Child Sexual Abuse and Criminal Statutes of Limitation: A Model for Reform

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CHILD SEXUAL ABUSE AND CRIMINAL STATUTES OF LIMITATION: A MODEL FOR REFORM

Abstract: Many states permit courts to toll criminal statutes of limitation in a child sexual abuse case if the victim is under a minimum age, or if the offender prevents the victim from reporting the abuse. Twenty-four states have no such tolling provision, however, and their state courts have not devised a common law solution to avoid the problem of time-barred prosecutions. This Comment examines child sexual abuse in the context of state criminal law. It concludes that statutes of limitation present a formidable obstacle to the successful prosecution of perpetrators of child sexual abuse, and proposes a model legislative amendment to toll states' criminal statutes of limitation.

Perpetrators of child sexual abuse escape prosecution for their acts when the abuser uses threats and coercion to prevent the victim from reporting the offense until after the statute of limitation has expired, or when the victim is too young to report the abuse within the statutory period. Consider the following facts:

The sexual contacts began when Susan was five years old and her brother Tom was seventeen. In the next three years, the abuse progressed from touching to oral sex to intercourse. Although Tom stopped having intercourse with Susan when she was ten, other acts of abuse and threats of harm continued until she was fourteen. Her brother often threatened to shoot her if she told anyone about the abuse. Frightened, Susan maintained her silence. Eventually she told her parents about the abuse, but they merely punished her for lying. When Susan was seventeen she learned that Tom also had abused her younger sisters. Distressed, she told a school counselor about her abuse and a complaint was filed with local police. Tom was prosecuted and convicted. His conviction was overturned, however, because the statute of limitation had expired.1

If Susan lived in Oregon, Utah, or any one of another twenty-two states,2 criminal charges could not be brought against Tom. In Oregon, for example, criminal charges would be barred by the state's three year statute of limitation for Rape of a Child.3 Similarly, in Utah, charges would be barred by the state's four year statute of limitation for most felony offenses.4 Although other acts of abuse continued

1. Adapted from State v. Shamp, 422 N.W.2d 736 (Minn. Ct. App.), rev'd, 427 N.W.2d 228 (Minn. 1988) (overturning conviction for sexual abuse because charges were brought after statute of limitation had expired).
2. See infra note 12.
4. UTAH CODE ANN. § 76-1-302(1)(a) (1978). A prosecution for murder, manslaughter, or a capital felony may be commenced at any time. Id. § 76-1-301.
until Susan was fourteen, prosecution for these offenses also would be barred.\(^5\)

Susan's story is not unique.\(^6\) Twenty-four states across the country have no provision for tolling the statute of limitation in cases where the victims are too young to report the sexual abuse within the statutory period. These states also have no provision for tolling the statute when child victims do not report the abuse because they were coerced into silence by their abusers.\(^7\) Despite statutes criminalizing child sexual abuse in every state,\(^8\) perpetrators of abuse continue to escape prosecution for their crimes.\(^9\) Often, abusers shame and threaten child victims into silence.\(^10\) When victims remain silent until after the

\(^5\) In Utah, a prosecution may be commenced for rape, sodomy or sexual abuse of a child within one year after the report to law enforcement officials so long as no more than eight years has elapsed since the commission of the offense. \textit{Id.} § 76-1-303. Oregon has a two year statute of limitation for all misdemeanor offenses, including sexual misconduct and second degree sexual abuse. \textit{Or. Rev. Stat.} §§ 131.125, 163.445.

\(^6\) The American Psychological Institute estimates that 12 to 15 million living American women have experienced incestuous abuse. Brozan, \textit{Helping to Heal the Scars Left by Incest}, \textit{N.Y. Times}, Jan. 9, 1984, at B6, col. 2. The National Incidence Study of Child Abuse and Neglect estimated that 44,700 children were sexually abused between May 1979 and April 1980. D. \textit{Finkelhor, A Sourcebook On Child Sexual Abuse} 17-18 (1986) [hereinafter \textit{SOURCEBOOK}]. The American Humane Association estimates that in 1983 almost 72,000 cases of child sexual abuse were reported to child protective agencies nationwide. \textit{Id.} at 17. An unidentified number of cases involved multiple victims. \textit{Id.} The broad range of estimates is based, in part, upon the definition of "incest" and the methodology and sample size used. \textit{See id.} at 22-27 (a comprehensive discussion of the definitions of "incest" on which studies have relied).

\(^7\) There are no statistics documenting how often criminal child sexual abuse cases are barred by statutes of limitation. In Seattle, Washington, an attorney in the King County Prosecutor's Office estimated that the office receives approximately four cases per month where charges are time-barred. This estimate does not include reports made to police officers who do not pursue cases barred by statutes of limitations. Telephone conversation with Jeff Baird, Co-director, Special Assault Unit, King County Prosecutor's Office, Seattle, Washington (Nov. 30, 1988) (notes on file with \textit{Washington Law Review}).


\(^9\) Child molestation is "perhaps the least understood and most poorly handled crime . . . . [The crime] is often not reported or discovered, let alone adequately investigated, prosecuted and sentenced." Assistant U.S. Attorney General Lois Haight Herrington, \textit{N.Y. Times}, Oct. 4, 1984, at C3, col. 1.

