

THE DISCOVERY RULE AND FATHER-DAUGHTER INCEST: A LEGISLATIVE RESPONSE

Father-daughter incest is a major problem in our society.¹ Some experts estimate that as many as one in every hundred women were sexually abused as children, by a family member.² Incestuous abuse often causes long-term psychological damage to the survivor,³ which may not manifest itself until many years after the abuse ceases.⁴ The incest victim also faces extreme pressures from society, her family and from the abuser himself, not to disclose the abuse.⁵ Thus, an incest survivor commonly does not seek a civil remedy until years after the incestuous relationship has ended.⁶

Criminal sanctions for incest, designed to punish offenders, have failed to protect the child-victim.⁷ Children often do not reveal the abuse, and if they do, a criminal trial

¹ Father-daughter incest is the most frequently reported incestuous relationship, and experts believe it has many more negative implications for the child than other incestuous relationships. J. HERMAN, *FATHER-DAUGHTER INCEST* 18 (1981). Incest also occurs between family members other than fathers and daughters. *Id.* at 29. In fact, "[s]ome authorities believe that brother-sister incest is more common than any other kind but that less of it gets reported or detected since it is considered less serious and may be handled within the family." B. JUSTICE & R. JUSTICE, *THE BROKEN TABOO: SEX IN THE FAMILY* 61 (1979). This note does not consider the problem of sexual abuse between family members, other than fathers and daughters.

Throughout this note, the terms "incest" and "incestuous abuse" will be used interchangeably.

² HERMAN, *supra* note 1, at 12-14. This figure was derived from the results of five major studies conducted by Alfred Kinsey in 1953 with over 4,000 women; John Gagnon in 1965 with over 1,200 women from Kinsey's group; Judson Landis in 1956 and David Finkelhor in 1978 with over 2,000 women; and Carney Landis in 1940 with 295 women. *Id.* at 12.

These surveys produced consistent outcomes. One fifth to one third of all women recounted a childhood sexual encounter with an adult male. *Id.* Between four and twelve percent of all adult women reported a sexual incident with a relative. *Id.* One adult woman in one hundred disclosed a sexual experience with her father or stepfather. *Id.*

These studies were conducted predominately with white middle-class women. *Id.* at 14. Because poor women are the most frequent victims of violence and abuse within the general population, these estimates are probably low. *Id.* Additionally, estimates are certainly low because many factors combine to prevent the victim from reporting the incestuous assault. See *infra* notes 59-65 and accompanying text for a discussion of these factors. But see K. MEISELMAN, *INCEST* 207 (1978) (citing Henderson, *Incest*, in 2 *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* 1537 (2d ed. 1975) (estimating the frequency of incest at one in one million)).

³ The term "survivor" means the adult victim of childhood incestuous abuse. See, e.g. HERMAN, *supra* note 1. Survivor describes the incest-victim at a time in her life when she has confronted the childhood sexual experiences, and links her trauma with the offender's conduct. *Tyson v. Tyson*, 107 Wash. 2d 72, 89, 727 P.2d 226, 235 (1986) (Pearson, J., dissenting). See *infra* notes 66-78 and accompanying text for a discussion of the negative psychological effects of childhood incestuous abuse.

⁴ Gelinas, *The Persisting Negative Effects of Incest*, 46 *PSYCHIATRY* 312, 315 (1983). See *infra* notes 79-88 and accompanying text for a discussion of the reasons for delayed emergence of incest-related injuries.

⁵ HERMAN, *supra* note 1, at 88. See also *infra* notes 59-65 and accompanying text for a discussion of the pressures that influence the child incest-victim not to disclose the abuse.

⁶ See *infra* notes 62-65 and accompanying text for a discussion of the reasons victims do not disclose the abusive relationship or seek a civil remedy.

