SEXUAL ABUSE MEMORY REPRESSSION: 
THE QUESTIONABLE INJUSTICE OF DEMEYER

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I. INTRODUCTION: PUBLIC PERCEPTION OF SEXUAL ASSAULT

Sexual assault on a child is a degrading and horrific event. The act itself is one of the most disgusting and degrading physical exertions of superiority and selfishness that a human being can perform. Not only is the minor physically assaulted, but the psychological damage, extortion

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of trust, and emotional devastation can wreak havoc on a victim’s life for tens of years. The experience can be so traumatizing that a victim actually forgets about the event for years and seals it away from their consciousness. Eventually, although potentially never, a “triggering event” will bring a victim’s memories of sexual abuse rushing back into their conscious memory. This phenomenon, although up for great debate in the scientific world, is what is referred to as a repressed memory, and can stand in the way of a victim and their vindication.

The law, in general, treats criminal sexual assault very heavy-handedly. A criminal offender found guilty of criminal sexual conduct could have a life sentence imposed. The incarceration served by the guilty offender is only half of the penalty. The social stigma associated with a sexual predator, even after serving his sentence, has been referred to by one judge as “infamous.” Terms like “monster” and “sexual predator” are used to describe sexual offenders, and some people believe they are beyond the realm of reform and rehabilitation. The stigma is so strong that Congress, and, arguably the judiciary, has refused to stand in opposition of laws against “sexual predators” that some may deem excessive or abusive. The Supreme Court of the United States has held that involuntary confinement for an indefinite period of time, sought by the state, for long-term care and treatment of a sexual predator, part and parcel from any jail sentence served, is constitutional and permissible by law. Sexual offenders are regularly forced to identify themselves on sex


3. See generally Janice Haaken & Paula Reavey, Memory Matters: Contexts for Understanding Sexual Abuse Recollections (2009) (looking back at the repressed memory debate of the 1980s and 1990s, re-analyzing cases from that era, and offering a fresh perspective on recollections of child abuse from a wide range of applied settings); see also Amina Memon & Mark Young, Desperately Seeking Evidence: The Recovered Memory Debate, 2 LEGAL & CRIMINOLOGICAL PSYCHOLOGY 131, 131-54 (1997) (concluding further research needs to be conducted in order to ascertain under what conditions false recollections may occur and how they can be prevented).


7. Id. at 362. The panic over child molesters has become so extreme that some states have adopted laws that allow for indefinite preventative detention to people who did not have a mental disease or defect, but are likely to engage in “predatory acts of sexual violence.” E.g., Sexually Violent Predator Act, Kan. Stat. § 59-29a01 to -29a23 (2003) (famously upheld by the U.S. Supreme Court in Kansas v. Hendricks, infra).

8. Kansas v Hendricks, 521 U.S. 346 (1997). The Court declined to accept the petitioner’s argument that the civil commitment after the serving of jail time was effectively double jeopardy, and instead held that the second “incarceration” was not
offender registries and the federal government requires the Attorney General for each state to maintain such a registry.\textsuperscript{9} The registries can contain personal identifying information including the address and the birth date of the offender as well as the offender’s conviction, and are freely available to the public via databases and public websites.\textsuperscript{10} Criminal sex offenders are punished heavily for their crimes.

With sexual predators being so feared, exposed, and loathed among the population, one would think that the civil counterpart to the criminal sentence – the civil judgment – would be obtained easily in cases alleging sexual abuse. However, the civil law seems to take a less aggressive stance towards sexual assault. Absent a slam-dunk-case brought immediately after the incident, civil vindication for the victim is rather difficult to obtain. Highly traumatic sexual abuse scenarios—the ones so horrendous the victim’s memories of the attack are repressed for years—encounter an insurmountable obstacle preventing plaintiffs from recovering any compensation or redress for the tragedy they were exposed to: the statute of limitations. The duality between the criminal law’s heavy hammer, swinging directly at the offender, and the civil law’s strict adherence to a simple timing procedure, that potentially robs plaintiffs of justice, seems to be counterintuitive. With such harsh treatment of sex offenders in the penal system, one would expect that the civil courts would find a way around the statute of limitations to allow civil judgments to be levied against sex offenders.

The dichotomy between the policies of the penal and civil systems addressed in this Note has been succinctly penned by the Arizona Court of Appeals when then Presiding Judge Pelander wrote:

\begin{quote}
Child sexual abuse cases present very difficult problems because of the competing interests at stake. The acts alleged are awful. They would arouse the righteous indignation of any sensible person. On the other hand, statutes of limitations are designed to encourage plaintiffs to pursue claims diligently and to prevent the assertion of stale and fraudulent claims.\textsuperscript{11}
\end{quote}

\begin{footnotes}
\item[9] 42 U.S.C §14071.
\item[10] \textit{Id.}; \textit{see also} FAMILY WATCHDOG, http://familywatchdog.us (last visited Feb. 17, 2012).
\end{footnotes}
Part II of this Note will discuss what exactly a repressed memory is, the challenges associated with it, and the ongoing debate on its validity. Part III will discuss the current state of the civil law in Michigan dealing with cases of child sexual abuse resting upon repressed memories. The Note will trace the rationale and development of the law from the case of first impression to the last published case. The final parts of this Note will explore how to change the current laws of Michigan to allow greater access to justice for plaintiff’s suffering from repressed memories of sexual abuse. Specifically, this Note will discuss how more progressive jurisdictions confront the issue of repressed memories, and recommend both a judicial and legislative way to provide better access to justice.

II. WHAT IS A REPRESSED MEMORY AND HOW DOES IT OCCUR?

Sigmund Freud, over one hundred years ago, first proposed the theory of memory repression as a defense mechanism that uses powerful emotions to shield victims’ painful memories of traumatizing experiences from their consciousness.12 The fundamental rationale behind memory repression is that people routinely exile disturbing experiences from their conscious memory because contemplation is too terrifying. The forgotten experiences can cause terrible mental and emotional injury. The causal connection between the injury and the experience is unbeknownst to the victim, and accurate revitalization of the memory is the only cure. However, revitalization of the memory back into a victim’s consciousness is only possible through special techniques to be administered by qualified professionals.13 Whether or not a memory is going to be repressed depends on a number of factors. Some factors have nothing to do with the sexual abuse itself and are properties of a victim’s psyche such as age, susceptibility to hypnosis, and family history of memory repression.14 Other factors spawning memory repression, including the bizarre nature of the attack, dissociation, refocusing, self-hypnosis, and drug or alcohol sedation, are generated during the event.15 Once removed from the event, a victim may still be induced into repressing a memory through denial, normalization by those

12. Loftus & Ketcham, supra note 2, at 49-51.
13. Elizabeth Loftus, Memory Distortion and False Memory Creation, 24 BULL. AM. ACAD. PSYCHIATRY & L. 281, 281-95 (1996). However, the last step – needing a professional for revitalization – although cited as a basic tenant of repressed memory has been demonstrated to not be true. In certain cases, victims have "remembered" repressed memories by simply noticing a particular sight or smell, for example, see infra note 23 and accompanying text.
15. Id. at 57-63.
around them, and post-hypnotic suggestion — similar to the self-hypnosis during the attack — to forget what just happened to them. The end result is that the survivor somehow manages to file away the memory so completely that he simply does not remember the traumatizing experience.

