until a "triggering event" sparked in the plaintiff an understanding of the *connection between* the injury the plaintiff experienced as a child and the plaintiff's current psychological and emotional problems.[94]

The delayed connection theory posited that the limitations period should commence only when the plaintiff reasonably could have understood fully the psychological, emotional, and legal ramifications

[91] *See, e.g.*, Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 782, 785 (Wis. 1995). Studies showed that adults who experienced childhood sexual abuse exhibited delayed-onset psychological symptoms like those associated with post-traumatic stress disorder (PTSD). *See, e.g.*, Francine Albach & Walter Everaerd, *Posttraumatic Stress Symptoms in Victims of Childhood Incest*, 57 PSYCHOTHERAPY & PSYCHOSOMATICS 143, 148 (1992) (showing 62% of adult female incest victims met criteria for PTSD); Susan McLeer et al., *Post-Traumatic Stress Disorder in Sexually Abused Children*, 27 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 650, 653 (1988) (collecting studies reporting 46–66% of sexually abused children demonstrate significant and severe symptoms, and 40–80% of symptoms constitute partial criteria for DSM-III-R (PTSD)); DAVID FINKELHOR, A SOURCEBOOK ON CHILD SEXUAL ABUSE 162–63 (1986).

[92] *See, e.g.*, *Pritzlaff*, 533 N.W.2d at 785, 786; Marci A. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 BROOK. L. REV. 397, 399–400 (2014) ("Social science studies have shown that children in fact do not fully understand (if they understand at all) what sex is, and certainly have no idea of the lifelong consequences of being sexually assaulted."). For more statistics on child sexual abuse, *see* studies cited in *Child Sexual Abuse Statistics*, DARKNESS TO LIGHT, http://www.d2l.org/wp-content/uploads/2017/01/all_statistics_20150619.pdf [https://perma.cc/JY5Y-5DZ2]; *Child Sexual Abuse Statistics: Reporting Abuse*, DARKNESS TO LIGHT, http://www.d2l.org/wp-content/uploads/2017/01/Statistics_6_Reporting.pdf [https://perma.cc/VS9T-C7CS]; *Statistics - Child Sexual Abuse*, CRIME VICTIMS CTR., https://www.parentsformeganslaw.org/statistics-child-sexual-abuse/ [https://perma.cc/MQ72-Y2EP].

[93] *See, e.g.*, Hamilton, *supra* note 92, at 404 ("Legislation that eliminates the civil SOL or includes a discovery rule is supported by various studies on the long-term effects of child molestation and the likely delay in disclosure."); Doe v. Hartford Roman Catholic Diocesan Corp., 119 A.3d 462, 514–15 (2015) ("The public policy objective argued by the plaintiff finds support from numerous commentators.").

[94] *See, e.g.*, Wisniewski v. Diocese of Belleville, 943 N.E.2d 43, 68 (Ill. App. Ct. 2011) (recounting the expert explanation that children and adults "will keep such things inside until something pierces their defense mechanisms and overwhelms their psychological need to look away.").

of childhood sexual abuse. Under this theory, therapists and other psychological experts testified as to the events that did or should have triggered the plaintiff's awareness of the connection between the abusive incidents and their psychological and emotional maladies as adults. For example, in *Placette v. M.G.S.L.*,[95] the plaintiff conceded that she knew she had been sexually abused as a child at the time the abuse occurred.[96] The plaintiff's psychologist testified that the plaintiff could not understand the reason for her ongoing psychological difficulties, or bring herself to file a civil action against the person who had abused her, "until the safe environment of the hospital and the understanding and confidence provided by being in law school brought her to the point where she could act on her experiences."[97] In *Wisniewski v. Diocese of Belleville*,[98] the plaintiff alleged that the trigger for his discovery of a claim against the diocese was media reporting in 2002 about the clergy sexual abuse scandal within the Archdiocese of Boston.[99]

Some courts accepted the delayed connection argument.[100] Other courts rejected the argument, concluding that a child sexual abuse claim is a traumatic injury that accrues when it occurs, and that any delay in discovering psychological or emotional repercussions from

[95] Palacette v. M.G.S.L., No. 09-09-00410-CV, 2010 Tex. App. LEXIS 2935, at *1 (Tex. App. Apr. 22, 2010).

[96] *Id.* at *8.

[97] *Id. See also* Melissa G. Salten, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L. J. 189, 202 (1984) ("Generally, it is only when the victim enters therapy that any meaningful understanding of her injuries can be developed."); *id.* at 204 (noting "the recency of authoritative evidence regarding belated manifestation of incest trauma"); Rosemarie Ferrante, *The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity for Redress*, 61 BROOK. L. REV. 199, 224 (1995).

[98] Wisniewski v. Diocese of Belleville, 943 N.E.2d 43, 43 (Ill. App. Ct. 2011).

[99] *See id.* at 65, 66, 68.

[100] *See* Russell G. Donaldson, *Running of Limitations Against Action for Civil Damages for Sexual Abuse of Child*, 9 A.L.R. 5TH 321, *3 (collecting cases); *see, e.g.*, Johnson v. Johnson, 701 F. Supp. 1363, 1369–70 (N.D. Ill. 1988) (predicting that the Illinois Supreme Court would apply the discovery rule to a child incestuous abuse claim where the plaintiff conceded awareness of the abuse when it occurred but inability, due to psychological and emotional trauma, to understand that current psychological and physical maladies were caused by the abuse); Osland v. Osland, 442 N.W.2d 907, 909 (N.D. 1989) (applying the delayed discovery doctrine where plaintiff alleged that the psychological effects of childhood sexual abuse prevented her from "fully understand[ing]" her cause of action during the limitations period); Callahan v. State, 464 N.W.2d 268, 273 (Iowa 1990) (holding a cause of action for child sexual abuse does not accrue until the plaintiff reasonably should have discovered that the abuse caused the emotional and physical maladies); Hammer v. Hammer, 418 N.W.2d 23, 26–27 (Wis. Ct. App. 1987) (citing Borello v. U.S. Oil Co., 388 N.W.2d 140, 146 (Wis. 1986)) (applying delayed discovery doctrine so that a cause of action for child sexual abuse accrues when the plaintiff reasonably should understand that the alleged incidents were abusive and their resultant psychological damage).

the injury affects only the nature and extent of the plaintiff's damages and not the timing of the accrual of the cause of action.[101]

Several state legislatures amended their statute of limitations for child sexual abuse claims expressly to provide prospectively for delayed discovery based on delayed connection of the injury with its effect.[102] For example, in *Tyson v. Tyson*,[103] the Washington Supreme Court held that the delayed discovery doctrine did not apply when the plaintiff contended that she had repressed all memory of the

[101] *See, e.g.*, M.H.D. v. Westminster Sch., 172 F.3d 797, 804–05 (11th Cir. 1999) (quoting Bitterman v. Emory Univ., 333 S.E.2d 378, 379 (Ga. Ct. App. 1985)) (applying Georgia law); *see also,* Donaldson, *supra* note 100, at *4 (listing cases); *c.f.* Rotkiske v. Klemm, 140 S. Ct. 355, 360 (2019) (holding that federal courts cannot use delayed discovery doctrine to delay commencement of a limitations period in a federal statute when the statute states that the period commences "[on] the date . . . the violation occurs"); TRW Inc. v. Andrews, 534 U.S. 19, 37 (2001) (Scalia, J., concurring) (describing the delayed discovery doctrine as "bad wine of recent vintage" by which courts do not interpret a statute but rather alter it).

[102] *See e.g.*, ALASKA STAT. § 09.10.140(a)–(c) (1994) (allowing the plaintiff to bring a suit within three years after the plaintiff discovered or through reasonable diligence should have discovered that the act caused the injury); CAL. CIV. PROC. CODE § 340.1 (Deering 1986) (allowing the plaintiff to bring suit within three years after the plaintiff discovers or reasonably should have discovered that the illness or injury occurring after the age of majority was caused by the sexual abuse); KAN. STAT. ANN. § 60-523(a) (1992) (allowing a plaintiff to bring suit within three years after the plaintiff discovers or reasonably should have discovered that the injury or illness was caused by childhood sexual abuse); MASS. GEN. LAWS ANN. Ch. 260, § 4C (West 1993) (allowing a plaintiff to bring suit within three years after the victim discovered or reasonably should have discovered that an emotional or psychological injury was caused by the sexual abuse); MINN. STAT. ANN. § 541.073(a) (West 1996) (allowing a plaintiff to bring suit within six years after the plaintiff knew or had reason to know that the injury was caused by the sexual abuse); MO. REV. STAT. § 537.046(2) (1996) (allowing a plaintiff to bring suit within three years after the plaintiff discovers or reasonably should have discovered that the injury or illness was caused by child sexual abuse); MONT. CODE ANN. § 27-2-216(1)(b) (1995) (allowing a plaintiff to bring suit within three years after the plaintiff discovers or reasonably should have discovered that the injury was caused by the act of childhood sexual abuse); NEV. REV. STAT. § 11.215(1)(a)–(b) (1995) (allowing a plaintiff to bring suit within ten years after the plaintiff discovers or reasonably should have discovered that the injury was caused by sexual abuse); N.J. STAT. ANN. § 2A:61B-1 (West 1995) (allowing a plaintiff to bring suit within two years after the reasonable discovery of the injury and its causal relationship to the act of sexual abuse); OKLA. STAT. tit. 12, § 95(6) (1996) (allowing a plaintiff to bring suit within two years after the victim discovered or reasonably should have discovered that the injury was caused by the sexual abuse); R.I. GEN. LAWS § 9-1-51(a)(1)(ii) (1995) (allowing a plaintiff to bring a suit within seven years after the victim discovered or reasonably should have discovered that the injury was caused by the sexual abuse); S.D. CODIFIED LAWS § 26-10-25 (1992) (allowing a plaintiff to bring suit within three years of the time the victim discovered or reasonably should have discovered that the injury was caused by sexual abuse); VT. STAT. ANN. tit. 12, § 522(2019 Subsec. (a)) (1994) (allowing a plaintiff to bring suit within six years of the time the victim discovered that the injury was caused by the act); WASH. REV. CODE § 4.16.340(1)(a)–(c) (1988) (allowing a plaintiff to bring suit within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by the act). *See generally*, Theodore R.A. Ovrom, Note, *Reasonable for Whom? Developing a More Sensible Approach to the Discovery Rule in Civil Actions Based on Childhood Sexual Abuse,* 103 IOWA L. REV. 1843, 1845 (2018).

[103] Tyson v. Tyson, 727 P.2d 226, 226 (Wash. 1986), *superseded by statute*, WASH. REV. CODE § 4.16.340 (West 1988).

childhood incest until her memory was revived in therapy.[104] Shortly thereafter, Washington amended its statute of limitations applicable to child sexual abuse claims expressly to provide for delayed discovery, superseding the holding in *Tyson v. Tyson*.[105] Similarly, in *Derose v. Carswell*,[106] a California court declined to apply the delayed discovery doctrine to a child sexual abuse claim.[107] California later amended its limitation statute to provide that a claim for child sexual abuse is time-barred three years after "the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual assault."[108]

V. NEW YORK LIMITATIONS LAW BEFORE ENACTMENT OF THE NYCVA

Before the enactment of the NYCVA in 2019, the limitations period for claims for damages for negligence under New York law was three years after the cause of action accrues.[109] If the plaintiff was a minor when the injury occurred, the limitations period commences three years after the person turns eighteen and no later than ten years after the cause of action accrues.[110]

New York courts were not receptive to arguments by child sexual abuse advocates to overcome the statute of limitations bar by judicial opinion applying the delayed discovery doctrine to child sex abuse claims. A New York statute expressly precludes courts from "extend[ing] the time limited by law for the commencement of an

---

[104] *Tyson*, 727 P.2d at 229–30. *See also* Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 785–86 (Wis. 1995) (holding that evidence of repressed memory of the incident does not justify delayed accrual); Lindabury v. Lindabury, 552 So. 2d 1117, 1118 (Fla. Dist. Ct. App. 1989) (same); Lemmerman v. Fealk, 534 N.W.2d 695, 702, 703, 704 (Mich. 1995) (same); Doe v. Maskell, 679 A.2d 1087, 1092 (Md. 1996) (same); Pearce v. Salvation Army, 674 A.2d 1123, 1125, 1126 (Pa. Super. Ct. 1996) (same).