⁷ See *infra* notes 190-96 and accompanying text for a discussion of incest and the criminal justice system.

may be as traumatic as the abuse itself.⁸ Consequently, few incest victims will testify at trial and offenders are very rarely prosecuted or punished.⁹ Because existing criminal remedies are inadequate, tort remedies should provide the needed supplement to criminal sanctions in order to fully vindicate the incest victim's rights.¹⁰ In particular, the sexual assault victim is entitled to monetary compensation for her injuries, including damages for subsequent medical and psychological treatment.¹¹ At present, however, procedural and substantive obstacles preclude traditional tort actions for incestuous assault.¹²

Procedurally, the major obstacle to an adult incest survivor's damages claim is that the statute of limitations for childhood sexual assault often expires before injuries become evident.¹³ Under traditional tort theory, the intentional tort victim's cause of action accrues, and the limitations period begins to run, when the wrongdoer completes the tortious act.¹⁴ Because it is an intentional tort, incestuous abuse claims accrue, and the limitations period begins to run, at the time the abuse occurs.¹⁵ Consequently, tort claims for incest-related injuries that do not surface until many years after the abusive relationship terminates, are often time-barred.¹⁶

Courts have developed a device known as the "discovery rule," in order to mitigate the harsh results that occur upon the mechanical application of statutes of limitation to civil actions.¹⁷ Specifically, the discovery rule delays a cause of action's accrual where the plaintiff did not and reasonably could not have known about the injury.¹⁸ In such cases,

⁸ Owen, *Introduction: Child Abuse and the Law: A Special Issue*, BOSTON BAR J. 4, 4 (Mar./Apr. 1986).

⁹ HERMAN, *supra* note 1, at 163. See *infra* notes 206-10 and accompanying text for a discussion of how the criminal justice system treats incestuous abuse claims.

¹⁰ See *infra* notes 197-99 for a discussion of the need for tort remedies to supplement criminal sanctions in order to vindicate the incest victim's rights.

¹¹ See *infra* notes 66-78 and accompanying text for a discussion of the negative psychological effects of incest.

¹² Note, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 189-90 (1984).

Historically, parent-child immunity has shielded the parent from liability for injuries sustained by the child, even in the case of intentional torts. See *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905) (demurrer sustained to daughter's complaint against father for money damages, following his conviction and imprisonment for her rape). The *Roller* court stated that "the maintenance of harmonious and proper family relations is conducive to good citizenship, and therefore works to the welfare of the state." *Id.* at 244, 79 P. at 788. Acknowledging that in this instance family relations had already been disturbed beyond repair, the court nonetheless asserted that the "domestic relations of the home and family fireside cannot be disturbed by the members thereof by litigation prosecuted against each other for injuries, real or imaginary, arising out of these relations . . ." *Id.* In most states, the trend is toward the abrogation of parent-child immunity. See generally Walker, *Till Torts Do Us Part*, 7 FAM. ADVOC. 4 (Spring 1985).

¹³ See *infra* notes 79-88 and accompanying text for a discussion of the delayed emergence of incest-related harm.

¹⁴ See generally, *Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200-01 (1950). See generally notes 105-19 and accompanying text for a discussion of tolling statutes of limitations.

¹⁵ See *infra* notes 93-97 and accompanying text for a discussion of statutes of limitation's application to intentional torts.

¹⁶ See *infra* notes 79-88 and accompanying text for a discussion of the delayed emergence of incest-related harm.

¹⁷ See *infra* notes 93-97 for a discussion of how statutes of limitation operate to bar stale claims.

¹⁸ See *infra* notes 89-92 and accompanying text for a discussion of the discovery rule.

the cause of action accrues, and the statutory period begins to run, when the plaintiff knew or reasonably should have known of the harm.¹⁹

Courts apply the discovery rule almost exclusively to negligent, and not to intentional, tort claims because in most intentional torts the wrongful conduct and the resulting harm occur simultaneously.²⁰ Courts hesitate to apply the discovery rule to intentional torts even where the victim was blamelessly ignorant of his or her injuries, for fear that the exceptions to statutes of limitation would swallow the rule, leaving potential defendants forever at risk. Because legislatures classify childhood sexual assault as an intentional tort, courts generally do not apply the discovery rule to toll the limitations period.²¹ Therefore, until legislatures recognize incestuous abuse as a unique tort and apply an appropriate statute of limitations in such cases, most civil incest claims will be barred forever.²²

To prevent the discovery rule from nullifying statutes of limitations, courts should not extend the rule to intentional torts. Rather, legislatures should extend the limitations period for incestuous abuse claims statutorily. A legislative response is appropriate because it would limit the discovery rule's expansion. Moreover, because incest is such a damaging and widespread social problem, a statutorily extended limitations period would ensure that more claims will be heard, more survivors compensated, and a more effective deterrence created.

