NOTES

CIVIL INCEST SUITS: GETTING BEYOND THE STATUTE OF LIMITATIONS

Women are slowly breaking the silence that surrounds incest.[1] As they begin to realize the harmful effects of incestuous abuse,[2] adult survivors[3] demand compensation from the men who abused them.[4] Relying upon traditional tort theories, many women file civil lawsuits against their fathers,[5] seeking damages for physical and emotional abuse.[6] Stat-

1. For purposes of this Note "incest" is defined as any sexually motivated physical contact between a child and an adult of paternal authority. This is the definition used by Judith Herman, noted scholar on father-daughter incest. *See* J. HERMAN, FATHER-DAUGHTER INCEST 70 (1981). This Note adopts a broad definition of incest, comprehending any sexually motivated physical contact, in order to protect children from harmful contact by adults seeking sexual gratification.

The scope of this Note is limited to father-daughter incest because it is the most reported type of incest. *See id.* at 19 (94.1% of reported cases involve father-daughter incest).

2. Women have written and published stories about their personal experiences in an effort to break the silence surrounding incest. Although speaking out about incest is very painful, victims of incest also find it a very empowering experience. *See generally* VOICES IN THE NIGHT—WOMEN SPEAKING ABOUT INCEST (T. MCNARON & Y. MORGAN eds. 1982). For a bibliography of books containing stories of women's experiences as incest victims, see E. BASS & L. DAVIS, THE COURAGE TO HEAL—A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE 467-69 (1988).

3. Women incestuously abused as children describe themselves as survivors, not victims. The description is important because it emphasizes the strength, rather than any weakness, of these women and thus is empowering. *See* E. BASS & L. DAVIS, *supra* note 2, at 13-15. This Note describes daughters incestuously abused by their fathers as both "incest victims" and "adult survivors" because it is important to remember both the extreme victimization and the powerful survival skills that characterize these women.

4. *See* Mithers, *Incest and the Law*, N.Y. TIMES MAG. 44 (Oct. 21, 1990). For a discussion of an early California case denying compensation to an adult survivor of incest, see Note, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 204-06 (1984).

5. Organizations such as the National Organization for Women's Legal Defense and Education Fund are providing technical assistance to women and their attorneys. For mailings write: NOW Legal Defense Fund, 99 Hudson Street, New York, NY 10013.

6. Courts refuse to recognize a separate tort for child abuse. *See, e.g.*, St. Michelle v. Robinson, 52 Wash. App. 309, 759 P.2d 467, 471 (1988) (noting view that a specific tort of child abuse is unnecessary as traditional tort doctrines are adequate). As a result, plaintiffs in civil incest suits must base their claims on traditional torts, including assault, battery, intentional infliction of emotional distress, and breach of fiduciary duty. *See, e.g.*, Doe v. Doe, 216 Cal. App. 3d 285, 264 Cal. Rptr. 633 (1989), *review granted*, 268 Cal. Rptr 283, 788 P.2d 1155 (1990). The problem, of course, is that the statutes of limitation governing these torts often bar the plaintiff's claim in civil incest cases. *See infra* notes 116, 123, 135 and accompanying text.

utes of limitation, however, pose a major obstacle to such women.[7]

Lawsuits seeking damages for incest are often not filed until several years after the abuse ceases.[8] Victims of incest develop defense mechanisms to protect themselves from the emotional trauma of sexual abuse.[9] These defense mechanisms may preclude an incest victim from understanding the nature of her injuries.[10] Without this understanding, the victim is unlikely to file suit against her abuser.

Because of the delay in filing a lawsuit, the governing state statute of limitations presents an obstacle to prosecution. Most states typically require suits to be filed within one to three years. Some courts hold that this period begins to run from the date of the last abusive act, thus barring suits filed several years after the incest ends.[11] Other courts, however, hold that the limitations period begins to run when the plaintiff discovers the harm caused by the abuse.[12]

This Note argues that women lack an adequate remedy for harm caused by the incestuous acts of their fathers. Part I will discuss the

7. The doctrine of parental immunity is another obstacle confronting civil incest plaintiffs. *See, e.g.*, Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) (policy of preserving harmony in domestic relations precludes minor child from suing her father for damages resulting from his raping her). However, many courts have either abolished the doctrine or limited it to very narrow situations. *See* Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980) (adopting a reasonable parent standard); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963) (abrogating parental immunity except where the allegedly tortious act involves an exercise of parental authority or ordinary parental discretion with respect to the necessities of life).

8. For example, the plaintiff in DeRose v. Carswell, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368, 369-70 (1987), filed suit thirteen years after the last incestuous act occurred. She claimed that although aware of the sexual abuse, she was not aware of how the abuse affected her life. *Id.* at 370. The plaintiff in Johnson v. Johnson, 701 F. Supp. 1363, 1364 (N.D. Ill. 1988), filed suit twenty years after her father stopped abusing her. She claimed she had repressed all memories of the abuse until she began psychotherapy. *Id.*

9. *See infra* note 61 and accompanying text for a discussion of the various defense mechanisms used by sexually abused women.

10. An incest survivor may not understand the effects of the abuse on her emotionally, physically and sexually. *See infra* notes 41-59 and accompanying text.

11. The traditional rule is that statutes of limitation begin to run from the date of the allegedly tortious act. *See, e.g.*, Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957) (medical instrument left in patient's abdomen).

12. In order to avoid harsh results in some cases, courts created the discovery rule as an exception to the traditional rule that the limitations period begins to run from the date of the allegedly tortious act. *See* Urie v. Thompson, 337 U.S. 163, 168-69 (1948); Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 115-17 (1982). The discovery rule holds that the statute begins to run when the plaintiff discovers all the elements of his cause of action. Tyson v. Tyson, 107 Wash. 2d 72, 75, 727 P.2d 226, 227 (1986). For a discussion of the application of the discovery rule in different types of cases, see *infra* notes 83-110 and accompanying text.

prevalence and seriousness of the incest problem, and outline the societal response, the family dynamics, and the individual defense mechanisms that make it difficult for an incest victim to file suit within the statutory time period for intentional tort actions. Part II will focus on the discovery rule and its application to various cases. Part III will discuss judicial application of the discovery rule to two types of civil incest cases, those involving women with repressed memories of the abuse and those involving women who remember the abuse. Part IV explores the legislative response to the statute of limitations problem in civil incest suits. Finally, this Note concludes that because courts are reluctant to apply the discovery rule in some cases, particularly those in which the plaintiff remembers the abuse, legislation is required to give incest victims a meaningful opportunity to file civil suits against their abusers.

I. FATHER-DAUGHTER INCEST

A. Society's Response

Father-daughter incest is a widespread and serious problem in our society.[13] Estimates of the frequency of father-daughter incest range from one in every one hundred women[14] to five in every one hundred

13. Judith Herman reviewed the five largest studies of parent-child incest and found that 94.1% of the 506 reported cases involved father-daughter incest, 2.6% involved father-son incest, 2.8% involved mother-son incest, and 0.5% involved mother-daughter incest. J. HERMAN, *supra* note 1, at 19. Some researchers explain the high incidence of father-daughter incest in terms of reporting, not in terms of actual occurrence. Dixon, Arnold, and Calestro, *Father-Son Incest: Underreported Psychiatric Problem?*, 135 AM. J. PSYCHIATRY 835, 835-38 (1978). Herman disagrees, arguing that the preponderance of father-daughter incest is not due to differential reporting, but reflects actual occurrence. She believes that the overwhelming occurrence of father-daughter incest is a product of a patriarchal society, in which labor is sharply divided according to gender. J. HERMAN, *supra* note 1, at 53-63.

Although victimized less often than female children, male children are nonetheless vulnerable to sexual exploitation by adult family members and suffer substantial harm from incestuous abuse. *See* Nasjleti, *Suffering in Silence: The Male Incest Victim*, in OUT OF HARM'S WAY: READINGS ON CHILD SEXUAL ABUSE, ITS PREVENTION AND TREATMENT 66 (Haden ed. 1986).

Incest also occurs between siblings. Once dismissed as harmless sexual exploration, mental health professionals now recognize the potential harm of sibling incest under certain circumstances, emphasizing such factors as (1) the age difference between siblings, (2) the use of force, threats, or authority, and (3) attempted or completed penetration and documented physical injury. DeJong, *Sexual Interactions Among Siblings and Cousins—Experimentation or Exploitation?*, 13 CHILD ABUSE & NEGLECT 271, 276 (1989).

14. This figure is based on five surveys: C. Landis' study of 295 women in 1940; Kinsey's study of 4,441 women in 1953; J. Landis' study of 1028 college students in 1956; Gagnon's study of 1200 women in 1965; and Finkelhor's study of 530 women in 1978. *See* J. HERMAN, supra note 1, at 12-13.

women.[15]

Historically, society has been unaware of the frequency and severity of incest.[16] Following the lead of Sigmund Freud, society viewed incest claims with skepticism for much of the twentieth century.[17] The legal profession shared this skepticism.[18] Society's awareness of the incest problem began to increase during the 1970's, largely due to the women's movement.[19] Feminists forced society to recognize the widespread sexual victimization of women, in the form of pornography, rape, and incest.[20] Today, incestuous behavior is a felony in every state and states are endeavoring to improve the prosecution of child sexual abuse cases.[21]

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15. D. RUSSELL, THE SECRET TRAUMA—INCEST IN THE LIVES OF GIRLS AND WOMEN 216 (1986). Diana Russell surveyed a random sample of 930 women in San Francisco in 1978 and found that 4.5% of the women had been incestuously abused before the age of eighteen by a biological father, a stepfather, a foster-care father, or an adoptive father. *Id.*

Researchers are unable to obtain exact figures because of variations in defining incest, the lack of a uniform methodology, and underreporting. R. GOLDMAN & V. WHEELER, SILENT SHAME: THE SEXUAL ABUSE OF CHILDREN 21-22 (1986). Researchers disagree as to the individuals who may commit incest and the types of behavior constituting incest. Also, the lack of control groups, the use of case histories, concentration on the victims, and individual biases and prejudices can skew results in incest-related research. *Id.*

16. D. RUSSELL, *supra* note 15, at 3-9.

17. J. HERMAN, *supra* note 1, at 11. Early in his career, Sigmund Freud advanced what was later called the "seduction theory": the theory that the origin of neurosis lies in childhood sexual victimization. *See generally*, Westerlund, *Freud on Sexual Trauma: A Historical Review of Seduction and Betrayal*, 10 PSYCHOLOGY OF WOMEN Q. 297 (1986). Freud later retracted this theory, stating that his patients had been lying to themselves and to him. J. MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY 11-12 (1984). Masson, after examining the published and unpublished works of Freud, came to this conclusion: "I adduce a large number of new facts that were unknown before, or simply unnoticed, to support my opinion that Freud gave up this theory, not for theoretical or clinical reasons, but because of a personal failure of courage." J. MASSON, *supra* at 189.