[105] *See* WASH. REV. CODE ANN. § 4.16.340(1)(a)–(c) (West 1988).

[106] Derose v. Carswell, 242 Cal. Rptr. 368, 368 (Cal. Dist. Ct. App. 1987).

[107] *See id.* at 372.

[108] CAL. CIV. PROC. CODE § 340.1(a) (West 1986) (effective Jan. 1, 2020).

[109] *See* N.Y. C.P.L.R. § 214(5) (Consol. 1996). The limitations period for a tort action against a priest perpetrator of sexual abuse, an intentional tort, is one year. N.Y. C.P.L.R. § 215(3) (Consol. 2019); *see, also*, Tserotas v. Greek Orthodox Archdiocese of N. and S. Am., 673 N.Y.S.2d 1011, 1012 (App. Div. 1998); Sharon B. v. Reverend S., 665 N.Y.S.2d 139, 140 (App. Div. 1997) (citing Joshua S. v. Casey, 615 N.Y.S.2d 200, 200 (App. Div. 1994); Doe v. Roe, 596 N.Y.S.2d 620, 621 (App. Div. 1993); Mazzaferro v. Albany Motel Enters., 515 N.Y.S.2d 631, 632 (App. Div. 1987)); Langford v. Roman Catholic Diocese of Brooklyn, 705 N.Y.S.2d 661, 662 (App. Div. 2000). *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 899, cmt. c (AM. LAW INST. 1979).

[110] N.Y. C.P.L.R. § 208(a) (McKinney 2019).

action."[111] Accordingly, New York courts decline to delay accrual of a cause of action except where the Legislature has expressly provided for it.[112]

A. Delayed Discovery

Other than tolling during a person's minority,[113] the New York Legislature has expressly provided for delayed discovery of a claim in several situations. For example, the limitations period is delayed until discovery of the malpractice in cases involving "foreign objects" left in a patient during surgery,[114] exposure to Agent Orange during Vietnam War era military service,[115] exposure to toxic substances,[116] and certain actions for fraud against a fiduciary or for misrepresentation by an agent as to his authority.[117] In 1986, New York amended the general tort statute of limitations to recognize delayed discovery of latent injury in cases asserting claims for illness from exposure to toxic substances.[118] For so-called "toxic tort" claims, the limitations period begins "from the date of discovery of the injury by the plaintiff or from the date when through the exercise of

[111] N.Y. C.P.L.R. § 201 (McKinney 2020) ("An action . . . must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action.").

[112] *See id.*; *see, e.g.*, Gerschel v. Christensen, 40 N.Y.S.3d 41, 43 (App. Div. 2016); Blanco v. AT&T, 689 N.E.2d 506, 512, 513 (N.Y. Ct. App. 1997) (stating that New York courts cannot delay accrual of a cause of action to account for delayed discovery, even to avoid injustice); Fritzhand v. Discover Fin. Servs., 800 N.Y.S.2d 316, 319 (Sup. Ct. 2005) (first quoting Evans v. Visual Tech., 953 F. Supp. 453, 456 (N.D.N.Y. 1997); then quoting Playford v. Phelps Mem'l Hosp. Ctr., 680 N.Y.S.2d 267, 268 (App. Div. 1998)) (holding that limitations period for negligence other than for latent injury due to exposure to toxic substances begins to run when the injury first occurs even though the injured party may be ignorant of the existence of the wrong or injury); Playford v. Phelps Mem. Hosp. Ctr., 680 N.Y.S.2d 267, 268 (App. Div. 1998) (reasoning that, until the legislature provides otherwise, the limitations period on a negligence claim begins to run when the injury occurs, not on the date when the plaintiff discovers the injury).

[113] *See supra* note 101.

[114] *See, e.g.*, Rodriguez v. Manhattan Med. Grp., P.C., 567 N.E.2d 235, 236 (N.Y. 1990).

[115] N.Y. C.P.L.R. § 214-b (McKinney 2019).

[116] *See* N.Y. C.P.L.R. § 214-c (McKinney 2019); *e.g.*, Wetherill v. Eli Lilly & Co. (*In re* N.Y. Cty. DES Litig.), 678 N.E.2d 474, 476–77 (N.Y. 1997); Blanco v. AT&T, 689 N.E.2d 506, 509 (N.Y. 1997) (noting that the legislative history describes the amendment as a "toxic torts" bill).

[117] *See* N.Y. C.P.L.R. § 206(2)(b) (McKinney 1966).

[118] *See* N.Y. C.P.L.R. § 214-c(2)(3) (McKinney 1966). C.P.L.R. § 214-c applied to a claim to recover damages for personal injury caused by exposure to a toxic substance. *Id.* New York had previously amended C.P.L.R. § 214 to delay the running of limitations period for claims for personal injury based on exposure to agent orange. NY C.P.L.R. § 214-b (McKinney 1966); *see* Consorti v. Owens-Corning Fiberglas Corp., 657 N.E.2d 1301, 1303 (N.Y. 1995) (holding that the plaintiff-wife did not have a loss of consortium claim where her husband was exposed to the injury-causing toxin before their marriage began).

reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier."[119]

In *Bassile v. Covenant House*,[120] the New York Supreme Court declined to apply the delayed discovery doctrine by analogy to delay running of the limitations period for plaintiff's claim against a Catholic religious order for negligence in connection with alleged sexual abuse by a friar of a fourteen-year-old at a group home operated by the order.[121] The plaintiff alleged that the sexual abuse caused psychological and emotional injury, resulting in his inability to perceive "the existence or nature of his psychological and emotional injuries and their connection to the sexual exploitation" until seventeen years later, when he was thirty-one years old.[122]

The court noted that New York courts are "not empowered to extend the statutory periods out of sympathy for a plaintiff or regret at a possible claim raised too late."[123] The court held that under New York law, unless the Legislature has provided otherwise, a tort action for damages based on child sexual abuse accrues, and the limitations period begins to run, when the injury occurs, even though the plaintiff has not yet discovered that he has been injured, and even if the plaintiff has not yet connected the injury with its negative emotional and psychological consequences.[124]

B. Cover-Up and Equitable Estoppel for Breach of a Fiduciary's Duty to Disclose

After the Boston Globe coverage of the cover-up of clergy sexual abuse within the Archdiocese of Boston, sexual abuse of children by Catholic priests changed from a perpetrator-centered, local problem, to an institution-centered scandal.[125] Advocates for child sexual

[119] N.Y. C.P.L.R. § 214-c (McKinney 2019).
[120] Bassile v. Covenant House, 575 N.Y.S.2d 233, 233 (Sup. Ct. 1991).
[121] *See id.* at 234, 235, 238.
[122] *Id.* at 234–35.
[123] *Id.* at 235.
[124] *See id.* (citing Schmidt v. Merch. Despatch Transp. Co., 200 N.E. 824, 827 (N.Y. 1936)); *see also* Zumpano v. Quinn, 849 N.E.2d 926, 930, 931 (N.Y. 2006); Doe v. Archdiocese of Cincinnati, 849 N.E.2d 268, 275–76 (Ohio 2006) (quoting Norgard v. Brush Wellman, 766 N.E.2d 977, 981 (Ohio 2002) (holding that a cause of action against a diocese accrues as a matter of law when plaintiff knows that he is assaulted by a priest and the priest is an employee of the diocese); Doe v. Catholic Bishop for the Diocese of Memphis, 306 S.W.3d 712, 726, 731 (Tenn. Ct. App. 2008) (holding that defendant's alleged fraudulent concealment could not toll the limitations period as a matter of law and discussing cases in other jurisdictions).
[125] *See, e.g.*, Ellen M. Bublick, *Who is Responsible for Child Sexual Abuse? A View from the Penn State Scandal*, 17 J. GENDER, RACE & JUST. 297, 310 (2014) (arguing that accountability of third-party facilitators of child sexual abuse is essential to prevent it); Marci A. Hamilton, *Child Sex Abuse in Institutional Settings: What is Next*, 89 U. DET. MERCY L. REV. 421, 424–25

abuse claimants described Catholic bishops as "motivated by image and self-preservation," who abused their power in "calculated ignorance of the clear risks to children" by deciding to protect "the abusers within the institution rather than the children."[126]

Advocates asserted that the defendant's conduct in covering up decades old abuse was fraud and a theory of liability separate from negligent supervision. Recall that to plead a claim for negligence against an employer based on injury caused by an employee's intentional sexual assault, the plaintiff must allege that the employer's negligence in supervising or retaining the employee was a proximate cause of the assault and the injuries it caused.[127] An employer's liability for negligent supervision of an employee depends on proof that the employer was on notice, before the assault occurred, of the employee's propensity for the type of assault that injured the plaintiff.[128] In *Mars v. Diocese of Rochester*,[129] the court held that to sustain a claim for fraud against the diocese based on its alleged cover up separate from a negligent supervision claim, the fraud must "occur separately from and subsequent to the abuse, and then only where the fraud claim gives rise to damages separate and distinct from those flowing from the abuse."[130]

Advocates for child sexual abuse claimants also tried to use Catholic dioceses' cover up as a means of justifying plaintiffs' failure to sue within the limitations period following the alleged abuse. Advocates argued that a diocese's fraudulent concealment of its knowledge of abusive priests, coupled with its position of trust and authority, prevented the plaintiff from discovering that the diocese could be a secondary proximate cause of his injury, and thus provided grounds for equitable estoppel of the diocese's limitations defense.[131]

(2012) (noting various institutions accused of covering up knowledge of child sexual abuse by employees to protect institutional reputation and discussing the shift in public attention toward institutional culpability for child sexual abuse and away from cases of individual abuse within families or among acquaintances).

126 Hamilton et al., *supra* note 5, at 5.

127 *See supra* note 20 and accompanying text.

128 *See supra* note 20 and accompanying text.

129 Mars v. Diocese of Rochester, 763 N.Y.S.2d 885, 885 (N.Y. Sup. Ct. 2003).

130 *Id.* at 889 (citing Schmidt v. Bishop, 779 F. Supp. 321, 326 (S.D.N.Y. 1991); Doe v. Roe, 596 N.Y.S.2d 620, 620–21 (App. Div. 1993); Coopersmith v. Gold, 568 N.Y.S.2d 250, 252 (App. Div. 1991)); *see also Doe*, 596 N.Y.S.2d at 620–21 (citing Paver & Wildfoerster v. Catholic High Sch. Ass'n, 345 N.E.2d 565, 568 (N.Y. 1976); New York Seven-Up Bottling Co. v. Dow Chem. Co., 466 N.Y.S.2d 478, 480 (App. Div. 1983)) (holding that plaintiff did not sufficiently plead a cause of action for fraud against the alleged perpetrator of sexual abuse distinct from the intentional tort claim, even if the defendant's alleged fraud facilitated his access to plaintiff and concealed the assault from third parties).