Some state legislatures already have responded to the need for statutory reform. For example, in 1986, California and Massachusetts enacted statutes extending the statute of limitations for incestuous abuse, in the civil and criminal contexts, respectively.²³ Similarly, the 1987 Massachusetts Legislature considered a bill to extend the statute of limitations for civil incest actions.²⁴ Although these bills are a step in the right direction, neither the California statute nor the Massachusetts bill is adequate. Neither precisely defines incest or psychological injury, applies a statute of limitations that balances the rights of the victim against the rights of potential defendants, and precludes judicial application of the discovery rule.²⁵ A model civil incest act, in contrast, balances the plaintiff's rights of privacy and emotional health against the defendant's right to the claim's timely presentation.²⁶ This law should ensure that the incest-victim's action is not time-barred before injuries are apparent. In addition, the statute should define explicitly incest-related emotional injury in order to protect the defendant from false allegations that are difficult to disprove.

¹⁹ Cf. Fischer, *The Limits of Statutes of Limitation*, 16 Sw. U.L. REV. 1, 5 (1986). See also *infra* notes 101-05 and accompanying text for a discussion of the discovery rule's purpose.

²⁰ See *infra* notes 96-97 and accompanying text for a comparative analysis of the discovery rule's application to negligent torts and intentional torts.

²¹ See, e.g., *Tyson v. Tyson*, 107 Wash. 2d 72, 727 P.2d 226 (1986); *Raymond v. Ingram*, 47 Wash. App. 781, 737 P.2d 314 (1987); *Smith v. Smith*, No. CIV-85-285E (W.D.N.Y. Nov. 10, 1986) (WESTLAW, Allfeds database).

²² Some state legislatures have recognized incestuous abuse as a specific tort and applied a statute of limitations different than that for other intentional torts. See, e.g. CAL. CIV. PROC. CODE § 340.1 (West Supp. 1988).

²³ See *infra* notes 180-89 and accompanying text for a discussion of the California and Massachusetts statutes.

²⁴ S. 722, 175 Leg., 1st Sess., 1987 Mass.; H.R. 5745, 175 Leg., 1st Sess., 1987 Mass.

²⁵ See *infra* notes 249-53 and accompanying text for a discussion of a Model Civil Incest Act.

²⁶ See *infra* note 253 and accompanying text for a proposed Model Civil Incest Act.

This note analyzes the nature of incestuous abuse claims and the impact of statutes of limitation on these claims. In particular, section I discusses the incestuous abuse problem.²⁷ Section II then examines the purposes underlying statutes of limitation,²⁸ including the justifications for tolling the statutory period,²⁹ the discovery rule,³⁰ and the rule's application in both intentional and negligent tort actions.³¹ Section III considers the impact of statutes of limitation on civil incest suits³² and the current legislative response to the incestuous abuse problem.³³ Section IV analyzes the need for civil remedies for incest³⁴ and examines the strict application of statutes of limitations to civil incest suits in light of the delayed emergence of incest-related harm.³⁵ Finally, this note concludes that because statutes of limitation render civil remedies ineffective, legislatures must extend statutorily the limitations period for incest claims.³⁶ To this end, this note proposes a Model Civil Incest Act, which recognizes that the incestuous abuse claim is unique and balances the plaintiff's right to sue against the defendant's right to timely presentation of claims.³⁷

I. THE PROBLEM OF INCEST

Incestuous abuse particularly that which occurs between fathers and daughters is a pervasive and serious problem in the United States.³⁸ Suspected underreport-

²⁷ See *infra* notes 38–88 and accompanying text for a discussion of the historic treatment of incest.

²⁸ See *infra* notes 89–97 and accompanying text for a discussion of the policy and purposes underlying statutes of limitation.

²⁹ See *infra* notes 98–105 and accompanying text for a discussion of justifications for tolling statutes of limitation.

³⁰ See *infra* notes 106–36 and accompanying text for a discussion of the discovery rule.

³¹ See *infra* notes 137–41 and accompanying text for a comparative application of the discovery rule to intentional and negligent torts.

