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Statutes of Limitations and Pollutant Injuries: The Need for a Contemporary Legal Response to Contemporary Technological Failure

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NOTES

STATUTES OF LIMITATIONS AND POLLUTANT INJURIES: THE NEED FOR A CONTEMPORARY LEGAL RESPONSE TO CONTEMPORARY TECHNOLOGICAL FAILURE

Most Americans had no idea, until relatively recently, that they were living so dangerously. They had no idea that when they went to work in the morning, or when they ate their breakfast . . . that when they did things as ordinary, as innocent and as essential to life as eat, drink, breathe or touch they could, in fact, be laying their lives on the line.¹

Technology has played an unmistakably instrumental role in the growth of modern civilization. For three centuries science and technology “had an unblemished and justified reputation as a wonderful adventure, pouring out practical benefits and liberating spirit from the errors of superstition and traditional faith.”² We now recognize, however, that the benefits of sophisticated technology carry with them inherent and often unrecognized burdens on public health and environmental safety.³ Of recent national concern have been the immediate and long-term problems attributable to improper hazardous-waste disposal.⁴ Particularly alarming is the

great proliferation of synthetic chemicals and substances generated as a consequence of technological advancement. This has produced a type of pollution against which few, if any, effective preventive measures can be taken.  

The legacy of improper hazardous- and toxic-waste disposal is already evident. Property damage, contaminated water, fish contamination, malodorous fumes, air pollution, income losses due to interference with industry, and acute personal injuries such as elevated blood levels, miscarriages, birth defects, asthma, nervous disorders, and urinary disease are some of a litany of effects linked to hazardous and toxic substances.  

More staggering are the prospects of latent or progressive injuries whose symptoms may first become ascertainable long after exposure to toxic substances. Damages for injuries attributable to environmental contamination may be sought under a gamut of common law doctrines such as trespass, nuisance, or negligence, depending upon the facts of a particular case. In the final analysis, however, liability is often predetermined by statutes of limitations. At hearings held in May 1979, New York Congressman John J. LaFalce described the potential problems limitations periods may pose in hazardous- and toxic-waste-disposal controversies:

We have great difficulties with the law right now, because very often you don’t find out about the fact that you are injured until maybe 25 years after someone has committed an act—maybe a negligent act, maybe not a negligent act . . . . How do you overcome the hurdle of the statute of limitations, which says that you have 2 or 3 years, or 4 years, depending upon the legal theory, from the act that caused the injury to bring your lawsuit, when you find out about it 25 or 35 years later? And should you put a

5. Kraus, supra note 3, at 84.
6. See, e.g., SIX CASE STUDIES, supra note 3, at 26, 31, 35, 47, 55-56 (property damage); id. at 20, 26, 29, 47, 61, 140, 143-44, 214, 339-40 (contaminated water); id. at 31, 74 (fish contamination); id. at 404, 407-12 (air pollution); id. at 16, 17, 30, 31, 55-56, 74, 214, 288 (income losses due to interference with industry); id. at 222, 282, 339, 344 (malodorous fumes); id. at 51 (elevated blood levels); id. at 43 (miscarriages and birth defects); Hazardous and Toxic Waste Disposal Hearings, supra note 4, Pt. 2, at 62, 76 (asthma); id. at 62, 74 (nervous disorders); id. at 62, 76 (urinary disease).
7. SIX CASE STUDIES, supra note 3, at 17, 20, 26, 29, 39, 43, 47, 51, 55, 72, 152, 224, 291, 355, 415-17; Kraus, supra note 3, at 94-97.
8. SIX CASE STUDIES, supra note 3 at 477-83; Baurer, Love Canal: Common Law Approaches to a Modern Tragedy, 11 ENV'TL L. 133, 137-46 (1980).
person through the torture of the traditional legal process when
you are dealing with a totally untraditional difficulty? Clearly
not.9

This Note examines the issue of statutes of limitations in
environmental-contamination suits and illustrates that these stat-
utes may pose significant and sometimes insurmountable obstacles
to recovery in hazardous- and toxic-waste-disposal cases where pri-
ivate parties seek compensation for latent or progressive personal
injuries. Examination of the policies underlying statutes of limita-
tions in general and specific analysis of their operation in New
York, New Jersey, and California, where hazardous and toxic
wastes have taken a considerable toll upon the environment, dem-
onstrates the pressing need for judicial interpretation or, prefer-
ably, legislative amendment of personal injury statutes of limita-
tions, so that victims of latent or progressive pollutant injuries will
not be foreclosed from recovery automatically or arbitrarily.

This Note first undertakes a brief historical overview of the
emergence of statutes of limitations, their underlying purposes,
and their operational systems. The subsequent section discusses
pollution incidents in New York, California, and New Jersey, and
projects how the limitations laws of these states will apply to
hazardous- and toxic-waste-disposal controversies where latent or
progressive injuries are alleged.10 The final section proposes a re-
form to resolve the illogical inconsistencies currently bred by vary-
ing personal injury statutes of limitations.

HISTORICAL OVERVIEW: THE HOWS
AND WHYS OF OPERATION

The major rationale for statutes of limitations11 is the belief

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9. *Hazardous and Toxic Waste Disposal Hearings*, supra note 4, Pt. 2, at 10 (re-
marks of Rep. LaFalce).
10. It also briefly examines the amendment the New York Legislature recently
considered to remedy this problem. *See* notes 111-117 infra and accompanying text.
11. For a comprehensive study of statutes of limitations, see *Developments in
the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950). This background
section relies heavily on that work.

Prior to the Limitations Act of 1623, Limitation Act, 1623, 21 JACI, c.16, the
common law recognized rights in contract and tort as perpetual. Labyrinthine proce-
dural requirements reduced the likelihood of suits untimely filed, and only when
more convenient forms of action emerged did the need for limitations pierce the
common law judicial system. *Id.* at 1177-78. The Limitations Act of 1623 established
different limitations periods for different forms of action. Most early American state
legislatures adopted this common law statute of limitations with only slight varia-
that at some point defendants should be secure in the knowledge that they will not be haunted by stale claims.\textsuperscript{12} In addition, statutes of limitations protect defendants against evidentiary problems—such as lost records and unavailable witnesses—caused by long-delayed litigation, and promote judicial economy.\textsuperscript{14}

Historically, limitations periods governing personal-injury claims have been shorter than those in other civil actions,\textsuperscript{15} possibly because personal-injury litigation poses special evidentiary problems.\textsuperscript{16} If the period between the time of injury and litigation is relatively short, there is less risk of spurious claims and inaccurate evidence.\textsuperscript{17}

The statute of limitations is an affirmative defense, and the burdens of pleading and proving its application normally fall upon the defendant.\textsuperscript{18} Where a plaintiff seeks to invoke a legislatively or judicially recognized exception to the statutory bar, however, the burden shifts to the plaintiff who then assumes the risk of non-persuasion.\textsuperscript{19}

In cases where the statute of limitations is invoked as a de-
fense, accrual of a plaintiff's cause of action marks the crucial point of inquiry. The date of accrual is generally what sets the statute in motion.\(^{20}\) for accrual "delineat[es] that combination of facts or events which permits maintenance of a lawsuit."\(^{21}\) Therefore, where a breach of contract or most intentional torts are involved, the statute of limitations begins to run from the moment the act is committed, since the act itself is a completed wrong against the plaintiff regardless of damage.\(^{22}\) Where the basis of the claim is actual damage, however, determining when the statute of limitations should commence becomes more complex, since there may be a delay between the defendant’s act and the plaintiff’s resulting injury or between the plaintiff’s injury and his or her discovery of its cause.\(^{23}\)

As a result, courts have advanced conflicting theories of accrual where harm is the basis of the tort action.\(^{24}\) Some courts have held that a statute of limitations begins to run at the time of the defendant’s allegedly wrongful conduct, even though a plaintiff is blamelessly ignorant of the tort or his injury until long after the limitations period has expired.\(^{25}\) Recognizing that it would be ludicrous to require that a suit be brought before a plaintiff knows or can reasonably be aware that he has been injured, some courts have applied a discovery rule of limitations, whereby a limitations period does not commence until the plaintiff discovers or, in the exercise of reasonable diligence, should have discovered his or her injury.\(^{26}\) Some courts have interpreted the discovery rule so that a

\(^{20}\) E.g., CAL. CIV. PROC. CODE § 312 (West 1954) (civil actions must be commenced within prescribed time period after accrual); N.J. STAT. ANN. § 2A:14-2 (West 1952) (actions must be commenced within two years after accrual); N.Y. CIV. PRAC. LAW § 203(a) (McKinney 1972) (period computed from time cause of action accrued).

\(^{21}\) Developments in the Law, supra note 11, at 1200.

\(^{22}\) Id. at 1200-01.


\(^{24}\) Harm is not always the gravamen of a tort action. For example, in cases involving intentional torts such as false imprisonment and trespass to land, the defendant’s conduct in itself invades the plaintiff’s rights such that a suit can be maintained regardless of damage. W. PROSSER, THE LAW OF TORTS § 11 at 42, § 13 at 66 (4th ed. 1971).


\(^{26}\) E.g., Urie v. Thompson, 337 U.S. 163 (1949); Roman v. A. H. Robins Co., 518 F.2d 970 (5th Cir. 1975); Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974).
statute of limitations begins to run upon the plaintiff's discovery of the injury and its cause. Still others have interpreted the discovery rule to postpone commencement of the limitations period until the plaintiff learns not only of his injury but also that his injury has been wrongfully inflicted by another.

The discovery rule has been applied to various cases involving "inherently unknowable" harms or injuries that are latent or progressive in nature. It has likewise been applied where the plaintiff can prove that the defendant has fraudulently concealed the fact of harm from him. Whether some permutation of the discovery rule will be applied in the arena of environmental-tort litigation remains to be seen.

THE APPLICATION OF PERSONAL INJURY STATUTES OF LIMITATIONS IN ENVIRONMENTAL-CONTAMINATION SUITS

In the past decade interest in compensation for pollutant injuries has grown along with reports of harms, potential harms, and attempts at amelioration. A discussion of incidents of toxic-substances pollution in New York, California, and New Jersey


29. E.g., Urie v. Thompson, 337 U.S. 163 (1949) (claim not barred where negligence of interstate railroad caused plaintiff to contract silicosis as result of inhaling silica dust over period of thirty years); Karjala v. Johns-Manville Prod. Corp., 523 F.2d 155 (8th Cir. 1975) (claim not barred where construction worker exposed to large quantities of asbestos dust for 28 years sued manufacturer of asbestos insulation alleging manufacturer's negligence caused him to develop asbestosis).


31. Given the latent or progressive nature of many projected pollutant injuries, see Kraus, supra note 3, at 94-97; Six CASE STUDIES, supra note 3, application of the discovery rule seems particularly appropriate. See text accompanying notes 91-122 infra.

32. See Six CASE STUDIES, supra note 3; TASK FORCE REPORT, supra note 4.
illustrates that existing statutes of limitation may foreclose plaintiffs from recovery for latent or progressive pollution-related injuries.

New York: The Love Canal Catastrophe

The problem of hazardous-waste disposal sites has commanded national attention due to events at the Love Canal in Niagara Falls in August 1978.\(^3\) Love Canal residents became "victims of a technological assault" when toxic chemical wastes buried over twenty-five years ago leaked from landfill sites and wrought havoc on the surrounding area.\(^4\) Poisonous chemical wastes infiltrated scores of neighboring basements and the Niagara River, and an array of dangerous chemicals volatized into the air. Hooker Chemical and Plastics Corporation disposed of 352 million pounds of industrial chemical waste between 1930 and 1953.\(^5\) It is estimated that 460,000 pounds of the total figure constitute trichlorophenol (TCP), the manufacture of which produces ultratoxic dioxin, a potentially lethal poison.\(^6\) Residents of the Love Canal area first discovered chemicals seeping from the dumping site in 1976 after a period of unusually heavy rain.\(^7\) Air-quality tests subsequently conducted in the basements of nearby homes revealed the presence of carcinogenic and teratogenic chemical substances.\(^8\) The Love Canal situation resulted in the declaration of a health emergency by the Commissioner of Health and prompted the State to do the following: contain the wastes; evacuate families living in the immediate vicinity; purchase 239 homes; study the problem of hazardous waste disposal; and recommend remedial measures.\(^9\)

The tragic physical consequences of Love Canal have already


\(^{35}\) SIX CASE STUDIES, supra note 3, at 43. The Hooker Chemical Company is a wholly owned subsidiary of the Occidental Petroleum Corporation. Id. at 143.


\(^{37}\) SIX CASE STUDIES, supra note 3, at 43; see Newsweek, Dec. 11, 1978, at 16, 18.

\(^{38}\) SIX CASE STUDIES, supra note 3, at 43. Kraus defines a carcinogen as "a substance, chemical, physical or biological, which increases the incidence of cancer." Kraus, supra note 3, at 83 n.2. A teratogenic substance is one which tends to produce gross deformity of the body, "causing the development of monsters, monstrosities, deformed fetuses or infants." 3 SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE T-29 (1979).