\(^10\) One child sexual abuse specialist recounts the following:

\begin{quote}
I have two little girls in my sex abuse group. They were both sexually abused by their father over a long period of time. The father has been prosecuted for abusing the younger girls, but not the older ones. Presently, he is living outside the home. He's not allowed to have contact with the kids, but he talks to them on the phone every day: he's trying to convince the older girls not to tell about the abuse. He tells them what happens to men like him if they have to go to prison . . . he says that without his income their mother won't be able to support them and that the girls will all end up in foster care. He knows the statute of limitations expires in six months. He's doing all he can to keep the girls from telling . . . . Unfortunately, he's succeeding.
\end{quote}
statue of limitation has expired, criminal charges are barred and the sex offender escapes prosecution.\textsuperscript{11}

Although the lack of tolling provisions in child sexual abuse cases is a problem nationwide,\textsuperscript{12} a growing number of states in recent years have endeavored to address the statute of limitation problem. Two states impose no statutes of limitation for criminal offenses.\textsuperscript{13} Another seven states impose no statutes of limitation for certain felonies, including felony sex offenses committed against children.\textsuperscript{14} Legislatures in sixteen other states have taken a different approach, mandating that the limitation period does not begin to run until an offense is discovered, the victim reaches a minimum age, or the abuse is reported to law enforcement agencies.\textsuperscript{15} Further, on occasion courts have acted

\begin{footnotesize}
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11. Statutes of limitation also pose a major procedural obstacle in civil suits brought by a victim against his or her abuser. Note, \emph{Statutes of Limitations in Civil Incest Suits: Preserving the Victim’s Remedy}, 7 \emph{Harv. Women’s L.J.} 189, 190 (1984) [hereinafter Note, \emph{Preserving the Victim’s Remedy}]; see also Note, \emph{The Discovery Rule and Father-Daughter Incest: A Legislative Response}, 29 \emph{B.C.L. Rev.} 941 (1988) [hereinafter Note, \emph{The Discovery Rule}]. For a summary of “Post-Incest Syndrome,” see Rosenfeld, \emph{The Statute of Limitations Barrier In Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy}, 12 \emph{Harv. Women’s L.J.} 206 (1989) [hereinafter Rosenfeld, \emph{The Equitable Estoppel Remedy}].


13. Wyoming and South Carolina have no statutes of limitation for any criminal offenses.


15. In Arizona, criminal statutes of limitation do not begin to run until after actual discovery by the state, or from the time discovery should have occurred with the exercise of reasonable diligence. \emph{Ariz. Rev. Stat. Ann.} § 13-107 (Supp. 1988). In Oklahoma, criminal prosecutions
independently of their legislatures to fashion their own tolling exceptions.\textsuperscript{16} Unless legislative or judicial changes are made in the remaining states, however, even the best-designed criminal laws will not protect children and will impede the successful prosecution of perpetrators of child sexual abuse.\textsuperscript{17}

Part I of this Comment examines the dynamics of sexually abusive relationships and discusses the states’ criminal statutes of limitation. Part II identifies the primary approaches to the statute of limitation problem and explains how tolling procedures have been implemented. Part III evaluates these procedures as models for change in states’ criminal statutes of limitation. Part IV recommends that state legislatures enact statutes directing state courts to toll statutes of limitation in criminal cases of child sexual abuse when the victim is under seventeen years of age.

\begin{footnotesize}
\textsuperscript{16} See e.g., State v. Danielski, 348 N.W.2d 352, 356–57 (Minn. Ct. App. 1984) (where victim and defendant reside in the same house and defendant’s use of authority to coerce the victim into submitting to the abuse is an element of the crime, the continued use of authority to silence the victim tolls the statute of limitation because the offense is not complete).

\textsuperscript{17} In Connecticut, for example, if the alleged victim of a sexual assault is less than sixteen years old at the time of the offense, a criminal action must be brought within one year after a parent or guardian learned of the assault, despite the general five-year limitation period. \textit{Conn. Gen. Stat. Ann.} § 53a-69 (West 1985). See, e.g., \textit{State v. Whiteman}, 204 Conn. 98, 526 A.2d 869 (1987) (section 53a-69 does not toll general five-year limitation period, so that where six-year-old victim did not report the assault until less than one month before the five-year period expired and the State did not issue a timely warrant, prosecution was time-barred).
\end{footnotesize}
I. CHILD SEXUAL ABUSE: VICTIMS' SILENCE AND THE LAW

A. The Abusive Relationship

Most incidents of child sexual abuse are intrafamilial, falling within the definition of incest. The majority of sex offenders are male, while the majority of reported victims are female. Most frequently, the abuse begins when the victim is between seven and twelve years old. In the incestuous family, victims often remain silent about the abuse, fearing the results of disclosure and desperately hoping to keep the family intact. Often, the incestuous father is the only adult employed outside the home. Thus, his wife and children depend on him for economic support. Victims of incest frequently feel responsible for the welfare of other family members and maintain their silence.

18. In his 1979 and 1984 studies, Dr. David Finkelhor defined incest and child sexual abuse to include contact acts, such as intercourse and genital fondling, as well as noncontact acts, such as intentional exhibition of genitals and solicitation. See SOURCEBOOK, supra note 6, at 23-24. Other studies define incest as any sexual contact “between a child and an adult in a position of paternal [sic] authority.” J. HERMAN, FATHER-DAUGHTER INCEST 70 (1981). Approximately 75% of all incest occurs between father and daughter or stepfather and daughter. KEMPE, INCEST AND OTHER FORMS OF SEXUAL ABUSE, in THE BATTERED CHILD, 204 (C. KEMPE & R. HELFER 3d ed. 1980).