18. John Henry Wigmore warned that courts should view sexual assault charges made by young girls with skepticism. J. WIGMORE, TREATISE ON EVIDENCE (1934), *cited in* J. HERMAN, *supra* note 1, at 11. He recommended that a psychiatrist examine female children who accuse their fathers of incestuous abuse to determine their credibility. *Id.* Wigmore, like Freud, apparently believed that the incestuous relationship existed only in the child's mind. *See supra* note 17. For a further discussion of societal denial of the prevalence and severity of child sexual abuse, see Summit, *Hidden Victims, Hidden Pain*, in LASTING EFFECTS OF CHILD SEXUAL ABUSE 39 (Wyatt & Powell eds. 1988).

19. J. HERMAN, *supra* note 1, at 18. *See also* Wattenberg, *In a Different Light: A Feminist Perspective on the Role of Mothers in Father-Daughter Incest*, 64 CHILD WELFARE 203 (1985).

20. D. RUSSELL, *supra* note 15, at 5. Feminist authors helped change the way society views the sexual victimization of women. For example, though once viewed as a crime of lust, rape is now regarded as a crime of violence and power. S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975).

21. For a listing of statutes criminalizing the sexual abuse of children, see Comment, *Statute of Limitations for Child Sexual Abuse Offenses: A Time for Reform Utilizing the Discovery Rule*, 80 J.

Mental health professionals now tend to believe individuals' claims of sexual abuse[22] and many communities provide services to help incest victims become adult survivors.[23] Increased media coverage also contributes to placing the problem of incest into society's general consciousness.[24]

B. The Nature of the Incestuous Family

While the incestuous family may appear normal and well-adjusted to the outsider,[25] a closer look reveals that the family is dysfunctional, that roles and relationships within the family are distorted, and that stress and turmoil abound.[26] The incestuous family does not provide the protection and nurturing traditionally associated with family life and necessary to the healthy development of children.[27] Rather, for the victim of father-daughter incest, the family is a place of exploitation and betrayal,

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CRIM. L. & CRIMINOLOGY 842, 844 n.12 (1989). Reformers also promote the adoption of hearsay exceptions for a child's out-of-court statements concerning abuse, removing competency tests for child witnesses, the videotaping of testimony, and closing the courtroom during a child's testimony. *Id.* at 842-43. The author concludes that despite these reforms, states still have difficulty prosecuting child sexual abuse cases. *Id.* at 843.

22. Researchers find that children rarely falsely accuse adults of sexual abuse. Indeed, victims of childhood incestuous abuse are very reluctant to disclose that information. Furthermore, adult survivors of incest, even those in therapy, are reluctant to disclose the abuse. *See* C. COURTOIS, HEALING THE INCEST WOUND: ADULT SURVIVORS IN THERAPY (1988) (citing studies). For a discussion of techniques to evaluate an allegation of sexual abuse, see K. Faller, *Is the Child Victim of Sexual Abuse Telling the Truth?*, in OUT OF HARM'S WAY: READINGS ON CHILD SEXUAL ABUSE, ITS PREVENTION AND TREATMENT 54 (Haden ed. 1986).

23. For a list of self-help groups and national organizations for incest victims, see E. BASS & L. DAVIS, *supra* note 2 at 463-65.

24. Made for television movies such as *Something About Amelia* (ABC), and media coverage of lawsuits involving child abuse have helped bring the problem of incest to the attention of the general public. Wang, *Child Abuse Alert!*, in OUT OF HARM'S WAY: READINGS ON CHILD SEXUAL ABUSE, ITS PREVENTION AND TREATMENT 10 (Haden ed. 1986). *Something About Amelia* portrays the experiences of a young girl sexually abused by her father, including her disclosure of the abuse, her mother's initial disbelief and anger towards the young girl, her father's removal from the home, and finally his admission of the crime.

The subject of father-daughter incest is showing up in other media as well. In 1990, the rock group Aerosmith released a rock ballad about a young woman who kills her incestuous father. Aerosmith, *Janie's Got a Gun*, PUMP (Warner Bros. 1990).

25. C. COURTOIS, *supra* note 22, at 57.

26. *Id.* at 57-58. The social factors conducive to the development of incest include a high level of stress within the family, social isolation, the opportunity for sexual contact, and a sexualized environment. Each of these conditions are dysfunctional in and of themselves. *Id.* at 59.

27. W. MALTZ & R. HOLMAN, INCEST AND SEXUALITY — A GUIDE TO UNDERSTANDING AND HEALING 25 (1987).

a place where she feels trapped.[28]

Incestuous fathers are a diverse group.[29] Yet, researchers find that fathers who commit incest share common characteristics, including a traditional family orientation, poor impulse control, overdependency, low self-esteem and insensitivity to the needs of other people.[30] An incestuous father often abuses alcohol or drugs, which tends to disinhibit his impulse control.[31] Lacking control over his impulses, the incestuous father uses his daughter to meet his own needs, while completely disregarding his parental obligation to protect and nurture her.[32]

A number of conditions impair a mother's ability to protect her daugh-

28. Many victims of incest leave their families at a young age to escape the abuse. Unfortunately, many such victims are financially and emotionally unequipped to live on their own. Thus, they are vulnerable to entering another abusive relationship. J. HERMAN, *supra* note 1, at 92-94.

29. C. COURTOIS, supra note 22, at 48-49. Because incestuous fathers are such a heterogeneous group, researchers find it useful to organize them by type: 1) the symbiotic father has strong unmet needs for closeness and attempts to meet those needs through sex; 2) a father with a psychopathic-sociopathic personality uses violence to achieve sex that is exciting and new to him; 3) the pedophiliac incest offender is attracted to his daughter only when she is young, nonthreatening and without secondary sexual characteristics; 4) the psychotic father experiences hallucinations and delusions; and 5) the father comes from a cultural group or a family background which permits sexual contact with children. *Id.* Eighty-five percent of all incestuous fathers fall into the symbiotic category. *Id.* at 48-51.

30. *Id.* at 48. *See also* W. MALTZ & R. HOLMAN, *supra* note 27, at 16-17; Groth, Hobson and Gary, *The Child Molester: Clinical Observations*, in OUT OF HARM'S WAY: READINGS ON CHILD SEXUAL ABUSE, ITS PREVENTION AND TREATMENT 147 (Haden ed. 1986).

31. R. GOLDMAN & V. WHEELER, *supra* note 15, at 23. The authors state that a "significant proportion" of incestuous fathers abused alcohol and other substances. *Id.* In Herman's study, over one-third of the women thought their fathers abused alcohol. J. HERMAN, *supra* note 1, at 76; *see also* C. COURTOIS, supra note 22, at 50. Herman notes that incestuous fathers often seek to rationalize or excuse their behavior as the result of alcohol or drug abuse. While these substances do lower inhibitions, they clearly are not the cause of the incestuous behavior. Experts recognize that treating the substance abuse alone will not stop the incest. J. HERMAN, *supra* note 1, at 76.

32. Some authors suggest that if fathers were more involved in the care of their small children, fewer would sexually abuse their children. They argue that early involvement in child rearing strengthens the parent's protective and nurturing instincts towards the child and decreases the likelihood that the parent will exploit the child for his own needs. *See* C. COURTOIS, *supra* note 22, at 52. Many incestuous fathers were abused themselves, and thus believe that sexual, emotional, and physical abuse is a normal part of family life. Others rationalize their behavior, refusing to admit to themselves or to anyone else that their behavior is harmful to their daughters. W. MALTZ & R. HOLMAN, *supra* note 27, at 17. One researcher found that over half of the incest offenders studied were incestuously abused as children. The study further found that half of the incest offenders witnessed their fathers sexually abuse their sisters. This research suggests that early exposure to incest is a strong predictor of later incestuous behavior. C. COURTOIS, *supra* note 22, at 52.

Abusers rationalize their behavior by convincing themselves that their daughters are seducing them, that the abuse is necessary "sex education," that they are giving their daughters special attention, that their daughters enjoy the abuse, or that they are keeping the family together by not going outside the family for sex. W. MALTZ & B. HOLMAN, *supra* note 27, at 18.

ter from sexual abuse by a father. The mother in an incestuous family is often physically absent from the home or suffering from physical illness or emotional problems.[33] An alcoholic or abusive husband may also render the mother powerless.[34]

33. J. HERMAN, *supra* note 1, at 77. A mother's permanent absence may also be explained by her death, the loss of custody of the children in a divorce proceeding, or her voluntarily relinquishment of custody. A mother may be temporarily absent due to childbirth, caring for sick relatives, or because of her work schedule. C. COURTOIS, *supra* note 22, at 54. Herman reports that in one study of incestuous families, 33% of the mothers suffered from a serious physical illness. Furthermore, she reports that in another study of 795 college students, the likelihood of sexual abuse increased almost two-fold when the mother was often ill. J. HERMAN, *supra* note 1, at 47. Mothers in incestuous families are often survivors of sexual abuse themselves. Such mothers often suffer lasting emotional effects manifesting themselves in depression or anxiety. These women's relationships with their husbands are often themselves destructive. W. MALTZ & B. HOLMAN, *supra* note 27, at 19. Other social conditions may also render women helpless to protect their daughters, including lack of education, poor work experience, early marriages, and large families. J. HERMAN, *supra* note 1, at 48.