\(^{39}\) TASK FORCE REPORT, supra note 4, at 1.
begun to manifest themselves. At public hearings convened by the New York Commissioner of Environmental Conservation, present and former Love Canal homeowners testified that they and their families have suffered acute medical injuries including miscarriages, birth defects, liver disease, chemical burns, chronic physical illness, nervous disorders, and cancer. Attempted suicides and emotional distress have also been reported. Dr. Beverly Paigen, a cancer research scientist at Roswell Park Memorial Institute in Buffalo, New York, conducted studies indicating that families living near the Love Canal dump site are particularly susceptible to health problems including but not limited to asthma, nervous breakdowns, urinary disease, miscarriage, birth defects, and crib deaths. Latent medical injuries may also occur, since the wastes discovered in the air and water near the abandoned, sixteen-acre Love Canal site are carcinogenic, mutagenic, and teratogenic. Stress-associated disorders may also be anticipated.

Private plaintiffs may be reluctant to seek compensation for pollutant injuries due to the prospect of expensive and protracted litigation and the difficulty of proving that exposure to toxic substances caused their injuries. The latter is especially true if the injury alleged is a chronic, long-latency disease. Plaintiffs who do initiate litigation will be faced with the problem of filing their claims within the statutorily prescribed period of limitations. New York State legislators do recognize the existence of the problem. In 1980, legislation was introduced to amend the current statute of limitations to afford plaintiffs seeking recovery for injuries “arising

40. Id. at 13.
41. Hazardous and Toxic Waste Disposal Hearings, supra note 4, pt. 2, at 62-79. Dr. Paigen has a Ph.D. in biology, and her research specialty is genetic susceptibility to environmental toxins. She served on the Environmental Protection Agency’s Toxic Substances Advisory Committee from 1977 to 1979 and on the Carcinogen Assessment Group (also an E.P.A. group) which “makes quantitative risk assessments of hazards from cancer-causing chemicals.” Id. at 62.
42. Six Case Studies, supra note 3, at 8. For definitions of carcinogenic and teratogenic, see note 38 supra. A mutagenic substance is one which causes or is capable of causing mutation, a change in genetic material. 2 SCHMIDT’S ATTORNEYS’ DICTIONARY OF MEDICINE M-135 (1979).
43. Six Case Studies, supra note 3, at 43.
44. Id. at 515; Estep, supra note 3, at 262-63, 266-67, 269-75; Kraus, supra note 3, at 104-07.
45. See, e.g., Six Case Studies, supra note 3, at 489: “The short history of toxic substances pollution as a national phenomenon is such that conclusive evidence of the long-term effects of land and water pollution is not readily available.” Estep, supra note 3, at 269-75.
or resulting” from hazardous wastes ample time to file suit.\(^46\) but the bill did not succeed in the state senate.\(^47\) Similar legislation was introduced in 1981,\(^48\) but it also was unsuccessful.\(^49\) Without such legislative action, most plaintiffs alleging a cause of action based on an injury resulting from contact or exposure to hazardous wastes have little hope of getting into court. An examination of New York law in this area demonstrates the unfortunate plight of these plaintiffs.

The time-of-exposure rule.—The time within which an action must be commenced in New York is generally computed “from the time the cause of action accrued to the time the claim is interposed.”\(^50\) The statute of limitations for personal injuries is three years,\(^51\) and, since the amendment under consideration did not succeed,\(^52\) it appears that this limitations period is applicable to situations where personal injury results from exposure to hazardous and toxic wastes. Crucial to the determination of when the three-year limitations period commences is the ability to ascertain when the plaintiff’s cause of action accrued. New York courts have pinpointed three times at which a cause of action may be deemed to have accrued: (1) when the act complained of took place (the general rule);\(^53\) (2) when the plaintiff was last exposed to a continuing


\(^{47}\) The proposed legislation apparently fell prey to Senate fears that the bill, as drafted, would subject the state, its political subdivisions or any instrumentalities of either to liability in the context of third-party actions. Conversation with Mr. Richard Rosso, Legislative Director to State Assemblyman Robin Schimminger, March 24, 1981 (notes of conversation on file in office of Hofstra Law Review). It is difficult to understand the basis for such concern, since the bill contained specific provisions removing “[t]he state, any public corporation, department, board, bureau, division, agency, commission, authority, officer, employee or any of them” from the scope of the proposed discovery rule. A.8789-B, 203d Sess. (1980); S.9642-A, 203d Sess., N.Y. Senate J. 652 (1980). This exemption appears in the 1981 proposal as well. A.2572, 204th Sess. (1981); S.3795, 204th Sess. (1981).


\(^{49}\) The bill was passed by the Assembly in April 1981, but was still in the Senate Codes Committee when the legislative session ended.

\(^{50}\) N.Y. Civ. Prac. Law § 203(a) (McKinney 1972).

\(^{51}\) Id. § 214(5) (McKinney Supp. 1980).

\(^{52}\) See text accompanying notes 46-49 supra.

wrong; or (3) when the plaintiff discovers or, in the exercise of reasonable diligence, should have discovered his or her cause of action.

In New York a cause of action accrues when the act complained of is committed, regardless of when the injury is discovered or becomes ascertainable. A 1963 negligence case, Schwartz v. Heyden Newport Chemical Corp., illustrates these principles at work. In 1944, a product called Umbrathor was inserted into the plaintiff's sinuses to enhance their visibility in x-rays. The plaintiff alleged that a portion of the substance (later discovered to have radioactive and carcinogenic properties) remained in his body and caused him to develop cancer requiring the removal of an eye in 1957. The Court of Appeals held that the cause of action accrued upon the introduction of the harmful substance into the plaintiff's body, despite the plaintiff's inability to determine that he had been harmed until the disease manifested itself over a decade later. Apparently, the Court of Appeals assumed that the chemical immediately acted upon the plaintiff and thereby caused damage, however imperceptible, to his bodily tissue. Despite recognizing that

   An action for medical malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure. . . . For the purpose of this section the term "continuous treatment" shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition.
   Id.; see notes 82-90 infra and accompanying text.
58. Id. at 215, 188 N.E.2d at 143, 237 N.Y.S.2d at 715.
59. Id. at 217-18, 188 N.E.2d at 144-45, 237 N.Y.S.2d at 718-19.
60. See id. at 217, 188 N.E.2d at 144, 237 N.Y.S.2d at 717.
its decision might be criticized as unjust due to the insidious nature of cancer, the court adhered strictly to precedent and legislative judgment and ultimately rejected an extension of the limitations period. In an age where there is often a considerable gap between technical injury and cognizable harm, the Schwartz decision lags far behind the times; yet any expectation that the Court of Appeals would reconsider the implications of its holding was dashed in the 1979 decision of Thornton v. Roosevelt Hospital.

Thornton presented the Court of Appeals with the opportunity to fashion a more logical approach to accrual, whereby a limitations period would not commence until a reasonable plaintiff discovered or should have discovered his or her injury. In 1954, Susan Thornton received an injection of Thorotrast to make her sinus cavity perceptible to x-rays. The defendants knew, but the plaintiff did not, that Thorotrast had radioactive properties and could have carcinogenic effects. In 1972, the plaintiff became afflicted with cancer and thereafter interposed her claim against the defendants. Prior to that date the plaintiff knew nothing of her disease, for medical examinations during the intervening years yielded no diagnosis of cancer, and she suffered no tell-tale symptoms between 1954 and 1972. The plaintiff maintained that the Thorotrast first produced its cancerous consequences in late 1972 or early 1973 despite the drug's initial introduction into her body in 1954. The defendant argued that the harm occurred in 1954 and that, consequently, the action was time-barred. The court responded with characteristic precedential conservatism, expressly declining the invitation to extend judicially the statutory limitations period and leaving such reform to the legislature. "When chemical compounds are injected into a person's body, the injury occurs upon the drug's introduction, not when the alleged deleterious effects of its component chemicals become apparent." Noting that in the context of medical malpractice an action could be commenced after discovery of a foreign object negligently left in a patient's body, the Thornton court pointed to a statutory distinction between foreign

61. Id. at 218-19, 188 N.E.2d at 145, 237 N.Y.S.2d at 718-19.
62. See Hutton, Statute of Limitations and Radiation Injury, 23 TENN. L. REV. 278 (1954); Kraus, supra note 3, at 84, 94, 102.
64. See id. at 782, 391 N.E.2d at 1004, 417 N.Y.S.2d at 922 (Fuchsberg, J., dissenting).
65. Id. at 781-82, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922.
66. Id. at 781, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922.
objects and chemical compounds. The former are encompassed within New York's limited statutory codification of the discovery rule while the latter are excluded from its operation. Why the court believed the statutory exclusion of chemical compounds from the medical malpractice "foreign objects" discovery rule relevant to the products liability case before it is unclear. What is clear, however, is the court's failure to balance the policies served by its refusal to deviate from precedent against those compromised by its rejection of the discovery rule. The present state of New York law in this area coupled with judicial hesitancy to embark upon allegedly legislative territory is particularly alarming, given the growing realization that chemical compounds encountered by a majority of Americans during the course of a normal day are known causative agents of various latent and slowly progressive diseases.

The Thornton decision has yet to be modified or overruled. Nevertheless, it has not gone uncriticized. Judge Fuchsberg's dissenting opinion describes the injustice of barring a cause of action before a prospective plaintiff can ascertain that he or she has been injured:

[The number of products] with a latent or slowly evolving potential for harm . . . grows greater all the time. More and more, they compel their users to place blind reliance on the care with which they are designed, tested, fabricated, marketed and administered. Characteristically, the dangers they carry are hidden; as often as not, the earliest indication of harm may not turn up until a point remote in time, the adverse effect meanwhile being unknown and perhaps even nonexistent. Good sense and

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67. Id.; see N.Y. CIV. PRAC. LAW § 214-a (McKinney Supp. 1980).

[Where the [medical malpractice] action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . . For the purpose of this section the term "foreign object" shall not include a chemical compound, fixation device or prosthetic aid or device.

Id.

68. The balance would weigh repose and administrative expediency against the competing interests of plaintiffs in having adequate time to discover their injuries and decide whether or not to seek recovery. Perhaps most significant is the plaintiff's interest in being able to present his or her claim on the merits—an interest virtually ignored in the Thornton opinion.

69. See Kraus, supra note 3, at 84-85, 96-97, 102.

70. 47 N.Y.2d at 782-85, 391 N.E.2d at 1003-06, 417 N.Y.S.2d at 922-24. (Fuchsberg, J., dissenting).
good law therefore require, it seems to me (and apparently to many courts), that the injured user not be foreclosed from having his day in court before he even has knowledge of any injury and certainly not before any injury has occurred.  

Judge Fuchsberg despaired both at his colleagues' rigid adherence to stare decisis and at their consequent failure to accommodate the "dynamic nature of personal injury law." He perceived a judicial duty to "readily reexamine established precedent to achieve the ends of justice in a more modern context." Likening the policy objectives in latent or progressive injury cases to those governing infants' cases, he remarked that "[t]he adult victim of a drug whose injurious effect, like that of a time bomb, is either delayed or unknowable, is clearly as helpless to act as an infant," who, either "too immature or too unaware of his or her right to act" must not be barred from suit. In conclusion the Judge censured the majority's decision to await legislative amendment of the statute of limitations, viewing it as "an abdication of" the judiciary's "role in the scheme of government to defer to the Legislature for rescue from an unconscionable decisional law."