³² See *infra* notes 142–79 and accompanying text for a discussion of statutes of limitation's application to civil incest.

³³ See *infra* notes 180–89 and accompanying text for a discussion of the current legislative response to the incest problem.

³⁴ See *infra* notes 190–99 and accompanying text for an analysis of the need for civil incest remedies.

³⁵ See *infra* notes 200–27 and accompanying text for an analysis of the need for civil remedies.

³⁶ See *infra* notes 228–48 and accompanying text for an analysis of current legislative enactments.

³⁷ See *infra* notes 249–53 and accompanying text for a proposed Model Civil Incest Act.

³⁸ For the purposes of this note, the term "incest" is defined as any sexual contact "between a child and an adult in a position of parental authority." HERMAN, *supra* note 1, at 70. This includes "any physical contact that had to be kept a secret . . . [T]he sexual motivation of the contact, and the fact that it must be kept secret, are far more significant [to the child] than the exact nature of the act itself." *Id.* Thus, incest is defined as not only sexual intercourse, but also any activity which sexually stimulates a child or uses a child for the sexual stimulation of others. JUSTICE, *supra* note 1, at 27. See also SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES 58 (P. Mrazek & C. H. Kempe ed. 1981). Furthermore, "[i]t is important to emphasize that incest is *relationally-based* sexual abuse Incest takes place within the context that is supposed to nurture, protect and care for the child . . . and upon which she is utterly dependent. Incest is a profound abandonment and betrayal" GELINAS, *supra* note 4, at 319.

This psychological definition of incest is broader than the statutory definitions, which are designed to prohibit sexual intercourse and marriage between family members. See, e.g., N.Y. PENAL LAW § 255.25 (McKinney Supp. 1988). For example, the New York incest statute states in pertinent part:

ing,³⁹ combined with the lack of a uniform incest definition,⁴⁰ makes it difficult to measure accurately the problem's precise scope.⁴¹ For example, estimates of the incidence of father-daughter sexual contact range from one daughter in one hundred to one in one million.⁴²

More cases of incest are now being reported than in the past.⁴³ States have enacted more effective child abuse reporting legislation, and the statistics show a 50 to 500 percent annual increase in confirmed cases of incestuous abuse, on both the metropolitan and state levels.⁴⁴ It is impossible to determine, however, whether the increased reports of childhood sexual assault reflect an actual escalation in its occurrence or a greater willingness among incest victims and families to report incestuous abuse.⁴⁵

The increase in substantiated incestuous abuse reports also may be credited to society's growing willingness to believe the victim. Because society has long viewed father-daughter incest as morally repugnant, investigators historically were reluctant to admit that it was as prevalent as most reports seemed to indicate.⁴⁶ Even Sigmund Freud, whose initial studies indicated that incest was a common source of later neurosis,⁴⁷ repudiated his claims and theorized that patients fantasized "sexual seduction."⁴⁸ Experts often relied on Freud's conclusion that victims fantasized sexual trauma to discount incest reports.⁴⁹ Current research, however, suggests that professionals should reconsider Freud's classification of incest reports as fantasies.⁵⁰

A person is guilty of incest when he or she marries or engages in sexual intercourse or deviant sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or out of wedlock, as an ancestor, descendant, brother or sister of either the whole or the half blood, uncle, aunt, nephew or niece.

Id. See generally Bienan, *The Incest Statutes*, in HERMAN, *supra* note 1, at 221.

³⁹ See *infra* notes 59-65 and accompanying text for a discussion of the factors involved in underreporting.

⁴⁰ See *supra* note 38 for various definitions of incest.

⁴¹ The "study of incest behavior necessarily involves the use of skewed, nonrepresentative samples, since the most feasible approach to obtaining a sample is to work under the auspices of a legal, social, or clinical agency that frequently encounters cases of incest in the population it serves." MEISELMAN, *supra* note 2, at 32. Thus, it will always be difficult to get an accurate estimate of the occurrence of incestuous abuse. *Id.*

⁴² See *supra* note 2 for statistics concerning the incidence of father-daughter incest.

⁴³ JUSTICE, *supra* note 1, at 15.