34. In her study of forty victims of father-daughter incest, Herman found that over half of the women reported that their fathers used violence repeatedly and that they saw their fathers beat their mothers. J. HERMAN, *supra* note 1, at 73-74; *see also* Wattenberg, *supra* note 19, at 207-08 (mothers in incestuous families "are frightened into submission by the terrorizing tactics of battering husbands"). Traditional mental health professionals and feminist researchers disagreee as to the role mothers play in the development of father-daughter incest. J. HERMAN, *supra* note 1, at 43. Traditional mental health doctrine holds that the failure of a mother to fulfill her traditional roles, especially her sexual responsibilities, forces the daughter to assume the responsibilities of the mother. *Id.*

Under this view, mothers may fail to fulfill their responsibilities in three ways. First, the literature states or at least implies that incest occurs when the mother does not provide her husband with sex. A frigid, hostile, unloving, unattractive, and cold wife forces the father to turn to his daughter for sexual gratification. A second way in which traditional mental health literature implicates the mother is by focusing on maternal absence as a causative factor. The literature states that the mother is often ill, incapacitated in some way, or emotionally unavailable. Her absence forces the daughter to take her place. The third indictment against mothers is the idea that mothers know and acquiesce in father-daughter incest cases. *Id.*; *see also* Wattenberg, *supra* note 19, at 206.

Feminist researchers and mental health professionals reject these indictments of the mother. Wattenberg regards the traditional views as myths resulting from gender biases held by researchers and faulty research methods. Wattenberg, *supra* note 19, at 207-09. Herman also believes that the traditional view of the mother's role in father-daughter incest is a biased and unfair one. J. HERMAN, *supra* note 1, at 43-47. She points out that offenders in even the most disturbed families are usually able to demand sex from their wives. Herman concludes, however, that the sexual availability of the mother is irrelevant. A woman is not required to perform sexually any time her husband demands, and her right to refuse does not entitle him to seek sex from his daughters. Moreover, while maternal absence is a reality in many incestuous families, traditional mental health literature fails to support its assumption that the daughter must take on the caretaking role. Herman states that "[t]he idea that the father might be expected to take on the mother's caretaking role is never entertained." J. HERMAN, *supra* note 1, at 46. Finally, the fact that many women react to disclosures of incest with outrage and prompt action refutes the idea that most mothers acquiesce in father-daughter incest. Of the small percentage of mothers who are aware of the incest, yet do nothing to protect their daughters, many "have been rendered unusually powerless within their families." J. HERMAN, *supra* note 1, at 47.

An incestuous father is most likely to abuse the oldest daughter in the family.[35] The incest may begin during the child's preschool years, latency years, or during adolescence.[36]

Secrecy is an essential element of the incestuous relationship.[37] The majority of incest victims do not tell anyone about the incest while living at home.[38] Many factors combine to silence the victim of incest, thus keeping the incestuous relationship intact.[39] Some perpetrators threaten psychological or physical harm to the victim or other family members if the secret is revealed.[40] Some victims fail to disclose the incest because of the shame, guilt, and stigma attached to involvement in a forbidden activity like incest.[41] Finally, some victims are simply unable to control the rage caused by the sexual abuse.[42]

For any or all of these reasons, a victim of father-daughter incest is unlikely to tell anyone about the abuse as long as she is living with her

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35. C. COURTOIS, *supra* note 22, at 55.

36. *Id.* at 55-56. The type of sexual abuse often varies according to the age of the child. The younger the child, the less likely that the sexual abuse will involve intercourse or other types of penetration. *Id.*

37. J. HERMAN, *supra* note 1, at 70.

38. Herman's study of forty survivors of father-daughter incest found that 58% did not tell anyone about the incest while living at home. *Id.* at 84.

39. C. COURTOIS, *supra* note 22, at 132-34.

40. *Id* at 133. Threats of psychological harm include rejection, blaming, and abandonment. Threats of physical harm include battering, mutilation, suicide, or death. *Id.*

41. *Id.* at 133.

42. *See generally* Ellenson, *Horror, Rage, and Defenses in the Symptoms of Female Sexual Abuse Survivors*, 70 SOCIAL CASEWORK 589 (1989). The rage experienced by incest survivors has been described as "cataclysmic." *Id.* at 592. Survivors deny their rage for several different reasons. First, survivors deny their rage because of a fear of "ego fragmentation" or a "disruption of ego functions"—what we call "going crazy." *Id.* at 592-93. Second, survivors defend against their rage to protect "representations of parents formed before sexual abuse began and hopeful representations of parents as being yet capable of giving them love, empathy and acceptance." *Id.* at 593. Third, the survivor fears her rage will result in physical violence. For example, one survivor arose from her sleep, attacked the members of her household, and later remembered nothing about the violence she committed. *Id.* Finally, rage is a painful emotion and causes low self-esteem. *Id.*

A daughter involved in father-daughter incest may remain silent in hopes of keeping the family intact or protecting other family members from the pain of knowing about the incest. C. COURTOIS, *supra* note 22, at 133. The victim may promise not to disclose the incest as a means of protecting younger siblings from her father's abuse. W. MALTZ & R. HOLMAN, *supra* note 27, at 27. Because an incestuous father's advances are rarely limited to one daughter, a victim may agree to keep silent if her father promises not to abuse her sisters. C. COURTOIS, *supra* note 22, at 134. A daughter may not disclose abuse because past disclosures resulted only in disbelief and escalated abuse. C. COURTOIS, *supra* note 22, at 133. Finally, given their history of exploitation, incest victims may find it difficult to trust anyone enough to disclose the abuse. W. MALTZ & R. HOLMAN, *supra* note 27, at 25.

father. Without disclosure, intervention by other adults is impossible. The child remains vulnerable to her father's incestuous behavior and its harmful consequences.

C. *The Harmful Effects of Father-Daughter Incest*

The sexual abuse of any child is extremely damaging.[43] When the abuse is inflicted by a member of the family, however, the harm to the child is even more severe.[44] Children suffer a number of harmful effects at the time of the incest or immediately thereafter.[45] The initial emotional consequences of incest include low self-esteem, anxiety, fear, confusion, guilt, anger, and depression.[46] The behavioral and physical symptoms vary depending upon the child's developmental stage and her level of physical, psychological, and sexual maturity.[47]

The effects and symptoms of incestuous abuse continue to develop

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43. According to one study, one-fifth to two-fifths of all sexually abused children manifest pathological disturbance immediately following the abuse. C. COURTOIS, *supra* note 22, at 89. The negative effects continued into adulthood, with twenty percent of sexual abuse victims showing serious psychopathology during their adult years. *Id.*

44. *Id.* at 89, 94. Researchers have found that certain characteristics of childhood abuse are associated with the severest reactions in victims, and that these characteristics are found more often in incest cases than in other types of child sexual abuse cases. *Id.* at 94. These characteristics include: "abuse of longer duration and frequency, abuse involving closer relatives. . ., a large age difference between victim and perpetrator, abuse perpetrated by males, sexual behavior which is more serious and involves penetration, greater use of force and coercion, and multiple abuse experiences." *Id.*

45. W. MALTZ & R. HOLMAN, *supra* note 27, at 24-28.

46. *See* Adams-Tucker, *Defense Mechanisms Used by Sexually Abused Children*, in OUT OF HARM'S WAY: READINGS ON CHILD SEXUAL ABUSE, ITS PREVENTION AND TREATMENT 72, 74 (Haden ed. 1986) (study of 27 sexually abused children found that only one child showed increased self-esteem following the abuse).

The anxiety and fear experienced by sexually abused children may manifest itself in compulsive behavior and phobias, sleep disturbances, perceptual distortions, dissociative reactions, mood swings, hypervigilance, and hyperactivity. C. COURTOIS, *supra* note 22, at 101-02. The child may also experience a sense of loss and grieving. *Id.* The sleep disturbances experienced by abused children include nightmares, night terrors, and fear of sleeping alone. *Id.* The types of phobias include the fear of being blamed, of being abandoned, of causing a family breakup, of hurting other family members, or of retaliation by the offender. *Id.* A child's negative self-image can manifest itself in withdrawal, risk-taking behavior and disregard for self, and self-inflicted defeats and injuries. *Id.*

47. *Id.* at 96-98. Common behavioral changes in younger victims of sexual abuse include withdrawal, loss of appetite, regressive behavior such as bedwetting, whining, unexplained gagging, age-inappropriate sexual knowledge, and excessive masturbation often resulting in genital infection. W. MALTZ & R. HOLMAN, *supra* note 27, at 25.

Sexually abused children learn to think of sexual interaction as a means of expressing affection. Faller, *Is the Child Victim of Sexual Abuse Telling the Truth?*, in OUT OF HARM'S WAY: READINGS ON CHILD SEXUAL ABUSE, ITS PREVENTION AND TREATMENT 54, 62 (Haden ed. 1986). They may

throughout a victim's life.[48] Adult survivors experience anxiety and fear, manifested by anxiety attacks, sleep disturbances, nightmares, and various phobias.[49] Adult survivors often develop negative self-images[50] and experience chronic depression, which may result in self-damaging behaviors, such as self-mutilation and suicide attempts.[51] Other victims suffer from addictive and compulsive behaviors, such as alcoholism and eating disorders.[52] Some adult survivors suffer from physical and somatic effects and symptoms, including discomfort and pain related to the type and locus of the abuse.[53]

Incestuous abuse also affects the adult survivor's interpersonal relationships and sexual functioning.[54] Survivors are often either sexually

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attempt to initiate sexual encounters with peers, elicit sexual responses from adults, or become sexually active to the point of promiscuity. *Id.*

Other behaviors common to older victims of sexual abuse include substance abuse, eating disorders, running away from home, inhibition of speech and movement, recurrent physical pain, suicide attempts, acting out sexually, and engaging in actions that bring attention to themselves. W. MALTZ & R. HOLMAN, *supra* note 27, at 25; *see also* Morrow & Sorek, *Factors Affecting Self-Esteem, Depression, and Negative Behavior in Sexually Abused Female Adolescents*, 51 J. OF MARRIAGE & THE FAM. 677 (1989).

48. D. RUSSELL, *supra* note 15, at 139-40. The degree of trauma experienced by adult survivors is related to the severity of the abuse, the frequency and duration of the abuse, the amount of force used, as well as other factors. *Id.* at 142-54. Long-term effects of incest are classified as either chronic manifestations of acute aftereffects or delayed reactions to the abuse. C. COURTOIS, *supra* note 22, at 104.