Judge Fuchsberg's comments on products that remain latent in the body after ingestion only to reveal their deleterious effects at

71. Id. at 783, 391 N.E.2d at 1004, 417 N.Y.S.2d at 923 (Fuchsberg, J., dissenting) (citations omitted).
72. Id. at 784, 391 N.E.2d at 1005, 417 N.Y.S.2d at 923 (Fuchsberg, J., dissenting).
73. Id. (Fuchsberg, J., dissenting).
74. Id. at 785, 391 N.E.2d at 1005, 417 N.Y.S.2d at 924 (Fuchsberg, J., dissenting).
75. Id. at 785, 391 N.E.2d at 1005, 417 N.Y.S.2d at 924 (Fuchsberg, J., dissenting). Judicial deference to the legislative branch is not uncommon in the field of statutory interpretation. Professor Samuel Mermin attributes such deference to a general judicial belief that courts "[are] in a subordinate power relationship to the legislature." S. MERMIN, LAW AND THE LEGAL SYSTEM 223 (1973). Where the legislature has made it implicitly clear, however, that the court is to play the major role in interpretation—as where the legislature "deliberately enacts a vague provision"—judicial deference to the legislature may be unwarranted. Id. at 223, 227. Statutes of limitations would appear to fall into the latter category, since legislatures generally use the vague term "accrual" to describe the point at which a limitations period shall commence, leaving the tasks of interpretation to the courts. See statutes cited note 20 supra. For judicial support of the proposition that the courts can define accrual when the legislature has failed to do so, see Velasquez v. Fibreboard Paper Prod. Corp., 97 Cal. App. 3d 811, 884-85, 159 Cal. Rptr. 113, 115 (Ct. App. 1979). See Developments in the Law, supra note 11, at 1185, 1188, 1200. Absent legislative definition of accrual, postponing commencement of limitations periods can be viewed as a judicial prerogative which may or may not be exercised depending upon how a court interprets the accrual concept.
a much later date are pertinent to the growing problems of hazardous- and toxic-waste disposal.\footnote{76} Professor William R. Ginsberg, a presiding Hearing Officer at public hearings on the problems of hazardous-waste disposal in Erie and Niagara Counties,\footnote{77} has noted that an environmental tort may occur "when the wastes are buried, . . . when contaminated substances migrate out of the site into neighboring property, when they are released into the atmosphere, or when they enter the ground or drinking water."\footnote{78} Regardless of when the technical wrong is committed, resulting pollutant injuries may not occur or be ascertainable for considerable periods of time, since many toxic substances often "tasteless and odorless" in nature operate "insidiously" upon those who come in contact with them.\footnote{79} Given the Environmental Protection Agency's estimate that there may be 50,000 hazardous-waste disposal sites nationwide, 2000 of which may have "the lethal potential of a Love Canal,"\footnote{80} it is likely that the problem of latent and progressive pollutant injuries will be one of considerable magnitude.

It is clear, then, that application of the strict theory of accrual, reaffirmed in 

\textit{Thornton}, to personal-injury claims arising from hazardous- and toxic-waste disposal may prevent more than an occasional plaintiff from having his or her day in court. Since a substantial number of plaintiffs may be foreclosed from trying their cases on the merits, defendants' interests in repose can no longer be the controlling factor in the policy balance. Hence, the New York courts and legislature should consider extension of a discovery rule to personal-injury environmental-tort claims involving be-

\footnote{76} Task Force Report, supra note 4, at 80.
\footnote{77} The hearings took place in early May, 1979, in conjunction with the New York Senate Standing Committee on Conservation and Recreation, the Assembly Standing Committee on Environmental Conservation, the Senate Subcommittee on Toxic Substances and Chemical Waste, and the Assembly Environmental Conservation Committee Task Force on Toxic Substances. Id. at 1-2. See also Ginsberg & Weiss, Common Law Liability for Toxic Torts: A Phantom Remedy, 9 HOFSTRA L. REV. 859 (1981).
\footnote{78} Task Force Report, supra note 4, at 80.
\footnote{79} Id. at 80-81; See Hutton, supra note 62, at 281; Kraus, supra note 3, at 84. Additionally, Kraus notes that identification of a cause-and-effect relationship between an environmental carcinogen and cancer is "highly improbable" due to "[t]he long latency period, the cumulative effect, the increased mobility of modern society, and the persistence of many of these chemicals in the environment and food chain . . . ." Id. at 96.
\footnote{80} Hazardous and Toxic Waste Disposal Hearings, supra note 4, pt. 2, at 2.
latedly detected latent and progressive diseases. Under current New York law there are exceptions to the general time-of-exposure rule which could grant plaintiffs access to the courts in some hazardous-waste-disposal controversies.

The continuing-wrong theory.—One exception to the time-of-exposure rule enables a plaintiff to sue on a theory of "continuing tort," whereby the statute of limitations does not begin to run until the last in a series of allegedly tortious acts is committed. This theory has been invoked frequently in the context of medical malpractice. Where a plaintiff has undergone a continuous course of medical treatment and has subsequently discovered a personal injury resulting from such treatment, his or her cause of action is deemed to have accrued on the last day of treatment. This is the rule regardless of when the doctor committed the malpractice, so long as the treatment is for the same or related injury or damage, continuing after the alleged acts of malpractice, and not mere continuity of a general professional relationship. The continuous-treatment theory may be applied constructively to one who can reasonably expect that his or her work will be relied upon by others in the chain of diagnosis or treatment, a practice which may save what would otherwise be an untimely claim against a defendant. Although the continuous-treatment theory has somewhat alleviated the harshness of the general time-of-exposure rule, the doctrine is of no help to a patient where more than two and one-half years have elapsed since the last treatment, since that is the


limitations period the legislature has fixed for medical-malpractice actions predicated upon the continuous-treatment theory.\textsuperscript{86}

The continuing-wrong exception to the general time-of-exposure rule might be invoked in cases where the movement of toxic substances onto private property results in personal injury. Arguably, the migration of toxic substances does not occur immediately upon their burial or disposal, but takes place over an extended period of time.\textsuperscript{87} Even if this is true, however, a theory of continuing tort will not enable victims of toxic-substances pollution to circumvent the limitations barrier, for a plaintiff still has the burden of proving that the last date of his or her exposure to the contamination was at most three years prior to the lawsuit’s inception.\textsuperscript{88} Thus, as Professor Ginsberg has observed, a Love Canal homeowner who has stopped using a contaminated well and who, after the limitations period has expired (computed from the last day he used the well), discovers that the well water has caused serious disease, will be barred from asserting his or her cause of action.\textsuperscript{89} Likewise, a homeowner who has been evacuated or who has voluntarily moved and lived elsewhere for more than three years will have no recourse upon discovery of an illness or birth defect that may have been caused by prior exposure to toxic substances, regardless of the merits of his or her claim.\textsuperscript{90} In addition, a plaintiff will have to prove that three years prior to the filing of his or her claim, the defendant was engaged in polluting activity which proximately caused his or her injury. Thus, a defendant who has actively polluted the environment but who has discontinued such activity more than three years prior to the institution of a plaintiff’s suit may escape liability, even though his or her conduct may have caused the injury that the plaintiff belatedly discovered.

The continuing-tort theory offers an equivocal advantage to plaintiffs while safeguarding defendants’ interests in repose. While it may postpone accrual until three years after a plaintiff’s last exposure to certain conditions, it does nothing to ameliorate the situation where injury first becomes ascertainable more than three years after a plaintiff’s last exposure to toxic substances. If, as a

\begin{itemize}
\item \textsuperscript{86} N.Y. Civ. Prac. Law § 214-a (McKinney Supp. 1980).
\item \textsuperscript{87} Task Force Report, supra note 4, at 81.
\item \textsuperscript{88} N.Y. Civ. Prac. Law § 214(5) (McKinney Supp. 1980).
\item \textsuperscript{89} Task Force Report, supra note 4, at 82.
\item \textsuperscript{90} Id. The Task Force Report assumes that a three-year limitations period would apply if the continuing-wrong theory encompassed environmental contamination suits; it is unclear, however, whether a two and one-half or a three-year period would in fact be applied.
\end{itemize}
policy matter, the legislature must assign a limitations period to personal injury claims and the courts must advance strict theories of accrual lest defendants' interests in repose be virtually ignored, then it is imperative that the policy's relevance to existing social conditions and modern scientific knowledge be established. It is this last criterion which the New York courts and Legislature have neglected, and it is this last criterion which holds the key to just resolution of claims involving latent pollution injuries.

The time-of-discovery rule.—Under a time-of-discovery rule, the cause of action does not accrue and the statute of limitations does not begin to run until the injured party knows or should know of his injury and its origin. The discovery rule appears logical in all cases where a diligent plaintiff first learns of his or her injury and its origin long after the defendant's actionable conduct takes place. The New York Court of Appeals, however, has exhibited general reluctance to employ the discovery rule unless a statute expressly provides for its application. An exception to this general trend can be found in Flanagan v. Mount Eden General Hospi-

91. In certain situations, the statute of limitations may be tolled pending a plaintiff's discovery of certain facts which presumably would lead him or her to file a claim. For example, the doctrine of equitable estoppel may toll the operation of the statute of limitations pending a plaintiff's discovery of his or her cause of action. Where a defendant fraudulently conceals from the plaintiff that he or she has a cause of action and the plaintiff is not negligent in failing to learn of the wrong, the defendant may be estopped from raising the limitations defense. See, e.g., Simcuski v. Saeli, 44 N.Y.2d 442, 449-51, 377 N.E.2d 713, 716-17, 406 N.Y.S.2d 259, 262-64 (1978) (doctor who had committed malpractice, concealed it, and told plaintiff that physiotherapy would rid her of discomfort could not use statute of limitations as defense to claim); General Stencils Inc. v. Chiappa, 18 N.Y.2d 125, 126-29, 219 N.E.2d 169, 170-72, 272 N.Y.S.2d 337, 339-41 (1966) (if plaintiff could prove that bookkeeper accused of embezzlement had concealed theft and that plaintiff was not negligent in failing to learn of theft, suit not barred). The notion underlying this principle is that a defendant should not be permitted to take refuge behind the shield of his or her own wrong. 44 N.Y.2d at 454, 377 N.E.2d at 719, 406 N.Y.S.2d at 266. Estoppel may be invoked to toll the statute of limitations where the plaintiff can prove the following: (1) that misrepresentation or fraudulent concealment by the defendant prevented the plaintiff from discovering the wrong; and (2) that he himself exercised due diligence in bringing the action. Id. at 450, 377 N.E.2d at 716, 406 N.Y.S.2d at 263.

Although it is certainly arguable that Hooker Chemical and Plastics Corporation concealed the dangers associated with toxic-waste disposal from the Love Canal residents, absent any specific documentation of this assertion, victims of toxic-substances injury will undoubtedly be foreclosed from implementing equitable estoppel as a ground for application of the discovery principle.

the seminal case in which a plaintiff successfully invoked the
discovery rule despite the absence of a legislative mandate
authorizing its application. In Flanagan a doctor negligently left
surgical clamps in the plaintiff's abdomen during surgery in 1958.
In the spring of 1966, the plaintiff first experienced severe abdomi-
nal pain, whereupon she immediately consulted a physician and
learned that her condition stemmed from the presence of surgical
clamps in her body. One week after this discovery the plaintiff un-
derwent an operation to remove the clamps, and shortly thereafter
the plaintiff instituted suit against the physician although the mal-
practice had occurred over eight years earlier. The Court of Ap-
peals, distinguishing between negligent medical treatment such as
that involved in Schwartz, and malpractice in which a foreign ob-
ject is left in the plaintiff's body, held that "where a foreign object
has negligently been left in the patient's body, the Statute of Limi-
tations will not begin to run until the patient could have reasonably
discovered the malpractice." The court explained that, as applied
in foreign-objects medical-malpractice cases, the discovery rule is
compatible with the purposes underlying statutes of limitations:
First, an undiscovered clamp lodged within the patient's body "re-
tains its identity so that a defendant's ability to defend a 'stale'
claim is not unduly impaired;" second, "the danger of belated, false,
or frivolous claims is eliminated;" third, such a claim does not raise
questions as to a plaintiff's credibility or a physician's professional
diagnostic judgment; and fourth, there is no possible causal break
between the defendant's negligence and the plaintiff's injury. It
is noteworthy that the Flanagan court applied the discovery rule
absent any legislative mandate to do so. Instead, the court exam-
ined the law of various jurisdictions, recognized that numerous
states applied the discovery rule in foreign-objects medical-mal-
practice cases, approved the logic underlying its application, and
consequently determined that the discovery rule "is not only an
equitable rule but also entirely consistent with the underlying pur-
pose of the Statute of Limitations." Despite the Flanagan hold-

94. Id. at 428, 248 N.E.2d at 871, 301 N.Y.S.2d at 24-25.
95. 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963). See text accompa-
nying notes 57-61 supra.
96. 24 N.Y.2d at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 27.
97. Id. at 430-31, 248 N.E.2d at 872-73, 301 N.Y.S.2d at 26-27.
98. Id. at 431-32, 248 N.E.2d at 874, 301 N.Y.S.2d at 28.
ing in support of the discovery rule, the New York Legislature did not codify a discovery rule applicable to foreign-objects medical-malpractice cases until six years after the Flanagan decision. 99

The definition of what constitutes foreign objects has proved rather flexible. 100 The legislature has excluded various items such as prosthetic devices, chemical compounds, and fixation devices from the foreign-objects category, 101 apparently leaving the task of determining what will be considered foreign objects to the courts. The legislature has not yet enacted a foreign-objects discovery rule applicable to cases involving ordinary negligence, and, therefore, statutory exclusion of chemical compounds from the foreign-objects medical-malpractice discovery rule need not control future treatment of chemical compounds for ordinary negligence purposes. However, judicial reluctance to encroach upon legislative prerogatives, 102 fear of specious claims, 103 and the difficulties of proving negligence and causation where the wrong is not evidenced by a tangible foreign object 104 leave little hope that a foreign-objects discovery rule will be applied in ordinary negligence cases.