Once the memory is repressed, it could potentially be years until it is recalled back into a victim’s consciousness and she is made aware of past abuse. Repressed memories, like all memories, cannot simply be recalled by trying to remember them. All memories come back by association. For example, if you see a picture of a place you once traveled as a child, then you recall memories associated with that trip and that location. If you were told to just think of a memory, however, it would be unlikely that one from that trip would be the first you would think about.

A. How Repressed Memories Are Discovered

Repressed memories can be recalled during “triggering events,” in which the event, by association like normal memories, sets off the surfacing of the once repressed memory in the victim's conscious mind. The triggering event could be any event, including viewing a television show discussing similar abuse as that experienced by the victim, a particular scent, engaging in sexual intercourse if the abuse was sexual, breaking an addiction, undergoing surgery, or seeing a peculiar object that resembled something present during the repressed event. Some psychologists, however, have the view that most repressed memories are not recoverable through spontaneous triggering events, and need to be

16. Id. at 64-66.
18. Julie Schwartz Silberg, *Memory Repression: Should it Toll the Statutory Limitations Period in Child Sexual Abuse Cases?*, 39 WAYNE L. REV. 1589, 1597 (1993) (citing Don Oldenburg, *Dark Memories; Adults Confront Their Childhood Abuse*, WASH. POST, June 20, 1991, at D5). In one of the most famous repressed memory cases of recent time, Eileen Franklin-Lipsker remembered that her father had killed a classmate in front of her twenty years after the event. Based on the recalled memories, her father was sentenced to life in prison.
19. Trying to remember a memory results in exploring what you already know, intuitively making it impossible to remember a repressed memory of which you have no knowledge.
exposed through therapeutic exercises aimed specifically at memory retrieval.\footnote{Id. at 97-99. Memory retrieval techniques include: imagistic work, dream work, journal writing, body manipulation, hypnosis, art therapy, and re-experiencing extreme emotions.}

\section*{B. The Dangers of Repressed Memories}

Therapeutic exercises aimed at retrieving a repressed memory have also been blamed for creating repressed memories. Dr. Elizabeth Loftus is a scholar in the fields of psychology and social behavior.\footnote{See Elizabeth F. Loftus, http://faculty.washington.edu/eloftus (last visited Feb. 19, 2012).} Dr. Loftus and other professionals in her field claim that psychologists are quite capable of implanting false memories into a patient’s mind.\footnote{Loftus & Ketcham, supra note 2 at 85-99. See also id. for a list of her publications on the topic.} A patient is encouraged to accept as true any lurking memories of child abuse, in order to explain their normal everyday problems.\footnote{Jacqueline Monte, Recovered Memories and the Psychologists That Create Them: A Study of the Repressed Memory Controversy, 1997 DET. C.L. MICH. ST. U.L. REV. 163, 174 (1997).} Studies have been conducted and successfully shown that the power of suggestion and expectation can be projected on to the patient during hypnosis and therapy to increase the number of abuse reports.\footnote{Loftus & Ketcham, supra note 2, at 79.} Psychiatrist memory implantation has resulted in rather large settlements within the court system.\footnote{Elizabeth Loftus, ‘The Price of Bad Memories’, SKEPTICAL INQUIRER, 1998, at 22. A hospital and group of therapists settled a case of alleged memory implantation for $10.6 million. For an explanation of a similar type suit, see generally Sullivan v Cheshier, 846 F. Supp. 654 (N.D.Ill. 1994).} Nevertheless, memory repression remains widely accepted as having some validity and is, in some courts across the country, recognized as a convincing method of overcoming statutes of limitation that have long passed by the time the memory is revitalized, and the victim is aware of the wrongdoing.\footnote{Many jurisdictions accept repressed memories as a way to toll the statute of limitation for battery — and sometimes specifically sexual abuse. Nevada, Ohio, North Dakota, Arizona, Wisconsin, California, and many other jurisdictions accept repressed memory as a means of tolling the statute of limitation.}
C. The Repressed Memory Debate

Even with the proven existence of memory implantation, repressed memories are still the subject of an ongoing debate. Some scientists still believe firmly in the authenticity of repressed memories while others are extremely critical and doubt a person would forget about a traumatizing event. Like scientists, courts have yet to reach unanimity with regard to repressed memory existence and reliability. Doctors have testified in open court, and firmly believe, that the phenomenon of memory repression is scientifically possible. The problem with recognizing repressed memories as reliable from an objective standpoint is that there exists no cogent scientific support. The American Medical Association believes that repressed memories are of uncertain authenticity, and should be verified by external evidence. Independent corroboration is the only known way to be sure with any level of certainty that the events alleged in a repressed memory are accurate.

The critics that express disbelief in memory repression justify their disbelief with anecdotes of memory fabrication and confusion as proof. Dr. Loftus believes that repression is a “philosophical entity, requiring a leap of faith in order to believe.” She also believes that without the help of a psychologist actual memories that are factually accurate can become entangled with extraneous information gained elsewhere to manifest into

28. See Loftus & Ketcham, supra note 2.
29. Id.
30. Compare Petersen v. Bruen, 792 P.2d 18 (Nev. 1990) (Nevada recognizes memory repression) with Dalrymple v. Brown, 701 A.2d 164 (Pa. 1997) (“it would be absurd to argue that a reasonable person, even assuming for the sake of argument, a reasonable six year old, would repress the memory of a touching so that no amount of diligence would enable that person to know of the injury”).
32. Flores, 917 P.2d 250; Monte supra, note 24, at 174.
33. Monte, supra note 24.
34. Loftus & Ketcham, supra note 2, at 90. Dr. Loftus recalls a conversation she had with Dr. Ganaway — a professor of psychiatry at Emory University and the director of a dissociative-disorders unit at a psychiatric hospital — after a lecture by Ganaway.
35. See generally Memon & Young, supra note 3, at 131-54. A woman recalled memories of her father being naked and threatening her when she was sixteen years old. The woman alleged that her father sexually abused her. The sexual abuse at the age of sixteen was impossible due to the parent’s divorce and it was later determined, and confirmed by the father, that at the age of twelve, the woman had walked in on her father having sex with a sixteen-year old girl. The father admitted to threatening his daughter while naked. The belief is that the woman placed herself in the role of the other child and fabricated partially false memories.
36. Loftus & Ketcham, supra note 2, at 64.
what the individual believes is an actual memory hidden outside of their consciousness. This is the scenario the doctor predicts happened in the famous 1989 case of Eileen Franklin-Lipsker, a woman who, arguably, fabricated the memory of her father murdering her childhood friend by mixing accurate personal memories with details gleamed from the news coverage of the event. The father’s murder conviction, which was based solely on Eileen’s testimony, was later over turned.