131 *See, e.g.*, Meehan v. Archdiocese of Philadelphia, 870 A.2d 912, 918 (Super. Ct. 2005) (explaining that child sex abuse plaintiffs alleged that the archdiocese's cover up of its

In general, a court can equitably estop a defendant from asserting a limitations defense "where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding."[132] Equitable estoppel of a limitations defense is not appropriate, however, where, notwithstanding the defendant's fraud, the plaintiff had "'knowledge' sufficient to place him . . . under a duty to make inquiry and ascertain all the relevant facts" pertaining to the claim before the limitation period expires.[133] When the doctrine applies, it tolls the limitations period only while the defendant's misrepresentation prevents the plaintiff from filing suit.[134]

Courts recognize the doctrine of equitable estoppel to toll the statute of limitations where the defendant's fraudulent misrepresentation or deceitful conduct, upon which the plaintiff reasonably relied, caused the plaintiff to delay beyond the limitations period to assert his claim.[135] The premise for estoppel to assert a limitations defense is that a defendant should not benefit from his own wrongdoing.[136] Put another way, tolling the commencement of the limitations period while the defendant fraudulently concealed key information from the plaintiff that would obstruct a reasonable plaintiff's discovery of her claim recognizes that while the defendant's fraudulent concealment scheme is working, the defendant, not the plaintiff, is the cheaper bearer of time risk.

Outside of New York, courts reached different conclusions on whether a Catholic organization's cover up of its knowledge of

knowledge of clergy sexual abuse reasonably prevented their discovery of that the diocese's negligence was a proximate cause of their injuries); Cevenini v. Archbishop of Washington, 707 A.2d 768, 771 (D.C. 1998) (explaining that plaintiffs alleged that due to the archdiocese's fraudulent concealment, they could not reasonably have known of its negligence until the archdiocese disclosed its knowledge of an abusive priest's propensity before assigning him to plaintiffs' parish).

[132] Gen. Stencils v. Chiappa, 219 N.E.2d 169, 171 (N.Y. 1966) (citing Feinberg v. Allen, 128 N.Y.S. 906, 907 (App. Div. 1911); Safrin v. Friedman, 96 N.Y.S.2d 627, 631 (Sup. Ct. 1950)).

[133] Gleason v. Spota, 599 N.Y.S.2d 297, 298 (App. Div. 1993) (citing McIvor v. Di Benedetto, 503 N.Y.S.2d 836, 837 (App. Div. 1986); Ramsay v. Mary Imogene Bassett Hosp., 495 N.Y.S.2d 282, 285 (App. Div. 1985); Augstein v. Levey, 162 N.Y.S.2d 269, 273 (App. Div. 1957)).

[134] *See* Doe v. Holy See, 793 N.Y.S.2d 565, 569 (App. Div. 2005) (citing Golden v. Scalise, 451 N.Y.S.2d 215, 216 (App. Div. 1982)).

[135] *See* Zumpano v. Quinn, 849 N.E.2d 926, 929 (N.Y. 2006) (citing Simcuski v. Saeli, 377 N.E.2d 713, 716 (N.Y. 1978)) (holding that equitable estoppel did not apply to bar defendant from asserting limitations defense in a child sex abuse case); *Gen. Stencils*, 219 N.E.2d at 171 (noting that New York courts have exercised discretion to apply equitable estoppel to the bar of a statute of limitations); *see, e.g.*, *Simcuski*, 377 N.E.2d at 716 (tolling the statute of limitations by equitable estoppel in a medical malpractice claim based on the doctor's intentional concealment of malpractice).

[136] *E.g.*, *Gen. Stencils*, 219 N.E.2d at 170 ("[t]he principle that a wrongdoer should not be able to take refuge behind the shield of his own wrong is a truism.").

abusive employees justified equitable estoppel of its limitations defense. For example, in *Meehan v. Archdiocese of Philadelphia*,[137] the court held that the plaintiffs' argument regarding fraudulent concealment "missed the mark."[138] The court reasoned that once a plaintiff became aware of the abuse, he should have known that the archdiocese, as the abusive priest's employer, was potentially liable.[139] Similarly, in *Doe v. Catholic Bishop for the Diocese of Memphis*,[140] the court rejected the plaintiff's argument, noting that the plaintiff never sued the priest perpetrator, never sought discovery regarding the priest's prior history of sexual abuse and the diocese's knowledge of it, and never inquired of the diocese about its knowledge of the priest's history.[141] For these reasons, the court held that the plaintiff failed to exercise reasonable diligence, the diocese's non-disclosure was irrelevant, and the trial court erred in denying the diocese's motion to dismiss on limitations grounds.[142] In contrast, some courts allowed the issue of whether the defendant's cover up justified a plaintiff's failure to sue within the limitations period to go to the jury.[143]

Although a New York statute precludes courts from modifying a limitations period,[144] the Court of Appeals has held that courts have discretion to invalidate a limitations defense on grounds of equitable estoppel.[145] Equitable estoppel to assert a statute of limitations defense based on the defendant's fraud requires an affirmative

[137] *Meehan*, 870 A.2d 912.

[138] *Id.* at 922 (quoting Kelly v. Marcantonio, 187 F.3d 192, 201 (1st Cir. 1999)).

[139] *Meehan*, 870 A.2d 912 (citing *Kelly*, 187 F.3d at 201)); *see also*, Cevenini v. Archbishop of Wash., 707 A.2d 768, 773 (D.C. 1998) (holding that plaintiffs' knowledge of the priest's misconduct and that he was an employee of the archdiocese put them on notice of claims against the archdiocese).

[140] Doe v. Catholic Bishop for the Diocese of Memphis, 306 S.W.3d 712 (Tenn. Ct. App. 2008).

[141] *Id.* at 730.

[142] *Id.* at 730–31.

[143] *E.g.*, Wisniewski v. Diocese of Belleville, 943 N.E.2d 43, 79 (Ill. App. Ct. 2011) (holding that the jury could find that the plaintiff had no reason to suspect that the diocese knew of the priest's history of child abuse and nonetheless assigned him to the plaintiff's parish until the national coverage regarding clergy sexual abuse in Boston in 2002); Matthews v. Roman Catholic Diocese of Pittsburgh, 67 Pa. D. & C. 4th 393, at *407 (Ct. Com. Pl. 2004) ("[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"); Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 432 (2d Cir. 1999) (affirming trial court's denial of diocese's motion to dismiss on limitations grounds because the effect of the diocese's concealment on the plaintiff's diligence in prosecuting his claim was an issue of fact for the jury).

[144] N.Y. C.P.L.R. § 201 (McKinney 2020); *see* discussion *supra* Part V, subheading 1.

[145] *See Gen. Stencils*, 219 N.E.2d 169, 170 (noting that the doctrine of equitable estoppel of a limitations defense is "[d]eeply rooted in our jurisprudence").

fraudulent act by the defendant after the injury that is the subject of the claim.[146] An obstacle for child sexual abuse claimants in New York was that the dioceses' cover up was at most non-disclosure or concealment, and not an affirmative false representation about the state of its knowledge on which the plaintiff could justifiably rely.[147]

New York courts recognize an exception to the "subsequent affirmative fraudulent act" requirement in cases of non-disclosure or active concealment of information, where the defendant is a fiduciary to the plaintiff and under a duty to disclose.[148] Failure by a fiduciary to discharge that affirmative duty to disclose is grounds for estoppel.[149] A fiduciary relationship exists where one party justifiably reposes confidence in the other (the fiduciary) and reasonably relies on the fiduciary's superior expertise or knowledge.[150] When a fiduciary conceals facts he has a duty to disclose and the plaintiff relies on that non-disclosure in a decision to abandon diligent investigation of her claim, the fiduciary is estopped from asserting a limitations defense, although it did not actively defraud the plaintiff by misrepresentation.[151]

In 2006, in *Zumpano v. Quinn*,[152] the New York Court of Appeals rejected the argument that the Diocese of Brooklyn's cover up was grounds for estoppel of the diocese's statute of limitations defense.[153] The plaintiff did not allege that the diocese made any specific misrepresentation to the plaintiff, or any "separate and subsequent acts of wrongdoing beyond the sexually abusive acts

[146] *See* Zumpano v. Quinn, 849 N.E.2d 926, 929 (N.Y. 2006) (holding that plaintiff must show that defendant's "subsequent and specific actions" prevented the plaintiff from asserting his claim within the limitations period) (citing Matter of Steyer, 521 N.E.2d 429, 423 (N.Y. 1988)).

[147] *See id.* at 930.

[148] *E.g.*, Horn v. Politopoulos, 628 Fed. App'x 33, 34 (2d Cir. 2015) ("[t]o merit equitable estoppel, a plaintiff must allege either active fraudulent concealment or a fiduciary relationship giving rise to the defendant's obligation to inform the plaintiff of the facts underlying the claim.") (citing Doe v. Holy See (State of Vatican City), 793 N.Y.S.2d 565, 568 (N.Y. 2005)).

[149] *See Zumpano*, 849 N.E.2d at 930 ("[w]here concealment without actual misrepresentation is claimed to have prevented a plaintiff from commencing a timely action, the plaintiff must demonstrate a fiduciary relationship . . . which gave the defendant an obligation to inform him or her of facts underlying the claim." (quoting Gleason v. Spota, 599 N.Y.S.2d 297, 298 (N.Y. App. Div. 1993)).

[150] *See Holy See*, 793 N.Y.S.2d at 568 (quoting WIT Holding Corp. v. Klein, 724 N.Y.S.2d 66, 66 (N.Y. App. Div. 2001)).

[151] *See* Chiarella v. United States, 445 U.S. 222, 228 (1980) ("[T]he duty to disclose arises when one party has information "that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.") (citations omitted).

[152] Zumpano v. Quinn, 849 N.E.2d 926, 929 (N.Y. 2006). Plaintiff alleged that the diocese knew of clergy sexual abuse of children for over 40 years and failed to report the abuse to police, reassigned known priest abusers without disclosing the abuse, and settled victims' complaints about abuse subject to non-disclosure agreements. *Id.* at 929–30.