100. Typically, a foreign object is a clamp or other surgical instrument left in the plaintiff’s body during the course of medical treatment. In Flanagan, for example, the foreign object complained of was a surgical clamp. The rationale for the foreign-objects exception, however, is broad enough to embrace circumstances which, upon closer examination, do not involve a foreign object left in a plaintiff’s body. For example, in Smalls v. New York City Health and Hosp. Corp., 55 A.D.2d 537, 389 N.Y.S.2d 372 (1976) (memorandum), where a needle inserted into and removed from the plaintiff’s spine in 1973 caused the plaintiff to feel pain for over a year before she learned from another physician that the prior treatment had caused the injury, the plaintiff could compute the limitations period from the date she discovered the wrong. Conceding that the case did not truly involve a “foreign object,” the court nonetheless applied the foreign-objects rule, since the rationale behind the rule would not be compromised. Id. at 538, 389 N.Y.S.2d at 372-73. Merced v. New York City Health and Hosp. Corp., 56 A.D.2d 553, 391 N.Y.S.2d 863 (1977) (memorandum) demonstrated that even a fetus might come within the foreign-objects exception. The plaintiff had undergone a sterilization procedure in 1971. Two years later, however, she had an ectopic pregnancy in the left fallopian tube. The court invoked the foreign-objects exception in its general terms, holding that the statute of limitations began to run upon the plaintiff’s discovery that the sterilization procedure had been improperly performed. Id., 391 N.Y.S.2d at 864.


102. See note 75 supra.


104. See Six Case Studies, supra note 3, at 488, 517-18; Kraus, supra note 3, at 96.
involving latent or progressive injuries stemming from toxic-substances pollution.

A lone indication of judicial extension of the discovery rule from medical-malpractice foreign-objects cases to an ordinary negligence case can be seen in the 1972 decision of Le Vine v. Isoserve, Inc.,\textsuperscript{105} where the plaintiff sought recovery for radiation injuries allegedly caused by a defective isotope. Le Vine had worked on a radioactive isotope in 1963. Seven years later he discovered that he had sustained serious alpha radiation injury due to the defective nature of the isotope.\textsuperscript{106} Although alpha radiation is not a foreign object in the tangible sense required by Flanagan, the court had no difficulty in applying the discovery rule in the Le Vine case. Reasoning that the possibility of a fraudulent claim for alpha radiation damage was minimal due to the availability of the isotope and records addressing its defective condition, the court held that on these facts there was no reason for the plaintiff to be barred by the statute from bringing his lawsuit before he even realized that he had been injured.\textsuperscript{107} The court conceded that the causal inference in the case at hand was weaker than that in a foreign-objects medical-malpractice case;\textsuperscript{108} it concluded, however, that “the problems involved in connecting the negligence with the injuries are better left to trial rather than ipso facto depriving the plaintiffs of their opportunity to surmount these problems.”\textsuperscript{109}

Desirability of the discovery rule in environmental-tort cases. —This extension of the Flanagan discovery rule makes eminently good sense. The plaintiff was given the benefit of a limitations period commencing upon discovery of his injury. Rather than precluding him from having his day in court, the court allowed him to try his case on the merits. Trial on the merits is a more equitable basis upon which to determine liability than is strict adherence to a codified limitations period and rigid interpretation of the accrual concept. By extending the discovery rule to latent-injury negligence cases in which plaintiffs are blamelessly ignorant of their injuries and causes of action, courts will be able to render humane judgments which more accurately reflect which risks society is willing to bear as a cost of progress and which are totally unacceptable. Admittedly, a considerable measure of repose is sacrificed under

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\textsuperscript{105} 70 Misc. 2d 747, 334 N.Y.S.2d 796 (Sup. Ct. 1972) (memorandum).
\textsuperscript{106} Id. at 748-49, 334 N.Y.S.2d at 798.
\textsuperscript{107} Id. at 750-52, 334 N.Y.S.2d at 801.
\textsuperscript{108} Id.
\textsuperscript{109} Id. (italics in original).
\end{flushleft}
this view. Likewise, this approach would impose significant costs on insurance companies and industry generally. These considerations, however, are outweighed by the unfairness of depriving a potentially large number of plaintiffs of effective remedies.

The most desirable remedial measure that can be taken to alleviate the burden of New York’s strict rule of accrual is legislative amendment of the statute of limitations to provide a discovery rule for causes of action involving latent personal injuries resulting from toxic-waste contamination. The bills introduced in the New York State Legislature in 1980 and 1981 demonstrate legislative recognition that current law must be changed. Under the proposed amendments, actions to recover damages for personal injury or injury to property arising or resulting from contact or exposure to a hazardous waste . . . may be commenced (i) within three years from the date of such injury, or (ii) within two years from the earlier of either the date of the discovery of such injury or from date of discovery of fact which would reasonably lead to such discovery.

The proposed legislation also contains a provision whereby an action previously barred by the statute of limitations “is hereby revived, and an action thereon may be commenced and prosecuted provided such action is commenced within one year of the effective date of this act.” Passage of this amendment would be a significant step toward remedying the harsh limitations rules currently faced by New York plaintiffs.

112. The memorandum submitted in support of the proposed legislation reflects legislative recognition of a need to “expand an injured party’s legal recourse for compensation due to injury or illness caused by exposure to or contact with a hazardous waste.” N.Y. State Assembly Memorandum in Support of Legislation, Bill No. A.2572, 1 (1981) (sponsored by Assemblyman Schimminger) (copy of file in office of Hofstra Law Review). The memorandum further states that “the unfairness of existing law requires the Legislature to provide a remedy to enable the victims of this tragedy to seek redress for their injuries.”
115. As with all new legislation, however, the proposed amendment contains questions of interpretation which could present problems to attorneys and the courts. One such problem lies in the use of the words “injury . . . arising or resulting from . . . hazardous waste.” A.2572, 204th Sess. (1981). If the amendment is passed, courts should not interpret “arising or resulting from” to require that the plaintiff prove
Since a change in the current law does not appear imminent, causation according to a strict legal standard for the discovery provision to apply. It will be difficult for the plaintiff to prove causation at trial on the merits. Cf. Estep, supra note 3, at 263-75 (discussing causation problems in cases involving environmental carcinogens); Kraus, supra note 3, at 94-96, 104-11 (discussing problems in cases involving radiation injuries). To require plaintiffs to do so in order to avail themselves of the discovery provision may render the provision meaningless. Relaxation of the strict legal standard of causation for plaintiffs seeking access to the courts in hazardous- and toxic-waste-disposal controversies amply serves the policy of repose, since it may encourage plaintiffs to litigate promptly. Presumably, plaintiffs stricken by the types of injuries which may result from contact with toxic substances will want to recover damages as soon as possible so that they need not independently shoulder the weighty financial burdens of alleviating or containing disease. There is always the possibility that certain plaintiffs will postpone litigation until it is most advantageous for them, and therefore it is conceivable that a plaintiff might refrain from filing suit until reasonably certain of a high damages award. However, since there is no precedent in this area, courts should proceed on a case-by-case basis to interpret “arising or resulting from” in light of the facts in each case, keeping in mind that the purpose of the amendment is to enable victims of hazardous-waste pollution, formerly barred by the statute of limitations, to have their day in court. See note 112 supra.

Similarly, the words “contact or exposure” to a hazardous waste could present interpretive problems. A.2572, 204th Sess. (1981). Strictly speaking, “contact or exposure” could mean once a year or once a week for a minute or two hours at a time. It is probable that the type of contact or exposure contemplated by the legislature is that found typically in hazardous-waste situations—prolonged, usually unknowing contact over a period of weeks, months, or years. At the same time, since so little information concerning hazardous-waste injuries is available, and the data that is available are constantly being updated and revised, courts should, as in the interpretation of “arising or resulting from,” look closely at the facts of each case to determine what “contact or exposure” is sufficient to give the plaintiff his or her day in court.

The revival provision, id., may appear at first glance to be an invitation to a barrage of litigation. By reviving all time-barred claims the statute could encourage litigation by plaintiffs who were previously barred due to their own inaction. The drafters of the amendment appear to envision a limitations scale that tips in favor of plaintiffs; in other words, the risk of occasional frivolous claims is outweighed by the equity of providing adequate remedies to good-faith plaintiffs previously barred under any of New York’s approaches to the statute of limitations.

Notwithstanding this apparently plaintiff-protective scheme, an avalanche of litigation is unlikely. First, the revival period is limited to one year from the effective date of the act, leaving potential litigants only twelve months to consider the possibility and feasibility of litigation, consult with an attorney, and ultimately decide whether to litigate. Id. Once a decision to litigate is made, the attorney must first begin to marshal often complex evidence, decide upon the theory or theories of the case, and prepare the litigation papers. Second, an individual who has attempted unsuccessfully to obtain recovery for an injury linked to hazardous waste and whose claim has been revived may determine that the monetary or emotional costs of litigation are simply too great to endure for a second time. Thus, while some plaintiffs may have their claims revived, the repose values at the heart of statutes of limitations are not completely diluted by the revival provision. If the provision becomes law, defendants need fear revived claims for only one year after the effective date of the act.
however, the courts should assume a more flexible position, recognizing the special judicial and social interest in protecting the health and welfare of our nation. The courts’ determination that the time of accrual is a peculiarly legislative decision is unpersuasive, especially since the legislature, by failing to define accrual, seems to have left the tasks of definition and interpretation to the courts. The judiciary would do well to consider that its action may be vital in alerting the legislature to particular problems so that their resolution may ultimately be expedited by legislative action.

Application of the discovery rule is particularly appropriate in the context of environmental-tort litigation. First, since many have already fallen prey to environmental contamination and since many projected pollutant injuries having latent properties may not begin to surface until long after the statute of limitations has expired, it is likely that more than an occasional plaintiff may be denied access to the courts. Second, although defendants may strenuously argue that they are being unduly burdened by an open-ended statute of limitations, diligent plaintiffs would be unduly and, moreover, illogically burdened if required to commence a personal-injury suit without knowledge that an injury has occurred. Third, a latent-injury victim’s claim is not stale in the sense that he or she has failed to exercise due diligence; only when the plaintiff knows of his or her injury and its cause should the public interest in timely institution of suit attach.

Although a discovery rule and consequent delay in bringing claims might cause difficulties in adducing evidence, any evidentiary burdens must cut both ways. Both parties must procure evidence, and the initial burden of acquiring and producing such evidence generally lies with the plaintiff. The plaintiff must also

116. The proposed amendment did not pass in the Senate in 1980 or 1981. See notes 46-49 supra and accompanying text.

117. The failure of the proposed legislation must not lead courts to conclude that the Legislature intended that old interpretations of accrual and applications of the statute of limitations prevail. In fact, the bill proposing a discovery rule cleared the State Assembly by a vote of 120-19 last year and once again passed through the Assembly without difficulty on April 8, 1981. Conversation with Mr. Richard Rosso, Legislative Director to Assemblyman Robin Schimminger, April 29, 1981 (notes of conversation on file in office of Hofstra Law Review). Additionally, as noted earlier, see note 47 supra, the bill’s failure to emerge from the Senate Rules Committee in 1980 has been attributed to an interpretive technicality rather than to a belief that the proposed legislation is unnecessary.

persuade the trier of fact that the defendant was negligent, and, more significantly, that the negligence caused his or her injury—not an easy feat considering the paucity of knowledge about the nature and causes of pollutant injuries.\textsuperscript{119} Judicial economy would not be unduly compromised if reasonable delay in instituting claims were approved, since plaintiffs unable to justify discovery and lacking sufficient evidence upon which to base their claims would be precluded from continuing litigation. Furthermore, considerations such as attorney's fees, the costs of scientific studies, expert witnesses, and other discovery procedures may discourage the pursuit of potentially significant claims and promote settlement in lieu of litigation to a verdict.\textsuperscript{120} Thus the courts might not be as crowded as one would expect. Finally, while rigid application of the limitations period preserves a defendant's historically protected interest in repose, it simultaneously compromises a countervailing policy which our industrial society would do well to consider—namely, fostering a higher standard of care for defendants engaged in contaminating activity in order to protect public health and environmental safety. As Professor Ginsberg noted in his report on hazardous-waste-disposal problems in Erie and Niagara Counties, the only possible rationale for requiring a plaintiff to file suit for injury caused by a defendant's alleged misconduct "before the plaintiff knows or can reasonably be aware that he has been injured" is "a desire to insulate the generator of harm" from liability.\textsuperscript{121} Professor Ginsberg concluded:

\begin{quote}
[P]ublic policy would best be served by placing responsibility on the person or entity which introduced the hazardous substances into the environment, often in the course of profitable endeavor. Such an approach would place the financial burden in most instances on the party best able to bear it, by internalizing the cost, and encourage a higher standard of care in the disposal of hazardous wastes.\textsuperscript{122}
\end{quote}

These arguments are indeed compelling. If a defendant engaged in contaminating activity can hide behind the arbitrary shield of the statute of limitations, never having to prove himself out of a case,
then there will be no incentive for such defendants to raise their standards of care, and the law will not effectively protect the social interests in public health and environmental safety.