49. C. COURTOIS, *supra* note 22, at 104-05.

50. *Id.* at 105. Many adult survivors think they are bad people. *Id.* They feel that they did something to cause the abuse. *Id.* These feelings are often reinforced by the fact that no one intervened to help them or by the abuser's statements that the victim liked the abuse or was at fault. *Id.*

51. C. COURTOIS, *supra* note 22, at 105; J. HERMAN, *supra* note 1, at 99. Recent studies indicate that victims of abuse do not suffer from depression any more frequently than the general population. C. COURTOIS, *supra* note 22, at 105. However, such a victim is more likely than a member of the general population to have self-destructive thoughts or to engage in self-destructive behavior. *Id.* For a discussion of the self-damaging behaviors incest victims may exhibit and treatment issues, see C. COURTOIS, *supra* note 24, at 301-08.

52. *Id.* at 311-15. Female survivors may develop eating disorders as a means of protecting themselves from further abuse. W. MALTZ & R. HOLMAN, *supra* note 27, at 48. Thus, the victim undereats because thinness gives her a boyish appearance, or overeats because it gives her a less attractive body. *Id.*

53. C. COURTOIS, *supra* note 22, at 106-07. Incest victims may experience physical effects related specifically to the locus of the abuse, such as nausea, gagging, vomiting, or choking. *Id.* at 106. More generalized physical effects may also result, such as migraine headaches, high blood pressure, frozen joints, ringing in the ears, hyperalertness, and hypervigilance. *Id.* at 106-07. Adult survivors often appear at war with their bodies, blaming them for the abuse. On the other hand, some incest survivors disregard their bodies so completely that they become unaware of the need to eat and sleep. *Id.* at 106.

54. *See* W. MALTZ & R. HOLMAN, *supra* note 27, at 52 ("incest profoundly influences what

withdrawn or sexually promiscuous.[55] The incest may also affect the victim's sexual preference and orientation.[56] Furthermore, adult survivors may experience problems in the areas of sexual arousal, response, and satisfaction.[57] Adult survivors may experience difficulties in forming close personal relationships with either men or women.[58] They also may experience difficulties in forming intimate relationships and raising their own children.[59]

Many women do not realize the harmful consequences of the incest until some years after the abuse has ended.[60] Incest victims engage in repression, denial, avoidance, and dissociation to protect themselves from the trauma of the sexual abuse.[61] Often, these defense mechanisms continue well into adulthood.[62] Because the adult survivor is often asymptomatic, she is unaware of her need to resolve the problems stemming from the abuse.[63] However, a significant event in the victim's life can often break through the psychological defense mechanisms and precipitate a crisis in her life.[64] This breakdown of defenses causes a flood of

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female survivors learn about sex and what they come to believe is expected sex role behavior"). Survivors become submissive, believing that their needs are unimportant and that they have no control over sex. *Id.*

55. *Id.* at 69-70. Some adult survivors alternate between the two extremes. C. COURTOIS, *supra* note 22, at 107-08. Whether through withdrawal or promiscuity, adult survivors attempt to gain control over their bodies and their sexuality. *Id.*

56. W. MALTZ & R. HOLMAN, *supra* note 27, at 72-75. Heterosexual women may choose sexual relations with women as part of their healing process. *Id.* Childhood sexual abuse may obscure a lesbian woman's preference for female partners. *Id.*

57. *Id.* at 75-79. Adult survivors may experience flashbacks during sex, making them feel they are reliving the abuse. *Id.* Some adult survivors may engage in dissociation or derealization during sex, losing emotional or cognitive touch with reality. *Id.*

58. C. COURTOIS, *supra* note 22, at 111-13. Adult survivors perceive the trust and openness necessary to a relationship as threatening. They may instead choose an abusive partner, thus reenacting their childhood role. *Id.* at 111-12.

59. *Id.* at 112-13. A lack of a positive role model may contribute to an adult survivor's inability to parent her own children. *Id.* Survivors experience difficulty with both sons and daughters, fearing that sons will become abusers and daughters will become victims. *Id.*

60. *Id.* at 129-62.

61. *See generally* Adams-Tucker, *Defense Mechanisms Used by Sexually Abused Children*, in OUT OF HARM'S WAY: READINGS ON CHILD SEXUAL ABUSE, ITS PREVENTION AND TREATMENT (Haden ed. 1986). The type of defense mechanism used varies with the age and gender of the victim, the identity of the abuser, and the amount of support the victim receives after disclosure. *Id.* at 74-80.

62. C. COURTOIS, *supra* note 22, at 94.

63. *See id.* at 130-62. Often, only professional counseling will enable the adult survivor to connect the abuse and her present problems. *Id.* Sometimes a survivor enters counseling for one problem, only to find that the problem is an aftereffect of the abuse. *Id.*

64. *Id.* at 137. Examples of such significant events include intimate relationships, marriage,

memories, emotions, and symptoms to ensue.[65]

Women may suffer long lasting and substantial harm as a result of father-daughter incest.[66] Some women seek compensation for their injuries through the civil court system. Before a court decides whether to award damages to an incest victim, it must find that her suit is timely under the governing statute of limitations.

II. STATUTES OF LIMITATION AND THE DISCOVERY RULE

A. Purpose, Application and Traditional Exceptions

State statutes of limitation govern the time period in which a plaintiff may file suit.[67] Statutes of limitation serve two primary purposes.[68] First, they protect potential defendants from defending against stale claims and allow them to plan for the future without fear of protracted litigation.[69] Second, they insure accurate factfinding by requiring the processing of claims before evidence is lost through the destruction or disappearance of physical evidence, the death or disappearance of witnesses, or the fading of memories.[70]

A statute of limitations begins to run when the cause of action ac-

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pregnancy, the birth of a child, illness, death, separation, and divorce. *Id.* at 137-38. Other survivors remember the abuse when they break an addiction, whether to food, drugs or alcohol. *Id.* Viewing media coverage of sexual abuse can also trigger memories of the abuse. E. BASS & L. DAVIS, *supra* note 2, at 75-78.

65. This stage in the survivor's life is often called the emergency stage. E. BASS & L. DAVIS, *supra* note 2, at 65-69. In this stage, the survivor may continually think about the incest, have frequent flashbacks and become very emotional and unable to function at a normal level.

The crisis stage often requires the immediate attention of mental health professionals. C. COURTOIS, *supra* note 22, at 139. Though individual or group therapy is often all that is required, some instances require sedation and hospitalization. *Id.*

66. Because of their tendency to develop symptoms long after the infliction of the abuse, many mental health professionals diagnose adult survivors of incest as suffering from post traumatic stress disorder. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 250-51 (3d ed. revised 1987). Post traumatic stress disorder is characterized by the patient developing symptoms long after the occurrence of a psychologically distressing event. *Id.* Common symptoms include re-experiencing the event, avoidance of stimuli associated with the event or a numbing response, and increased arousal when exposed to stimuli associated with the event. *Id.*

67. Most statutes of limitation provide that "all actions . . . shall be brought within [X] years" or that "no action . . . shall be brought after [X] years" from the date the cause of action accrued. *See Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1179 (1950) [hereinafter *Developments*].

68. United States v. Kubrick, 444 U.S. 111, 117 (1979).

69. *Id. See also* Callahan, *Statutes of Limitations—Background*, 16 OHIO ST. L.J. 130 (1955).

70. *Kubrick*, 444 U.S. at 117.

crues.[71] Generally, the cause of action is deemed to accrue either from the time the defendant commits the wrongful act or the time when the injury occurs.[72] An intentional tort creates an immediate right to nominal damages,[73] thus, the limitations period in such cases generally begins to run from the time of the wrongful act, regardless of when the harm is sustained.[74] In contrast, because harm is an essential element of a negligence action, the statutory period in such actions normally does not commence until the plaintiff realizes harm.[75]

Courts do not strictly apply the statute of limitations in all cases, often postponing or suspending the limitations period when the defendant's conduct makes it equitable to do so.[76] Incest survivors frequently invoke

71. *Developments*, *supra* note 67, at 1200.

72. *Id.* This distinction is only relevant if the two events do not occur simultaneously. *Id.*

73. Bumgart v. Bailey, 247 Miss. 604, 156 So.2d 823 (1963) (damages from assault occur immediately); Mason v. Wrightson, 205 Md. 481, 109 A.2d 128 (1954) (false imprisonment and assault and battery).

74. *Developments*, *supra* note 67, at 1200-01; *see also* Atkins v. Crosland, 417 S.W.2d 150, 153 (Tex. 1967) (citing 54 C.J.S. Limitations of Actions § 168, at 123; RESTATEMENT (SECOND) OF TORTS § 899 (1965)). Because a victim may not realize harm immediately after abuse this construction of the limitations period works a hardship on plaintiffs in civil incest cases. *See infra* notes 112-116 and accompanying text.

75. Martin v. Edwards Labs. Div. of American Hosp. Supply Corp., 60 N.Y.2d 417, 469 N.Y.S. 923, 457 N.E.2d 1150 (1983) (limitations period begins to run from date of injury caused by faulty implantation of artificial heart valve); Cannon v. Sears, Roebuck & Co., 374 Mass. 739, 374 N.E.2d 582 (1978) (products liability); White v. Schnoebelen, 91 N.H. 273, 18 A.2d 185 (1941) (negligent installation of lightning rod).