⁴⁴ *Id.* In recent years, the problem of childhood sexual abuse has been championed by both the women's and children's movements, groups experienced in publicizing social problems. D. FINKELHOR, *CHILD SEXUAL ABUSE* 3 (1984). This increased publicity has contributed to the increased public awareness of the incest problem, and resulted in increased reporting. HERMAN, *supra* note 1, at 18.

⁴⁵ JUSTICE, *supra* note 1, at 15.

⁴⁶ HERMAN, *supra* note 1, at 7.

⁴⁷ Cf. 3 S. FREUD, *THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 207-08 (1962). See also generally 2 J. BREUR & S. FREUD, *THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 133-34.

⁴⁸ See S. FREUD, *THE ORIGINS OF PSYCHOANALYSIS* 215-16 (1954). Freud stated that "[t]hen there was the astonishing thing that in every case . . . blame was laid on perverse acts by the father, and realization of the unexpected frequency of hysteria, in every case of which the same thing applied, though it was hardly credible that perverted acts against children were so general." *Id.*

⁴⁹ MEISELMAN, *supra* note 2, at 37. See also GOODWIN, SAHD & RADA, *False Accusations and False Denials of Incest: Clinical Myths and Clinical Realities*, in *SEXUAL ABUSE — INCEST VICTIMS AND THEIR FAMILIES* 18 (J. Goodwin ed. 1982) [hereinafter GOODWIN].

⁵⁰ MEISELMAN, *supra* note 2 at 37 (citing Berry, *Incest: Some Clinical Variations on a Classical Theme*,

Following Freud's lead, the legal system failed also to recognize the scope of the incest problem.⁵¹ In his influential *Treatise on Evidence*, John Henry Wigmore asserted that women's, especially children's, complaints of sexual assault were of dubious credibility.⁵² He therefore suggested that sexual assault accusations frequently originate entirely in the accuser's mind, with no basis in fact.⁵³

In contrast to Freud and Wigmore, modern experts conclude that children rarely make false incest accusations.⁵⁴ In fact, false retractions of valid claims are more common than false accusations of incest.⁵⁵ Generally, retractions occur where the child becomes frightened by the impact of her disclosure on the family and recants her story,⁵⁶ or refuses to talk about the incest or to testify.⁵⁷ Statistical data on incest hoaxes include these false retractions, which inflate the perception that children invent incest stories.⁵⁸

Notwithstanding society's increased awareness of incestuous abuse and a greater willingness to believe the child who reports abuse, many cases still remain undisclosed.⁵⁹ Once an incestuous incident occurs,⁶⁰ the abusive relationship can continue only if the victim keeps the father's secret.⁶¹ Given the imbalance of power, resources, and knowledge, the child generally agrees to secrecy.⁶² Furthermore, many abusers threaten the children with severe harm if they break the silence.⁶³ Thus, although the victim knows

3 J. AM. ACAD. PSYCHOANALYSIS 151 (1975); Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. PSYCHOTHERAPY 398 (1976)).

⁵¹ See e.g., *Wilson v. United States*, 271 F.2d 492 (D.C. Cir. 1959); *People v. Willmore*, 24 Ill. App. 3d 291, 320 N.E.2d 333 (1974).

⁵² IIIA WIGMORE, *TREATISE ON EVIDENCE* § 924a, at 736-47 (Chadbourn rev. 1970). See generally HERMAN, *supra* note 1, at 11.

⁵³ *Id.* See also *Kelly v. United States*, 194 F.2d 150, 153 (D.C. Cir. 1952) ("[O]ur courts have traditionally been unusually skeptical toward the accusation . . . This has been true of all the so-called sex offenses.").

⁵⁴ Goodwin, *Helping the Child Who Reports Incest: A Case Review*, in GOODWIN, *supra* note 43, at 6 ("Less than 4% of sexual abuse referrals in our experience involved a child making a false report of a sexual experience with a parent."). See also HERMAN, *supra* note 1, at 166 (citing Giarretto, Giarretto & Sgroi, *Coordinated Community Treatment of Incest*, in *SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* 233 (1978)) (on the basis of studies of substantiated incest reports, estimates that fewer than 1% of all reports are false).

⁵⁵ *Id.*

⁵⁶ Goodwin, *Helping the Child Who Reports Incest: A Case Review*, in GOODWIN, *supra* note 49, at 6.