III. MICHIGAN’S VIEWS ON REPRESSED MEMORIES OF SEXUAL ABUSE AND THE STATUTE OF LIMITATIONS

A. Meiers-Post

In July of 1986, Mrs. Jan Post was a thirty-year-old professional watching a television program discussing a teacher sexually abusing his students when it dawned on her that as a high school student, some twenty-four years earlier, she had been the victim of sexual abuse at the hands of her math teacher. She began to experience nightmares, insomnia, depression, anxiety, and guilt stemming from her realization. Post’s complaint filed in 1986 alleged sexual abuse from 1970 to 1974, and presented a matter of first impression for the Michigan courts. Before the court stood a thirty-year old woman that alleged her former teacher engaged in a sexual relationship with her when she was in high school. The defendant, Robert Schafer, openly acknowledged in his deposition that he had sexual intercourse with Post when she was a sophomore in high school. The problem facing Post, however, was that the applicable statute of limitations was only three years. In *Meiers-Post v. Schafer*, the Michigan Court of Appeals was faced with the issue of “whether the psychological phenomena known as repression and post-traumatic syndrome can constitute insanity for tolling purposes.” Insanity is defined as a condition of mental derangement that prevents the sufferer from comprehending rights that he or she would otherwise

37. *Id.* at 40-72.
38. *Id.*
40. *Meiers-Post*, 427 N.W.2d at 607.
41. *Id.* at 608.
42. *Id.*
43. *Id.*
44. *Id.* at 607.
45. *Id.* at 608
46. *Id.*
be bound to understand and recognize.\textsuperscript{47} The court of appeals looked to two other jurisdictions, California and Washington, for help in their disposition of the issue. Both decisions reviewed debated whether or not the delayed-discovery rule could toll the statute of limitations in repressed memory cases.\textsuperscript{48} \textit{Tyson v. Tyson}, out of the Washington Supreme Court, was most influential on the court’s decision.\textsuperscript{49} The Washington Supreme Court relied heavily on the policy considerations underlying the statute of limitations to conclude that the discovery rule was applicable when the injustice of denying a justified cause of action outweighs the risk of a stale claim.\textsuperscript{50} The majority opinion in \textit{Tyson} required objective and verifiable evidence of the claim as a prerequisite to applying the discovery rule; a requirement that sharply divided the court 5-4.\textsuperscript{51} With objective verifiable evidence — the defendant’s deposition — on the record, the court in \textit{Meiers-Post} was not focused on deciding cases where an adult testifies, via a repressed memory, years after alleged abuse absent corroborating evidence.\textsuperscript{52} In a surprising move, however, the court instead decided to use the insanity rule for tolling the statute of limitations and held:

\begin{quote}
[T]hat the statute of limitations can be tolled under the insanity clause if (a) plaintiff can make out a case that she has repressed the memory of the facts upon which claim is predicated, such that she could not have been aware of rights she was otherwise bound to know, and (b) there is corroboration for plaintiff’s testimony that the sexual assault occurred.
\end{quote}

The court felt, and rightfully so, that its rule struck a fair balance between the policy concerns of the statute of limitations for the defendant and any unfairness to the plaintiff produced by precluding a justifiable claim.\textsuperscript{54}

\begin{footnotes}
47. \textsc{Mich. Comp. Laws} § 600.5851(2) (2008).
48. \textit{Meiers-Post}, 427 N.W.2d at 609.
51. \textit{Meiers-Post}, 427 N.W.2d at 609. The \textit{Tyson} dissent would have held that there was no requirement of objective verifiable evidence if the fact-finder concluded that the plaintiff had repressed all conscious memory of the abuse during the statute of limitations.
52. \textit{Id.} at 610.
53. \textit{Id.}
54. \textit{Id.}
\end{footnotes}
B. Lemmerman

It was not until nine years later in which the issue was before the Michigan Supreme Court.\textsuperscript{55} Marlene Lemmerman alleged that her father physically and sexually abused her for ten years during her youth, and that as a result of her mother repeatedly denying the allegations against her father and even threatening her, she repressed the memories for years until undergoing therapy later in life.\textsuperscript{56} Lemmerman offered testimony that her father corroborated the repressed memory during a conversation with her in which he apologized multiple times shortly before his death.\textsuperscript{57} The Michigan Court of Appeals, in \textit{Lemmerman v. Fealk}, decided that the discovery rule and the insanity provision applied to toll the statute of limitations, and that neither rule required the accompaniment of corroboration, which constituted an unnecessary restraint.\textsuperscript{58} This landmark decision represented a great stride towards justice for individuals suffering from repressed memories as a result of sexual abuse when they were children.\textsuperscript{59} In its review of \textit{Lemmerman}, the Michigan Supreme Court turned the court of appeals decision on its head. The Michigan Supreme Court went back and evaluated the \textit{Tyson} decision.\textsuperscript{60} The court neither extended the discovery rule nor the insanity provision to Lemmerman’s claim because, absent verifiable evidence, the court felt that the concerns protected by the statute of limitations were nullified by placing the plaintiff in a position to exercise her discretion in bringing suit at any opportune time without respecting time limitations.\textsuperscript{61} The court did not stop there: they held that neither the discovery rule nor the insanity provision would be available even if there was objective and verifiable evidence to support the repressed memory.\textsuperscript{62} The court defaulted to the state legislature, and felt that the proper forum for the plaintiff’s case was before the lawmakers, in hopes of having a statutory provision provided to avoid such harsh and unjust results.\textsuperscript{63}

\textsuperscript{55} Lemmerman v. Fealk, 534 N.W.2d 695 (Mich. 1995).
\textsuperscript{56} \textit{Id}. at 696-97.
\textsuperscript{57} \textit{Id}. Plaintiff alleged that she showed her father a picture of her when she was younger and told him that he hurt her very bad to which he responded, approximately six times, that he was sorry and stated that God would never forgive him.
\textsuperscript{60} Lemmerman, 534 N.W.2d at 700.
\textsuperscript{61} \textit{Id}. at 703.
\textsuperscript{62} \textit{Id}. at 702.
\textsuperscript{63} \textit{Id}. at 703-05.
clearly and repeatedly refused to recognize the authenticity of a repressed memory standing on its own with objective verifiable evidence.\textsuperscript{64} Although the court struck a substantial blow to plaintiffs similarly situated to Lemmerman, it did, however, through a footnote that would become increasingly debated, leave unadulterated the court of appeals earlier decision in \textit{Meiers-Post}.\textsuperscript{65}