The California Problem:
Groundwater Pollution in Lathrop

The Best Fertilizer Company first established a plant at Lathrop, California, in 1953. The Occidental Petroleum Corporation acquired the Lathrop plant in 1964. The plant is engaged in the manufacture of fertilizers, pesticides, and their constituents. Between 1953 and 1976, fertilizer and pesticide wastes were disposed within the plant’s boundaries and into nearby unlined ponds and ditches. The soil in the Lathrop area is highly permeable, permitting migration of liquids between its surface and groundwater. As a result, the fertilizer and pesticide wastes have traveled through the soil, contaminating the groundwater with radioactive substances and such pesticides as dibromochloropropane (DBCP), alpha-BHC and Lindane. DBCP is a known carcinogen, mutagen, and teratogen, and it has caused sterility in male humans. The chronic toxicity of BHC isomers and the potential liver damage causally related to them have been known since 1950 and 1973 respectively. The carcinogenic properties of Lindane were disclosed as early as 1972.

The community of Lathrop sits atop an aquifer which is the primary source of domestic, industrial, and agricultural water for the surrounding area. Some of the contaminants generating from the fertilizer and pesticide wastes have been found in hazardous concentrations in wells used as a source of drinking water. At least two wells have been closed due to high radiation levels, and the utility of several others has been destroyed and will continue to

123. SIX CASE STUDIES, supra note 3, at 143.
125. SIX CASE STUDIES, supra note 3, at 141.
126. Id. at 140.
127. Id. at 140, 148.
128. Id. at 148-49.
129. Id. at 149.
130. Id. at 141.
131. Id. at 140. In February, 1979, tests revealed that a domestic well in Lathrop had 58 parts per billion (ppb) of DBCP. The State of California advises against drinking water with more than 1 ppb of DBCP. Id.
be endangered due to the presence of dangerous, radioactive substances.\textsuperscript{132} Radiation is known to cause various types of cancer,\textsuperscript{133} increased susceptibility to disease,\textsuperscript{134} shortened lifespan,\textsuperscript{135} and genetic damage to unborn generations.\textsuperscript{136}

Approximately 120 people have already been exposed to contaminated water, and since the groundwater emanating from beneath Occidental's plant is migrating at a rate of approximately 175 feet per year, more extensive exposure and consequent latent disease damage may reasonably be anticipated.\textsuperscript{137} Under California law, damages may be recovered for future adverse health effects to the extent that they are "reasonably certain to occur."\textsuperscript{138} Since the study of diseases caused by exposure to toxic substances is at such an early stage, however, the public is generally unacquainted with the grave and long-term effects of exposure.\textsuperscript{139} Therefore, victims of pollutant injuries have no alternative but to institute action once the latent effects of injury became manifest. If and when the residents of Lathrop and surrounding areas decide to seek redress for pollutant injuries, they will inevitably be faced with the statute of limitations.

\textit{Application of the discovery rule}.—In California, the statute of limitations in an action for personal injury allows a plaintiff one year from the time the cause of action accrues to institute suit.\textsuperscript{140} The cause of action generally accrues at the time of injury.\textsuperscript{141} Therefore, under the general rule, plaintiffs suffering from latent or progressive pollutant injuries will be foreclosed from recovery unless their illnesses surface within the one-year limitations period. The potential harshness which could result from strict adherence to the statute of limitations, however, is substantially mitigated by

\textsuperscript{132} Id. at 140, 145, 149-51.  
\textsuperscript{133} Id. at 149; see Estep, supra note 3, at 266.  
\textsuperscript{134} Estep, supra note 3, at 263.  
\textsuperscript{135} Id. at 264.  
\textsuperscript{136} Id. at 265.  
\textsuperscript{137} Six Case Studies, supra note 3, at 140, 141, 152, 173.  
\textsuperscript{139} Six Case Studies, supra note 3, at 496.  
\textsuperscript{140} CAL. CIV. PROC. CODE § 340 (West Supp. 1981).  
California's liberal application of the discovery rule. The discovery rule applies in personal-injury actions where "the pathological effect occurs without perceptible trauma and the victim is 'blamelessly ignorant' of the cause of injury. In such cases the statute of limitations does not begin to run until the person knows or, by the exercise of reasonable diligence, should have discovered the cause of injury."142 California courts have applied the discovery rule to negligence claims grounded upon theories of medical malpractice143 and strict products liability144 and to other cases involving libel,145 fraudulent concealment,146 and fiduciary relationship.147

The plaintiff who invokes the discovery rule to counter his or her adversary's statute-of-limitations defense must plead facts justifying a judicial determination of delayed accrual.148 In order to raise the issue of belated discovery, a "plaintiff must state in his complaint when the discovery was made, the circumstances surrounding the discovery, and facts which show that the failure to make an earlier discovery was reasonable, justifiable and not a result of plaintiff's failure to investigate or to act."149 Once a plaintiff has pleaded the foregoing, his or her cause of action will be barred only if the defendant can prove that the plaintiff discovered or in the exercise of reasonable diligence should have discovered the injury and its cause at least one year prior to commencing suit.150

In cases involving latent or progressive disease, the courts

150. Sanchez v. South Hoover Hosp., 18 Cal. 3d 93, 101-02, 553 P.2d 1129, 1135-36, 132 Cal. Rptr. 697, 663-64 (1976) (claim barred where plaintiff suspected her physician's malpractice more than one year before bringing suit).
have engaged in detailed analyses to determine the point at which a plaintiff is deemed to have discovered facts sufficient to trigger commencement of the limitations period. In Velasquez v. Fibreboard Paper Products Corporation, the plaintiff, an insulator who had worked with asbestos products for over thirty years, contracted asbestosis. Radiological findings in 1965 indicated that Velasquez had tendencies “compatible with asbestosis.” A medical examination conducted in 1967 revealed that his respiratory capacity had dropped below that which was normal for a man his age. In 1971, the physicians who had examined him in 1967 diagnosed Velasquez’ condition as “moderately severe asbestosis” and informed his personal physician of their findings. The examining physicians told Velasquez that although he had “indications of asbestosis” there was no need for him to quit his job provided that he avoid dust inhalation whenever possible and continue under the care of his private physician. By March 1973, Velasquez complained of shortness of breath, at which time he underwent another physical examination, this time with different physicians. In May 1973, “follow-up tests revealed ‘positive findings’ of asbestosis.” In November 1973, the physicians who had initially examined Velasquez reexamined him and found significant progression of his disease, whereupon they advised him to leave the insulating trade. Velasquez continued to work, however, until he became disabled on January 4, 1974.

Notwithstanding his knowledge of the 1971 diagnosis, Velasquez instituted suit in October 1974, within one year of his physicians’ warning that he leave the insulating trade and the date of actual disability and retirement. Fibreboard contended that the statute of limitations began to run in 1971 upon Velasquez’ discovery of the job-related injury, and that therefore the action was time-barred under the one-year limitations period imposed by California law. Faced with the issue of when Velasquez knew or

152. Id. at 883, 159 Cal. Rptr. at 114.
153. Id.
154. Id.
155. Id. at 883-84, 159 Cal. Rptr. at 115.
156. Id. At the time of this consultation Velasquez felt no discomfort in his chest. Id. at 884, 159 Cal. Rptr. at 115.
157. Id.
158. Id.
159. Id.
should have discovered that he was suffering from a disease that had caused him injury which would entitle him to legal relief, the California Court of Appeals advanced an interesting analytical analogy. Noting that "[l]ogically, such knowledge might come as well from an early diagnosis of a latent disorder as from an experience of pain or disability of an active disorder," the court concluded that "where diagnosis is meant to be the essence of discovery," what is required is that the plaintiff be privy to "'informed diagnosis' roughly parallel to 'informed consent' in medical malpractice or battery actions." Therefore, a plaintiff is not deemed to have discovered a latent or progressive disorder which has caused imperceptible harm until he has reasonable knowledge, through "brief explanation of findings and prognosis by the examining physician," that the harm has occurred or is likely to occur.

Velasquez is significant for reasons beyond its specific holding. If applied to cases involving latent or progressive pollution-related injuries, a plaintiff whose ailment or potential ailment remains undiagnosed, or diagnosed but unexplained to him, may invoke the discovery rule if and when he decides to litigate. Thus, he may circumvent the one-year limitations barrier, provided that he fulfills the pleading requirements of the discovery rule. Although potential defendants might be denied a certain measure of repose, the "informed diagnosis" approach would not be unduly harsh upon them for at least three reasons: (1) the pleading requirements and burdens of proof still bear most heavily upon the plaintiffs; (2) defendants remain free to challenge plaintiffs' allegations of justified belated discovery; and (3) defendants may argue that belated discovery, although reasonable on the part of a plaintiff, was caused by the plaintiff's physician who either unreasonably failed to diagnose the plaintiff's ailment or failed to properly foresee or explain the potential future consequences of the plaintiff's diagnosed illness, and thus that the physician should share the burden of liability. Although this would not render an action time-barred, it arguably would mitigate the actual costs to be borne by a defendant if the final result of litigation were unfavorable to him.

Martinez-Ferrer v. Richardson-Merrell, Inc., presented another California appellate court with the opportunity to analyze the

160. Id. at 888-89, 159 Cal. Rptr. at 118.
161. Id. at 889, 159 Cal. Rptr. at 118.
162. See text accompanying notes 148-149 supra.
reasons for postponing commencement of the limitations period. The plaintiff, a physician, learned in 1960 that his cholesterol level had become high and began taking MER/29 (an anti-cholesterol drug) in March of that year. In September 1960 the plaintiff found that he could not read. He went to an ophthalmologist who examined his eyes, discovered some retinal swelling (macula edema), and suggested some possible causes of the problem. After the plaintiff himself raised the possibility that the problem may have been chemically induced by the MER/29, the ophthalmologist told him to discontinue taking any medications and diagnosed his condition as an “acute allergic reaction.” Other specialists made the same diagnosis and “assumed,” along with the plaintiff, that the cause of his condition was the medication. Shortly after the eye problem became apparent, the plaintiff developed severe dermatitis all over his body, which his physician concluded was “likely cause[d]” by the MER/29. Within four or five months the skin disorder disappeared, and the retinal condition had improved greatly. Intermittent eye examinations between 1961 and 1975 revealed no further problems. In 1976, however, the plaintiff learned that he had developed cataracts, “a permanent condition” which, according to the plaintiff’s doctor, had been caused by MER/29.

The plaintiff filed his products liability action in June 1976. The defendants made a motion for summary judgment claiming that the plaintiff’s action was time-barred, since the limitations period began to run “when plaintiff knew or should have known that he ha[d] suffered injury as the probable result of MER/29, whether or not his actual or constructive knowledge was correct.” The plaintiff, on the other hand, contended that “there was no point” in filing a claim in 1960, since he had incurred “no permanent damage or injury” as a result of his 1960 problems. The lower court granted the defendant’s motion for summary judgment, having determined that the statute of limitations had run when the complaint was filed.

164. Id. at 318, 164 Cal. Rptr. at 592. There were two plaintiffs in this case, Raul Martinez-Ferrer and his wife. For the purposes of the following discussion, however, only Mr. Martinez-Ferrer’s claim is relevant.
165. Id. at 319, 164 Cal. Rptr. at 592.
166. Id.
167. Id.
168. Id. at 320, 164 Cal. Rptr. at 593.
169. Id. at 321, 164 Cal. Rptr. at 593 (emphasis in original).
170. Id. at 321, 164 Cal. Rptr. at 593.
171. Id.
The California Court of Appeals reversed the lower court's grant of summary judgment since triable issues of fact remained regarding the causal connection between the plaintiff's 1960 dermatitis and the MER/29 he ingested, but recognized that the real issue on appeal was the statute-of-limitations question. The court undertook a detailed analysis sensitive to the potential injustices that rigid adherence to prior doctrine could cause "in these days of miracle drugs with their wondrous, unintended, unanticipated and frequently long-delayed side effects." Addressing the limitations problem, the court demonstrated that allowing the plaintiff to present his claim on the merits would advance, rather than hinder, the fundamental purposes of limitations statutes articulated by the California Supreme Court—"to protect potential defendants by affording them an opportunity to gather evidence while facts are still fresh" and to "reflect . . . concern for the practical needs of prospective plaintiffs." The court maintained that since the defendants became aware of the "cataract-causing potential of MER/29" in 1960 or 1961, they had ample opportunity to marshal evidence on the topic when the facts were most fresh. Additionally, they had twenty years to refine their research and formulate ways to "prevent, minimize or even cure the harm[s]" bred by MER/29. Insofar as the "practical needs" of the plaintiff were concerned, the court observed that he was "legally impotent" to seek a substantial legal remedy (as opposed to an award of nominal damages) until the harmful seed planted in his body in 1960, festering for sixteen years, produced an injury upon which he could base a claim.