76. Thus, courts will toll the running of a statute of limitations when 1) the defendant fraudulently conceals the existence of the plaintiff's cause of action, Atlantic City Electric Co. v. General Electric Co., 312 F.2d 236 (2d Cir. 1962), *cert. denied*, 373 U.S. 909 (1963) (Clayton Act); DeRugeriis v. Brener, 471 Pa. 103, 348 A.2d 139 (1975) (identity of automobile driver withheld); 2) the defendant induces the plaintiff to forebear from bringing suit, Southern Cal. Enter., Inc. v. D.N. & E. Walter & Co., 78 Cal. App. 2d 750, 178 P.2d 785 (1947) (breach of warranty); McNeill v. Simpson, 39 S.W.2d 835 (Tex. 1931); 3) the defendant is outside the state when the cause of action accrues, American Surety Co. v. Gainfort, 123 F. Supp. 743 (S.D.N.Y. 1954) (applying California law in judgment creditors suit); Bratton v. Trojan Boat Co., 19 Mich. App. 236, 172 N.W.2d 457 (1969), *aff'd*, 385 Mich. 585, 189 N.W.2d 206 (1971) (service of foreign corporation in products liability case); 4) the defendant has died and a personal representative has yet to be appointed, Lydem v. Feldman, 36 Conn. Sup. 121, 414 A.2d 202 (1979) (automobile accident); Carpenter v. Johnson, 514 S.W.2d 868 (Tenn. 1974); 5) the plaintiff is underage, Edmonds v. Union Pacific R.R. Co., 294 F. Supp. 1311 (D. Kan. 1969) (personal injuries); Hun v. Center Properties, 63 Haw. 273, 626 P.2d 182 (1981) (wrongful death); 6) the plaintiff is insane, Hill v. Clark Equip. Co., 42 Mich. App. 405, 202 N.W.2d 530 (1972); Barnett v. Ashley, 89 Ga. App. 679, 81 S.E.2d 11 (1954) (insufficient evidence of weakness of mind); and 7) the plaintiff is imprisoned, Gaudette v. Webb, 362 Mass. 60, 284 N.W.2d 222 (1972) (automobile accident); Matthews v. Matthews, 177 So.2d 497 (Fla. App. 1965) (administrator allowed to bring suit after expiration of statutory period).

the insanity exception[77] to persuade courts to toll the statute of limitations.[78] Most courts reject such attempts, finding that incest survivors do not meet the statutory test for the insanity exception.[79] Though acknowledging that incest victims suffer emotional problems as a result of the abuse, courts reason that such problems generally do not render them insane or unable to function in society.[80]

B. The Discovery Rule

Incest survivors most often rely upon the discovery rule to argue that a court should find their claims timely under the governing statute of limitations.[81] They argue that the limitations period is tolled until a victim

77. *See supra* note 76. Incest survivors have also attempted to invoke other traditional exceptions. *See* Hildebrand v. Hildebrand, 736 F. Supp. 1512 (S.D. Ind. 1990) (finding issue of fact precluding summary judgment as to whether accrual of the cause of action delayed on the grounds of fraudulent concealment); E.W. and D.W. v. DCH, 754 P.2d 817 (Mont. 1988) (fraudulent concealment); DeRose v. Carswell, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368, 377-78 (1987) (rejecting plaintiff's argument that claim was timely under the theory of equitable estoppel); John R. v. Oakland Unified School Dis., 48 Cal. 3d 438, 256 Cal. Rptr. 766, 769 P.2d 948, 951 (1959) (remanding for determination of whether teacher charged with molestation of a student equitably estopped from pleading the statute of limitations). For further discussion of the equitable estoppel theory in civil sexual abuse cases, see Rosenfeld, *The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy*, 12 HARV. WOMEN'S L.J. 206 (1989).

78. *See* Smith v. Smith, 830 F.2d 11 (2d Cir. 1987) (refusing to apply insanity exception to toll the statute of limitations); DeRose v. Carswell, 196 Cal. App. 3d 101, 242 Cal. Rptr. 368 (1987) (refusing to apply the insanity exception to toll the statute of limitations); Altena v. Altena, 428 N.W.2d 315 (Ct. App. Iowa 1988) (reversing jury decision that plaintiff fell within the mentally ill exception to the two year statute of limitations period for personal injuries); Meirs-Post v. Schafer, 170 Mich. App. 174, 427 N.W.2d 606 (1988) (holding that statute of limitations tolled under insanity exception if plaintiff could prove she repressed memories of sexual abuse and if there was corroborating evidence for plaintiff's testimony that the abuse occurred); Hoffman v. Hoffman, 556 N.Y.S.2d 668 (N.Y. App. Div. 1990) (refusing to apply insanity exception to toll the statute of limitations); Peters v. Medaglia, No. 130,588 (Ohio App. April 13, 1989) (WESTLAW, 1989 WL 36709).

79. *Smith*, 830 F.2d at 12-13; *DeRose*, 242 Cal. Rptr. at 378-79; *Altena*, 428 N.W.2d at 317; *Hoffman*, 556 N.Y.S.2d at 609; *Peters*, 1989 WL 36709, at 5.

80. *Smith*, 830 F.2d at 12; *DeRose*, 242 Cal. Rptr. at 378; *Altena*, 428 N.W.2d at 317. Acceptance of the insanity argument is also potentially detrimental to female victims of incest. Commentators indicate that the use of the insanity defense in battered women cases perpetuates the stereotype that women are irrational and hysterical. Schneider & Jordon, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149, 159-60. The use of the insanity exception to toll the statute of limitations in civil incest suits is likely to perpetuate the same stereotype. *Id.*

81. *See* Hildebrand v. Hildebrand, 736 F. Supp. 1512 (1990); Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988); Evans v. Eckelman, 216 Cal. App. 3d 1609, 265 Cal. Rpr. 605 (1990); Doe v. Doe, 216 Cal. App. 3d 285, 264 Cal. Rptr. 633 (1989); Lindabury v. Lindabury, 552 So.2d 1117 (Fla. App. 1989); Osland v. Osland, 442 N.W.2d 907 (N.D. 1989); E.W. and D.W. v. DCH, 754 P.2d 817

discovers, or reasonably should have discovered, the nature of her injuries and the causal connection to the earlier sexual abuse.[82]

The Supreme Court first recognized the discovery rule in *Urie v. Thompson*.[83] In *Urie*, an employee brought suit against the Missouri Pacific Railroad for injuries sustained after thirty years of inhaling silica dust while on the job.[84] The railroad argued that the applicable three-year statute of limitations barred Urie's claim because the exposure caused him to contract the disease long before he brought suit.[85] The Supreme Court rejected the railroad's argument, stating that it would leave Urie with only a "delusive remedy."[86] Instead, the Court held that the statute of limitations did not bar the suit, because his symptoms did not appear and he could not have known he had silicosis prior to that date.[87] The Court reasoned that the legislature did not intend to bar the suit of a blamelessly ignorant plaintiff.[88]

Since the Supreme Court's decision in *Urie*, courts apply the discovery rule to insure that the statute of limitations does not bar a blamelessly ignorant plaintiff's suit.[89] In *Wilson v. Johns-Manville*,[90] for example, an employee's widow brought suit in 1979 against manufacturers of asbestos products, alleging that the products caused her husband's pulmonary illness and death. Beginning in 1941, Wilson worked as an insulation worker at various construction sites.[91] As part of his job, he regularly handled asbestos and asbestos products.[92] In 1973, Wilson learned that

(Mont. 1988); Kaiser v. Milliman, 50 Wash. App. 235, 747 P.2d 1130 (1988); Hammer v. Hammer, 142 Wis.2d 257, 418 N.W.2d 23 (1987); DeRose v. Carswell, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (1987); Raymond v. Ingram, 47 Wash. App. 781, 737 P.2d 314 (1987).

82. *See, e.g., Johnson*, 701 F. Supp. at 1370.

83. 337 U.S. 163 (1949).

84. *Id.* at 165-66. The plaintiff brought suit under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (1986), and the Boiler Inspection Act, 45 U.S.C. § 23 *et seq.* (1986).

85. *Urie*, 337 U.S. at 169. For a discussion of latent disease cases in the context of statutes of limitation, see Note, *Claim Preclusion in Modern Latent Disease Cases: A Proposal for Allowing Second Suits*, 103 HARV. L. REV. 1989 (1990).

86. *Urie*, 337 U.S. at 169; *cf.* Wilson v. Johns-Manville Sales Corp., 684 F.2d 111 (D.C. Cir. 1982) (balancing unfairness to plaintiff of losing any real opportunity for compensation against unfairness of defending against stale claims to decide whether to apply the discovery rule).

87. *Urie*, 337 U.S. at 170.

88. *Id.*

89. *See* Mann v. A.H. Robins Co., Inc., 741 F.2d 79 (5th Cir. 1984) ("Dalkon Shield" case); Hamilton v. Turner, 377 A.2d 363 (Del. 1977) (inter-uterine device); Society of Mt. Carmel v. Fox, 90 Ill. App. 3d 537, 413 N.E.2d 480 (1980) (design defect in building).

90. 684 F.2d 111, 113-14 (D.C. Cir. 1982).

91. *Id.* at 112.

92. *Id.* at 112-13.

he had contracted asbestosis,[93] and in 1978, after suffering two heart attacks and a collapsed lung, Wilson was diagnosed as suffering from mesothelioma, a type of cancer.[94]

To resolve the statute of limitations issue, the District of Columbia Court of Appeals applied the discovery rule.[95] The manufacturers argued, however, that Wilson's cause of action accrued, at the latest, when he first knew or reasonably should have known that he was suffering from an asbestos-related disease, that is, in 1973 when Wilson learned he had asbestosis.[96] The court disagreed, finding that the 1973 diagnosis of "mild asbestosis" did not trigger the statute of limitations on his right to sue for the disease of mesothelioma, which resulted from the same asbestos exposure but did not manifest itself until 1978.[97] Rather, the Court held that Wilson's cause of action accrued and the statute began to run when Wilson learned he suffered from mesothelioma.[98]

To support its conclusion, the court examined the purposes of the statute of limitations.[99] The court noted that while the defendant's approach best served the interest in protecting defendants against stale claims, tolling the statute until 1978 furthered the evidentiary purpose of insuring accurate factfinding; evidence concerning the existence of a latent disease, its proximate cause, and the resultant damage tends to increase rather than disappear over time.[100] The court further noted that in personal injury and wrongful death cases, the community, through the process of adjudication, seeks to compensate the plaintiff adequately.[101] The

93. *Id.* at 113. Asbestosis is a "fibrous induration of the lungs due to irritation caused by the inhalation of [asbestos] dust." STEDMAN'S MEDICAL DICTIONARY 116, 990 (3d unabr. law. ed. 1972) *quoted in Wilson*, 684 F.2d at 113 n.3.

94. *Wilson*, 684 F.2d at 113. Mesothelial cells are flattened cells forming an epithelium that lines the membranes enveloping the lungs and the heart. *Id.* at 113 n.7 (citing STEDMAN'S, *supra* note 93, at 768, 942, 983).

95. *Id.* at 117. The Court noted a clear trend toward application of the discovery rule in latent disease cases. *Id.* at 116 (collecting cases).

96. *Id.* at 114.