⁵⁷ Goodwin, Sahd & Rada, *False Accusations and False Denials of Incest: Clinical Myths and Clinical Realities*, in GOODWIN, *supra* note 49, at 21.

⁵⁸ Goodwin, *Helping the Child Who Reports Incest: A Case Review*, in GOODWIN, *supra* note 49, at 6.

⁵⁹ HERMAN, *supra* note 1, at 88, 177.

⁶⁰ Typically, the victim is about nine years old when first approached sexually. HERMAN, *supra* note 1, at 83. See also L. SANFORD, *THE SILENT CHILDREN* 154 (1980). The abusive relationship usually continues for three or more years. *Id.* at 154. At that time, the child, usually an adolescent, comprehends the sexual contact's improper nature, and ends the relationship. *Id.* See also HERMAN, *supra* note 1, at 85-86; JUSTICE, *supra* note 1, at 27 ("Most authorities also regard incest as a continuing activity and not a single act.").

⁶¹ SANFORD, *supra* note 60, at 160.

⁶² *Id.* See also FINKELHOR, *supra* note 44, at 18.

⁶³ As Judith Herman states in her book, *FATHER-DAUGHTER INCEST*:

Most [victims] were warned not to tell anyone about the sexual episodes. They were threatened with the most dreadful consequences if they told: their mothers would

that exposing the abusive relationship may bring it to an end, she often hesitates to reveal the abuse.⁶⁴ Consequently, experts estimate that most incest victims reach adulthood without ever revealing their secret.⁶⁵

Childhood incest inflicts serious emotional damage on the survivor.⁶⁶ Studies of adult incest survivors have found that these women often exhibit characteristic psychiatric problems,⁶⁷ similar in description to post-traumatic stress disorder.⁶⁸ Clinicians frequently

have a nervous breakdown, their parents would divorce, their fathers would be put in jail, or they themselves would be punished and sent away from home. One way or another, the girls were given to understand that breaking secrecy would lead to separation from one or both of their parents In some cases, the fathers threatened severe bodily harm.

HERMAN, *supra* note 1, at 88. See also SANFORD, *supra* note 60, at 160-61 ("He always reminds her that if she breaks the silence, the family will fall apart, she will be sent away, he will go to jail Not exposing it keeps the family together.").

⁶⁴ SANFORD, *supra* note 60, at 161. In the victim's mind, disclosure "would bring on the end of her world as she knows it." *Id.*

⁶⁵ Note, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191, 192 (1985) (citing J. RENVOIZE, *INCEST: A FAMILY PATTERN* 51 (1982)). See also, HERMAN, *supra* note 1, at 88.

⁶⁶ As Herman notes, however, "[I]t would be an exaggeration to state that victims of sexual abuse inevitably sustain permanent damage." HERMAN, *supra* note 1, at 29. Rather than assuming that the occurrence of incestuous abuse automatically and invariably leads to traumatic mental illness, "[i]t seems much more likely . . . that the occurrence of incest . . . does predispose the individual to certain kinds of problems." MEISELMAN, *supra* note 2, at 204. See also HERMAN, *supra* note 1, at 29. Furthermore, although the survivor may believe that incest caused her adult difficulties, she may be selecting a dramatic childhood event on which to blame her adult failures. MEISELMAN, *supra* note 2, at 196. Moreover, because incest occurs most frequently in chaotic and otherwise troubled families, it is difficult to isolate the problems caused by incest from the effects of the overall noxious family environment. MRAZEK, *supra* note 38, at 227. See also MEISELMAN, *supra* note 2, at 195. Thus, the survivor may assert mistakenly that the incestuous abuse caused her injury.

⁶⁷ But see MEISELMAN, *supra* note 2, at 207 (quoting Henderson, *Incest*, in 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1537) (2d ed. 1975)) ("Incestuous relationships do not always seem to have a traumatic effect It has even been suggested that . . . such incestuous activity diminishes the subject's chance of psychosis and allows a better adjustment to the external world.").