19. “Molesters cut across economic, social, ethnic and educational lines. They may be rich or poor, well-educated or ignorant, blue collar or white, married or single.” THE CHILD MOLESTER: NO PROFILE, L.A. Times, Apr. 25, 1984 at 1, col. 1.

20. Every study documenting child sexual abuse has found rates of abuse to be at least five times higher for female victims than for males. Experts speculate that male victimization may be underreported in part because males are more reluctant to admit to the abuse “because it clashes with the expectations of masculinity.” SOURCEBOOK, supra note 6, at 62. Estimates of the frequency of male victimization range from 3% to 31% of all reported abuse. Id. at 19.

21. Child sexual abuse specialists previously believed abuse typically began when the child reached the age of 12. Id. at 64-66. More recent studies indicate that now children are frequently victimized between the ages of six and seven. Id. at 64. Victims range in age, however, from one or two months to 18 years or older. The American Humane Association reported 71,961 cases of child sexual abuse in 1983. Twenty-five percent of these cases involved victims under the age of five. BACKLASH FEARED ON CHILD SEX CASES, Wash. Post, Mar. 23, 1985, at A13, col 1. With the abuse beginning at an earlier age, child sexual assault victims will spend more years in the abusive environment. For the victim who waits to report the abuse until she or he is out of the home, the lower age increases the likelihood that the statute of limitation will expire before the abuse is reported.

22. Even after disclosing the abuse, victims may be reluctant to testify against their abusers. In 1984, a Solano County, California, judge sentenced a nine-year-old girl to eight days of solitary confinement for her refusal to testify against her stepfather, a local Air Force physician, who was charged with sexually abusing her. DEFIANCE; SOLITARY FOR A TWELVE-YEAR-OLD, TIME, Jan. 23, 1984, at 35; see also STATE v. DeLONG, 456 A.2d 877, 883 (Me. 1983) (affirming contempt conviction and seven-day jail sentence of a 15-year old girl who refused to testify against her father, accused of sexually abusing her).

23. J. HERMAN, supra note 18, at 72.
in exchange for the abuser's promise not to hurt them or another family member.²⁴

Similarly, extrafamilial abuse typically is perpetrated by someone with a close personal relationship to the child victim.²⁵ The abuser usually is someone in a position of authority and trust.²⁶ The abuser typically uses that authority to coerce the victim into an abusive relationship.

Horror stories of child sexual abuse abound. Present in each is the perpetrator's desire to keep the abuse secret. Even where the child does not have an innate sense that the sexual activity is wrong, the abuser's demand that it be kept secret communicates to the child that the activity is wrong.²⁷ Victims soon come to realize that they are participating in an activity that is unacceptable, but one that they are powerless to stop.²⁸

B. Child Sexual Abuse and Criminal Laws

1. State Child Sexual Abuse Laws

Child sexual abuse has been recognized as a crime in the United States since the early 1800's.²⁹ Since then, statutes defining child sexual abuse have been revised and refined to reflect society's increased understanding and intolerance of sexual abuse.³⁰ Today, incest is a


²⁵. "Approximately three-fourths of the offenders are known to the victim, possibly as family friends, neighbors, baby sitters, or school or church personnel." Schultz, The Child Sex Victim: Social, Psychological and Legal Perspectives, 52 CHILD WELFARE 148 (1973) [hereinafter Schultz] (cited in L. SANFORD, THE SILENT CHILDREN 84 (1980)).

²⁶. Child victims of sexual assault "are usually persuaded and tricked by known, and often trusted, adults into repeated sexual activity over extended periods of time." Berliner, The Child Witness: The Progress and Emerging Limitations, 40 MIAMI L. REV. 167, 168 (1985) (citing Conte & Berliner, Sexual Abuse of Children: Implications for Practice, J. CONTEMP. SOC. WORK 601 (1981)); see also, J. CREWDSON, BY SILENCE BETRAYED 114 (1988) (FBI study of 40 convicted pedophiles found that half used their occupations as principal way of meeting victims).

²⁷. J. HAUGAARD & N. REPPECCI, supra note 24, at 91.

²⁸. Id.

²⁹. In Missouri, for example, the first rape statute was passed in 1808. Act of Nov. 4, 1808, I Terr.L. p. 211, § 8. Washington's first statute prohibiting sexual acts between a minor child and an adult was passed in 1854 by the first legislative assembly of the Washington Territory. 1854 Wash. Laws ch. 2, § 33. Minnesota's Code of 1848 included a prohibition against fornication between a male guardian and his female ward. Hutchinson's Code of 1848, ch. 64, art. 12, tit. 3(22).

³⁰. For example, the 1989 Washington Legislature recently enacted legislation tolling statutes of limitation until the victim reaches 18 in all criminal child sexual abuse cases. See supra note 15; see also infra note 34 and accompanying text.
criminal offense in every state. Moreover, every state prohibits adults from having intercourse with persons under a minimum age. States also continue to regulate the age at which minors may legally consent to marriage.