C. Guerra

\textit{Guerra v. Garratt} was the case that would parse through the footnote of the \textit{Lemmerman} decision.\textsuperscript{66} The Michigan Court of Appeals in \textit{Guerra} was faced with a plaintiff that alleged her female high school basketball coach engaged in wrongful sexual contact with her, including oral sex and digital penetration.\textsuperscript{67} The defendant acknowledged that the plaintiff slept in her bed; french kissed her; and fondled her clothed breasts.\textsuperscript{68} The plaintiff argued that with objective and verifiable evidence of the sexual abuse the case fell under the \textit{Meiers-Post} decision that was carved out of the \textit{Lemmerman} holding.\textsuperscript{69} The argument was that the defendant’s admissions were express and unequivocal, which took the plaintiff’s action outside the realm of being unverifiable because it was partially admitted to by the alleged perpetrator. Taking into account the \textit{Lemmerman} footnote, along with the concerns expressed within, and the decision in \textit{Tyson} that served as the foundation for Michigan’s line of cases, it was reasonable for one to believe the plaintiff’s argument would likely succeed.\textsuperscript{70} Judges Markman, O’Connell, and Talbot, however, felt that the correct interpretation of the footnote was to address the retroactivity of \textit{Lemmerman}, and in no way fashion an exception.\textsuperscript{71} That is, the \textit{Lemmerman} opinion was interpreted as not upsetting the court’s prior decisions (i.e. no retroactivity), while simultaneously overruling the law applied therein (absolutely no discovery rule or insanity provision

\begin{itemize}
\item \textsuperscript{64} \textit{Id.} (Weaver, J., concurring).
\item \textsuperscript{65} \textit{Id.} at 703 n.15. Footnote 15 of the majority opinion reads: “We do not address the result of those repressed memory cases wherein long-delayed tort actions based on sexual assaults were allowed to survive summary disposition because of the defendants’ admissions of sexual contact with the plaintiffs when they were minors. Such express and unequivocal admissions take these cases outside the arena of stale, unverifiable claims with which we are concerned in the present cases.”(internal citations omitted).
\item \textsuperscript{66} \textit{Guerra v. Garratt}, 564 N.W.2d 121 (Mich. Ct. App. 1997).
\item \textsuperscript{67} \textit{Id.} at 122.
\item \textsuperscript{68} \textit{Id.} at 122-23.
\item \textsuperscript{69} \textit{Id.} at 124.
\item \textsuperscript{70} \textit{See supra} notes 51 and 65 and accompanying text.
\item \textsuperscript{71} \textit{Guerra}, 564 N.W.2d at 125. The court relied on the fact that the court in \textit{Lemmerman} repeatedly stated it’s general holding.
for repressed memories).\textsuperscript{72} The law of \textit{Lemmerman} remained, neither the discovery rule nor the insanity provision was available to plaintiffs with repressed memories, and the only way around the statute of limitations was through the legislature.\textsuperscript{73}

\textbf{D. The Unbelievable Demeyer}\textsuperscript{74}

The latest case in the repressed memory lineage involved a plaintiff that claimed to have been sexually assaulted by his priest as early as the age of nine years old.\textsuperscript{75} The defendant priest, who had previously been accused of sexual misconduct, admitted during a deposition to massaging the plaintiff’s chest and stomach while they were alone in the plaintiff’s bedroom, and massaging other boys while sometimes wearing nothing but their underwear.\textsuperscript{76} Aside from the admission, the Archdiocese had a psychiatric evaluation performed on the priest, and the psychiatrists determined that the plaintiff’s claims were well founded. The priest was treated with medication to calm him and curb his sex drive, and counseling as well.\textsuperscript{77}

The Michigan Court of Appeals declined to allow the plaintiff to escape the statute of limitations, because, as the lead opinion cites, it was bound by \textit{stare decisis} to follow \textit{Guerra}.\textsuperscript{78} That opinion rightfully exhibits frustration with the \textit{Guerra} decision because the \textit{Demeyer} case seemed to fit into the exception created by the \textit{Lemmerman} footnote, but the court in \textit{Guerra} did not recognize the creation of the exception expressed in the footnote.\textsuperscript{79} The stale fact finding present in \textit{Lemmerman} was not present in \textit{Demeyer}, and the majority felt \textit{Demeyer} would fall outside of \textit{Lemmerman}.\textsuperscript{80} Lemmerman’s father was dead at the time of suit: whereas, the priest in \textit{Demeyer} was still alive. \textit{Demeyer} is more akin to \textit{Meiers-Post} because reliable fact-finding was obtainable, and Judge

\begin{itemize}
\item \textsuperscript{72} \textit{Id.}\textsuperscript{.}
\item \textsuperscript{73} \textit{Id.} at 124
\item \textsuperscript{74} \textit{Demeyer} v. Archdiocese of Detroit, 593 N.W.2d 560 (Mich. Ct. App. 1999), \textit{cert. denied}, 608 N.W.2d 810 (Mich. 2000). This case was the author’s motivation for writing this article.
\item \textsuperscript{75} \textit{Demeyer}, 593 N.W.2d 560.
\item \textsuperscript{76} \textit{Id.} at 561.
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} \textit{Id.} at 560-61.
\item \textsuperscript{79} \textit{Id.} at 563. The opinion states: “[W]ere we to consider this issue as a matter of first impression, we would hold that repressed memory cases supported by admissions may fall outside \textit{Lemmerman}. Under the reasoning of \textit{Lemmerman}, the focus in determining whether to apply the discovery rule in those cases is on whether the court can be assured of reliable fact finding.” (internal citation omitted).
\item \textsuperscript{80} \textit{Id.} (noting that reliable fact-finding was surely obtainable in \textit{Demeyer}).
\end{itemize}
Corrigan wrote that he would have found for the plaintiff on that basis and would not have dismissed the action.\textsuperscript{81}

The Michigan Supreme Court, however, seemed to think that the analogy to \textit{Meiers-Post} was far more attenuated, and declined to hear \textit{Demeyer}.\textsuperscript{82} In a concurrence, then Chief Justice Weaver stated that \textit{Demeyer} was not the factual scenario that would allow the court to consider the unanswered question of \textit{Lemmerman}: whether the statute should be tolled for repressed memories accompanied by an unequivocal incriminating admission.\textsuperscript{83}

As Michigan law stands now, it has completely departed from its original requirements of corroboration and verifiable evidence that would allow a claim to be free from stale fact-finding, and now demands unequivocal admissions.\textsuperscript{84} Although rooted in \textit{stare decisis}, this evolution seems to be to the contrary of following precedent. The Michigan Supreme Court has ignored the bases for past decisions, and in accord with its conservative reputation, declined to take a proactive approach to correcting the current state of the law.\textsuperscript{85} The balance of this Note will delve into how other states have handled similar cases of memory repression, and propose actions that should be taken in Michigan to correct — what this author views as — the injustice of \textit{Guerra} and \textit{Demeyer}. One such action will pertain to the Michigan Supreme Court, while the other — in accord with \textit{stare decisis} and its present perceived binding nature — will be proposed legislation for the Michigan Legislature.

\textbf{IV. JUDICIAL REMEDY}

Michigan common law, pre-\textit{Guerra}, provided a narrow framework that allowed plaintiffs with repressed memories to overcome the hurdle posed by the statute of limitations if there was objective verifiable evidence that corroborated the sexual abuse. The insanity tolling provision was the vehicle for such escape.\textsuperscript{86} The Michigan line of cases

\begin{itemize}
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} \textit{Demeyer} v. Archdiocese of Detroit, 608 N.W.2d 810 (Mich. 2000). The concurrence in the court of appeals decision in \textit{Demeyer}, 593 N.W.2d at 564, differentiated \textit{Meiers-Post} from \textit{Demeyer} because \textit{Meiers-Post} contained an unequivocal admission and \textit{Demeyer} was, at best, an admission to “questionable behavior.”
\item \textsuperscript{83} \textit{Demeyer}, 608 N.W.2d 810 (Weaver, C.J. concurring).
\item \textsuperscript{84} Contrasting the policies and requirements behind the decisions in \textit{Tyson} and \textit{Lemmerman} with the most recent \textit{Guerra} and \textit{Demeyer}.
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{See Meiers-Post}, 427 N.W. 2d 606; \textit{see also Tyson}, 727 P.2d 226.
\end{itemize}
has since foreclosed the use of the provision.\textsuperscript{87} The Michigan Supreme Court could easily undo the injustice of the plaintiff in \textit{Demeyer} by addressing the court of appeals decision in \textit{Guerra}. Based on the previous case law and policy concerns, \textit{Guerra} should be overturned, and the insanity provision should be reinstated, in limited cases, as a viable means for plaintiffs suffering from repressed memories to overcome the statute of limitations.