97. *Id.* at 120-21. Johns-Manville argued that to allow a separate cause of action for mesothelioma amounted to a splitting of Urie's cause of action. *Id.* at 117.

98. *Id.* at 120-21.

99. *Id.* at 118-19. The court noted that statutes of limitation serve two purposes. *Id.* at 118. First, they aid accurate fact-finding by preventing the loss of evidence through "death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Id.* at 118-19 (citing United States v. Kubrick, 444 U.S. 111, 117 (1979)). Second, they protect defendants' interests "in planning for the future without the uncertainty inherent" in defending stale claims. *Id.* at 119. *See supra* notes 68-70 and accompanying text.

100. *Wilson*, 684 F.2d at 119.

101. *Id.*

court determined that a rule requiring plaintiffs to file suit as soon as the first manifestations of a disease appeared would frustrate this purpose.[102] According to the traditional rule of recovery a plaintiff may recover damages based on future consequences only if such consequences are reasonably certain;[103] a plaintiff suffering from a latent disease, therefore, may recover only for the harm that is already manifest. Thus, the court found that requiring a plaintiff to file suit upon the earliest manifestations of a disease leaves plaintiff uncompensated for the most serious harm.[104]

In addition to latent disease cases, courts apply the discovery rule in product liability cases[105] and professional malpractice cases.[106] Courts will also apply the discovery rule in negligence cases when the plaintiff is blamelessly ignorant of his injury or its cause.[107] Courts are less willing, however, to apply the discovery rule in intentional tort cases. The cause of action accrues when the tort occurs without proof of harm.[108]

III. JUDICIAL RESPONSE TO CIVIL INCEST SUITS

Courts considering whether to apply the discovery rule to toll the statute of limitations in civil incest suits face two different situations: First, a plaintiff may not remember the abuse until after the statute of limitations

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102. *Id.*

103. *Id.* at 119 n.42 (collecting cases).

104. *Id.* The court also noted that adoption of the defendant's rule would stimulate the filing of many lawsuits by attorneys unwilling to risk losing a lawsuit by waiting to see if symptoms do in fact appear. *Id.* The court further noted that once in court, such attorneys may attempt to prolong the litigation until the full extent of the plaintiff's condition is known. *Id.*

105. *See* Mann v. A.H. Robins Co., Inc., 741 F.2d 79 (5th Cir. 1984) (cause of action accrued when plaintiff knew or reasonably should have known that a Dalkon Shield caused her endometriosis); Franzen v. Deere & Co., 334 N.W.2d 730 (Iowa 1983) (products liability); *but see* Johnson v. Eli Lilly & Co., 577 F. Supp. 174 (W.D. Pa. 1983), *aff'd without op.*, 738 F.2d 422 (3d Cir.), *cert. denied*, 469 U.S. 857 (1984) (plaintiff contended that exposure to DES caused cancer).

106. Courts have applied the discovery rule in a variety of malpractice suits: medical malpractice suits, *see* Mateo v. Rish, 86 App. Div. 2d 736, 446 N.Y.S.2d 598 (1982); Hamilton v. Turner, 377 A.2d 363 (Del. 1977) (intra-uterine device); dental malpractice suits, *see* Paske v. Green, 142 Ill. App. 3d 367, 491 N.E.2d 1195 (1986); McKee v. Williams, 23 Ohio App. 3d 187, 492 N.E.2d 461 (1985); Foster v. Harris, 633 S.W.2d 304 (Tenn. 1982); Shadle v. Pearce, 287 Pa. Super. 436, 430 A.2d 683 (1981); legal malpractice suits, *see* Levin v. Berley, 728 F.2d 551 (1st Cir. 1984); Yazzie v. Olney, Levy, Kaplan, & Tenner, 593 F.2d 100 (9th Cir. 1979); accounting malpractice suits, *see* Chisolm v. Schott, 86 N.M. 707, 526 P.2d 1300 (1974); Moonie v. Lynch, 256 Cal. App. 2d 361, 64 Cal. Rptr. 55 (1967); and in malpractice suits against engineers and architects, *see* Gevaart v. Metco Constr., Inc., 111 Wash. 2d 499, 760 P.2d 348 (1988); Society of Mt. Carmel v. Fox, 90 Ill. App. 3d 537, 413 N.E.2d 480 (1980); Banner v. Town of Dayton, 474 P.2d 300 (Wyo. 1970); *but see* U-Haul Co. of Western Georgia v. Abner & Robeson, Inc., 247 Ga. 565, 277 S.E.2d 497 (1981).

107. *See supra* notes 83-88 and accompanying text.

108. *See supra* notes 73-74 and accompanying text.

expires;[109] or second, a plaintiff may be aware of the sexual abuse, but does not understand that her present injuries resulted from the abuse until some time after the statute runs.[110] However, plaintiffs in either situation argue that they could not reasonably discover the essential elements of their causes of action during the period specified by the applicable statute of limitations.[111] Courts respond favorably to the discovery rule argument for plaintiffs who repress memories of the sexual abuse,[112] but hesitate to toll the statute of limitations when the plaintiff remains aware of the abuse.[113]

A. Plaintiffs Who Repress Memories of the Abuse

In *Johnson v. Johnson*,[114] a daughter filed suit against her father, alleging that he sexually abused her for a period of ten years. Though the alleged abuse occurred over twenty years beforehand, the daughter claimed that she repressed all memories of the abuse until she began psy-

109. *See* Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988) (plaintiff with multiple personalities claimed that her dominant personality had no conscious memories of the abuse); Lindabury v. Lindabury, 552 So.2d 1117 (Fla. App. 1989) (plaintiff claimed that she began remembering the abuse only after entering counseling); Doe v. Doe, 216 Cal. App. 3d 285, 264 Cal Rptr. 633 (1989) (same); Tyson v. Tyson, 107 Wash.2d 72, 727 P.2d 226 (1986) (same).

110. Hildebrand v. Hildebrand, 736 F. Supp. 1512 (S.D. Ind. 1990); Whatcott v. Whatcott, 790 A.2d 578 (Vt. App. 1990) (father-son suit); Evans v. Eckelman, 216 Cal. App. 3d 1609, 265 Cal. Rptr. 605 (1990); Bock v. Harmon, 526 So.2d 292 (La. App. 1988); Hammer v. Hammer, 142 Wis. 2d 257, 418 N.W.2d 23 (1987); Raymond v. Ingram, 47 Wash. App. 781, 737 P.2d 314 (1987); DeRose v. Carswell, 196 Cal. App. 3d 101, 242 Cal. Rptr. 368 (1987).

111. Plaintiffs who have repressed their memories are unaware of the abuse, although they may suffer from some harm during the statutory period. *See, e.g.*, Johnson v. Johnson, 701 F. Supp. 1363, 1365-66 (N.D. Ill. 1988) (plaintiff developed multiple personalities before statute of limitations expired). Plaintiffs who remember the abuse may fail to understand the nature of their injuries and their connection to the abuse. Hammer v. Hammer, 142 Wis. 2d 257, 418 N.W.2d 23, 24-25 (1987) (plaintiff suffered from depression). *See supra* notes 41-66 and accompanying text for a discussion of the types of harm suffered by adult survivors and the tendency for delayed recognition.

112. *See Johnson*, 701 F. Supp. at 1359; Doe v. Doe, 216 Cal. App. 3d 285, 264 Cal. Rptr. 633 (1989); Peters v. Medaglia, No. 55208 (Ohio App. April 13, 1989) (WESTLAW, 1989 WL 36709). Meiers-Post v. Schafer, 170 Mich. App. 174, 427 N.W.2d 606 (1988); *but see* Lindabury v. Lindabury, 552 So.2d 1117 (Fla. App. 1989); Tyson v. Tyson, 107 Wash. 2d 72, 727 P.2d 226 (1986).

113. Hildebrand v. Hildebrand, 736 F. Supp. 1512 (S.D. Ind. 1990); Whatcott v. Whatcott, 790 A.2d 578 (Vt. App. 1990); Peters v. Medaglia, No. 130,588 (Ohio App. April 13, 1989) (WESTLAW, 1989 WL 36709); E.W. and D.W. v. DCH, 231 Mont. 481, 754 P.2d 817 (1988); Kaiser v. Milliman, 50 Wash. App. 235, 747 P.2d. 1130 (1988); DeRose v. Carswell, 196 Cal. App. 3d 101, 242 Cal. Rptr. 368 (1987); Raymond v. Ingram, 47 Wash. App. 781, 737 P.2d 214 (1987); *but see* Evans v. Eckelman, 216 Cal. App. 3d 1609, 265 Cal. Rptr. 605 (1990); Osland v. Osland, 442 N.W.2d 907 (N.D. 1989); Hammer v. Hammer, 142 Wis. 2d 257, 481 N.W.2d 23 (1987).

114. 701 F. Supp. 1363, 1364 (N.D. Ill. 1988). The daughter also named her mother as a defendant, alleging that the mother failed to protect her from the abuse. *Id.*

chotherapy.[115] The district court refused to bar the daughter's complaint under the two-year statute of limitations.[116] The court emphasized the unfairness of barring the claim of a plaintiff, who neither knows nor reasonably should have known of the sexual abuse and its consequences at the time of the acts.[117] The court noted that the states addressing the issue apply the discovery rule when the plaintiff does not remember the abuse.[118]

B. Plaintiff's Who Have Conscious Memories of the Abuse

In *Hammer v. Hammer*[119] a fifteen-year-old, after ten years of being sexually abused by her father several times a week, told her mother about

115. *Id.* The daughter claimed that because she repressed all memories of the alleged sexual abuse, she was blamelessly ignorant of the causal connection between her father's acts and the injuries she suffered. *Id.* at 1364-65.

The father argued that his daughter did not repress memories of the abuse and offered as proof letters written by her three years prior to the lawsuit discussing the abuse. *Id.* at 1365. In response, the daughter offered the testimony of her therapist, who stated that the daughter suffered from Multiple Personality Disorder and that one of the daughter's other personalities wrote the letters. *Id.* at 1365-66.

116. *Id.* at 1370. The parents argued that the Illinois two-year statute of limitations for personal injury suits, ILL. REV. STAT. ch. 110, § 13-202 (1987), barred their daughter's claim. *Id.* at 1366.