Increasingly, state legislatures are expanding the definition of what constitutes sexually abusive behavior. This increase stems from legislatures’ growing awareness of the power imbalance between offenders and child victims. In recent years, some state legislatures have begun to criminalize the use of authority to coerce the child victim into the abusive relationship. In other states, however, legislatures continue to expect abuse victims who are too young to consent to sexual relations to report an assault within the statutory period. This remains true even when the offense is committed by a member of the child’s family or by an authority figure outside the family. Thus, despite statutes prohibiting incest and sexual abuse, criminal laws remain inadequate to protect young sex abuse victims if the state is time-barred from prosecuting sexual offenders.

2. Criminal Statutes of Limitation and Child Sexual Abuse

Twenty-four states do not toll their statutes of limitation in criminal child sexual abuse cases. In these states, the statutes of limitation for

32. Generally, the age of consent ranges from 14 to 18 years. Exemptions may be granted with parental or judicial authorization. The Book of the States, Table 8.3, at 336 (1988-89 ed.).
33. See, e.g., Ark. Stat. Ann. preamble § 5-1-109 (Supp. 1987) (“Whereas, in many instances, child victims are threatened or intimidated to prevent the prompt reporting of abuse or sexual offenses . . . it is in the best interest of the State to extend the statute of limitations for certain offenses involving child victims . . . .’’); Fla. Stat. Ann. preamble § 794.011 (West Supp. 1989) (“through fear, guilt, or immaturity children of tender years may fail to report a sexual offense; this frequent and understandable failure to report sexual offenses before statutes of limitation expire bars prosecution of many offenders’’); see also Selected 1987 Georgia Legislation, Felonies Against Minors: Extend Statutes of Limitations, 3 Ga. St. U.L. Rev. 418, 419 (1987) [hereinafter Georgia Legislation] (“Due to the child’s immaturity and the close relationship . . . between the abused child and the criminal offender, a child generally is reluctant to tell an adult about the criminal conduct.”)
34. Washington, for example, recently established the crime of Sexual Misconduct With a Minor. In the first degree, the offense includes a perpetrator at least 60 months older than the victim, in a significant relationship to the victim, and who commits the offense by abusing a supervisory relationship. Wash. Rev. Code Ann. §§ 9A.44.093–096 (Supp. 1989). In Minnesota, an offender commits Criminal Sexual Misconduct by using his or her position of authority to coerce the victim into the abusive relationship. Minn. Stat. Ann. § 609.342(b) (1980). For a more extensive discussion of Minnesota law, see infra notes 57–61 and accompanying text; see also Colo. Rev. Stat. § 18-3-405 (1984) (increasing from four years to eight the maximum penalty for sexual assault on a child by a person in a position of trust).
35. See supra note 12.
crimes of sexual activity with a minor range from one year for Sexual Assault in the Third Degree to ten years for Rape of a Child or Sexual Assault. In contrast, none of these states imposes a limitation period for murder or for arson resulting in death. Each of these states permits tolling statutes of limitation for a felony committed by a public officer in breach of a public duty or in violation of an oath of office.

South Dakota is typical in the structure of its criminal laws and accompanying statutes of limitation. South Dakota has no statutes of limitation for major felony crimes (a "major crime" is defined as any class A, B, or 1 felony). Rape and incest are class 2 and 5 felonies, respectively. Because neither rape nor incest is classified a major crime a prosecution must commence within seven years of the offense. In contrast, a defendant charged with forgery or theft may be prosecuted up to seven years after the discovery of the offense. Thus, relatively minor crimes may have a limitation period considerably longer than those for child sexual abuse.

Further, although criminal statutes of limitation should be liberally interpreted in favor of repose, every state has well-recognized tolling exceptions. In each of the twenty-four states without a tolling provision in child sexual abuse cases, the state's legislature previously enacted a statute permitting courts to toll criminal statutes of limitation during the time a defendant was not "usually and publicly" a resident within the state. Many state legislatures also toll the limitation period during the time an indictment, complaint, or information is set aside. Even when law enforcement officials know the defendant's out-of-state address, absence from the state may be sufficient to toll the limitation period for any crime. Thus, in each of the "non-
tolling" states, legislatures already authorize courts to toll statutes of limitation in some circumstances.

II. STATES' APPROACHES TO THE PROBLEM OF TIME-BARRED PROSECUTIONS IN CRIMINAL CHILD SEXUAL ABUSE CASES

Expiring statutes of limitation in child sexual abuse cases are a problem nationwide. To remedy the problem, many state legislatures and courts have adopted a variety of curative procedures. This section outlines solutions to the problem of time-barred prosecutions adopted by legislatures and courts throughout the states.

A. Legislative Approaches To Tolling

Legislatures have enacted a variety of solutions to the problem of time-barred prosecutions. In nine states there are no statutes of limitation for felony child sexual abuse. Legislatures in another sixteen states have fashioned statutory provisions for tolling statutes of limitation in criminal child sexual abuse cases. Although the statutes vary from state to state, all but two states (Arizona and Oklahoma) permit courts to toll the statute of limitation at least until the victim reaches the age of fifteen.