\textbf{A. The Policy Behind the Statute of Limitations}

The statutes of limitations, used by legislatures to limit the window of time a lawsuit may be commenced, protects defendants and assists the court in their pursuit of truth, but it is diametrically opposed to the notion of repressed memories.\textsuperscript{88} The statute of limitation provides a qualified freedom from unending harassment of judicial process that is one of the hallmarks of justice.\textsuperscript{89} Statutes of limitation are a necessary evil that counterbalance the ambition of the law — to provide a remedy for every wrong — because it has traditionally been viewed that forcing one to answer a stale claim is a substantial wrong in and of itself.\textsuperscript{90} Justice requires that

\begin{quote}
[n]o civilized society . . . lay claim to an enlightened judicial system which puts no limits on the time in which a person can be compelled to defend against claims brought in good faith, much less whatever stale, illusory, false, fraudulent or malicious accusations of civil wrong might be leveled against him.\textsuperscript{91}
\end{quote}

The threat of litigation is a stress inducing fear that is in itself punishment that should not be suffered indefinitely.\textsuperscript{92} As time passes, claims tend to become more elaborate, specious, and embellished, and minor grievances can morph into outlandish claims.\textsuperscript{93} The main reason

\textsuperscript{87}. See \textit{Lemmerman}, 534 N.W.2d 695; see also \textit{Guerra}, 564 N.W.2d 121. The holding in \textit{Guerra} closed any possible use of the insanity provision that was left after the decision in \textit{Lemmerman}.

\textsuperscript{88}. \textit{Tyson}, 727 P.2d at 227.


\textsuperscript{90}. \textit{Compare Ruth}, 453 P.2d 631 \textit{with Lenawee County v. Nutten}, 208 N.W. 613, 614 (Mich. 1926) ("statutes of limitation are intended to remedy . . . the general inconvenience resulting from delay" in asserting a legal right) (emphasis added) (internal citations omitted).

\textsuperscript{91}. \textit{Ruth}, 453 P.2d at 634.


\textsuperscript{93}. \textit{Ruth}, 453 P.2d at 634.
stale claims present a problem is the dissipation of evidence. Crucial eyewitnesses may die or cannot be located. Physical evidence becomes misplaced or was not originally collected because its significance was unknown. Inherently, most of the evidentiary issues addressed by statutes of limitation are present in cases based on repressed memories.

If a plaintiff is unaware of an event that gives rise to his cause of action for some time, it is logical to conclude that no evidence would have been gathered or witness testimony secured. This lack of evidence in cases involving repressed memories undermines a court’s ability to determine the facts pertinent to the cause of action. To that end, and to ensure fairness to the defendant to be free of stale claims, statutes of limitation require prompt prosecution of cases by plaintiffs.

In its basic application, a statute of limitations is deemed not to present a hardship to the plaintiff because the plaintiff will have notice of the wrong or injury done to him at the time it is committed and the short window of opportunity is ample for the claim to be brought to court. However, because limitation periods are procedural and not substantive, they are not absolute and may not be followed if the plaintiff is able to demonstrate that upholding the statute of limitations is “so harsh and unreasonable in its consequences that it effectively divests ‘plaintiffs of the access to the courts intended by the grant of the substantive right of due process’.” One such exception created by the judiciary to avoid harsh and unjust results to a plaintiff is the “discovery rule.” The discovery rule prevents the statute of limitations from commencing if the plaintiff is unable to discover his injury or unable to discern the causal connection between the injury and the defendant’s actions. Michigan’s courts have historically and continually declined to extend the discovery rule to cases involving repressed memories.

B. The Policy Underlying the Application of the Insanity Tolling Provision

In facing repressed memories for the first time, the Michigan courts opted to stick with a statutory exception to the statute of limitations, and toll the limitation period with the insanity provision. The insanity

94. *Tyson*, 727 P.2d at 228.
95. *Id.*
96. *Id.*
98. *Leeawee County*, 208 N.W. at 613.
101. *See generally Meiers-Post*, 427 N.W. 2d 606 and *Lemmerman*, 534 N.W.2d 695.
provision allows a plaintiff to get around the limitation period if his mental condition is such that they were unable to comprehend the rights he was otherwise bound to know at the time of the defendant’s actions.\textsuperscript{103} Being mindful that the purpose behind the statute of limitations is to prevent the prosecution of stale claims, the court in \textit{Meiers-Post} allowed the plaintiff to overcome the statute of limitations when there was corroboration of the plaintiff’s claim.\textsuperscript{104} The main concern of courts, in making similar decisions, is to bar the case where there is entirely no corroboration of the plaintiff’s claim because this scenario is clearly on point with the policy underlying the statute of limitations.\textsuperscript{105} But, where the evidentiary record justifies the plaintiff’s cause of action by clear support the balance is in favor of not precluding the plaintiff’s access to justice, and the defendant’s right to be free from the never-ending threat of litigation must yield.\textsuperscript{106}

Having verifiable corroborating evidence in the record avoids the evidentiary issues underlying the statute of limitations.\textsuperscript{107} In \textit{Meiers-Post}, it was the defendant’s admission of sexual abuse that provided the verifiable corroborating evidence. The evidentiary standard needed to overcome the statute of limitations was never elaborated in the cases that followed \textit{Meiers-Post}.\textsuperscript{108} The evidentiary standard of verifiable corroborating evidence almost never existed at all. In \textit{Tyson}, the case relied heavily upon in \textit{Meiers-Post}, the dissent argued vigorously that the prerequisite of objective verifiable evidence was not needed where the court entertained “swearing contests” (one’s word versus another’s) in the past, and that the main concern at the pre-discovery point of litigation is the plaintiff’s opportunity to prove his case, not whether they will be able to do so.\textsuperscript{109} \textit{Meiers-Post}, however, presented perfectly verifiable evidence and left the court free to make their decision without arguing the intricacies of the \textit{Tyson} decision.\textsuperscript{110}

Nevertheless, it seemed that the court in \textit{Meiers-Post} carved a niche exception into the rigid application of the statute of limitations that would allow a plaintiff to present a case based on repressed memories