[153] *Id.* at 927.

themselves. . . ."[154] Because the plaintiff was aware of the abuse and was aware that the priest abuser was a diocesan employee, when the abuse occurred, the diocese's subsequent cover up was causally unrelated to the plaintiff's failure to sue the diocese within the limitations period.[155] The court declined to decide whether a Catholic diocese was a fiduciary to members of the faithful in a parish within the diocese.[156] The court noted that even if it found that the diocese was a fiduciary to the plaintiff, the plaintiff failed to allege how the diocese's failure to disclose its wrongdoing prevented the plaintiff from suing within the limitations period.[157] Nothing the diocese might have done or failed to do after the incidents of sexual abuse affected the plaintiff's knowledge at the time of the abuse of his injury and its cause.[158]

Three years later, in *Doe v. Roman Catholic Diocese of Rochester*,[159] the Court of Appeals considered whether a Catholic priest had a fiduciary duty to an adult congregant who alleged that the priest sexually abused her within a counselling relationship.[160] The court held that to show a fiduciary duty, the congregant must "set forth facts and circumstances in the complaint demonstrating that the congregant became uniquely vulnerable and incapable of self-protection regarding the matter at issue."[161] The court concluded that the plaintiff's allegations did not meet the standard.[162]

New York courts have held that to establish a diocese's fiduciary duty to a sex abuse claimant, the plaintiff "may not merely rely on the church's status in general" but must show that his relationship with the diocese was unique from the diocese's ordinary relationship with other parishioners so as to justify the plaintiff's confidence in

[154] *Id.* at 930.
[155] *Id.* at 929.
[156] *See id.* at 930–31.
[157] *Id.* at 928.
[158] *Id.* at 930. "Plaintiffs possessed timely knowledge of the actual misconduct and the relationship between the priests and their respective dioceses to make inquiry and ascertain relevant facts prior to the running of the statute of limitations." *Id.*; *see also* Baselice v. Fransciscan Friars Assumption BVM Province, Inc., 879 A.2d 270, 278–79 (Pa. Super. Ct. 2005) (holding that fraudulent concealment as grounds for estoppel did not apply in sex abuse claim because diocese did not cause plaintiff's failure to sue within the limitations period); Doe v. Roman Catholic Archbishop of Archdiocese of Detroit, 692 N.W. 2d 398, 405 (Mich. Ct. App. 2004) (same); Mark K. V. Roman Catholic Archbishop of Los Angeles, 79 Cal. Rptr. 2d 73, 78–79 (1998) (same); Doe v. Archdiocese of Washington, 689 A.2d 634, 644 (Md. Ct. Spec. App. 1977) (same).
[159] 907 N.E.2d 683 (N.Y. 2009).
[160] *Id.* at 683.
[161] *Id.* at 683–84 (citing Marmelstein v Kehillat New Hempstead: Rav Aron Jofen Community Synagogue, 892 NE2d 375 (2008)).
[162] *Roman Cath. Diocese of Rochester*, 907 N.E.2d at 684.

and reasonable reliance on the diocese's superior expertise or knowledge as to his affairs.[163] Allegations that the diocese provided pastoral services and held out parish schools as religious education institutions with programs for children were insufficient to establish the requisite fiduciary relationship.[164] New York courts have noted and declined to follow decisions in other jurisdictions that recognized a fiduciary relationship between a diocese and a plaintiff parishioner based on allegations that the plaintiff attended a parish Catholic school, participated in parish-sponsored activities or was the object of the priest perpetrator's individual attention.[165]

New York courts have also rejected an alternative argument for estoppel based on "religious duress." For example, in *Doe v. Holy See*,[166] plaintiffs sued the Diocese of Syracuse, various parishes within the diocese, and the Holy See for child sexual abuse committed by diocesan priests.[167] In response to the defendants' limitations defense, the plaintiffs unsuccessfully alleged equitable estoppel based on fraudulent concealment.[168] The plaintiffs argued alternatively that, due to the hierarchical structure and required obedience to ecclesiastical authority under Catholic canon law, they were afraid to sue the diocese, and that their fear justified their failure to sue within the limitations period.[169] The court held that factual inquiry into the plaintiffs' claim of religious duress would entangle the courts in a religious matter.[170] In any event, the

[163] Doe v. Holy See, 793 N.Y.S.2d 565, 568 (N.Y. App. Div. 2005) (citing Doe v. Norwich R.C. Diocesan Corp., 268 F. Supp. 2d 139, 149–50 (D. Conn 2003)); Hoatson v. New York Archdiocese, 901 N.Y.S.2d 907, 907 (Sup. Ct. 2009) (citing *Doe*, 793 N.Y.S.2d at 568).

[164] *Holy See*, 793 N.Y.S.2d at 568–69. *But see*, *id.* at 570–71 (Peters, J., dissenting) (arguing for a fiduciary relationship with the diocese based on allegations that plaintiffs attended a Catholic parish school, were singled out for individualized instruction or special attention, and their families permitted them to participate in church-sponsored extra-curricular activities).

[165] *See* Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 430 (2d Cir. 1999) (holding that plaintiff showed a fiduciary relationship based in part on allegations that the diocese knew of and ignored reports of sexual abuse by the priest); Doe v. Roman Catholic Diocesan Corp., 309 F. Supp. 2d 247, 252–53 (D. Conn. 2004) (finding a fiduciary relationship based on allegations that plaintiff participated in parish-sponsored activities, sang in the parish choir with the abuser's encouragement, ate dinner with the abuser, and consulted with the abuser for spiritual counseling with the diocese's encouragement); Moses v. Diocese of Colorado, 863 P.2d 310, 321 n.13 (Colo. 1993) (finding a fiduciary duty where the diocese "occupied a position of superiority, assumed a duty to act in good faith, and then breached their duty").

[166] 793 N.Y.S.2d at 569–70 (discussing religious duress).

[167] *Id.* at 567.

[168] *Id.* at 569.

[169] *Id.* at 569–70 (alleging duress arising from "the beliefs of the Roman Catholic Church and in the nature of a fear of excommunication or eternal damnation resulting from the pursuit of a civil action against church officials.").

[170] *Id.* at 569. *See generally* Teadt v. St. John's Evangelical Church, 603 N.W.2d 816, 823 (Mich. Ct. App. 1999) (refusing to recognize a fiduciary relationship between an adult and her

plaintiff failed to allege facts to explain how any such duress continued after they reached the age of majority or separated from the Catholic church.[171]

VI. THE NEW YORK CHILD VICTIMS ACT

In 2019, the New York legislature enacted law that provided both prospective and retrospective relief from the time bar under prior limitations laws.

A. Prospective Extension of the Limitations Period

The NYCVA extended the limitations period prospectively for criminal charges for certain sexual offenses against a child victim (the covered sexual offenses) until the victim turns 23 years old.[172] As to civil claims, the NYCVA provided two types of prospective limitations relief. First, the NYCVA extended the limitations period for certain civil claims until the plaintiff turns 55, and second, the NYCVA relieved the plaintiff from the burden of complying with notice of claim requirements against public organization defendants.[173]

The NYCVA defines the set of civil claims entitled to prospective limitations relief by reference to two factors: 1) the type of injury the plaintiff alleges (the covered claims); and 2) the defendants whose limitations or notice defenses are prospectively altered (the covered defendants).[174] The covered claims are "civil claims or causes of action brought by any person for physical, psychological or other injury or condition suffered by such person as a result of conduct

minister because allegations of an imbalance of power or the existence of a special relationship of trust or confidence would require judicial entanglement in religious doctrine); H.R.B. v. J.L.G., 913 S.W.3d 92, 98 (Mo. Ct. App. 1995) (refusing to recognize a claim for breach of fiduciary duty against a church for clergy sexual abuse because defining the scope of the duty of clergy to congregants would require excessive entanglement); Langford v. Roman Catholic Diocese of Brooklyn, 705 N.Y.S.2d 661, 662 (App. Div. 2000) (showing a court's concern regarding becoming entangled in a religious matter); Ira C. Lupu v. Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 B.Y.U. L. REV. 1789, 1827–28 (arguing that judicial determination of whether a fiduciary relationship existed between a clergy member and a congregant requires impermissible entanglement).

171 *Holy See*, 793 N.Y.S.2d at 568.

172 N.Y. CRIM. PROC. LAW § 30.10 (McKinney 2019). The affected sexual offenses are: i) offenses listed in New York Penal Law § 130, excluding the offense listed in § 30.10(3)(f) committed against a child less than 18 years old, incest in the first, second or third degree as defined in Penal Law § 255.25-27, if committed against a child less than 18 years old; ii) and use of a child in a sexual performance as defined in Penal Law § 263.05 (the covered sexual offenses). *Id.*

173 S.B. 2440 § 2, § 5-8, 242 Legis. Sess. (N.Y. 2019); N.Y. C.P.L.R. § 208-b (McKinney 2019).

174 S.B. 2440 § 2, § 5-8, 242 Legis. Sess. (N.Y. 2019).

which would constitute" a covered sexual offense.[175] The covered defendants are "any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of said conduct."[176]

The NYCVA eliminates only limitations and notice of claim defenses and only for tort claims for personal injury "as a result of" certain forms of child sexual abuse.[177] The NYCVA does not eliminate any defenses to covered claims other than limitations and, for public organization defendants, notice of claim. Elimination of the limitations and notice defenses applies only against the perpetrator and defendants other than the perpetrator whose conduct, the plaintiff alleges, "result[s]" in the commission by the perpetrator of covered offenses.[178]

The NYCVA does not alter the pleading or proof requirements for a tort claim based on negligent hiring or supervision against an employer or other entity responsible for the perpetrator of the abuse.[179] As explained above, the plaintiff must allege and ultimately prove by a preponderance of the evidence that the abuse occurred, and that the defendant employer knew or should have known of the abusive propensities of a particular priest abuser before the abuse occurred.[180]

[175] *Id.*

[176] *Id.*

[177] N.Y. C.P.L.R. § 214-G (McKinney 2019); *see* Doe v. Diocese of Rockville Centre, No. 900010/2019, 2020 N.Y. Misc. LEXIS 1964, at *16 (holding that the NYCVA revived all claims against any defendant "as a result of" certain forms of child sexual abuse, including claims against an employer other than for its intentional or negligent misconduct, such as recklessness or gross negligence).

[178] S.B. 2440 § 3, 2019-2020 Legis. Sess. (N.Y. 2019) (expressly preserving certain defenses to criminal charges set out in the penal law and "any other defense[s] and affirmative defense that may be available in accordance with law").

[179] *See* Doe v. McFarland, No. 34675/2019, 2019, N.Y.L. J. LEXIS 4437, at *3 n.3 (Sup. Ct. 2019) (noting that the NYCVA does not create a new cause of action for tort claims based on child sexual abuse).

[180] *See* Golden v. Diocese of Buffalo, NY, 125 N.Y.S.3d 813 (App. Div. 2020) (requiring an allegation that the defendant knew or should have known that the priest was a danger to children for a claim for damages for negligence under NYCVA); Doe v. Diocese of Rockville Ctr., No. 900010/2019, 2020 N.Y. Misc. LEXIS 1964, at *15–16 (Sup. Ct. May 11, 2020) (holding that the claims against diocese for negligent hiring, retention, and supervision were properly pleaded).

B. Retroactive Limitations Relief by Revival of Time-Barred Claims

The NYCVA retroactively revives covered claims against covered defendants, provided that plaintiffs assert the claims within the designated window of time.[181] The NYCVA originally established a one-year window for filing otherwise time-barred claims free of a defense based on limitations or notice of claim requirements.[182] The original window commenced on August 14, 2019 and ended on August 14, 2020.[183]

On May 8, 2020, Governor Cuomo issued an executive order extending the window until January 14, 2021 as part of emergency action to account for the negative impact of COVID-19.[184] On May 28, 2020, the New York Legislature passed a bill that extended the window through August 14, 2021.[185] Governor Cuomo signed the bill and the extension became effective on August 3, 2020.[186] The Sponsor's Memorandum explained that the window extension would "provide more time to notify New Yorkers about the [claims revival window] and allow more survivors to seek the justice that was denied them by New York's formerly prohibitive civil statute of limitations."[187]

---

[181] *See* S.B. 2440 § 3, 242 Legis. Sess. (N.Y. 2019); N.Y. C.P.L.R. § 214-g (McKinney 2019) ("Notwithstanding any provision of law which imposes a period of limitation to the contrary and the provisions of any other law pertaining to the filing of a notice of claim or a notice of intention to file a claim as a condition precedent to commencement of an action or special proceeding, every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense [as defined in the penal code] committed against a child less than eighteen years of age, incest [as defined in the penal code], or the use of a child in a sexual performance [as defined in the penal code] . . . which conduct was committed against a child less than eighteen years of age, which is barred as of the effective date of this section because the applicable period of limitation has expired . . . is hereby revived . . . .And dismissal of a previous action . . . on grounds that such previous action was time barred . . . shall not be grounds for dismissal of a revival action pursuant to this section.").