State legislatures have begun to realize that the power relationship between the adult offender and the child victim makes reporting abuse within the statutory period very unlikely. They continue to revise state criminal laws to reflect recognition of the power dynamics in the sexually abusive relationship. Generally, these legislatures have two motives for permitting courts to toll child sexual abuse statutes of limitation. First, legislators believe that children under a certain age need additional time to disclose the abuse. Second, legislatures recognize

49. See supra notes 13-14 and accompanying text.
50. See supra note 15 and accompanying text.
51. Id.
52. See supra note 33.
53. "The bill [extending the statute of limitations] was introduced because prosecutors were concerned that this increased time was necessary when sexual crimes were committed against children. . . . This additional time should enable the state to more effectively prosecute criminal defendants who commit a felony against children under fourteen years of age." Georgia Legislation, supra note 33. What legislatures fail to recognize, however, is that adults, too, need additional time to report the abuse. Age is a facile bright line test for determining when a victim shall be deemed to have the requisite emotional stability to criminally prosecute his or her abuser. Child victims may become adults long before they have recovered from the abuse sufficiently to report their abuser. See Rosenfeld, The Equitable Estoppel Remedy, supra note 11.
that child sexual abuse is an offense serious enough to warrant laws which facilitate prosecution of offenders.\textsuperscript{54}

\textbf{B. Judicial Approaches To Tolling}

Courts in several states have fashioned judicial exceptions to statutes of limitation in criminal cases of child sexual abuse. These courts employ two approaches. Some state courts have applied the "continuing crime" doctrine. Other state courts have extended existing "secret manner" or "concealment" statutes to cases of child sexual abuse.

\textit{I. Continuing Crime Doctrine}

In common law, a crime continues, and therefore is not complete, so long as the defendant engages in the criminal conduct.\textsuperscript{55} The statute of limitation does not begin to run until the crime is complete.\textsuperscript{56} Courts have employed the continuing crime doctrine to toll the statute of limitation for the duration of the criminal activity.

The Minnesota Court of Appeals has used the continuing crime doctrine to extend the limitation period in cases of criminal child sexual abuse. In \textit{State v. Danielski},\textsuperscript{57} a case of first impression, the court held that where an element of a sexual offense is the perpetrator’s exercise of authority over the victim, the exercise of that authority to prevent the victim from reporting the abuse is a continuing crime.\textsuperscript{58} The victim in \textit{Danielski} was abused by her stepfather over a seven-year period, beginning when she was nine years old. Although the victim told her mother about the abuse, the mother did nothing. On one occasion, she participated in the abuse.\textsuperscript{59} Thus, the same parental authority that was used to accomplish the criminal acts also was used to prevent the victim from reporting the abuse.\textsuperscript{60} The court reasoned

\begin{itemize}
  \item \textsuperscript{54} See supra note 33.
  \item \textsuperscript{55} See generally 21 AM. JUR. 2D Criminal Law §§ 154–57 (1965). "[T]here are crimes which are continuous in character . . . . Generally, in crimes of this nature, the statute does not begin to run from the occurrence of the initial act . . . but from the occurrence of the most recent act." \textit{Id.} § 157.
  \item \textsuperscript{56} Pendergast v. United States, 317 U.S. 412, 418 (1943); United States v. Irvine, 98 U.S. 450, 452 (1879).
  \item \textsuperscript{57} 348 N.W.2d 352 (Minn. Ct. App. 1984).
  \item \textsuperscript{58} \textit{Id.} at 355–56.
  \item \textsuperscript{59} The victim also sought assistance from friends and professionals. She eventually disclosed the abuse to her natural father and stepmother, who immediately reported it to law enforcement authorities. The report was filed 26 days after the statute of limitation had expired. \textit{Id.} at 354.
  \item \textsuperscript{60} The defendants in \textit{Danielski} were charged with criminal sexual misconduct in the first degree. \textit{Id.} at 353. In Minnesota, criminal sexual misconduct in the first degree occurs when an adult feloniously and unlawfully engages in sexual penetration with a minor and the minor is at least 13 but less than 16 years old, the defendant is at least 48 months older than the victim, the
that under these facts, the offense continued until the abuse of authority ceased. Applying the continuing crime doctrine, the court held that because the ongoing abuse of authority prevented the crime from being complete, the statute of limitation did not begin to run until the victim was no longer subject to her parents' authority.61

2. Secret Manner and Concealment Statutes

In many states, statutes of limitation may be tolled in a criminal case if the crime is committed in a secret manner,62 or if the perpetrator concealed the fact that a crime occurred.63 Courts have wide discretion in determining the scope of secret manner and concealment provisions. For example, the Nevada secret manner tolling statute does not specify in which criminal cases the statute of limitation may be tolled pursuant to these provisions. In *Walstrom v. State*,65 the Nevada Supreme Court held that the secret manner statute could be applied to criminal cases of child sexual abuse even where the victim was aware that an offense had been committed.66 In *Walstrom*, the defendant is in a position of authority over the victim, and the defendant uses that authority to coerce the victim to submit to the sexual acts. MINN. STAT. § 609.342(b) (1980).

61. If the victim and the defendant are not in frequent contact and do not reside together, the defendant's control over the victim may be insufficient to justify tolling the statute of limitation. See *State v. Shamp*, 422 N.W.2d 736, 740 (Minn. Ct. App.) (where the victim and the defendant do not live in the same house and the defendant does not control the victim's day-to-day movements, defendant's authority is insufficient to prevent the victim from reporting the crime), rev'd on other grounds, 427 N.W.2d 228 (1988); see also *State v. French*, 392 N.W.2d 596 (Minn. Ct. App. 1986) (no tolling statute of limitation where, although victim was abused by her uncle, an elder in her church, her uncle did not control her day-to-day life, he did not engage in "active coercion" to prevent her from reporting the abuse, and, prior to reporting the abuse to law enforcement officials, victim's church congregation attempted to resolve the matter privately).