117. *Id.* at 1369-70. In reaching its decision, the court relied heavily upon the dissent in Tyson v. Tyson, 107 Wash. 2d 72, 727 P.2d 226 (1986). *Johnson*, 701 F. Supp. at 1367-68. In *Tyson*, the Washington Supreme Court held that the discovery rule did not apply to a civil incest claim in which the plaintiff has blocked all memories of the abuse during the statutory time period and when no objective evidence that the abuse actually occurred existed. 107 Wash. 2d at 79-80. The court concluded that a literal reading of the statute of limitations struck the proper balance between the possibility of stale claims and the plaintiff's right to sue. *Id.* The majority failed to see the harshness of the result, stating that the plaintiff had a "reasonable opportunity to assert a claim" during the three years following her attainment of majority. *Id.* at 279.

The dissent in *Tyson* would not require objective, verifiable evidence of the alleged act as a prerequisite to applying the discovery rule. *Id.* at 80 (Pearson, J., dissenting). Rather, Justice Pearson noted that the underlying principle of the discovery rule is fairness. *Id.* at 81. As such, he argued for a test balancing the rights of the plaintiff and the defendant, to the exclusion of evidentiary problems and the merits of the case. *Id.* at 83-84. After engaging in such a test, Justice Pearson concluded that the discovery rule should apply in civil incest suits when the plaintiff represses all conscious memory of the sexual abuse during the limitations period. *Id.* at 90. For a further discussion of *Tyson*, see Note, *The Discovery Rule and Father-Daughter Incest: A Legislative Response*, 29 B.C.L. REV. 941 (1988).

In response to *Tyson*, the Washington legislature passed a law giving incest victims a more reasonable time period in which to file suit against their abusers. *See infra* note 162 and accompanying text.

118. *Johnson*, 701 F. Supp. at 1369.

119. 142 Wis. 2d 257, 418 N.W.2d 23 (1987).

the abuse.[120] Her mother refused to believe her and the family blamed the daughter.[121] Ten years after the abuse ended, the daughter filed suit against her father.[122] Her father argued that both the two-year limitations period for assault and battery and the three-year limitations period for injuries to the person resulting from negligence barred her claim.[123] The trial court rejected[124] the daughter's contention that the discovery rule applied because she did not know the nature of the harm nor did she understand its causal connection to the abuse until after the statute ran.[125]

The Wisconsin Court of Appeals reversed the trial court's decision and applied the discovery rule to toll the statute of limitations.[126] The court held that an incest victim's cause of action does not accrue until she discovers, or in the exercise of due diligence should discover, "the fact and cause of her injury."[127] The court rejected the argument that because the daughter suffered harm at the time of the incest and was aware of that harm, her cause of action accrued at the time of the act.[128] The court

120. 418 N.W.2d at 24. The father threatened his daughter with physical violence if she ever told anyone about the abuse. He also told her that she was to blame for the incest. *Id.*

121. *Id.* at 24-25. The father convinced the entire family that the daughter was to blame for the family's problems. *Id.* For a discussion of the factors that keep incest victims from disclosing their abuse, see *supra* notes 37-42 and accompanying text.

122. *Hammer*, 418 N.W.2d at 24.

123. *Id.* (citing WIS. STAT. §§ 893.57 (assault and battery) and 893.54 (1987-88) (negligence)).

124. The trial court reasoned that the legislature was the proper body to extend the statutory time period, not the courts. *Id. See also Hammer*, 418 N.W.2d at 25-26.

125. *Hammer*, 418 N.W.2d at 24-25. The daughter's counselor submitted an affidavit listing reasons why the daughter had not perceived the incest as harmful until she began counseling. *Id.* at 24. His reasons were as follows: (1) the abuse happened so often and for such a long period of time that she saw it as natural, (2) her father imposed isolation and secrecy on her, (3) the abuse caused her to view herself as an object without rights, (4) her father told her that the incestuous conduct was normal, and (5) her father's betrayal made her distrustful of other authority figures in a position to help her. *Id.* at 25.

The daughter alleged that her father's efforts to obtain custody of her younger sister triggered severe emotional problems. She alleged that it was not until she obtained psychotherapy that she began to understand the nature of her injuries and their connection to her abuse. *Id.* at 25.

126. *Id.* at 26.

127. *Id.* at 26. The court concluded that the authority and dominion exercised by the father, combined with the daughter's own feelings of guilt, depression, and dissociation, precluded her from understanding the nature of her injuries and their cause. *Id.* at 26. The court's inclusion of a causal element is important. Other courts refuse to include a causal element in the discovery rule, thus foreclosing the possibility that a incest victim who does not repress memories of the abuse can have a timely claim. *See* E.W. and D.W. v. DCH, 231 Mont. 481, 754 P.2d 817 (1988); DeRose v. Carswell, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (1987); Raymond v. Ingram, 47 Wash. App. 781, 737 P.2d 314, 317 (1987).

128. *Hammer*, 418 N.W.2d at 27.

noted that claims do not necessarily accrue with the first manifestations of an injury.[129] Furthermore, the court concluded that the unfairness to incest victims resulting from a strict application of the statute of limitations demands that they have time to more fully understand the nature and cause of their injuries.[130]

Most courts respond less favorably than the *Hammer* court to the arguments of incest survivors who do not repress all memories of the abuse.[131] *DeRose v. Carswell*[132] is more typical of judicial response in these types of cases. In *DeRose*, the plaintiff alleged that her step-grandfather sexually abused her while she was a child.[133] The plaintiff filed suit against her grandfather thirteen years after the abuse ended and five years after she reached maturity.[134] The plaintiff argued that her suit was timely under the governing one-year statute of limitations because although she was aware of the abuse, she experienced a delayed response to the abuse and did not understand the connection between her emotional problems and the abuse.[135]

The California Court of Appeals refused to apply the discovery rule to toll the statute of limitations.[136] The court reasoned that because the plaintiff experienced harm at the time of the abuse as a matter of law, the discovery rule did not apply.[137] The court concluded that the plaintiff's delayed injuries and her ignorance of the causal connection between the injuries sustained and the abuse inflicted were insufficient reasons to ap-

129. *Id.* at 26. *Cf.* DeRose v. Carswell, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368, 374-77 (1987) (rejecting plaintiff's argument that the statute of limitations did not bar her claim because her later injuries constituted a separate claim).

130. *Hammer*, 418 N.W.2d at 27.

131. *See supra* note 113 and accompanying text. Courts reason that because the plaintiff knew about the incest and because she suffered harm at the time of the act, she could have filed suit within the statutory time limit. *See* E.W. and D.W. v. DCH, 231 Mont. 481, 754 P.2d. 816, 820 (1988); DeRose v. Carswell, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368, 371 (1987); Raymond v. Ingram, 47 Wash. App. 781, 737 P.2d 314 (1987). The *Raymond* court, like some other courts, underestimates the force of plaintiff's defense mechanisms that keep plaintiffs from recognizing the harm caused by the abuse. Even to trained mental health professionals, incest survivors often appear asymptomatic. *See supra* notes 60-66 and accompanying text.

132. 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (1988).

133. 242 Cal. Rptr. at 369.

134. *Id.* at 369-70. The governing one-year limitations period, CAL. CIV. PROC. CODE § 352(a), began to run in 1980, when the plaintiff reached the age of maturity, and thus expired in March of 1981. The plaintiff filed her complaint nearly five years late, on January 13, 1986. *Id.*

135. *Id.* at 369-70. The plaintiff argued that the defense mechanisms she used to protect herself from the abuse also kept her from realizing the extent and cause of her harm. *Id.*

136. *Id.* at 370-73.

137. *Id.* at 371, 373.

ply the discovery rule.[138]

C. *Courts Should Apply the Discovery Rule in Civil Incest Suits*

Incest is an intentional tort.[139] Traditionally, courts are reluctant to apply the discovery rule to intentional tort cases, reasoning that because plaintiffs in such cases suffer harm immediately as a matter of law, it is unnecessary to toll the statute of limitations until the injuries are fully manifested.[140]

A victim of incest suffers harm at the time of the incestuous act.[141] However, unlike most victims of intentional torts, various defense mechanisms often keep the incest victim from realizing she has been harmed.[142] Thus, although the victim is harmed at the time of the act, she is unlikely to file suit at that time because she is unable to understand that she has been harmed.[143]

Even if a victim files suit immediately after the incestuous act, or when she reaches majority, she is unlikely to receive adequate compensation because many of her injuries are not yet fully manifested.[144] She is not unlike the plaintiff in *Wilson*[145] whose asbestos-related injuries mani-

138. *Id.* at 372. Though recognizing the applicability of the discovery rule when a plaintiff has repressed memories of the abuse, the court refused to apply the discovery rule to DeRose's case. *Id.* The court also dismissed the plaintiff's appeal to recent California legislation on civil incest suits, *see infra* note 158 and accompanying text, correctly stating that the new law merely codified the existing judicial approach. *Id.* at 373.

139. In tort law, an actor has intent if he desires the consequences that flow from his act or is substantially certain that those consequences will occur. RESTATEMENT (SECOND) OF TORTS, § 8A (1965). Although an incestuous father may not consciously want to harm his daughter, as an adult he is at least substantially certain that his acts will harm her.

140. *See supra* note 85 and accompanying text.

141. See *supra* notes 43-47 and accompanying text for a discussion of the types of harm an incest victim suffers.

142. Incest, because it is inflicted within the family context, is especially devastating, and thus requires strong defense mechanisms on the part of the victim. *See supra* notes 45-48 and accompanying text. Because most people shudder at the thought of a small child being sexually abused by her parent, it is perhaps difficult to understand how an incest victim could not know she suffered harm from the abuse. However, mental health literature strongly supports the idea that many incest victims are ignorant of the harm. *See generally,* J. HERMAN, *supra* note 1; C. COURTOIS, *supra* note 22.

In some cases, the abuser may tell the victim that the abuse is normal, and because of his position as an authority figure the victim may believe him. *See, e.g.,* Hammer v. Hammer, 142 Wis. 2d 257, 418 N.W.2d 23, 25 (1987).

143. For examples of the time lag between the incestuous acts and the filing of a suit see *supra* note 8.

144. *See supra* notes 60-65 and accompanying text.