[182] N.Y. C.P.L.R. § 214-g (McKinney 2019).

[183] *Id*. Other defenses, however, remain valid, for example, release by settlement, or equitable laches. *See id.*

[184] Exec. Order No. 202.29 (May 8, 2020), https://www.governor.ny.gov/news/no-20229-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency[https://perma.cc/4JYU-P856]; *see Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces State Will Extend Window for Victims to File Cases under the Child Victims Act until January 14th*, NEW YORK STATE (May 8, 2020), https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-state-will-extend-window-victims-file#:~:text=Amid%20the%20ongoing%20COVID%2D19,months%20until%20January%2014%2C%202021[https://perma.cc/CY2H-YU25].

[185] N.Y. C.P.L.R. § 214-g (McKinney 2019).

[186] 2020 N.Y. Sess. Laws. ch.130 (McKinney).

[187] 2019 Legis. Bill. His. NY Senate Bill S7082 (N.Y. 2020).

C. Legislative History

In 2019 when the bill that would become the NYCVA was pending in New York, window legislation to revive time-barred claims for child sexual abused already had a long history elsewhere. In 2002, California passed the first claims revival legislation, opening a 3-year window.[188] In 2013, Minnesota enacted a claims revival statute, known as the Minnesota Child Victims Act, which opened a three-year window for filing time barred child sexual abuse claims.[189]

For more than a decade before the success in 2019, proponents of limitations reform for child sexual abuse civil claims in New York introduced limitations reform bills that passed in the Democratic-controlled Assembly but failed to win support in the Republican-controlled Senate.[190] The New York State Catholic Conference (NYSCC) lobbied against these early versions of the NYCVA.[191] The

[188] Sen. Bill No. 1779, (2001-2002 Reg. Sess.) § 340.1. *See generally* CAL. CIV. PROC. CODE § 340.1(Q) (West 2020) (California has recently enacted legislation opening a second claims revival window).

[189] MINN. STAT. ANN. § 541.073 (West 2013). Todd Melby, *Sex Abuse Victims Say Minn. Law Brought Hope, Chance for Justice*, MPR NEWS (May 25, 2016, 9:00 AM), https://www.mprnews.org/story/2016/05/25/sex-abuse-victims-say-minnesota-law-brought-hope. [https://perma.cc/JZN6-REH3] (over 900 claims were filed within the window).

[190] *E.g.*, 2019 Legis. Bill Hist. NY Senate Bill S2440 (N.Y. 2020) (explaining the prior legislative history as follows: 2018 NY Senate Bill S6575, sponsored by New York State Senator Brad Hoylman died in Codes; 2017 NY Assembly Bill A5885-A, sponsored by New York State Assemblymember Linda B.Rosenthal passed Assembly; 2015 NY Senate Bill S63-A, sponsored by New York State Senator Brad Hoylman died in Codes, which was similar legislation to NYCVA; 2015 NY Assembly Bill A2872-A, sponsored by New York State Assemblymember Margaret Markey died in Codes, which was similar legislation to NYCVA; 2015 NY Assembly Bill A1771-A, sponsored by New York State Assemblymember Margaret Markey died in Codes, which was similar legislation to the NYCVA; 2012 NY Assembly Bill A10814-B of 2012, sponsored by New York State Assemblymember Margaret Markey died in Codes, which was similar legislation to the NYCVA).

[191] *See, e.g.*, Marci A. Hamilton, *Reforming the Statute of Limitations for Child Sex Abuse: New York's Child Victims Act Shouldn't Be Political, But It Is*, FINDLAW (June 10, 2010), https://supreme.findlaw.com/legal-commentary/reforming-the-statute-of-limitations-for-child-sex-abuse-new-yorks-child-victims-act-shouldnt-be-political-but-it-is.html[https://perma.cc/9URR-HTSX] (asserting that the most virulent opposition to the bill was the New York Catholic Conference of Bishop); *see* Augusta Anthony, *New York Passes Child Victims Act, allowing child sex abuse survivors to sue their abusers,* CNN (Jan. 28, 2019, 10:46 PM), https://www.cnn.com/2019/01/28/us/new-york-child-victims-act/index.html [https://perma.cc/H8S5-DPB9](quoting Cuomo noting opposition of the New York Catholic Conference); *See generally*, James O'Reilly & Margaret Chalmers, THE CLERGY SEX ABUSE CRISIS AND THE LEGAL RESPONSES 66 (2014); Kathleen E. Carey, *Bill Extending Statute of Limitations For Sexual Abuse Fails to Pass PA House*, T. HERALD (Oct. 26, 2016), https://www.timesherald.com/news/bill-extending-statute-of-limitations-for-sexual-abuse-fails-to-pass-pa-house/article_18b3308b-2caf-5d42-a39d-005b146a84a0.html [https://perma.cc/3B5Z-7JNU]; George Joseph, *US Catholic Church Has Spent Millions Fighting Clergy Sex Abuse Accountability*, THE GUARDIAN (May 12, 2016), https://www.theguardian.com/us-news/2016/may/12/catholic-church-fights-clergy-child-sex-abuse-measures[https://perma.cc/BT6U-2F2J] ("The US Catholic Church has poured millions

insurance industry lobbied against the claims revival aspect of the proposed legislation too.[192] Insurers were understandably concerned about the financial impact of coverage claims on decades-old policies. In 2019, ratings firm A.M. Best noted that claims revival legislation in New York and other states posed a significant and growing risk to insurance companies.[193]

Many Catholic dioceses in New York and in other states had implemented voluntary, independently administered claims mediation and settlement processes called Independent Reconciliation and Compensation Programs (IRCPs) to provide compensation and other support to persons who claimed to have been abused by diocesan clergy.[194] IRCPs were modeled after the September 11th Victim's Compensation Fund, administered by lawyer and mediator Kenneth Feinberg.[195] In general, under IRCPs, claims deemed by independent administrators to be meritorious without regard to any limitations defenses received an offer of

of dollars over the past decade into opposing accountability measures for survivors of clergy sex abuse."); Marisa Kwaiatkowski & John Kelly, *The Catholic Church and Boy Scouts are Lobbying Against Child Abuse Statutes. This is Their Playbook*, USA TODAY (updated April 23, 2020), https://www.usatoday.com/in-depth/news/investigations/2019/10/02/catholic-church-boy-scouts-fight-child-sex-abuse-statutes/2345778001/ [https://perma.cc/BV2B-D8T8]. *See also* Mayo Moran, *Cardinal Sins: How the Catholic Sexual Abuse Crisis Changed Private Law*, 21 GEO. J. GENDER & L. 95, 119–20 (2019) (one commentator opined that the Catholic bishops' opposition to limitations reform throughout the US may have caused erosion of political support for existing limitations laws that precluded suits on time-barred claims.).

[192] Chris Glorioso & Evean Stulberger, *I-Team: Insurance Industry Helped Squash Child Sex Abuse Law in New York*, NBC N.Y. (Mar. 29, 2018, 12:34 PM), https://www.nbcnewyork.com/news/local/child-victims-act-sex-abuse-law-insurance-industry-new-york-albany/456181/ [https://perma.cc/AES9-S6PT] (reporting that the American Insurance Association spent $130,000 on lobbying in the New York Legislature on various subjects including the 2018 version of the Child Victims Act).

[193] Nicole Friedman, *Insurers Face Risk of child Sex-Abuse Claims*, WALL ST. J. (July 21, 2019), https://www.wsj.com/articles/child-sex-abuse-claims-are-a-growing-risk-to-insurance-firms-11563710520 [https://perma.cc/8LQK-VDDG] (noting reaction of insurance companies to the financial impact of increase claims exposure for revived claims under the NYCVA).

[194] *See* John Woods, *Archdiocese Opens Independent Reconciliation, Compensation Program for Victim-Survivors of Clergy Sexual Abuse*, CATHOLIC N. Y. (Oct. 6, 2016), https://www.cny.org/stories/archdiocese-opens-independent-reconciliation-compensation-program-for-victim-survivors-of-clergy,14547 [https://perma.cc/X2H3-8864] (reporting on Cardinal Dolan's remarks on the Archdiocese of New York IRCP program and prior programs offered by Catholic dioceses).

[195] *See id.*; *Air Transportation Safety and System Stabilization Act, Title IV Victim Compensation,* Pub. L. 107-42, 115 Stat. 230. The Act provides compensation without proof of negligence for eligible persons in exchange for a release of any right to file or continue a civil action for damages sustained as a result of the September 11 events. *Id.* at Title IV, § 405(c)(3)(B). *See generally* Department of Justice, September 11th Victim Compensation Fund: Compensation of Claims, 83 Fed. Reg. 49,946 (Oct. 3, 2018) (describing the fund and the role of the Special Master); Kenneth Feinberg, WHAT IS LIVE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 66 (2005).

compensation (amount determined by the administrators) in exchange for a release from liability for the diocese.[196]

In August 2018, Josh Shapiro, the Pennsylvania Attorney General, released an investigative grand jury report on the results of a two-year investigation of child sexual abuse against six Catholic dioceses in Pennsylvania (the Pennsylvania Report).[197] The report recounted in detail the allegations of hundreds of persons who reported sexual abuse as children by diocesan clergy, and how dioceses responded to those allegations.[198] The report concluded that the dioceses "brushed aside" reports of abuse to protect the abusers and the dioceses.[199] It offered recommendations for legislative reform to Pennsylvania's limitations laws, including enactment of a claim revival window.[200] The Pennsylvania report was the subject of national media reporting,[201] and likely galvanized political support for claims revival legislation in New York.[202]

---

[196] *See IRCP FAQ*, CATHOLIC DIOCESE OF PITTSBURGH, https://diopitt.org/ircp-faq [https://perma.cc/9RKC-LLMJ]. The Diocese of Pittsburgh explained that compensation was available under the IRCP for "those who had been harmed, no matter how long ago that happened."

[197] Office of the Attorney General, *Report I of the 40th Statewide Investigating Grand Jury Redacted*, Pa. Att'y Gen. Op. (2018), https://www.attorneygeneral.gov/report/ [https://perma.cc/DD8X-S259] [hereinafter Pennsylvania Report]. *Id.* at 1. The Pennsylvania Report recounted allegations of sexual abuse perpetrated by clergy affiliated with the Dioceses of Allentown, Erie, Greensburg, Harrisburg, Pittsburgh, Scranton and the Society of St. John. *Id*. Allegations against clergy associated with the Dioceses of Altoona-Johnstown and Philadelphia were not included in the 2018 report because allegations against clergy associated with those dioceses had been the subject of earlier investigative grand jury reports.

[198] *See id*. at 1, 10.

[199] Pennsylvania Report, *supra* note 197, at 1. *But see*, Peter Steinfels, *The PA Grand-Jury Report: Not What It Seems*, COMMW. MAG. (Jan. 25, 2019), https://www.commonwealmagazine.org/pa-grand-jury-report-not-what-it-seems [https://perma.cc/3K67-U3G8]. Concluding based on a review of material presented in the Pennsylvania Report and testimony presented to the grand jury that the conclusion that dioceses routinely and universally covered up reports of clergy sexual abuse of children is "grossly misleading, irresponsible, inaccurate, and unjust".