Although prior decisional law might require a holding that the plaintiff's ingestion of MER/29 triggered but one cause of action for

172. 105 Cal. App. 3d at 322, 164 Cal. Rptr. at 594. The causation determination was crucial to the statute-of-limitations issue because if the plaintiff knew or should have known the cause of his earlier injury in 1960, he could have and should have sued at that point for injuries reasonably certain to occur in the future. See text accompanying note 138 supra, note 195 infra.
173. 105 Cal. App. 3d at 324, 164 Cal. Rptr. at 595.
174. Id. at 325, 164 Cal. Rptr. at 596 (quoting Davies v. Krasna, 14 Cal. 3d 502, 512, 535 P.2d 1161, 1168, 121 Cal. Rptr. 705, 712 (1975)).
175. Id.
176. Id. at 325 n.8, 164 Cal. Rptr. at 596 n.8.
177. Id. at 325, 164 Cal. Rptr. at 596. "[T]he period cannot run before the plaintiff possesses a true cause of action, by which we mean that events have developed to a point where plaintiff is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages." Id. (quoting Davies v. Krasna, 14 Cal. 3d 502, 513, 535 P.2d 1161, 1168, 121 Cal. Rptr. 705, 712 (1975)).
personal injuries in which recovery could be obtained for both present damages (those incurred until trial) and reasonably predictable future damages (those determinable as the reasonably probable consequences of the injury),\(^ {178}\) the court believed that such a holding would produce an unjust result in the case at hand.

Raul would have been laughed out of court had he sued for his dermatitis and macula edema when defendants say he should have—say in 1962—and had he then attempted to be compensated for the speculative possibility that his 1960 ingestion of MER/29 might cause cataracts before that chance became a fact in 1976. On the other hand, under our statutory scheme Raul would have been quite unable to keep his cause of action alive for a decade and a half.\(^ {179}\)

The court reasoned that a drug manufacturer normally liable for the long-term effects of his product should not be absolved from that liability merely because shortly after initial ingestion “the user suffered other, different, independent and relatively innocuous side effects for which he did not bother to sue.”\(^ {180}\) Such an approach would advance “no coherent public policy” in a modern scientific and technological age.\(^ {181}\) Additionally, the court analyzed various developments indicating a trend away from strict rules against splitting a cause of action. First, the court pointed to special limitations rules applicable to nuisance cases, observing that a plaintiff may elect to treat a permanent nuisance as a temporary one and bring successive claims upon it without encountering a plea of merger.\(^ {182}\) Second, the court noted that cases involving progressive oc-


\(^{179}\) 105 Cal. App. 3d at 323-24, 164 Cal. Rptr. at 595 (citation omitted).

\(^{180}\) Id. at 324, 164 Cal. Rptr. at 595.

\(^{181}\) Id.

\(^{182}\) Id. at 326, 164 Cal. Rptr. at 596; see RESTATEMENT (SECOND) OF JUDGMENTS § 61.2(c), Comment h (Tent. Draft No. 5 1978). Nuisance rules apply not only to invasions of property interests, but also to personal injuries. See Nestle v. City of Santa Monica, 6 Cal. 3d 920, 937-38, 496 P.2d 480, 492, 101 Cal. Rptr. 568, 581 (1972).

"The doctrine of res judicata . . . prevents ‘splitting a cause of action’ and requires all grounds upon which a single claim is based to be asserted and concluded in one action, on pain of being barred from separate suit.” C. WRIGHT, THE LAW OF FEDERAL COURTS § 78 (3d ed. 1976). “[I]n accordance with public policy, partially to conserve the court’s time but probably in the main to prevent the hardship upon defendant of unnecessary piecemeal litigation, a single cause of action cannot be split so as to be properly made the subject of different actions.” 1B J. MOORE, FEDERAL PRACTICE ¶ 0.410[2], at 1164 (2d ed. 1980) (citing Sutcliffe Storage & Ware-
ocupational disease might indicate a trend away from strict application of merger rules. Finally, the court cited the tentative draft of the Restatement (Second) of Judgments which states that the general rule against splitting a cause of action will not apply where it is clear that the policies against splitting are outweighed by an "extraordinary reason" or the first judgment was in conflict with the just fulfillment of a statutory or constitutional plan. Conceding that these developments in the law would not mandate a decision favorable to the plaintiff, for he could not "wish away" the minor problems he experienced in 1960, the court nevertheless declared that the developments cited certainly . . . indicate which way the wind is blowing: away from a blind adherence to rigid concepts of what constitutes a cause of action and toward a set of rules which will enable plaintiffs to recover for just claims where that is possible without prejudice to defendants or insult to established rules of law, such as the merger aspect of the rule of res judicata.

The court admitted its inability to foresee the future effects of such an approach; it concluded, however, that to deny the plaintiff an opportunity to present his case on the merits "would be a miscarriage of justice."

The Martinez decision's major strengths lie in its perception of limitations dilemmas typical of situations involving latent or progressive diseases and its suggestion that modern adjustments be made in the laws of limitation and merger. Its most obvious weakness is that it gives relatively short shrift to the values of repose and stability in human affairs which statutes of limitations are often said to foster. If it is always true that "the right to be free of

house Co. v. United States, 162 F.2d 849 (1st Cir. 1947)). What constitutes a "cause of action" for res judicata purposes cannot be defined with precision. Various tests have emerged which aid in the determination. See, e.g., United States v. Haitian Republic, 154 U.S. 653 (1940) (will same evidence suffice to sustain both judgments); Baltimore S.S. Co. v. Phillips, 274 U.S. 316 (1927) (is same right infringed by same wrong); Cypress Co. v. Atlantic Coast Line R.R., 109 F.2d 623 (5th Cir. 1940) (is there identity of grounds); Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456 (1929) (are actions so identical that different judgment in second action would damage interests established by first judgment).

183. 105 Cal. App. 3d at 326, 164 Cal. Rptr. at 597 (citing Coots v. Southern Pac. Co., 49 Cal. 2d 805, 322 P.2d 460 (1958)).

184. Id. at 327, 164 Cal. Rptr. at 597 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 61.2(1)(d), (f)).

185. 105 Cal. App. 3d at 327, 164 Cal. Rptr. at 597.

186. Id.

187. See note 11 and text accompanying notes 12-17 supra. The Martinez court,
stale claims in time comes to prevail over the right to prosecute them,"\textsuperscript{188} then the Martinez court sorely understated defendants' repose interests, unless it did not view the plaintiff's claim as "stale." Apparently adopting the latter view, the court noted that the plaintiff "would have been laughed out of court" had he sought recovery in 1962 for his eye problems, dermatitis, and the "speculative possibility" of cataracts.\textsuperscript{189} Moreover, after the plaintiff first discovered his cataracts and their cause in 1976, he diligently filed suit within less than a year of his discovery.\textsuperscript{190}

It is also conceivable that the court, like another court before it, may have perceived drug companies as "unique among most potential tortfeasors" regarding their "expectations of repose,"\textsuperscript{191} for since the harmful potential of drugs often is not fully appreciated when drugs are initially marketed,\textsuperscript{192} drug "companies know or at least should expect that some time may pass before the harmful effects of their products manifest themselves in drug users."\textsuperscript{193} Still more time may pass before users are able to discover a probable causal connection between their respective injuries and the drugs they have consumed.\textsuperscript{194} Therefore, if drug manufacturers cannot reasonably expect immunity to suit before consumers have had a fair opportunity to discover their injuries and the probable cause of those injuries, then the Martinez court may not have underplayed defendants' repose interests unduly.

\textit{The discovery rule in environmental-tort litigation.}—Since the Martinez court was willing to grant the plaintiff his day in court despite the fact that there had been an earlier minor disorder,\textsuperscript{195} a Lathrop area resident who seeks recovery for a serious toxic-waste
injury discovered after the statute of limitations has run should be able to bring suit even if he or she had previously contracted a minor and temporary disorder whose origin or future progression was unclear at the time of diagnosis. As a matter of course, the plaintiff who sustains such a serious and permanent disorder must be diligent to determine the cause of the injury and whether he should litigate. Likewise, he must file his claim within one year of discovering the probable cause of the disorder, making certain to properly raise the issue of belated discovery in the complaint. This does not mean that a plaintiff should be permitted to sleep on his or her rights until the full extent of damages caused by a permanent and serious disease becomes manifest. Martinez-Ferrer filed suit within a year of his discovery that the MER/29 caused his cataracts; he did not wait for his cataracts to worsen or cause blindness before he brought his claim. Environmental-pollution victims could be held to a similar standard whether suing to recover for serious permanent damage sustained long after a temporary affliction whose probable cause and future progression were earlier indeterminable, or, for any damage, temporary or permanent, whose probable cause and future progression are scientifically determinable at the time of discovery.

The value of repose is substantially undercut by such an approach. Nevertheless, a useful analogy may be drawn between environmental polluters and drug manufacturers. Just as a drug's potential for harm often remains unknown to manufacturers and users for many years after initial marketing, the potentially hazardous consequences of environmental pollution may be unknown for many years, perhaps even generations, after initial contamination. Just as it may take time for the potential harm to manifest itself in the drug user, it may take years for environmental contaminants, acting upon unsuspecting residents, to cause ascertainable harms in their victims. And in both types of cases there may be an extended period of time before the victim discovers the injury and its cause. The lapse may be even longer in the pollutant-injury situation, since the gravity of hazardous- and toxic-waste disposal and its ramifications has gained considerable national attention only recently. If drug manufacturers cannot reasonably expect immunity to suit before the deleterious effects of their products manifest

196. Kraus, supra note 3, at 84. See text accompanying notes 7, 42, 79 supra.
197. SIX CASE STUDIES, supra note 3, at 496-97. See, e.g., Hazardous and Toxic Waste Disposal Hearings, supra note 4; TASK FORCE REPORT, supra note 4.
themselves in consumers so that a causal connection between injury and product can be drawn, then environmental polluters, with knowledge or reason to know that their activities may cause grave and long-term health effects, should not reasonably expect to be free from the possibility of litigation before the same causal connection can be drawn between injury and polluting substance. The argument becomes even more compelling when one realizes that in many instances consumers may actively choose whether to purchase or ingest a particular drug. In the environmental-pollution context, however, residents are often deprived of such choice, since the harmful effects of pollution may remain hidden until long after the initial purchase of a home and regular use of necessities such as drinking water.

Given California’s relatively liberal approach to limitations periods where latent and progressive injuries are involved, it is likely that plaintiffs who sustain damages stemming from the Lathrop plant’s disposal of toxic wastes will be able to try their cases on the merits in California courts. This, of course, is contingent upon their ability to properly raise the issue of belated discovery in their complaints. Foreign jurisdictions would do well to adopt the California approach to the statute of limitations, since statutes of limitations which begin to run only when the injured party is able or should reasonably be able to ascertain a causal connection between the injury and exposure to an environmental hazard are highly sensitive to the special handicaps posed by the latency of so many potential toxic-pollutant injuries. Such an approach is especially useful, since environmental injuries are often characterized by unknown or indeterminate causation.

Plaintiffs cannot be expected to do something so illogical as to file suits before they are aware of their injuries and the causes of those injuries. In addition, they need not be required to bear all, or even many, of the costs of improper waste disposal—costs which good sense and equity require be borne primarily by those who introduce dangerous contaminants into the environment. Defendants, in turn, need to be encouraged to keep more accurate rec-

198. See text accompanying notes 191-194 supra.
199. See text accompanying notes 89-90 supra.
200. Estep, supra note 3, at 266-67, 269-75; Kraus, supra note 3, at 94-96. “The long latency period, the cumulative effect, the increased mobility of modern society, and the persistence of many of these chemicals in the environment and the food chain make accurate identification of a cause-and-effect relationship highly improbable.” Id. at 96 (footnotes omitted).
ords of their disposal activities and to adopt a significantly higher standard of care in the disposal of toxic and hazardous wastes. This is not too much to exact from those whose conduct creates environmental hazards of considerable magnitude. The law, as a policy matter, should not insulate environmental polluters from the inconvenience of delayed litigation and the prospects of liability and compensation of innocent victims where their negligence can be firmly established in the courtroom. The courts should not permit such an unconscionable result, especially where the costs are imposed not only on a personal, individual level but on a social level as well.

The California judiciary, if the Velasquez and Martinez cases are any indication, recognizes the dilemma of the plaintiff with a latent injury, and public policy and good sense dictate that it extend its liberal application of the discovery rule to the area of environmental-tort litigation.

Petrochemical Contamination of Cohansey Aquifer, Dover Township, New Jersey

The Union Carbide Corporation is engaged in the manufacture of organic chemicals, plastics and resins at a plant in Bound Brook, New Jersey. The manufacturing process results in the production of various chemical wastes such as aromatic hydrocarbons, benzene, toluene, styrene, xylene, ketone, alcohols, trichloroethylene, acrylonitrile and phenolic resins. The Environmental Protection Agency has determined that many of the wastes enumerated above are hazardous due to their toxicity to human or aquatic life, their reactivity to other chemicals, and their flammable and irritant properties. Medical research has revealed that phenol not only promotes tumor growth, but also has mutagenic effects. Acrylonitrile and trichloroethylene are carcinogenic substances.