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{103}]{Mich. Comp. Laws § 600.5851(1)-(2) (2000).}
\item[\textsuperscript{104}]{\textit{Meiers-Post}, 427 N.W.2d at 610 or \textit{Tyson}, 727 P.2d at 235 (Pearson, J. dissenting); \textit{Ruth}, 453 P.2d at 635 (balancing “the harm of being deprived of a remedy versus the harm of being sued [on a stale claim]”).}
\item[\textsuperscript{105}]{See \textit{Meiers-Post}, 427 N.W.2d at 610 (discussing the concerns of the courts making the decisions it relied on in its decision).}
\item[\textsuperscript{106}]{\textit{Id.}}
\item[\textsuperscript{107}]{See generally \textit{Ruth}, 453 P.2d 631; Doe, 692 N.W.2d 398.}
\item[\textsuperscript{108}]{See generally \textit{Lemmerman}, 534 N.W.2d 695; \textit{Guerra}, 564 N.W.2d 121.}
\item[\textsuperscript{109}]{\textit{See Tyson}, 727 P.2d at 232 (Pearson, J. dissenting).}
\item[\textsuperscript{110}]{\textit{See Meiers-Post}, 427 N.W.2d at 610.}
\end{enumerate}
\end{footnotesize}
when he could present corroborating evidence sufficient to prove that his claim was not stale. The protections afforded by the statute of limitations were still honored. The key behind limitation periods is mainly the evidentiary burden. But when plaintiffs can demonstrate corroborating evidence, the risk of stale claims is nullified, and there are less evidentiary concerns than a case that would be barred by the limitations period. *Meiers-Post* at least provided a plaintiff suffering from repressed memories a narrow window to overcome the statute of limitations.\(^{111}\)

**C. The Toppling of Meiers-Post’s Significance**

*Lemmerman*, the case that followed *Meiers-Post*, was nearing the other side of the evidentiary spectrum in relation to its predecessor. In *Lemmerman*, the court was not even faced with a “swearing contest.” Before the court was a single plaintiff suing her father’s estate who alleged that he had corroborated her repressed memories of sexual abuse before his death.\(^{112}\) It was clear that there was no way the court would allow the plaintiff to overcome the statute of limitations on what could have arguably been completely fabricated facts. What was not expected was the breadth of power and subsequent impact the *Lemmerman* decision would carry with it. The only remaining hope for plaintiffs suffering from repressed memories to overcome the statute of limitations was the interpretation of the opinion’s footnote, which read to the effect that the *Lemmerman* decision did not affect the precedent of *Meiers-Post*.\(^{113}\) However, the footnote misstated the evidentiary standard of *Meiers-Post* as requiring an express unequivocal admission even though *Meiers-Post* never stated the need for an express unequivocal admission.\(^{114}\) This mischaracterization of *Meiers-Post* and the subsequent disregard of *Meiers-Post in Guerra* are judicial errors that could be remedied to fix the injustice of *Demeyer*.

There is no denying that *Lemmerman* was surely going to be decided for the defendant when considering the evidentiary concerns of the statute of limitations. The court’s broad holding, however, seemed to be at odds with the precedent before it. Consistent with *Lemmerman*, however, the court of appeals dealt the final blow to *Meiers-Post* by characterizing the exception-bearing footnote of *Lemmerman* as solely

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111. See id. (stating that verifiable corroborating evidence opens a narrow window).
112. See *Lemmerman*, 534 N.W.2d at 696.
113. See id. at 702.
addressing the retroactivity of *Lemmerman*.*115* The court in *Guerra* refused to recognize an exception because the court in *Lemmerman* chose to defer to the legislature for any tolling of the statute of limitations.*116* This author is not the first to express disbelief and frustration with the holding of *Lemmerman* and the interpretation in *Guerra*.*117*

**D. The Case for Demeyer and the Judicial Remedy That Should Have Been**

In reading the majority opinion in *Demeyer*, it is clear that the justice penning the opinion, then Chief Justice Corrigan, was uneasy with the broad holding of *Lemmerman* and believed that an exception based on *Meiers-Post* should exist.*118* The majority and concurrence both recognized that the court was bound to find for the defendant based on *Guerra* and *stare decisis*.*119* The concurrence and majority disagreed as to whether the exception that could have been created in *Lemmerman* required an express admission and whether it would be applicable in *Demeyer*.*120* The majority specifically set out that if not for *Guerra*, the Court would have focused on whether there was assurance of reliable fact-finding when deciding to toll the statute of limitations or not because the court in *Lemmerman* implicitly accepted the premise that “[i]n cases supported by admissions, courts are essentially asked to recognize memory repression as a verifiable basis for a person’s inability to bring his claim within the limitation period.”*121*

Reliable fact-finding is the essential prerequisite to allow the statute of limitations to toll. It is the only way to ensure that the plaintiff’s harsh detriment of being denied legal remedy may actually outweigh the defendant’s burden of the threat to be sued. The evidentiary issues underlying the statute of limitations are all avoided and irrelevant.*122* Essentially, *Demeyer* is the case that fell short of the unequivocal admission in *Meiers-Post*, but that still satisfied all of the Court’s concerns addressed when it examined *Tyson* for its decision.

In *Demeyer*, the defendant admitted to massaging the plaintiff’s chest and stomach, and also to inappropriately massaging other altar

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115. *Guerra*, 564 N.W.2d at 124.
116. Id. at 125.
117. See *Demeyer*, 593 N.W.2d 560 (indicating the court’s frustrated desire to find for the plaintiff).
118. Id. at 562-64.
119. See id. at 564 (Sawyer, J., concurring).
120. Id. at 562-64.
121. Id. at 563.
122. See generally *Meiers-Post*, 427 N.W. 2d 606 and *Lemmerman*, 534 N.W.2d 695.
boys while each wore only his underwear. Psychologists examined the defendant and found the plaintiff’s claims to be well founded. The Archdiocese even sent the defendant to treatment, which resulted in a drug prescription for the priest to curb his sex drive. The priest had also been accused of previous sexual misconduct.

The evidentiary concerns that were highly examined by the court in Meiers-Post are almost equally satisfied in Demeyer, and as required by the holding of Meiers-Post, Demeyer provided “corroboration for [the] plaintiff’s testimony that the sexual assault occurred.” Demeyer provided reliable fact-finding that would have prevented the defendant from becoming a victim of a stale claim. It appears that the plaintiff could have brought forth no more evidence but an unequivocal admission by the defendant. Like the majority opinion in Demeyer, this author feels that the court in Guerra made the wrong decision and have thus precluded meritorious claims like Demeyer from accessing justice.

The Supreme Court of Michigan had their chance to correct Demeyer, but failed and instead interpreted Meiers-Post as requiring an express unequivocal admission. The author concedes that Meiers-Post did not address the question of repressed memories absent an unequivocal admission, but the court’s opinion laid the ground work for cases like Demeyer to proceed past summary disposition because they are removed from being stale claims due to the presence of verifiable corroborative evidence. Making the failure of the Michigan courts to correct their decisions in Guerra and Lemmerman and to allow justice to Demeyer even worse is their acknowledgment of “the plight of sexual abuse victims, especially those victimized by Catholic priests…”

The Michigan Supreme court should narrow the holding of Lemmerman to address only those cases outside the court’s reasoning in Meiers-Post. The discovery rule and the insanity grace period should never apply, absent legislative action, to claims that are premised on unverifiable evidence that calls into question the corroboration of the claim. The evidentiary burden should not be heightened from objective verifiable evidence that corroborates the plaintiff’s testimony (built from Tyson and Meiers-Post) to the unequivocal admission required by the Michigan Supreme Court in Demeyer. The concern of the statute of

123. Demeyer, 593 N.W.2d at 561
124. Id.
125. Id.
126. Id.
127. Meiers-Post, 427 N.W. 2d at 610.
128. Demeyer, 608 N.W.2d at 810 (Weaver, C.J., concurring).
129. Meiers-Post, 593 N.W.2d at 610.
130. Doe, 692 N.W.2d at 401.
limitations is the ability to bring a claim, not the ability to prevail on it. The mountain of evidence presented nullified the underlying policy of the statute of limitations: thus, Demeyer should have been entitled to his day in court. The Michigan Supreme Court should re-examine the body of law before it and apply stare decisis properly. Demeyer presented an almost perfect factual scenario for reform. The injustice suffered by Demeyer could be avoided in the future with the simple judicial remedy of limiting the holding of Lemmerman, and correcting the decision of Guerra.