[200] *See* Pennsylvania Report, *supra* note 197, at 7–8.

[201] *See, e.g.*, Laurie Goodstein & Sharon Otterman, *Catholic Priests Abused 1,000 Children in Pennsylvania, Report Says*, N.Y. TIMES (Aug. 14, 2018), https://www.nytimes.com/2018/08/14/us/catholic-church-sex-abuse-pennsylvania.html [https://perma.cc/N9VG-7CTC]; Editorial Board, *The Catholic Church's Unholy Stain*, N.Y. TIMES (Sept. 13, 2018), https://www.nytimes.com/2018/09/13/opinion/pope-catholics-sexual-abuse.html [https://perma.cc/VK3S-4NRA] (calling the Pennsylvania Report "gut-wrenching" and opining that the crisis is "devouring the Roman church").

[202] *See* Hamilton et al., *supra* note 5, at 4 (describing limitations reform accomplished in 2019 as the result of three "historic developments" occurring in 2018, release of the 2018 Pennsylvania Report, media video coverage of claimants' testimony against accused child abuser Larry Nassar, and print media coverage of alleged child sex-trafficker Jeffrey Epstein); Sean Carlson, *A Grand Jury Investigation into Sex Abuse by New York Clergy Could Fall Short*, WNYC NEWS (Aug. 22, 2018), https://www.wnyc.org/story/state-lawmaker-wary-grand-jury-would-bring-justice-sex-abuse-victims/ [https://perma.cc/GN6N-ZAKG] (reporting that NY

A sticking point for the NYSCC over the 2018 version of the NYCVA had been the disparate treatment for private organizations like Catholic dioceses (who would lose the limitations defense for claims asserted during the revival window) and public organizations who would remain protected from liability by New York's notice of claim rules.[203] Under New York law, as a condition precedent to suit, a plaintiff seeking to sue a public organization for negligence must submit to the agency a notice of suit within ninety days after the injury occurred.[204] The 2019 legislation eliminated this distinction by expressly eliminating for public organizations the notice of claim defense for claims filed within the window.[205] The NYSCC withdrew its opposition to the 2019 bill, ostensibly because the bill treated private and public defendants equally with respect to liability for time-barred claims.[206]

As a result of the 2018 election, Democrats controlled both houses of the New York Legislature.[207] Governor Cuomo, a Democrat, made passage of the NYCVA a part of his agenda for his first 100 days in office.[208] Child advocacy and public interest organizations expressed their support for the NYCVA.[209] On February 14, 2019, Cuomo

State Assembly member Linda Rosenthal said that NY should follow the recommendation in the Pennsylvania Grand Jury's report regarding enactment of a claims revival window).

[203] *See* Michael Gartland, *Catholic Church Spent $10.6M in Northeast on Lobbying Since 2011*, N.Y. DAILY NEWS (June 4, 2019), https://www.nydailynews.com/news/politics/ny-metro-catholic-church-lobbyists-20190604-hgrmn5ip6rh55ksdzrlr4eemzq-story.html [https://perma.cc/6QZH-VX3K].

[204] N.Y. GEN. MUN. LAW § 50-e (McKinney 2019) (amended by NYCVA to exclude claims for child sexual abuse).

[205] *See* S.B. 2440, 242d Legis. Sess. (N.Y. 2019).

[206] *See NYS Bishops Statement on Passage of Child Victims Act*, N.Y. ST. CATHOLIC CONF. (Jan. 28, 2019), https://www.nyscatholic.org/nys-bishops-statement-on-passage-of-child-victims-act/ [https://perma.cc/U8W9-K48G]; N.Y. S.B. 2440 § 2(b); *see also* E-mail from Susan Phillips Read, former Assoc. J. of the New York Ct. of Appeals and Of Couns. at Greenberg Traurig, LLP to Richard Barnes, p. 1, 4 (May 21, 2018) (available at https://www.nyscatholic.org/wp-content/uploads/2018/06/2018-analysis-of-Susan-Read.pdf) [https://perma.cc/QZ3A-X6S9].

[207] *See* Vivian Wang, *Democrats Take Control of New York Senate for First Time in Decade*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/nyregion/democrat-ny-senate.html [https://perma.cc/V3FD-YFRM].

[208] *Governor Cuomo Unveils Agenda for First 100 Days - 2019 Justice Agenda*, GOVERNOR ANDREW M. CUOMO (Dec. 17, 2018), https://www.governor.ny.gov/news/governor-cuomo-unveils-agenda-first-100-days-2019-justice-agenda [https://perma.cc/AU6F-22WK].

[209] *See e.g.*, *Jewish Leaders and Rabbis Who Support Child Victims Act (New York)*, KOL V'OZ, http://sol-reform.com/News/wp-content/uploads/2016/05/LETTER-Jewish-leaders-and-rabbis-support-NY-Child-Victims-Act-PETITION.pdf [https://perma.cc/SJQ3-5YDJ]. The following organizations submitted letters of support: Citizens' Committee for Children of New York, Inc.; Kol v'Oz; New York State Children's Alliance, Inc.; New York State Coalition Against Domestic Violence; New York State Coalition Against Sexual Assault; The New York Society for the Prevention of Cruelty to Children; Planned Parenthood; Safehorizon; The Sexual Addiction Treatment and Training Institute; YWCA Brooklyn; Za'akah; and Legislature of Erie County, New York. *See* N.Y. S.B. 2440.

signed the NYCVA into law.[210] Speaking to adults who experienced childhood sexual abuse who were present at the signing of the legislation, Governor Cuomo said, "[t]his is society's way of saying we are sorry . . . that it took us so long to acknowledge what happened to you."[211]

The Senate Committee Report for the bill that became the NYCVA explained that the statute, if enacted, "would open the doors of justice to the thousands of survivors of child sexual abuse in New York State . . . help the public identify hidden child predators through civil litigation discovery, and shift the significant and lasting costs of child sexual abuse to the responsible parties."[212]

The Assembly Committee Report asserted: "The societal plague of sexual abuse against minors is now well-documented. Also well-established is how certain abusers—sometimes aided by institutional enablers and facilitators—have been successful in covering up their heinous acts against children, either by guile, threats, intimidation, and/or attacks upon child-victims."[213] It notes that the bill "is a legislative acknowledgement of the unique character of sex crimes against children, which can have a multitude of effects upon victims, including being justifiably delayed in otherwise timely taking action against their abusers and/or those who facilitated in their abuse."[214] Neither the Senate nor Assembly Committee Reports refer to facts or cite to authoritative sources to support these assertions.

VII. THE LESSONS AND LEGACY OF REVIVAL

Retroactive claims revival legislation effectively shifts to defendants and the judicial system all risks and costs associated with adjudication based on time-degraded evidence. The delayed discovery doctrine preserves the defendant's limitations defense

---

[210] *See* N.Y. C.P.L.R. § 214-g (McKinney 2019); N.Y. CRIM. PROC. LAW § 30.10-3(f) (McKinney 2019); N.Y. S.B. 2440. *See also* Augusta Anthony, *New York Passes Child Victims Act, Allowing Child Sex Abuse Survivors to Sue Their Abusers*, CNN (Jan. 28, 2019), https://www.cnn.com/2019/01/28/us/new-york-child-victims-act/index.html [https://perma.cc/T9EX-JM5K] (quoting Marci Hamilton as saying that the passage in both houses "represents over 15 years of work by survivors and advocates trying to get around the stiff opposition from the Catholic bishops and the insurance industry").

[211] Elizabeth Joseph, *'This is Society's Way of Saying We Are Sorry,' New York Governor Tells Survivors of Sex Abuse Before Signing Child Victims Act into Law,* CNN (Feb. 14, 2019), https://www.cnn.com/2019/02/14/us/new-york-child-victims-act-signed/index.html [https://perma.cc/V65N-5ZWS].

[212] INTRODUCER'S MEMORANDUM IN SUPPORT, S. 242-S.B. 2440, 2019 Legis. Sess., at 7–8 (N.Y. 2019).

[213] NEW YORK COMM. REP., A. 242-2683, 2019 Legis. Sess. (N.Y. 2019).

[214] *Id.*

except where the plaintiff can persuade the finder of fact that her delay in suing is justified under the circumstances in her case. In contrast, a statutory claim revival window eliminates the defendant's limitations defense against *any plaintiff* who files a covered claim within the window, without regard to that plaintiff's justification for delay.

Claim revival window legislation retroactively upends defendants' expectations as to the duration of their potential liability for wrongdoing. It is difficult to assess the impact on defendants, or on the judicial system, of that undermining of reliance interests. Defendants' reliance interest in a limitations defense is hard to value because limitations defenses are unstable. The legislatures who create limitations defenses can retract them, even retroactively, subject only to constitutional limitations.[215]

The Supreme Court has concluded that the Fourteenth Amendment does not prohibit states from passing legislation to revive claims that previous legislation had time-barred.[216] Due process protection against retroactive retraction of limitations defenses under state constitutions varies.[217] The Diocese of Rockville-Centre challenged the NYCVA under the New York Constitution. In *Werner v. Diocese of Rockville-Centre*,[218] New York Supreme Court held that due process required only that the retroactive legislation remedy "an identifiable injustice," and that the legislature's revival of child sexual abuse claims "was reasonable in light of that injustice."[219] Applying this standard, the court held that the claims revival window in the NYCVA passed constitutional muster.[220]

The legislative reports accompanying the NYCVA articulate the "injustice" that motivated the passage of the law.[221] They highlight the arguments advocates advanced before the courts to achieve

[215] Consideration of constitutional constraints on retroactive limitations relief like claim revival windows is beyond the scope of this article.

[216] *See* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314–15 (1945).

[217] *See, e.g.*, Doe v. Hartford Roman Catholic Diocesan Corp., 119 A.3d 462, 471, 508 (Conn. 2014) (holding that retroactive application of amendments to limitations law to extend the limitations period for child sexual abuse claims did not violate substantive due process protections under the Connecticut Constitution, and surveying the constitutional law of other states on retroactive limitations relief).

[218] Werner v. Diocese of Rockville-Centre, No. 900012/2019, 2020 N.Y. Misc. LEXIS 2003, at *11 (N.Y. Sup. Ct. May 11, 2020).

[219] *Id.* (quoting Sweener v. St.-Gobain Performance Plastics Corp., No. 1:17-CV-0532, 2018 U.S. Dist. LEXIS 19893, at *21 (N.D.N.Y. Feb. 7, 2018)).

[220] *See Werner*, 2020 N.Y. Misc. LEXIS 2003, at *14–15.

[221] INTRODUCER'S MEMORANDUM IN SUPPORT, S. 242-S.B. 2440, 2019 Legis. Sess., at 7–8 (N.Y. 2019); NEW YORK COMM. REP., A. 242-2683, 2019 Legis. Sess. (N.Y. 2019).

limitations relief. They assert as fact that the unique psychological attributes of child sexual abuse claims coupled with the culpability of the defendants justifies an exception from the time-bar.[222]

Although the consensus regarding the moral offense of organizational negligence in protecting children from sexual abuse is clear,[223] the factual premises that might justify revival of time-barred claims for this failure are not clear. As to the premise that persons who experience child sexual abuse are uniquely impaired in their ability to sue promptly, the New York Assembly Committee Report noted, without citation to authority, that child sexual abuse is distinct from other forms of traumatic injury.[224] The report noted that persons who experience criminal sexual abuse as children can "be[] justifiably delayed" in suing the perpetrator and "those who facilitated their abuse."[225]

Clearly, most child sexual abuse claimants have indeed delayed decades after the abuse to sue. That people delay in suing for compensation for a particular type of injury does not explain *why* people delay. Nor does it establish that the delay in suing under the circumstances is reasonable given the degradation of evidence and the reliability of judicial outcomes over time.