Between March and December 1971 Union Carbide disposed

201. Six Case Studies, supra note 3, at 343.
203. Six Case Studies, supra note 3, at 343.
204. Id. (citing Heller & Pursell, Phenol-Contaminated Waters and Their Physiological Action, 63 J. Pharmacology & Experimental Therapy 99 (1938)).
of at least 5000-6000 barrels of chemical waste. A scavenger trucker under contract to Union Carbide disposed of approximately 4500 of those barrels on a farm in Dover Township between August and December 1971. Although the trucker scattered a majority of the drums around the farm, he poured a portion of the wastes directly into the ground. He dumped the remainder of the barreled wastes produced between March and December 1971 in the Dover Township landfill, notwithstanding the fact that the landfill was not approved for liquid-chemical-waste disposal. Early in 1972 the New Jersey Supreme Court ordered Union Carbide and its trucker to stop the dumping and to remove the wastes disposed on the farm. The removal operation revealed that approximately ten percent of the Union Carbide barrels were partially or completely empty. The E.P.A. determined that their contents may have been discharged into the farm's ground or into neighboring property.\(^{206}\)

Toxic-waste disposal by Union Carbide has resulted in groundwater contamination which could adversely affect a substantial number of Southern New Jersey residents. The first indications of groundwater contamination appeared in early 1974, when commercial lab tests revealed traces of toluene and phenols in water samples taken from wells situated near the Dover Township landfill.\(^{207}\) Subsequent tests conducted in 1974 by various state and federal agencies confirmed the findings of toluene and disclosed the presence of styrene and carbon tetrachloride in water samples extracted from the contaminated areas.\(^{208}\) Other specific contaminants may well have been present, but tests could not distinguish them from others already isolated.\(^{209}\) As a result of these findings and unsuccessful attempts to ameliorate the water problem, 148 wells were officially condemned by health authorities by 1977\(^{210}\) and were sealed by their owners.\(^{211}\)

Results of a 1974 "illness survey" conducted by the Disease Control Section of the Ocean County Health Department indicate that 15 of 23 families interviewed reported kidney, stomach, liver, or gall bladder illnesses. Eight families reported no illnesses. The survey provided no correlation between the consumption of contaminated water and illness, since discomfort was reported by fami-

\(^{206}\) SIX CASE STUDIES, \textit{supra} note 3, at 343-45.
\(^{207}\) \textit{Id.} at 345.
\(^{208}\) \textit{Id.} at 347-48, 352.
\(^{209}\) \textit{Id.} at 346-47.
\(^{210}\) \textit{Id.} at 349.
\(^{211}\) SIX CASE STUDIES, \textit{supra} note 3, at 354.
lies with contaminated wells, those with uncontaminated wells, and those with wells for which no testing data were available.\textsuperscript{212} Children of one family who had suffered body rashes, however, found that the rashes disappeared once they stopped using well-water.\textsuperscript{213}

Although many of the laboratory tests used to examine various contaminated water samples did not specifically isolate undesirable organic chemicals present in the groundwater—and thus determination of the full range of health effects is speculative—some contaminants in the groundwater have been identified as styrene, phenol, carbon tetrachloride, and toluene.\textsuperscript{214} As of 1977, the National Academy of Sciences had no data on the carcinogenic, mutagenic, or teratogenic properties of styrene and toluene;\textsuperscript{215} nevertheless, it is entirely possible that medical research may reveal links between such devastating properties and these substances. Phenol and carbon tetrachloride, on the other hand, have been linked to serious disorders: Phenol promotes tumor growth and is a known mutagen,\textsuperscript{216} while carbon tetrachloride is carcinogenic, possibly mutagenic, and causes liver and kidney problems.\textsuperscript{217}

\textit{Application of the discovery rule.}—The New Jersey personal-injury statute of limitations requires that a plaintiff file suit within two years of the day that his or her cause of action accrues.\textsuperscript{218} Taken in its strictest sense—where the limitations period begins when the defendant commits the act complained of—such a statute would bar the claim of a plaintiff who, through no fault of his or her own, was unaware of the tort or injury until more than two years after exposure to the defendant’s alleged misconduct. Cognizant, however, that rigid adherence to a strict rule of accrual would operate harshly against plaintiffs blamelessly ignorant of their causes of action, the New Jersey courts have sanctioned relatively liberal application of the discovery rule.\textsuperscript{219} The New Jersey formu-
lation of the rule provides that "in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim."220 In other words, the plaintiff must know that he or she has been injured and that the injury is attributable to the fault of another.221

The New Jersey Supreme Court described the discovery rule's use and operation in Lopez v. Swyer,222 a medical-malpractice claim in which the plaintiff sought recovery for injuries allegedly sustained as a result of negligent radiation treatment. Following a radical mastectomy for breast cancer the plaintiff underwent radiation therapy administered by Dr. Swyer, a radiologist, from early January to mid-February 1962. The plaintiff suffered "calamitous" side-effects including severe burns, constant pain and nausea, necrotic ulcers, pulmonary radiation fibrosis, and spontaneous rib fractures.223 In March 1967, while hospitalized for reconstructive surgery, the plaintiff overheard her examining physician make remarks which she alleged first alerted her to the possibility that the radiologist had been negligent in 1962. The plaintiff filed suit against Dr. Swyer in mid-September 1967, alleging inter alia that he had been negligent in administering the radiation treatments of 1962. Recognizing that New Jersey's two-year personal-injury statute of limitations might preclude her from presenting her claim on the merits, the plaintiff urged that the discovery rule be applied to postpone commencement of the limitations period until March 1967, when she allegedly first suspected that Dr. Swyer had been negligent.224

Holding that a material issue of fact as to the date the plaintiff

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223. Id. at 271, 300 A.2d at 565.
224. Id.
discovered or should have discovered the link between her injury and the malpractice precluded summary judgment for the radiologist on statute of limitations grounds, the court proceeded to trace the development of the discovery rule, noting that its relevance had been acknowledged "whenever equity and justice have seemed to call for its application." Nevertheless, the court explained, in keeping with the defendant-protective policies underlying statutes of limitation, courts should identify, evaluate, and weigh the equities of both parties to the lawsuit before relaxing the statute of limitations. In balancing the claims of an aggrieved plaintiff against those of a defendant compelled to defend an action out of time, the court explained that all relevant facts and circumstances including but not limited to the following should be considered:

The nature of the alleged injury, the availability of witnesses and written evidence, the length of time that has elapsed since the alleged wrongdoing, whether the delay has been to any extent deliberate or intentional, whether the delay may be said to have peculiarly or unusually prejudiced the defendant.

Further evincing a scrupulous regard for defendants' interests, the court explained that the plaintiff must establish that the discovery rule should be applied and determined that judges should decide whether the plaintiff has met that burden.

Yet in a subsequent case, Fox v. Passaic General Hospital, the New Jersey Supreme Court saw no reason to require a plaintiff to bring her action any more expeditiously after belated discovery than she would have had she sustained ascertainable injuries at the time the wrong was committed. The justifications advanced in support of this proposition were characterized by the court as "convenient as well as logical." First, since under the discovery rule a plaintiff's claim does not accrue until discovery of the injury complained of, as a matter of principle the plaintiff should have the full statutory period within which to file a claim just as he or she has

225. Id. at 273, 300 A.2d at 566. The court also held that availability of the discovery rule to a plaintiff was a question for the court, not the jury. Id.
226. Id. at 274, 300 A.2d at 567.
227. Id. at 276, 300 A.2d at 568.
228. Id. at 274-76, 300 A.2d at 567-68.
230. Id. at 125-26, 363 A.2d at 343.
231. Id.
when discovery and the actionable conduct occur simultaneously.\textsuperscript{232} Furthermore, judicial determination of the precise point at which a plaintiff must file suit after belated discovery would be unduly difficult and could yield uncertain, illogical results.\textsuperscript{233} Apparently, the court is as determined to protect a plaintiff's interest in sufficient time to make an intelligent decision regarding litigation as it is to guard a defendant's interest in repose. Yet since allowing plaintiffs two years from discovery in which to commence their actions may pose hardships on defendants compelled to defend against untimely claims, a defendant may successfully invoke the statute-of-limitations defense if he or she can establish (1) that the lapse of time between the expiration of two years after the wrong and the date the suit was filed peculiarly prejudices him or her; and (2) that there was reasonable time for the plaintiff to institute his or her action between discovery of his or her cause of action and the expiration of two years after the initial wrong.\textsuperscript{234} By definition, the prejudice rule set forth above applies only where the plaintiff discovers her cause of action within two years of the defendant's actionable conduct.\textsuperscript{235} The effect of prejudice to the defendant where the cause of action is discovered over two years after the defendant's wrongful conduct remains a factor to be considered among others when balancing the equities of both parties.\textsuperscript{236}

In keeping with the principal policy consideration embodied in statutes of limitation—fairness to the defendant—and the equitable nature of the discovery rule, not every belated discovery justifies application of the discovery doctrine. Burd v. New Jersey Telephone Co.\textsuperscript{237} illustrates this proposition. The plaintiff in Burd was a laborer whose work mainly consisted of gluing together pieces of plastic pipe in a narrow, unventilated trench.\textsuperscript{238} The plaintiff had used the same glue on two prior jobs and had been using it for two days prior to his heart attack. Having read the label on the glue, which advised against inhaling the product's fumes, the plaintiff nevertheless used the glue under conditions that made it impossi-

\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Id. at 128, 363 A.2d at 343-44. The Fox court did not define peculiar prejudice.
\textsuperscript{235} Id. at 128 n.2, 363 A.2d at 344 n.2.
\textsuperscript{236} The Fox court specifically did not decide the issue of the effect of prejudice to defendant where the cause of action is discovered later, but rather left it "subject to...Lopez" for consideration in a later case. Id.
\textsuperscript{238} Id. at 24, 372 A.2d at 1356.
ble for him to heed the instructions. He regularly felt dizzy about one and a half hours after starting to use the glue, but the dizziness always subsided approximately one hour after he finished working. On September 7, 1971, however, the plaintiff stopped working in the early afternoon due to dizziness and pains in his upper body. That afternoon he went to the hospital where his condition was diagnosed as a heart attack. The plaintiff left the hospital at the end of September but returned on October 12, 1971, after suffering another heart attack. The court, rejecting the plaintiff's argument that he first learned of a possible connection between the glue and his heart attack in October 1972 during a conversation with his attorney, held that the claim, filed in May 1974, was barred by the statute of limitations.

The court's decision was based upon a variety of factors. First the court observed that the plaintiff was aware of his injury on September 7, 1971, and noted the absence of a relationship between the plaintiff and defendants which would reasonably "lull [the] plaintiff into sleeping on his rights." Further, there was no indication that the defendants had concealed any possible liability from the plaintiff. Additionally, the court attributed significance to the plaintiff's pre-accident and post-accident knowledge of the product's warning against inhalation of fumes, and the unpleasant side effects he regularly suffered while using the glue, which subsided approximately one hour after he left his place of employment. All of these elements appear to have influenced the court's decision that the plaintiff should have known that he had a possible basis for an actionable claim on the date of his heart attack. At the very least, the court declared, "from the moment of his heart attack, plaintiff should have been on inquiry as to the possible causes thereof, and taken appropriate steps to ascertain them." Burd can serve as a reminder to less than diligent plaintiffs that prior application of the discovery rule "whenever equity and justice"

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239. Id. at 25, 372 A.2d at 1357. The plaintiff worked in an unventilated trench 5 feet deep and 18 inches wide. Id. at 24, 372 A.2d at 1356. One of the plaintiff's expert witnesses, a chemical engineer and toxicologist, opined that wind "would not be a significant factor in a 5' deep trench." Id. at 26, 372 A.2d at 1358.
240. Id. at 24, 372 A.2d at 1357.
241. Id. at 24-25, 28-29, 32, 372 A.2d at 1359, 1362.
242. Id. at 33, 372 A.2d at 1361.
243. Id.
244. Id. at 34, 372 A.2d at 1362.
245. Id. at 33, 372 A.2d at 1361.
have required it does not guarantee its automatic application in every case. Where circumstances permit the suggestion that a plaintiff may have knowingly slept on his rights, invocation of the discovery rule will not be easy.

The effect of the New Jersey statute of limitations and discovery rule on the potential ability of Dover Township residents to recover damages for latent injuries caused by petrochemical well contamination is difficult to assess. Considerations of fairness to both parties might lead a court to conclude that requiring a polluter to defend itself years after the wrongdoing would be inequitable. If this were to occur, latent injuries would not be recompensed. Nevertheless, it is equally possible that the courts will not bar actions for latent medical injuries if the evidence indicates that a plaintiff had neither knowledge nor reason to know of his right to compensation for such injuries until two years prior to instituting his claim.