62. See, e.g., NEV. REV. STAT. § 171.095(1) (Supp. 1987) ("If a felony . . . is committed in a secret manner [a complaint must be] filed [within three or four years] after the discovery of the offense . . . .")

63. See, e.g., KAN. CRIM. CODE ANN. § 21-3106(4)(c) (Vernon Supp. 1986) ("The period within which a prosecution must be commenced shall not include any period in which . . . the fact of the crime is concealed . . . ."). Georgia's concealment statute provides that the period within which the prosecution must be commenced does not include the period in which the person committing the crime or the crime is unknown. GA. CODE ANN. § 17-3-2 (1982).

64. In Nevada, a crime is committed in a secret manner "when it is committed in a deliberately surreptitious manner that is intended to and does keep all but those committing the crime unaware that an offense has been committed." *Walstrom v. State*, 752 P.2d 225, 228 (Nev. 1988). In addition to tolling statutes of limitation under the secret manner statute, Nevada has a separate statute tolling the limitation period in cases of child sexual abuse. The statute provides that criminal charges may be filed at any time until the victim of the sexual abuse is 18 years old if the victim did not report the offense to any person who had a duty to report, and no other report was made to a law enforcement or protective service agency. NEV. REV. STAT. § 171.095(2) (Supp. 1987).


66. Id. at 228.
defendant's wife revealed the abuse to law enforcement officials after she discovered pornographic slides of her husband committing lewd acts with a minor. The court concluded that because the defendant committed the crime in a secret manner, the statute of limitation was tolled until the discovery of the offense.

In Kansas and Georgia, courts have relied on the concealment statute to toll statutes of limitation in embezzlement or theft cases. The same courts, however, have refused to extend the concealment statute to criminal cases alleging child sexual abuse. In State v. Bentley the Kansas Supreme Court held that "[c]rimes against persons, by their very nature, cannot be concealed," and declined to "equate a threat made to a child victim with concealment . . . ." Similarly, in Sears v. State, the Georgia Court of Appeals refused to toll the statute in a criminal case of child sexual abuse. The Court held that where the victim knew that an offense had been committed, the victim's knowledge was imputed to the state. The court reasoned that if the state is aware of the offense, then the crime has not been concealed and the statute of limitation cannot be tolled.

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67. The pictures at issue had been taken at least eight years before their discovery. The defendant concealed the film in a locked footlocker inside his private vehicle. Id. at 226.
68. Id. at 229. The Nevada court rejected the assertion of the Kansas Supreme Court that, by their very nature, crimes against persons cannot be concealed. The Nevada court stated that the Kansas courts' interpretation of the statute was overbroad and failed to take into account the special vulnerability of children. Id. at 228.
69. The Kansas statute states that the statute of limitation does not include any period in which a crime has been concealed. KAN. CRIM. PROC. CODE ANN. § 21-3106(4)(c) (Vernon Supp. 1986). To constitute concealment under Kansas law, the defendant's acts must be calculated or designed to prevent discovery of the crime. State v. Bentley, 239 Kan. 334, 721 P.2d 227, 229 (1986).
71. 721 P.2d at 230.
72. Id. The court cautioned that the "practical effect of construing a threat to a sexually abused child as concealment would be to extend the statute of limitations . . . in nearly every [child sexual abuse] case." It also noted that because statutes of limitation are measures of public policy, revising them is a task which should be left to the legislature. Id.
74. 356 S.E.2d at 74. But see Bentley, 721 P.2d at 231 (Herd, J. dissenting) ("A nine-year-old victim does not 'necessarily know' that the acts of a trusted uncle constitute a crime.").
III. SOLUTIONS TO STATUTE OF LIMITATION PROBLEMS IN CRIMINAL CHILD SEXUAL ABUSE CASES

Although state legislatures continue to revise the statutes of limitation for child sexual abuse,\(^7\) the current laws are inadequate to protect victims. Courts and legislatures must act to ensure that offenders cannot escape prosecution by coercing their victims into silence. The following section evaluates various mechanisms for effecting the necessary change.

A. Legislative Solutions

1. Eliminating or Increasing Statutes of Limitation

State legislatures could greatly increase—or even eliminate—the criminal statutes of limitation for child sexual abuse, and thereby ensure that prosecution of offenders would not be time-barred. This approach would permit the state to delay pursuing criminal charges against an alleged offender for an indefinite period of time or until the victim was no longer legally a minor. Greatly increasing or eliminating a statute of limitation effectively ameliorates the harsh effects of statutes of limitation.

There are, however, several drawbacks to this approach. The problem of time-barred prosecutions is not related to the length of the statutes of limitation per se. Instead, the problem arises when child victims are unable to report because they are too young to know how or what to report, because they are too traumatized to report the abuse, or because they are prevented from reporting the crime within the statutory period. Greatly increasing or eliminating the limitation periods may unnecessarily extend the reporting period for all child sexual abuse cases, including cases where the offender has not prevented the victim from reporting the abuse.