Scientific evidence as to the impact of child sexual abuse on memory and the capacity of persons to understand the connection between the abuse and the harm it caused is inconclusive. Some research on childhood trauma and memory has demonstrated differences regarding autobiographical memory of childhood experiences between adults with and without child sexual abuse histories.[226] Generalized assertions based on small scale studies of human subjects about memory or other psychological effects of childhood sexual abuse are inherently controversial.[227] Researchers

---

[222] See Elizabeth A. Wilson, *Suing for Lost Childhood: Child Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult-Survivors of Child Abuse*, 12 UCLA WOMEN'S L.J. 145, 194 (2003); NEW YORK COMM. REP., A. 242-2683, 2019 Legis. Sess. (N.Y. 2019).

[223] *See* Timothy D. Lytton, *Legal Legacy*, BOS. GLOBE (Feb. 4, 2007), http://archive.boston.com/news/globe/ideas/articles/2007/02/04/legal_legacy/ [https://perma.cc/44XH-YYSP] (describing the clergy child sexual abuse story as "especially scandalous . . . and one that fueled an unusual level of moral outrage").

[224] *See* NEW YORK COMM. REP., A. 242-2683.

[225] *See id.*

[226] *See generally* Christin M. Ogle et al., *Autobiographical Memory Specificity in Child Sexual Abuse Victims*, 25 DEV. PSYCHOPATHOLOGY 321 (2013) (observing both memory deficits and advantages for child sexual abuse victims relative to non-victims).

[227] *See* Helen P. Hailes et al., *Long-Term Outcomes of Childhood Sexual Abuse: An Umbrella Review*, 6 THE LANCET PSYCHIATRY 830, 833–34 (2019) (reviewing studies on psychological

do not agree on a common definition of "child sexual abuse."[228] Survey data of adults who claim to have been abused as children on the reasons for their delay in reporting abuse may be subject to recall bias.[229] Studies show that the emotional and psychological ramifications of sexual abuse in childhood vary depending on factors specific to the abuse and the individual's circumstances.[230] For example, some research indicates that males may experience

effects of child sexual abuse and concluding that of 559 primary studies, only two studies met high quality standards).

[228] *See* Laura K. Murray et al., *Child Sexual Abuse*, 2014 CHILD ADOLESCENT PSYCHIATRY CLIN. N. AM. 321, 321 (noting that researchers use many definitions of "child sexual abuse" and that differences may lead to different policy implications). The U.S. Center for Disease Control and Prevention defines "child sexual abuse" as "any completed or attempted (noncompleted) sexual act, sexual contact with, or exploitation (i.e., noncontact sexual interaction) of a child by a caregiver." *Id*. at 321 (quoting Rebecca T. Leeb et al., *Child Maltreatment Surveillance: Uniform Definitions for Public Health and Recommended Data Elements* 14 (2008)), http://www.cdc.gov/violenceprevention/pdf/cm_surveillance-a.pdf [https://perma.cc/QY2H-Q946]). The World Health Organization defines child sexual abuse as:

> [T]he involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violate the laws or social taboos of society. Child sexual abuse is evidenced by this activity between a child and an adult . . . who by age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person.

WORLD HEALTH ORG., REPORT OF THE CONSULTATION ON CHILD ABUSE PREVENTION (1999), https://apps.who.int/iris/handle/10665/65900 [https://perma.cc/RGP3-M2DL].

[229] *See* Leeb et al., *supra* note 228, at 7; Daniel Cukor & Lata M. McGinn, *History of Child Abuse and Severity of Adult Depression: The Mediating Role of Cognitive Schema*, 15 J. CHILD SEXUAL ABUSE 19, 30 (2006).

[230] *See, e.g.*, JEROME KROLL, PTSD/BORDERLINES IN THERAPY: FINDING THE BALANCE 190 (1993) (noting that a child's ability to report sexual abuse at the time it occurs depends on whether the perpetrator has threatened the child); *see also* Deborah Goldfarb et al., *Long-Term Memory in Adults Exposed to Childhood Violence: Remembering Genital Contact Nearly 20 Years Later*, 7 CLINICAL PSYCHOL. SCI. 381, 382, 390 (2019) (data showed differences in rates of recalling documented sexual event (genital touching) experienced as children based on gender and age when the event occurred); Denise-Marie Ordway, *Why Sexual Assault Survivors May Not Come Forward for Years*, JOURNALIST'S RES., HARV. KENNEDY SCH., SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL'Y (Oct. 5, 2018), https://journalistsresource.org/studies/government/criminal-justice/sexual-assault-report-why-research/ [https://perma.cc/7242-7FHQ] (summarizing several psychological studies, and concluding that "the answer is complicated" and that research indicates a wide range of possible reasons why people delay reporting sexual assault and abuse); Beverly Engel, *Why Adult Victims of Childhood Sexual Abuse Don't Disclose*, PSYCHOLOGY TODAY (Mar. 6, 2019), https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201903/why-adult-victims-childhood-sexual-abuse-dont-disclose [https://perma.cc/24S6-76CU] (listing reasons people delay disclosure of childhood sexual abuse based on the author's clinical experience as a family therapist); DELAYED DISCLOSURE: A FACTSHEET BASED ON CUTTING-EDGE RSCH. ON CHILD SEX ABUSE, CHILD USA 2 (Mar. 2020), https://childusa.org/wp-content/uploads/2020/04/Delayed-Disclosure-Factsheet-2020.pdf [https://perma.cc/QHN2-V4FT] ("The delay in disclosing child sex abuse happens for a variety of complex and overlapping reasons").

different, more severe, mental health effects from childhood sexual abuse than females.[231] Children who are older when the abuse occurs are more likely to disclose the abuse than younger children.[232] Research about the psychological and emotional effects on children of *clergy* sexual abuse is undeveloped and inconclusive.[233] One pervasive problem in designing studies to pinpoint the reasons *why* people delay in disclosing sexual abuse they experienced as children is the inability to control for the effects of *other* forms of childhood abuse and injury.[234] In short, the psychological effects of child sexual abuse are not sufficiently well understood to support a general justification for delay based on a unique and pervasive causal connection between the of the abuse and an abused person's ability, as an adult, timely to sue those responsible.

Although psychological science does not offer a blanket justification for delay, it does offer some support for the conclusion that children who experience sexual abuse likely face obstacles in asserting their claims because of their immaturity at the time the incidents occur and the sexual nature of the incidents.[235] For incidents occurring during the 1960s–1980s—the statistical peak of the occurrence of

[231] *See* Judy Cashmore & Rita Shackel, *The Long-Term Effects of Child Sexual Abuse*, AUSTL. INST. FAMILY STUDIES 9–10 (2013), https://aifs.gov.au/cfca/publications/long-term-effects-child-sexual-abuse/impact-child-sexual-abuse-mental-health (describing research that shows that 25% of adults who reported exposure to child sexual abuse did not meet any criteria for psychiatric diagnoses or adjustment difficulties and 40% exhibited no clear symptoms).

[232] *See* Irit Hershkowitz et al., *Trends in Children's Disclosure of Abuse in Israel: A National Study*, 29 CHILD ABUSE & NEGLECT 1203, 1203 (2005) (finding that 74% of 11-14 year old children disclosed abuse to researchers whereas 50% of 3-6 year old children disclosed); Thomas D. Lyon et al., *Children's Reasoning About Disclosing Adult Transgressions: Effects of Maltreatment, Child Age, and Adult Identity*, 81 CHILD DEV. 1714, 1723 (2010); *see generally* Catherine Townsend, CHILD SEXUAL ABUSE DISCLOSURE: WHAT PRACTITIONERS NEED TO KNOW, DARKNESS TO LIGHT 11 (2016), https://www.d2l.org/wp-content/uploads/2020/01/Child-Sexual-Abuse-Disclosure-Statistics-and-Literature-Review.pdf [https://perma.cc/GX75-ZLR8] (summarizing conclusions of researchers).

[233] *See* Stephen Brady, *The Impact of Sexual Abuse on Sexual Identity Formation in Gay Men*, 17 J. CHILD SEXUAL ABUSE 359, 359 (2008).

[234] *See, e.g.*, Jonathan Adams et al., *Characteristics of Child Physical and Sexual Abuse as Predictors of Psychopathology*, 86 CHILD ABUSE & NEGLECT 166, 168 (2018) (noting that child abuse victims frequently experience more than one form of victimization and research on the effect of on type of abuse frequently fails to control of the effects of other types).

[235] *See* Elizabeth Gruenfeld et al., *"A Very Steep Climb": Therapists' Perspectives on Barriers to Disclosure of Child Sexual Abuse Experiences for Men*, 26 J. CHILD SEXUAL ABUSE 731, 732 (2017) (observing that shame associated with sexual abuse inhibits disclosure by males who experience it as children); A. Munzer et al., *Please Tell! Barriers to Disclosing Sexual Victimization and Subsequent Social Support Perceived by Children and Adolescents*, 2014 J. INTERPERSONAL VIOLENCE 1, 13 (noting that shame was most frequently mentioned as the obstacle for disclosure); P. Schaeffer et al., *Children's Disclosures of Sexual Abuse: Learning from Direct Inquiry*, 35 CHILD ABUSE & NEGLECT 343, 344 (2011).

reported incidents involving Catholic clergy[236]—the obstacles for an adult to bring a tort action in New York within the then applicable short limitations period were higher compared to today. Relative to perceptions in the 1960s to 1980s, perception of child sexual abuse and the rights of children have changed to accord children a much greater range of agency for their own bodily integrity and well-being.[237] Certainly, religious organizations responsible for the care of children have suffered an erosion of public trust,[238] making them far less formidable potential defendants. It is easy for a potential plaintiff to find enthusiastic legal representation today among the organized and highly visible bar specializing in child sexual abuse claims.[239] Although it was no doubt more difficult to sue an organization for damages for child sexual abuse decades ago, plaintiffs did bring successful claims for child sexual abuse against Catholic and other organizations as early as the 1980s.[240] Jeff Anderson, a nationally recognized advocate for child sexual abuse claimants, reportedly filed more than 200 child sexual abuse suits against religious organizations during the 1980s and 1990s.[241]

That plaintiffs faced obstacles to success in suing a religious organization for compensation for an employee's sexual abuse decades ago that are greater than those they face today does not provide a clear justification for retroactive relief from limitations laws. Rather, the fact that legal standards and processes, social perceptions, and scientific knowledge changes over time, tends to

[236] *See* Rev. D. Paul Sullins, *Is Sexual Abuse by Catholic Clergy Related to Homosexuality?*, 2017 NAT'L CATHOLIC BIOETHICS Q. 671, 677 (2018).

[237] *See* Ute Haring et al., *Reflecting on Childhood and Child Agency in History*, 5 PALGRAVE COMMUN. 1, 6 (2019) (literature review on history of developments in childhood, child abuse, and child agency).

[238] Lydia Saad, U. *S. Confidence in Organized Religion at Low Point*, GALLUP (July 12, 2012), https://news.gallup.com/poll/155690/confidence-organized-religion-low-point.aspx [https://perma.cc/74VD-9ZXB] (noting decline in confidence in religious institutions and in public schools, banks and television news).