A PROPOSAL FOR REFORM: A UNIFORM TOXIC SUBSTANCES STATUTE OF LIMITATIONS

The problems incident to toxic waste disposal have only begun to emerge, and future generations doubtless will continue to face them. Lawyers have predicted that diseases allegedly caused by exposure to toxic substances present in industrial waste dumps may bring about a flood of litigation in the coming years. The profession has also agreed that the legal system has been forced to fashion new methods of dealing with latent disease, although some attorneys have suggested that "latent disease suits are pushing the tort system beyond its limits" and may threaten the national economy. It must be remembered, however, that latent or progressive disease cases differ from the usual tort case in which a plaintiff knows that he has been injured, when the injury occurred,

247. Podgers, supra note 110, at 140. In SIX CASE STUDIES, supra note 3, however, the committee concluded that "[e]ffects that cannot be seen, diseases that are not manifest, susceptibility that cannot be detected—these are matters that are much less likely to result in lawsuits than accidents that make immediate and tangible physical injury or property destruction." Id. at 497. Also noted is that aggrieved parties "may encounter resistance from... [l]awyers unacquainted with what little toxic substances injury law does exist [who] may be discouraging about the prospects of recovery." Id. These and other factors "combine to discourage the initiation of potentially legitimate claims, and to promote settlement that may not provide adequate compensation." Id. If this study, prepared by the Environmental Law Institute, is correct, then the proverbial "floodgates of litigation" argument against application of the discovery rule to latent environmental-injury cases loses much of its strength.

248. Podgers, supra note 110, at 141.
249. Id. at 139-42.
and who is legally accountable to him.\textsuperscript{250}

The reaction of many potential defendants to the devastating problems attributable to hazardous and toxic wastes and their regulation has been less than cooperative. In response to the news that regulations purporting to police the disposal of hazardous and toxic wastes “from the cradle to the grave” were imminent,\textsuperscript{251} “cut-rate, no-questions-asked disposal services . . . offered by shady operators . . . often suspected of having connections with organized crime”\textsuperscript{252} sprang up around the country to facilitate dumping before the federal waste monitoring system took effect on November 19, 1980.\textsuperscript{253} Thousands of tons of hazardous and toxic wastes were dumped into sewer systems, onto highways, and in abandoned shopping center lots “in a last-minute rush to dispose of the chemicals.”\textsuperscript{254}

The time is ripe for special limitations legislation embodying both the traditional policy of repose and current awareness that the harms wrought by environmental pollution may not become ascertainable until years, perhaps even decades or generations, after a potential plaintiff’s initial exposure to substances generated as a consequence of hazardous or toxic waste disposal. A uniform toxic substances statute of limitations would reconcile the inconsistencies of treatment in states such as New York, California, and New Jersey and avoid the flagrant injustices which disparities of treatment in this area would undoubtedly engender. The uniform act proposed here attempts to adopt the best features of the discovery rule as applied in jurisdictions such as New Jersey and California and minimize the possibilities of disparate treatment. While it directs that accrual be defined flexibly to avoid penalizing an otherwise diligent plaintiff for blameless delay in bringing a claim, it also safeguards the fundamental repose interest embodied in statutes of limitations.

\begin{quote}
Proposed Uniform Toxic Substances Statute of Limitations
\end{quote}

\textbf{§ 1 Accrual, Injury, Discovery of Injury and Likely Cause}

(a) The statute of limitations shall commence to run upon the date that the plaintiff’s cause of action shall have accrued. “Accrual” shall

\begin{itemize}
\item \textsuperscript{250} See id. at 140.
\item \textsuperscript{252} Knight, \textit{Toxic Wastes Hurriedly Dumped Before New Law Goes into Effect}, N.Y. Times, Nov. 16, 1980, § 1, at 1, col. 5, 28, col. 4.
\item \textsuperscript{253} \textit{Id.}
\item \textsuperscript{254} \textit{Id.} at 28, col. 4.
\end{itemize}
be interpreted to mean the point at which a plaintiff discovered or reasonably should have discovered his or her latent or progressive injury and the likelihood of causal link between such injury and the polluting conduct of the defendant.

(b) "Injury" shall mean a latent or progressive disorder of a permanent nature rather than a minor, temporary disorder causing no substantial physical and/or monetary damage to the plaintiff. Nevertheless, a plaintiff may not postpone commencement of suit until the full extent of permanent damage becomes manifest. Instead, he must exercise diligence in filing his claim within one year of the date that the first indications of such permanent disorder are ascertainable to a physician exercising reasonable care in the diagnosis of plaintiff's condition.

Comment: This provision is designed to induce plaintiffs to promptly seek informed medical opinions when physical discomfort becomes apparent so that disease can be diagnosed as early as possible. This, in turn, will help safeguard defendants' interests in repose.

(c) A plaintiff's discovery must be informed discovery, such as may be obtained through medical examination and consultation.

Comment: A plaintiff's mere speculation that he has been injured by the acts of a defendant shall not be deemed discovery within the meaning of this act. The proffered definition of discovery, however, shall not allow a plaintiff to await an unequivocal medical determination of the causal connection between his injury and the polluting conduct of a defendant. If, however, such a connection has already been established and accepted within the general scientific community and is readily determinable through standard testing apparatus when the plaintiff ascertains his disorder, the plaintiff may await such a medical determination of the link between the hazardous or toxic substance and the disorder complained of provided he has sought such a medical determination within six months of the first ascertainable indication of injury. The policy underlying this approach is defendant-protective in that a plaintiff shall not be permitted to sit idly by and await scientific discovery of a causal link

255. This concept of injury is inspired by the California Court of Appeals' approach in Martinez-Ferrer v. Richardson-Merrell, Inc., 105 Cal. App. 3d 316, 164 Cal. Rptr. 591 (1980). There the court recognized that a plaintiff who had been afflicted with a minor, temporary disorder in 1960 "would have been laughed out of court" had he sought compensation for "the speculative possibility" that his 1960 ingestion of a drug might cause a more serious, permanent condition before that chance materialized into a fact in 1976. Id. at 323-24, 164 Cal. Rptr. at 595. This recognition appears to have stemmed from the court's observation that the plaintiff could not have kept his cause of action alive for ten and a half years under California's statutory scheme. The provision here proposed adopts the California court's view of latent harm and the rationale underlying that court's approach.
between his disorder and a hazardous substance before he files a claim.

Comment: Where the medical effects of hazardous or toxic substances have not been conclusively determined, the point of discovery shall be marked by the plaintiff's suspicion or reasonably imputed suspicion that a strong causal connection exists between his injury and the polluting conduct of another. "Suspicion or reasonably imputed suspicion" is intended to apply to situations including but not limited to those in which a plaintiff is aware or should have been aware that others in his immediate geographical vicinity or in his line of employment exposed to the same hazardous or toxic substances have suffered harms similar to those of which he or she complains.

§ 2 Limitations of Time Within Which to File Suit

(a) A plaintiff shall have a period of one year from the date of belated discovery to institute suit against the defendant, subject to an outside limit of twenty years computed from the date of the conduct complained of and subject to subdivision (b) of this section.

Comment: This provision applies both to plaintiffs entitled to await unequivocal medical findings of causation as described in § 1 and to plaintiffs who are not entitled to the benefit of such a determination. This formulation is designed to induce expeditious action on the part of plaintiffs seeking redress for latent injuries allegedly caused by exposure to harmful pollutant substances and to promote administrative expediency. In addition, by setting a maximum limitations period of twenty years computed from the date of defendant's actionable conduct this provision embodies the ever-present concern that a defendant is entitled to some measure of repose.

(b) Where the plaintiff is a victim of genetic mutation or other disease which manifests itself in the next generation after initial exposure, and discovery is deemed to have occurred at birth or during the plaintiff's minority, he shall have one year from the date of his eighteenth birthday to file a claim against a defendant, provided that his parents or other relatives or guardians with standing have not already instituted suit on his behalf within one year of discovering his injury and its likely cause.

Comment: This provision is designed to comport with current legal principles tolling commencement of the limitations period until an infant is capable of bringing an action on his own behalf, provided of course, that someone with standing has not already brought a claim on behalf of such infant. This provision encourages diligence on the part of potential plaintiffs to determine the source of genetic

256. See Developments in the Law, supra note 11, at 1229-31.
mutation or other disease first ascertainable one generation after exposure to harmful pollutant substances. The limit of one year from the injured party's majority is designed to preserve the repose interest as much as possible in situations of this nature.

§ 3 Burdens of Production and Persuasion

(a) The plaintiff who invokes the discovery rule to counter a defensive plea by his adversary that the action is time-barred under state law has the burdens of raising and providing belated discovery and persuading the court that such belated discovery was reasonable and beyond the plaintiff's control.
(b) In order to raise the issue of belated discovery a plaintiff must state the following in his complaint:
   (i) when exposure to the toxic substance occurred and under what circumstances;
   (ii) when discovery of injury took place;
   (iii) the circumstances surrounding discovery;
   (iv) facts which show that failure to make an earlier discovery was reasonable, justifiable, and not a result of the plaintiff's indolence in failing to investigate or to act.

Failure to allege the foregoing will leave the plaintiff vulnerable to the general rule of accrual as defined by the state in which the claim arose.

§ 4 Role of the Court

(a) The court must identify, evaluate, and weigh the equities of both parties in determining whether or not to apply the appropriate discovery standard set forth in either § 2(a) or (b) of this act.
(b) In balancing the claims of an aggrieved plaintiff against those of a defendant compelled to defend an action out of time, the court must consider all the relevant facts and circumstances, including, but not limited to the following:
   (i) nature of the alleged injury;
   (ii) availability of witnesses and written evidence;
   (iii) time lapse between exposure and commencement of suit;
   (iv) whether the delay has been to any extent intentional;
   (v) whether the delay may be said to have peculiarly prejudiced the defendant. Prejudice does not mean inconvenience to defendant's counsel in adducing evidence, for this burden is equally cast upon the plaintiff.

This is an unorthodox approach to an untraditional problem. Admittedly, this proposal spins its own web of legal issues which ultimately must be grappled with and resolved through judicial interpretation. However, it provides an alternative which does justice to the principles of tort law and does not run afoul of the un-
derlying reasons for statutes of limitations—namely, to promote the timely assertion of claims by plaintiffs on notice of invasion of their legal rights and the injuries caused by such invasion. The uniform act here proposed does not unusually prejudice potential defendants, nor does it give plaintiffs an unwarranted windfall. A defendant is not subject to indeterminate liability. In addition, the burden of adducing evidence regarding the circumstances of exposure to toxic substances and their possible injurious effects, if any, falls with equal weight on both parties. In fact, the plaintiff will often have a greater burden since free and ready access to various records of hazardous- and toxic-waste disposal prepared by the defendant polluter is unlikely even in the process of discovery. Moreover, the plaintiff carries the burden of persuading the trier of fact not only that the defendant was negligent, but also that the defendant's negligence caused his injuries—not an easy feat since the types of chemicals we encounter regularly may be as much the cause of harm as toxic wastes pumped into the environment by various entities.257 If present statutes of limitations are to be interpreted restrictively so that future environmental-tort personal injury claims are barred, and if defendants need never mount a vigorous defense against such claims, then there will be no incentive for those engaged in toxic-waste disposal to raise their standards of care for the sake of environmental safety and public health. Similarly, if defendants are to assume no responsibility for the belated consequences of their acts, our judicial system could suffer a tremendous loss of public favor and confidence in its legitimacy. The act proposed, or one similar in underlying purpose, could avoid such unfortunate results.

CONCLUSION

There is a need for critical evaluation and reformulation of statutes of limitations—defenses entrenched in public policy that should not be ignored by the courts, yet defenses that should be protected from abuse at the hands of unscrupulous defendants and from unthinking application to cases where diligent plaintiffs may reasonably fail to bring timely suits. Strict adherence to statutory limitations periods and automatic deference by the courts to various legislatures will often deprive those victimized by toxic-substances contamination of any relief, regardless of the merits of their claims. Dissimilar treatment of statutes of limitations and

257. Kraus, supra note 3, at 96.
rules of accrual across the board only adds to the confusion of a very complicated legal area. The situation as it stands now will, if unchanged, inevitably breed glaring inequities of treatment. A plaintiff stricken by a serious latent disorder or genetic mutation filing suit out of time might not recover a cent in New York even if the causal link between his harm and the defendant’s polluting activities were firmly established; someone filing out of time across the Hudson River or in California, however, might recover money damages even if he had nothing more than a skin rash. Such disparate results are clearly unfair and provide little hope that victims of pollutant injury will be adequately compensated.

This Note does not advocate court adoption of a “deep pockets” policy of basing liability on the ability of various defendants to compensate those afflicted by latent or progressive injuries. Instead, it proposes that liability be based upon causation rather than predetermined by statute of limitations. Desperately needed is a humane legislative plan which will not attach adverse consequences to blameless ignorance and inaction on the part of plaintiffs and which will ensure uniform treatment of latent and progressive injury victims. Until such legislation is enacted, the courts must safeguard the special interests in public health, environmental safety, and the integrity of the judicial system.

Michelle Sokol