This approach also neglects the important judicial interests served by statutes of limitation. Statutes of limitation are designed to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories

\(^{7}\) In 1989, the Washington Legislature enacted a statute tolling the limitation period in all criminal cases of child sexual abuse until the victim reaches the age of 18. 1989 Wash. Laws 1577 § 3. In 1987, the Massachusetts Legislature extended from six years to ten the criminal statute of limitation for sexual offenses committed upon a child under 14 years of age. The limitation period does not begin to run until the victim reaches age 16 or until the offense is reported to law enforcement officials, whichever occurs first. MASS. ANN. LAWS ch. 277, § 63 (Law. Co-op. Supp. 1988); see also Note, The Discovery Rule, supra note 11, at 959–60.
have faded, and witnesses have disappeared."

Statutes of limitation provide predictability for both the defendant and the prosecution by prescribing the time period beyond which "there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." Finally, it is argued that statutes of limitation provide defendants with repose, by limiting defendants' exposure to criminal prosecution to a fixed period of time. For all these reasons, extensions of statutes of limitation should be closely tailored to address specific needs. Thus, eliminating or greatly increasing the limitation period for all sexual offenses involving a minor is not the best solution to the problem of time-barred prosecutions.

2. Statutes Tolling The Limitation Period

A statute permitting courts to toll the limitation period in criminal cases of child sexual abuse could ameliorate the harsh effects of statutes of limitation. Applying a tolling statute to child sexual abuse cases also is consistent with state laws criminalizing child sexual abuse, with public policy reasons for tolling civil statutes of limitation in child sexual abuse cases, and with existing state tolling provisions.

Many states have already enacted appropriate tolling statutes. Sixteen states have enacted statutes specifically permitting courts to toll statutes of limitation in criminal cases of child sexual abuse. Although the statutes vary their requirements for tolling, each state's provision reflects an awareness that criminal statutes of limitation must accommodate child victims who are less able than adults to disclose incidents of sexual abuse.

Legislatures (and courts) remain willing to toll the limitation period for a variety of offenses, despite evidentiary concerns and defendants' claims of prejudice. Because courts recognize that the passage of
time does not necessarily prejudice a criminal defendant, prosecutors should be permitted to pursue criminal charges against sex offenders who effectively discourage their victims from reporting the abuse, or who violate children too young to disclose that they have been abused. Legislatures previously have enacted measures to permit tolling the statute of limitation in other circumstances. They also should pass legislation tolling the limitation period in cases of criminal child sexual abuse.

B. Judicial Solutions

The concealment doctrine in Minnesota and the secret manner statute in Nevada enabled these courts to toll the statutes of limitation. Yet, neither of these approaches is an ideal solution to the statutes of limitation problem.

I. Continuing Crime Doctrine

Adopting the concealment doctrine to establish a continuing crime offers several benefits. Adoption of the doctrine would require no changes in state law. This approach therefore would permit courts to toll the statutes of limitation in child sexual abuse cases even if the state’s legislature fails to enact a specific tolling provision. The concealment approach also grants courts broad discretion in determining whether an abuser’s conduct falls within the scope of the exception. It thus permits courts to focus on the very factor which prevented the abuse from being reported within the statutory period: the use of authority to coerce the child victim into an abusive relationship.83

Despite these benefits, however, adopting the continuing crime approach would be a limited solution. The Supreme Court has stated that a criminal offense should not be construed as a continuing crime unless either the explicit language of the statute compels such a conclusion, or the framers of the law intended that the offense be treated

82. See supra notes 39–40 & 46–48 and accompanying text.
83. See supra notes 33–34 and accompanying text.
as a continuing crime.\textsuperscript{84} Minnesota's criminal sexual misconduct statute, for example, requires that the defendant occupy a position of authority over the victim and that the defendant use that authority to coerce the victim to submit to the abuse.\textsuperscript{85} Thus, the defendant's conduct in \textit{State v. Danielski}\textsuperscript{86} was uniquely suited to fall within the continuing crime exception. Other states' child sexual abuse laws do not dovetail so neatly with the continuing crime exception. In Washington, for example, only criminal sexual misconduct requires as an element of the offense that a significant and supervisory relationship be abused.\textsuperscript{87} Far more serious crimes, such as incest, do not explicitly require that the offender abuse a position of authority to engage in the sexual contacts.\textsuperscript{88} Thus, the concealment doctrine would be but a partial solution to the statute of limitation problem.

2. \textit{Secret Manner and Concealment Statutes}

State legislatures could enact secret manner or concealment statutes to permit courts, in their discretion, to toll the limitation period in certain cases of child sexual abuse. Enacting a secret manner statute has several benefits. First, this approach preserves judicial flexibility by permitting courts to decide case by case when the facts warrant tolling the statute of limitation. Second, the secret manner and concealment statutes appear to address the very element of the crime (secrecy and concealment) that prevents reporting and prosecuting within the statutory period. Legislatures, however, would have to resolve critical issues before implementing a secret manner or concealment statute. For example, they would have to decide whether to limit the statute to cases of child sexual abuse or to extend it to other concealed crimes. They would also have to carefully define what constitutes concealment.