V. LEGISLATIVE ACTION

Because Michigan, like so many other jurisdictions, has decided that the power to remedy cases like Demeyer falls squarely within the legislature’s power, the remainder of this Note will examine how other jurisdictions handle repressed memories and propose legislation that could better handle repressed memories in future litigation. The rationale behind the decision to leave change to the legislature is the judiciary’s inability to make a precious judgment call between the effects of any decision they may make against the effect of potentially open-ended claims against defendants and society in general.

A. No Statute of Limitation

One of the simplest ways that states have handled the problems associated with repressed memories is to make them exempt from statutes of limitation. One such jurisdiction is Nevada. In Nevada, the statutes of limitation used to not bar actions of an adult survivor asserting a claim of child sexual abuse when the plaintiff could demonstrate by clear and convincing evidence that there in fact was sexual abuse, by the named defendant, during the plaintiff’s minority. If the plaintiff is unable to meet the requisite evidentiary burden, the claim was instead subjected to the two-year period of limitation provided by statute.

131. See generally Lemmerman, 534 N.W.2d 695; see also Bassile, 575 N.Y.S.2d 233.
132. Bassile, 575 N.Y.S.2d at 236 (“The argument [for a discovery rule] is not new. We have carefully considered it on numerous occasions. In each, we weighed the detriments of such a result against the effect of potentially open-ended claims upon the repose of defendants and society, and held that the statute of limitations must run from the time of the act until the Legislature decrees otherwise . . . .”) (citing Goldsmith v. Howmedica, Inc., 491 N.E.2d 1097, 1099 (N.Y. 1986)).
133. See generally Petersen, 792 P.2d 18.
134. Id., at 24-25.
At first glance this scheme seems that it would be beneficial to plaintiffs similarly situated to Demeyer. However, upon further examination, this author believes that by having to meet the clear and convincing evidentiary standard enunciated in *Petersen v. Bruen* the decision that would need to be reached by the Michigan court’s would be those same decisions argued in the first half of this Note’s analysis section. By asking the plaintiff to prove his case by clear and convincing evidence, the court is essentially asking the plaintiff to demonstrate that there exists sufficient evidence to remove the plaintiff’s claim from the realm of stale claims, thus placing the same decisions in the court’s hands that would require analysis of objective and verifiable evidence and re-examination of the *Lemmerman* footnote.

For the foregoing reasons, this Note will no longer wrestle with the possible use of the statutory scheme employed in Nevada. Additionally, a past article, long before the decision in *Demeyer*, proposed the use of the Nevada legislation, but due to the cases after the publication of that article the argument to be made is redundant for purposes of this Note.\(^\text{136}\)

**B. The Discovery Rule**

In general, a cause of action accrues when the plaintiff is injured, whether or not he knows of the wrong or injury, and that accrual of his cause of action starts the statute of limitations.\(^\text{137}\) The discovery rule, however, lengthens the statute of limitations by delaying the cause of action from accruing until the plaintiff knows or should have known of the defendant’s conduct giving rise to their injury.\(^\text{138}\) Although Michigan has previously declined to extend a discovery rule to the application of the statute of limitation, the legislature could choose to recognize a discovery rule in limited instances.\(^\text{139}\) Michigan and other state legislatures, such as New York, have passed statutes codifying discovery rules for causes of action including medical malpractice and toxic

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137. See generally Bassile, 575 N.Y.S.2d 233.
138. Logerquist v. Danforth, 932 P.2d 281, 284 (Ariz. Ct. App. 1996) (discussing the common law discovery rule used in Arizona). It should be noted that there exists discovery rules that prolong the statute of limitations by delaying when it begins, see Nev. Rev. Stat. § 200.366 and there are tolling provisions that suspend the period of limitations. For a detailed analysis and difference, see Hearndon v. Graham, 767 So.2d 1179, 1184-85 (Fla. 2000).
139. For denying application of the discovery rule, see Meiers-Post, 427 N.W. 2d at 610.
torts. Michigan’s codification of a discovery rule in the realm of professional malpractice allows a plaintiff to bring a claim within two years or “within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.”

The rationale for allowing the discovery rule to toll the accrual of a cause of action and thus delay the statute of limitation is fairly straightforward. Courts believe that the application of the discovery rule is fair. A victim of certain torts has no reason to know he was damaged until manifestations of his injury exist, and it would be unjust to deprive a victim of a claim before he has reason to believe that the claim exists. Not allowing a plaintiff to bring a cause of action once he is aware that his claim exists would foreclose plaintiffs from bringing any claim based on a hidden injury if the injury was not discovered within the applicable statute of limitation.

Applying the discovery rule liberally to cases of sexual abuse premised on repressed memories appears to be the modern trend in American jurisprudence. The two reasons enunciated by one Florida court, include: (1) the wide recognition that repressed memories of sexual abuse are possible, if not rampant, and (2) that it is only fair and consistent to apply the rule to a uniquely sinister and heinous tort in comparison to its current applications. This seems to make perfect sense. Courts have even wrestled with the considerations of stale claims and lack of evidence that underlie the statutes of limitation. Seemingly revolutionary in light of Michigan’s stance, the courts that apply a

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140. N.Y.C.P.L.R. §214-a to -c (McKinney 2010), all cited in Bassile, 575 N.Y.S.2d 233. N.Y.C.P.L.R. §214-c, since Bassile, has been constitutionally preempted. Proposed legislation is in the process of amending it, but the discovery aspect remains codified in the proposed legislation. See also Mich. Comp. Laws §§ 600.5838, 600.5838(a) (2010). Michigan’s statutory discovery rules prolong the statute of limitations and not the accrual of the claim. See also Mich. Comp. Laws § 600.5827 (2010), which governs the accrual of a claim in general. However, for purposes of this Note, the difference between the exact mechanism is irrelevant and was only discussed at length in Logerquist, 932 P.2d 281, due to the statutory scheme and legislative intent of that jurisdiction.


142. Hearndon, 767 So.2d at 1186. Even though a large number of discovery rules are created and applied by the courts, the same concerns underlie that application that would underlie a legislative codification of a discovery rule.


144. Such “hidden” injuries include breaches of implied warranties or medical malpractice (see Hearndon, 767 So.2d at 1186) or toxic torts (see Bassile, 575 N.Y.S.2d 233).