145. Wilson v. Johns-Manville, 784 F.2d 111 (D.C. Cir. 1982). The plaintiff's exposure to asbes-

fested themselves over a period of several years. Given their general distrust of psychological evidence,[146] courts are unlikely to find that additional severe symptoms are reasonably certain to occur in the future and allow damages for them.[147] Thus, a strict application of the statute of limitations in civil incest suits is likely to leave plaintiffs only partially compensated for later, and perhaps more serious, emotional problems resulting from the abuse.[148]

Statutes of limitation exist in part to protect defendants from having to litigate stale claims.[149] The discovery rule exists to preserve a blamelessly ignorant plaintiff's right to compensation.[150] The decision whether to apply the discovery rule involves a balancing of the rights of the defendant against the rights of the plaintiff.[151] Courts tend not to understand that virtually every victim engages in some defense mechanism to protect herself from the horror of the abuse.[152] These defense mechanisms may cause the victim to repress memories of the abuse, keep her from understanding that she has been harmed, or prevent her from understanding the cause of her harm.[153] The rights of the victim are the same, however, regardless of the type of defense mechanism she adopts. Thus, a judicial approach to the statute of limitations issue based on the fortuity of whether the victim immediately understands the fact, nature, and consequences of the abuse is unrealistic and unfair.[154]

The widespread problem of child sexual abuse in our society, the defense mechanisms used by victims, and the substantial harm suffered by victims tips the balance toward applying the discovery rule in civil incest

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tos caused him to develop asbestosis and mesothelioma. The court treated these as two distinct diseases. *See supra* notes 90-98 and accompanying text. Incest victims may also suffer distinct injuries that develop at different periods in their lives.

146. The distrust of psychological evidence is apparent in the *Tyson* opinion. The majority states that "[p]sychology and psychiatry are imprecise disciplines." Tyson v. Tyson, 107 Wash.2d 72, 727 P.2d 226, 229 (1986). "Unlike the biological sciences, their methods of investigation are primarily subjective and most of their findings are not based on physically observable evidence." *Id.*

147. *See supra* notes 96-98.

148. *See supra* notes 43-66.

149. *See supra* note 69 and accompanying text.

150. *See supra* note 88 and accompanying text.

151. *See supra* note 86 and accompanying text.

152. *See supra* notes 60-65 and accompanying text.

153. *Id.*

154. A victim's use of one type of defense mechanism is fortuitous in the sense that a child does not consciously choose one defense mechanism over another. The author found no research explaining why a particular child engages in dissociation rather than repression, or projection rather than acting out.

suits. Thus, the statute should begin to run only when the incest victim is aware of all the elements of her cause of action, including the abusive acts, the harm suffered, and the causal connection between the two. However, because courts are reluctant to apply the rule in cases in which the plaintiff did not repress all memories of the abuse, legislatures should pass legislation specifically designed to give all incest victims a reasonable opportunity to file suit against their abusers.

V. LEGISLATIVE RESPONSE

Since 1986, several states have enacted specific legislation governing the time period in which victims of childhood sexual abuse can bring civil suits against their abusers. Eleven states passed legislation that extends or tolls the statute of limitations in civil sexual abuse actions.[155] These statutes provide victims of incest an increased opportunity to reach the merits of their cases.

Most of the new legislation tolls the statute of limitations until the incest victim discovers, or reasonably should discover, the elements of her cause of action.[156] In 1989, Minnesota passed the longest statute of limitations for civil incest suits, prescribing a six-year limitations period from the date of discovery in actions for negligence, and a two-year period for intentional tort cases.[157] Connecticut in 1986, Missouri and Oregon in 1989, and California and Colorado in 1990, passed legislation extending the statute of limitations in civil incest suits.[158] The Connecti-

155. These states are Alaska, California, Colorado, Connecticut, Iowa, Maine, Minnesota, Missouri, Montana, Oregon and Washington.

156. *See* 1989 Alaska Adv. Legis. Serv. 4; 1990 Cal. Adv. Legis. Serv. 1578 (Deering) (amending CAL. CIV. PROC. CODE § 340.1 (West 1990 Supp.)); 1990 Iowa Legis. Serv. H.F. 2268 (West); ME. REV. STAT. ANN. tit. 14, § 752-C (1989 Supp.); MINN. STAT. ANN. § 541.073 (West 1990 Supp.); MONT. CODE ANN. § 27-2-216 (1989); WASH. REV. CODE ANN. § 4.16.340 (1989 Supp.).

157. Minnesota allows a plaintiff six years to bring suit after discovering a cause of action for negligence, and 2 years for intentional torts. MINN STAT. ANN. § 541.073 (West 1990 Supp.). Iowa's new legislation requires all child sexual abuse claims to be commenced within four years of discovery of all the elements of the cause of action. 1990 Iowa Legis. Serv. H.F. 2268 (West). Alaska, California, Maine, Montana and Washington all allow the plaintiff three years after discovery. 1989 Alaska Adv. Legis. Serv. 4; 1990 Cal. Adv. Legis. Serv. 1578 (Deering); ME. REV. STAT. ANN. tit. 14, § 752(c) (1989 Supp.); MONT. CODE ANN. § 27-2-216 (1989); WASH. REV. CODE ANN. § 4.16.340 (1989 Supp.). The Washington legislature was prompted to act by its Supreme Court's decision in Tyson v. Tyson, 107 Wash. 2d 72, 727 P.2d 226 (1986), refusing to apply the discovery rule to an incest victim who was not aware of the cause of her injuries at the time filing was required. *See supra* note 121.

158. California's statute sets the limitations period at three years from the date of discovery, or eight years from the date the victim reaches majority, whichever is later. 1990 Cal. Adv. Legis. Serv.

cut, Missouri, and Oregon statutes do not address the issue of application of the discovery rule.[159]

The new statutory provisions do not share the judicial system's emphasis on whether the victim repressed the abuse.[160] None of the statutes distinguish between cases in which the plaintiff remembers the abuse and those in which she represses memories of the abuse. Furthermore, five of the statutes contain specific language that allows discovery of the causal link between the abuse and the injury, the element often at issue in cases involving plaintiffs who did not repress memories of the abuse.[161]

State statutes that extend the limitations period arguably give defendants in civil incest suits greater security than those that toll the limitations period until the victim discovers the elements of her cause of action.[162] However, such statutes must provide a significantly longer limitations period if they are to give incest victims a meaningful opportunity to file timely claims.[163] States considering a fixed-time limitation

1578 (Deering) (amending CAL. CIV. PROC. CODE § 340.1 (West 1990 Supp.)). Connecticut allows an incest victim two years to file suit from the date she reaches maturity, CONN. GEN. STAT. ANN. § 52-577 d (West 1989), while Oregon allows five years from the time the victim turns eighteen. OR. REV. STAT. § 12.117 (1989). Colorado sets the limitations period at six years. COLO. REV. STAT. ANN. § 13-80-103.7 (West 1990 Supp.). Missouri allows the longest period before barring a suit: ten years. MO. ANN. STAT. § 371 (Vernon 1990 Supp.).

159. *See supra* note 158. The absence of discovery rule language in the Missouri statute may be less ambiguous. First, the lengthy ten-year limitaitons period indicates an intent to encompass the same claims as would adoption of a discovery rule. Second, Missouri has expressly adopted the discovery rule in the area of medical malpractice, suggesting it would have done so for incest cases had it intended that rule to apply. *See* MO. ANN. STAT. § 516.105 (Vernon 1990 Supp.).

160. *See supra* notes 112-13, 131-38 and accompanying text for a discussion of the emphasis courts place on this distinction.

161. These five statutes are the California, Iowa, Minnesota, Montana, and Washington statutes. *See supra* note 157. See *supra* note 127 for cases in which the causation element was in issue.

Legislation tolling the statute of limitations until the incest victim discovers all the elements of her cause of action is preferable to statutes extending the time period in which such suits must be brought. Because of the delay in an incest victim's injuries manifesting themselves and her inability to understand the connection between those injuries and the abuse, both caused by the use of defense mechanisms, incest victims need the flexibility afforded by statutes incorporating the discovery rule. *See* Comment, *Statute of Limitations for Child Sexual Abuse Offenses: A Time for Reform Utilizing the Discovery Rule*, 80 J. CRIM. L. & CRIMINOLOGY 842 (1989) (discovery rule approach is the better rule in criminal child sexual abuse cases).

162. Statutes of limitation utilizing the discovery rule, however, do not guarantee that all civil incest suits will be found timely. A plaintiff still has the responsibility to act with reasonableness to discover the elements of her claim.

163. For example, a five year statutory period would not have benefitted the plaintiffs in Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988), or DeRose v. Carswell, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (1987), any more than the existing statutes of limitation did. *See supra* notes 114-18, 132-38 and accompanying text.

statute rather than a statute implementing the discovery rule should consider whether the statute meets the dual objectives of providing incest victims with a meaningful opportunity to file suit and of providing security for potential defendants.

A statute that extends the limitations period until the victim discovers all of the elements of her cause of action, plus a short time thereafter, protects both the plaintiff's and the defendant's interests.[164] A requirement that the plaintiff act reasonably in discovering her claim further protects the defendant's interests. In assessing whether a plaintiff acted reasonably, courts should consider the age of the victim when the abuse began, the frequency and severity of the abuse, the duration of the abuse, the amount of coercion and force used by the abuser, the defense mechanisms used by the victim, and interventions by third parties on behalf of the victim. Only if an incest survivor fails to discover the abuse, her injuries and their cause within a reasonable time period, should the defendant be relieved of defending the suit on its merits.

VI. CONCLUSION

Father-daughter incest is a very serious problem. Often, the victims of incest suffer serious emotional, physical, sexual and social problems, which can persist throughout the victim's life. Because the consequences of incest are so devastating, society has a strong interest in ensuring that incest victims are compensated for their injuries.

Often, this compensation is not forthcoming because statutes of limitation bar adult survivors' remedies. Through judicial or legislative application of the discovery rule, however, women have the opportunity to prove the harm caused by the acts of their fathers.

Carol W. Napier

164. At least one attorney who represents women in civil incest claims believes that "one year from the date of discovery is not enough time for many survivors to make the decision to sue." E. BASS & L. DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE 308 (1988). The painful process of discovering and healing makes it very difficult to think about suing, much less standing up to the demands of the litigation process. *Id.*