The \textit{Walstrom},\textsuperscript{89} \textit{Bentley},\textsuperscript{90} and \textit{Sears}\textsuperscript{91} cases illustrate that such statutes can be ambiguous, depending upon whether concealment is narrowly or broadly construed. The \textit{Walstrom} court, for example, held that a sexual offense committed with a minor could be committed

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\textbf{Footnote} & \textbf{Reference} \\
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86 & 348 N.W.2d 352 (Minn. Ct. App. 1984); see supra notes 57–60 and accompanying text. \\
87 & See supra note 34. \\
88 & Amending states' criminal laws to include "abuse of authority" as an element of each crime is not an appropriate solution. This would only increase the state's burden of proof by adding another element to be proven. \\
89 & 752 P.2d 225 (Nev. 1988). \\
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in a "secret manner." On the other hand, Bentley and Sears held that threats to prevent victims from reporting the offense did not constitute concealment. If a victim knew an offense had been committed that victim's knowledge was imputed to the state. Accordingly, before a state could adopt a secret manner or concealment statute, the legislature would have to resolve the conflicts demonstrated by the caselaw.

Secret manner and concealment statutes also are inefficient solutions to statute of limitation problems in criminal cases of child sexual abuse, despite the flexibility and broad discretion they give the courts. The statutes do not encompass the child sexual abuse cases where the abuser does not actively coerce the victim but the child is too young or frightened to report the crime within the statutory period. The statutes also would unduly burden the courts by setting a standard that requires individual application to each abusive incident in every case.

IV. A CALL FOR LEGISLATIVE ACTION

State legislatures should enact statutes permitting courts to toll statutes of limitation in criminal cases until the victim reaches eighteen, if the victim is under seventeen at the time of the offense. This statute would permit the state to delay pursuing criminal charges in cases where the victim was too young to report the abuse, and legally still under parental authority. Not tolling in cases where the victim is seventeen at the time of the offense is appropriate because even with a one-year statute of limitation the victim would reach majority before the period for filing charges expired.

The age of majority means that a person will be treated as an adult by the legal system. It does not automatically make a child victim better able to confront his or her experience as a sex abuse victim. Some victims may be living with their abuser at the time they reach majority, or after. Nevertheless, the age of majority provides legislatures and courts with a bright line test for determining when the limitation period commences. It may allay legislatures' fears that criminal

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92. Walstrom, 752 P.2d at 228; see supra notes 65–68 and accompanying text.
93. Bentley, 721 P.2d at 230; Sears, 356 S.E.2d at 74; see supra notes 70–74 and accompanying text.
94. See supra notes 70–74 and accompanying text.
95. The Bentley and Sears holdings and analyses should be rejected because they do not recognize the special vulnerability of children. The courts' decisions fail to consider fully the dynamics of the sexually abusive household, and the reasons why sexual crimes against a child, particularly incestuous abuse, easily may be concealed. Further, the courts erroneously impute to young children the maturity and wisdom of adults, although in some instances victims may not even be aware that a crime has occurred.
defendants' rights are being compromised.96 Also, it spares courts and prosecutors the administrative overload which could result from a test requiring a case by case determination of when a victim could have reported the abuse. Legislatures should therefore amend existing tolling statutes97 to read:

... And further provided. That if the victim of a crime set forth in [statute(s) defining applicable offense(s)] is under the age of seventeen at the time the offense is committed, the period of limitation does not begin to run until the victim reaches the age of majority or until the offense is reported to a law enforcement agency, whichever occurs first.98

Until a state's legislature amends or enacts a tolling statute, state courts could extend existing secret manner or concealment statutes to toll the limitation period if a defendant engages in coercive behavior to prevent the victim from reporting the abuse.99 When a perpetrator of child sexual abuse engages in coercion or threatens the victim in order to conceal the acts of abuse, courts should hold such conduct to be a continuing crime.100

V. CONCLUSION

Many victims of child sexual abuse are too young or too frightened to disclose their abuse while they are under the control or authority of the person who abused them. Unless state legislatures and the courts remedy the problem of time-barred prosecutions, offenders will continue to escape prosecution because the criminal statutes of limitation have expired.

There are several possible approaches to the statute of limitation problem, some of which have been successfully adopted in other states. The best solution is for state legislatures to extend the scope of existing

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96. See supra notes 76–77 and accompanying text.
97. Every state already has a statute tolling the limitation period during the time a defendant is absent from the state. See state statutes of limitation referenced in SHEPARD'S LAWYER'S REFERENCE MANUAL, supra note 39 at 479–487.
99. Another useful approach would be to follow California's lead in criminalizing the conduct of a person who "attempts to prevent or dissuade another person who has been the victim of a crime [from] ... [m]aking any report of such victimization to any peace officer or [state or local law enforcement officer]." CAL. PENAL CODE § 136.1(b)(1) (West Supp. 1988). Then, even if the limitation period for the sexual offense had expired, offenders could be prosecuted for preventing the report of the crime.
100. Criminal acts such as indecent liberties, rape, and child molestation probably would not fall within the scope of the continuing crime exception because abuse of authority is not usually a defined element of any of these offenses.
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tolling statutes. This would permit courts to toll the statutory period until the victim reaches the age of majority, or until the abuse is reported to law enforcement authorities.

State legislatures must act to protect child victims and to break the cycle of abuse. If the legislatures fail to act, child victims of sexual abuse will continue to suffer, neglected by a system unable to help them and unable to prosecute their abusers.

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