[239] Nate Raymond, *Lawyer Ads Seeking Catholic Church Abuse Victims Surge, Report Finds*, REUTERS (Oct. 1, 2021) https://www.reuters.com/legal/litigation/lawyer-ads-seeking-catholic-church-abuse-victims-surge-report-finds-2021-10-01/ [https://perma.cc/E4FR-2D42] (describing results of a study by an advertising tracking firm and noting that lawyer advertising on church-related sex abuse increased 55% to nearly $2 million during July and August 2021 compared to the previous two months).

[240] *See* Corey Flintoff, *Timeline: Priest Abuse Claims Date Back Decades*, NPR (Apr. 26, 2010), https://www.npr.org/templates/story/story.php?storyId=126160853 [https://perma.cc/RL2A-23J5] (listing history of Catholic clergy sexual abuse criminal and civil litigation beginning in the 1980's).

[241] *Jeff Anderson (Attorney)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Jeff_Anderson_(attorney) [https://perma.cc/VJ5H-LUYM].

illustrate the utility of limitations laws.[242] Change in these conditions over time raises another concern about retroactive claims revival. On the one hand, retroactive limitations relief affords a pathway to compensation for persons who faced barriers to justice in period one that do not seem justified in period two. On the other hand, application of legal, social, and scientific norms prevailing in period two to adjudicate responsibility for harms occurring in period one seems inherently unjust to the extent that it holds defendants to a standard of care they could not reasonably have foreseen in period one.[243] Although the temporal mismatch benefits plaintiffs, it is not clear that the benefit to plaintiffs outweighs the cost to defendants and the legal system.

The problem of change in legal and social norms over time is ubiquitous throughout human history and affects all human activity.[244] Claims revival legislation that selects one type of claim for relief from the time-bar on grounds that claimants had a more difficult time suing within the otherwise applicable limitations period than they do today does not distinguish that type of claim from a host of others. Absent a justification for distinguishing revived claims from those that remain un-revived, revival undermines the reliability of all limitations laws, with a corresponding loss in the social value of repose they otherwise provide.

As explained above, shifting the focus from the plaintiffs' justification for delay in suing to the defendants' culpability for covering up knowledge of clergy sexual abuse of children did not persuade New York courts to relieve child sexual abuse claimants from the limitations time bar.[245] The cover-up narrative has, however, been important in shaping public support for retroactive

[242] *See, e.g.*, *In re* African-American Slave Descendants Litig., 471 F.3d 754, 763 (7th Cir. 2006) (dismissing with prejudice tort claims of legal representatives of enslaved persons against corporations who allegedly profited from slavery on statute of limitations grounds); Alexander v. Oklahoma, 382 F.3d 1206, 1219–20 (10th Cir. 2004) (dismissing as time-barred the claims of alleged victims and descendants of victims for injuries incurred in the Tulsa race riots in the 1920's); *see generally* Erik K. Yamamoto, et al., *American Reparations Theory and Practice at the Crossroads,* 44 CAL. W. L. REV. 1, 21-27 (2007) (describing civil claims for reparations for historic wrongs in the early 2000's and their failure in the courts on limitations and other grounds).

[243] *See* Andre v. Pomeroy, 320 N.E.2d 853, 858 (N.Y. 1974) (Breitel, J., dissenting) ("What would be negligence in retrospect is not negligence in prospect"); Glen Feinberg, *What is the Standard of Care for Child Victims Act Cases*, 265 N.Y.L.J. 4 (2021) (arguing that under New York tort law an organization's negligence in connection with child sexual abuse should be measured by the standard of care applicable at the time the abuse occurred).

[244] *See* Annie Niemand, *Changing Culture by Changing Norms*, MEDIUM (Sept. 2, 2020), https://medium.com/bending-the-arc/changing-culture-by-changing-norms-64b79c77a14b **[**https://perma.cc/S9AG-R26X].

[245] *See supra* Part VII.

claims revival legislation for child sexual abuse claims. In addition to the argument in favor of compensatory justice for holders of otherwise time-barred claims, advocates assert that retroactive limitations relief achieves retributive justice—by holding organizations like Catholic dioceses accountable for their failures to protect children and cover up behavior.[246]

Although revival of time-barred child sexual abuse claims will likely add little to the deterrent effect of liability for current abuse and prospective limitations reform,[247] it will accomplish retribution.

[246] *See, e.g.*, Pennsylvania Report, *supra* note 197, at 7, 223, 299 (noting that church officials who protected clergy who abused children remained in office and got promoted, including Cardinal Donald Wuerl who later became the archbishop of the Archdiocese of Washington, D.C.). "Until that changes," the Report noted, "we think it is too early to close the book on the Catholic Church sex scandal." *Id.*; *see also* Laurie Goodstein & Sharon Otterman, *Catholic Priests Abused 1,000 Children in Pennsylvania, Report Says*, N.Y. TIMES (Aug. 14, 2018), https://www.nytimes.com/2018/08/14/us/catholic-church-sex-abuse-pennsylvania.html [https://perma.cc/P8K5-MLRW].

[247] In 2002, the USCCB adopted the Charter for the Protection of Young People, which provides procedures for collecting and responding to allegations of clergy sexual abuse of minors, and for prevention of abuse. *See Charter for the Protection of Young People*, U.S. CONF. OF CATH. BISHOPS 21 (June 2018), https://www.usccb.org/test/upload/Charter-for-the-Protection-of-Children-and-Young-People-2018-final(1).pdf [https://perma.cc/GP4K-QBHK]. Each year an independent investigator audits compliance with the Charter. *See, e.g.*, 2019 Annual Report: Findings and Recommendations, U.S. CONF. OF CATH. BISHOPS (June 2020), https://cdn.ymaws.com/usccb.site-ym.com/resource/group/1560f0d7-fee7-4aff-afd2-4cf076a24943/resource_toolbox/audit/2019_annual_report_final.pdf [https://perma.cc/R9UL-DH3P]. The 2019 audit reported 4,434 allegations of abuse, 37 of which involved persons who were minors in 2019. *Id.* at 28. Of these 37, eight allegations (.002% of all incidents reported in 2019) were substantiated and the accused clergy were removed from ministry. *Id.* In contrast with the assertion in the New York State Assembly Report that child sexual abuse is a "plague on society," N.Y. Comm. Rep., Assemb. B. 242-2683 (2019), data from multiple sources indicate that reported incidents of child sexual abuse involving current minors have dramatically declined. Reported cases of child sexual abuse by year fell more than 60% from 1992-2010. See David Finkelhor & Lisa Jones, *Have Sexual Abuse and Physical Abuse Declined Since the 1990s*?, CRIMES AGAINST CHILD. RES. CTR. 1 (Nov. 2012), http://www.unh.edu/ccrc/pdf/CV267_Have%20SA%20%20PA%20Decline_FACT%20SHEET_1 1-7-12.pdf [https://perma.cc/5LHD-CJRM] (concluding based on data from various governmental reports); *see also* David Finkelhor & Lisa Jones, *Why Have Child Maltreatment and Child Victimization Declined?*, 62 J. OF SOC. ISSUES 685, 685–86 (2006) (finding that incidents of sexual abuse of children began to decline in the early 1990's, and between 1990-2004 substantiated reported incidents of child sexual abuse declined by 49%); David Finkelhor & Lisa M. Jones, *Explanations for the Decline in Child Sexual Abuse Cases*, U.S. DEPT. OF JUSTICE, OFF. JUV. JUST. DELINQ. PREVENTION 1–3 (Jan. 2004), https://www.ncjrs.gov/pdffiles1/ojjdp/199298.pdf [https://perma.cc/C9GU-QTVE] (evaluating explanations of the decline using data from various reporting sources); Erica Goode, *Researchers See Decline in Child Sexual Abuse Rate*, N.Y. TIMES (June 28, 2012), https://www.nytimes.com/2012/06/29/us/rate-of-child-sexual-abuse-on-the-decline.html [https://perma.cc/486C-GAK4]. Physicians who treat physically abused children have noted a decrease in the number of physically abused child patients but an increase in the severity of their injuries during the Covid-19 pandemic. *See* Candy Woodall, *As Hospitals See More Severe Child Abuse Injuries During Coronavirus, 'The Worst is Yet to Come'*, USA TODAY (May 13, 2020), https://www.usatoday.com/story/news/nation/2020/05/13/hospitals-seeing-more-severe-child-abuse-injuries-during-coronavirus/3116395001/ [https://perma.cc/D9BT-9D8B].

Assuming that retribution against organizations whose negligence was a proximate cause of sexual abuse of a child is morally compelling, it is not clear that claims of adults who experienced sexual abuse as children against organizations whose negligence contributed to their injuries are *uniquely* compelling. Even if retribution for child abuse in general is morally compelling, it is not clear that child *sexual* abuse presents a distinctively compelling case for retroactive claims revival compared to claims for other forms of child abuse. Research indicates that most abused children suffer multiple forms of abuse; less than 5% of maltreated children suffer only one type of abuse.[248] A study published by the American Psychological Association concludes that children who experience emotional abuse and neglect experience similar or worse mental health repercussions than children who experience physical or sexual abuse.[249]

[248] Philip G. Ney et al., *The Worst Combinations of Child Abuse and Neglect*, 18 CHILD ABUSE & NEGLECT 705, 706 (1994). Child abuse takes several forms which researchers have categorized: physical abuse, physical neglect, verbal abuse, emotional abuse, emotional neglect and sexual abuse. *Id.* at 707–09 (reporting on 167 children from 7-18 years old).

[249] *See* Joseph Spinazzola et al., *Unseen Wounds: The Contribution of Psychological Maltreatment on Child and Adolescent Mental Health and Risk Outcomes*, 6 PSYCHOL. TRAUMA: THEORY, RES., PRAC., AND POL'Y S18, S18 (2014). The study used a national data set tracking 5,616 children. *Id.* at S20.

VIII. CONCLUSION

A legislature considering retroactive relief from limitations laws for a particular type of claim must balance the social value of retribution against the costs. The impact of litigation of revived child sexual abuse claims on the credibility of the litigation system remains to be seen. We can anticipate, however, a significant impact on the legal system.

Laws that set limitations periods and laws that retroactively eliminate them are particularly hard to defend or justify because they inescapably balance conflicting interests.[250] Absent transparent consideration of the balancing purpose of limitations laws, and the reasons for altering the balance, they appear, and perhaps are, no more than an expression of the current relative political influence of the persons they affect.[251]

[250] *See* discussion, *supra* Part III.

[251] *See* Dawson, *supra* note 42, at 5 ("If the periods of limitation defined by statute were carefully adjusted to the requirements of particular cases, or if scientific methods could be used to measure the effect of lapse of time on legal relationships, then time limitations in statutory form would doubtless possess a greater moral authority."). Legislatures are well-adapted to political process and they make decisions based on anecdote and intuition (as opposed to data) all the time. *See e.g.*, John Martinez, *Rational Legislating*, 34 STETSON L. REV. 547, 550, 593, 611 (2005) (noting the tendency of legislatures to "misbehave" by enacting legislation based solely on anecdote and arguing for a statutory or constitutional requirement for "rational legislating"—that legislatures explain legislation from logical conclusions based on evidence). Martinez notes that "[t]he overwhelming majority of legislation enacted by states contains no findings at all, or findings without reference to supporting evidence." *Id.* at 593. *See generally* Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 934 (2006) (noting differences between the law-making capacities of courts (bottom up) and legislatures (top down) and noting that the two processes "commonly produce different answers to the same legal questions").