145. See, e.g., Ault, 637 N.E.2d at 871-73 (recognizing the application of the discovery rule to the accrual of a claim for sexual assault when the plaintiff suffers from repressed memory).

146. Hearndon, 767 So.2d at 1186.
discovery rule to repressed memory cases feel that the discovery rule does not prejudice defendants, and that the defendant’s burden is much less than the greater injustice of the plaintiff being robbed of a remedy. The concern that there will be a lack of evidence is not protected by the statute of limitation but still must be overcome by the plaintiff when presenting his case. This seems to be a logical and fundamentally fair way to address the problems with repressed memories.

Some jurisdictions, such as Oklahoma, take application of the discovery rule to stringent new heights and require that objective verifiable evidence also be presented to warrant the application of the discovery rule. Not only is the plaintiff required to produce evidence that the abuse actually occurred but also that his memory was repressed. This view, although more in line with the focus of the Michigan courts, is not the majority rule and is contrary to the application of the discovery rule by most courts. This heightened evidentiary standard would require the plaintiff to prove his case before even getting to discovery. This is a very rare pleading requirement. No other applications — to different causes of action — of the discovery rule, including Michigan’s currently codified version, require the plaintiff to meet an evidentiary burden to overcome the statute of limitation. Placing a burden on the plaintiff to prove his memory was repressed and to present objective verifiable evidence of his claim in order to overcome the statute of limitation essentially takes us back to the debate that went on in Michigan’s earliest case law dealing with repressed memories. Such a standard seems ridiculous in light of how other states apply the discovery rule — whether judge made or legislative.

147. Logerquist, 932 P.2d at 287 (citing Ault, 637 N.E.2d at 872).
148. Id.
150. Id.
151. Logerquist, 932 P.2d at 287. This opinion actually demonstrates the spectrum of current ways used to handle repressed memories. That spectrum includes liberal application of the discovery rule at one end, with Michigan’s current refusal to apply the discovery rule at the other end. In the middle of the spectrum lies Oklahoma’s discovery rule with the heightened evidentiary burden.
C. The Way the Michigan Legislature Can Correct Demeyer

Michigan’s best hope to provide justice to plaintiffs similarly situated to Demeyer is to pass legislation providing a discovery provision for claims of child sexual abuse. This seems to be the most suitable alternative over passing legislation that makes claims of sexual abuse exempt from a statute of limitation. Making claims of sexual abuse entirely excused from any statute of limitation would completely undermine the rationale for having the statute of limitation, and would allow plaintiffs to abuse the system. Plaintiffs that clearly recognized the accrual of their claim would be free to wait years to bring suit against the defendant. Having no statute of limitation in cases of child sexual assault, although helpful to Demeyer, would be a poor legislative decision.

The Nevada approach, from Petersen, although still open to abuse by plaintiffs cognizant of their claim, could be helpful to Demeyer. It is arguable whether the evidence presented in Demeyer would be clear and convincing evidence of sexual abuse. Recall that in Demeyer, the church sent the priest for treatment — including curbing his sex drive, psychiatrists and concluded that the plaintiff’s claim was well founded, and the priest admitted to massaging the plaintiff while wearing only underwear. Giving the plaintiff, Demeyer, the benefit of the doubt, it is possible that a fact finder could conclude by a preponderance of the evidence that a sexual assault occurred. However, clear and convincing proof is a higher standard than preponderance of the evidence and it is likely Demeyer would fall short. For this reason, and because the heightened pleading of clear and convincing proof is fundamentally unfair, for the situation, in this author’s eyes, the Nevada approach is not the best option for Michigan’s legislature.

The discovery rule is perfect and tailor-made for repressed memory plaintiffs. It is fundamentally fair to apply it. It is already applied to malpractice cases and toxic tort cases where plaintiffs are unaware of their injury or unaware of a causal connection. The utter heinousness of child sexual abuse cases warrants that sexual abuse should qualify for similar application of a discovery rule. Michigan should follow the emerging trend of American jurisprudence and liberally apply the discovery rule to cases of sexual abuse premised on repressed memories. Michigan’s existing discovery rules operate by extending the statute of limitation and not delaying the accrual of the plaintiff’s claim—although

154. See Guerra, 564 N.W.2d at 124; see also Demeyer, 593 N.W.2d 560.
the same result is reached. Therefore this author proposes that legislation be passed reading:

A claim based on the sexual abuse of a person accrues at the time of the harm.\textsuperscript{155} An action involving a claim based on sexual abuse of a person may be commenced at any time within the applicable period prescribed by section 5805 or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.

This statute would read very similar to the malpractice discovery rules already in place. This new legislation would allow plaintiffs like Demeyer, and all other plaintiffs suffering from repressed memories of sexual abuse, to bring their claims into court. The cases could be properly adjudicated on the merits, instead of preliminarily disposed. Any evidentiary inadequacies would become apparent during discovery and defendants would still be able to avoid trial. This method should be preferred because the monetary and reputational burden placed on the defendant in the assertion of an action is nothing compared to the burden placed on a plaintiff that is unable to access justice with a meritorious claim.

The Oklahoma discovery rule with a heightened evidentiary burden was not selected because the evidentiary burden again places too high of a step in front of the plaintiff at such an early stage in the litigation. In Michigan, a plaintiff asserting professional malpractice is not required to plead his case with objective verifiable evidence to overcome the statute of limitation. With sexual abuse being so much more despicable, it only follows that plaintiffs asserting a delayed claim should likewise not be held to such a high evidentiary burden at the onset of a suit.

This Note is not advocating that a plaintiff asserting a claim of sexual abuse premised on repressed memory should not have to carry his full evidentiary burden. It is this Note’s position that the burden should not be carried at the pleading stage of the controversy. Many cases get past pleading and never make it to trial. Many of those cases are still considered victories for the plaintiff by virtue of the compensatory settlements awarded to the plaintiffs. Although the defendants are exposed to having to defend the suits, even those later determined frivolous, this inconvenience seems minor in relation to the criminal penalties and subsequent treatment available if the allegations have merit. The legislation proposed in this Note would open the door to

\textsuperscript{155} To be consistent with \textsc{Mich. Comp. Laws § 600.5827 (2010)}. 
justice for those plaintiffs that suffer from repressed memories and avoid the automatic preclusion—absent a confession—from justice that they are now faced with in the justice system. It’s time the civil system took a hint from the criminal system’s treatment of child sexual assault.

VI. CONCLUSION

Horrendous acts of sexual abuse that force the victims to repress the memories of their attack should not also give the potential defendants a free pass on their conduct. Michigan has been hesitant to extend the chance at justice to plaintiffs suffering from repressed memories of sexual assault. It could be the conservative nature of the court system that makes the court reluctant to recognize repressed memories and follow suit with the ever-growing number of jurisdictions. Nonetheless, Michigan should take steps to make justice accessible to those plaintiffs. Whether it is accomplished through the judiciary correcting its past interpretations and providing a narrow gate for the plaintiff to walk through, or by the legislature passing a wider discovery rule similar to those already employed for other torts, Michigan needs to take action to correct this serious deterioration of justice.