⁶⁸ DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236 (3d ed. 1980) [hereinafter DSM-III]. The diagnostic criteria for post-traumatic stress disorder are:

- A. Existence of a recognizable stressor that would evoke significant symptoms of distress in almost everyone.
- B. Reexperiencing of the trauma as evidenced by at least one of the following:
 - (1) recurrent and intrusive recollections of the event
 - (2) recurrent dreams of the event
 - (3) sudden acting or feeling as if the traumatic event were reoccurring, because of an association with an environmental or ideational stimulus
- C. Numbing of responsiveness to or reduced involvement with the external world, beginning some time after the trauma, as shown by at least one of the following:
 - (1) markedly diminished interest in one or more significant activities
 - (2) feeling of detachment or estrangement from others
 - (3) constricted affect
- D. At least two of the following symptoms that were not present before the trauma:
 - (1) hyperalertness or exaggerated startle response
 - (2) sleep disturbance
 - (3) guilt about surviving when others have not, or about behavior required for survival

describe symptoms ranging from sexual dysfunction,⁶⁹ including promiscuity and prostitution;⁷⁰ severe depression;⁷¹ intense guilt;⁷² markedly low self-esteem;⁷³ self-destructive behavior, including drug and alcohol abuse⁷⁴ to an increased risk of future victimization;⁷⁵ marital difficulties;⁷⁶ and an increased risk of raising children to become incest victims.⁷⁷ Although these symptoms are not unique to incest survivors, women who were

- (4) memory impairment or trouble concentrating
- (5) avoidance of activities that arouse recollection of the traumatic event
- (6) intensification of symptoms by exposure to events that symbolize or resemble the traumatic event.

Id. at 238.

⁶⁹ GELINAS, *supra* note 4, at 314. See generally MEISELMAN, *supra* note 2, at 221-61 for a thorough discussion of the variety of sexual problems that incest survivors experience.

⁷⁰ Goodwin, *Helping the Child Who Reports Incest: A Case Review*, in GOODWIN, *supra* note 49, at 4 (citations omitted). Goodwin states that "[i]n studies of prostitutes it has been reported that 50% are incest victims It has been reported that 74% of men incarcerated for sexual perversions (rape, exhibiting, pedophilia) have been sexually involved with a family member." *Id.*

⁷¹ See, e.g., HERMAN, *supra* note 1, at 99. Herman found that "[s]ixty percent . . . of the incest victims complained of major depressive symptoms in adult life. Thirty-eight percent became so depressed at some point in their lives that they attempted suicide." *Id.*

⁷² See, e.g., *id.* at 97 ("Although they had been helpless as children to prevent the incest, they nevertheless felt that they had committed an unpardonable sin which left them permanently stigmatized."). *Id.*

⁷³ See, e.g., JUSTICE, *supra* note 1, at 182. The authors believe that:

[p]erhaps the most pervasive long-term consequences of incest are the effects it may have on the daughter's self-image. These effects stem from years of being weighted down with feelings of both anger and guilt. As a small child, the daughter may not have known the incestuous behavior was wrong and, therefore, she did not put up resistance. Once she realizes society condemns it, she starts blaming herself for having participated.

Id.

⁷⁴ Approximately twenty percent of adult incest survivors are alcohol or drug dependents. HERMAN, *supra* note 1, at 99. Among severe drug abusers, over forty percent of the women addicts were incest victims. Goodwin, *Helping the Child Who Reports Incest: A Case Review*, in GOODWIN, *supra* note 43, at 4.

⁷⁵ Goodwin, *Helping the Child Who Reports Incest: A Case Review*, in GOODWIN, *supra* note 49, at 4. About fifty percent of female adolescent runaways are incest victims. *Id.* at 52. "In women who have been raped three or more times, 30% are incest victims." *Id.* Judith Herman describes the victimized incest-survivors' attitude as more noteworthy than the actual incidence of rape. "More striking than the actual incidence of rape . . . was their attitude toward being raped Most reacted to the assaults as if they were deserved punishments." HERMAN, *supra* note 1, at 102.

⁷⁶ Although most incest survivors do marry, the incidence of divorce is high. HERMAN, *supra* note 1, at 29. Many women who were incest victims feel grateful to their husbands for marrying them, "knowing they had already been used by their fathers." *Id.* at 100. Also, many of the women interviewed seemed to take it for granted that their husbands would mistreat them, and would "tolerate[] extremes of abuse in their marriages, and took steps to protect themselves only when their lives were clearly in danger." *Id.* at 101.

⁷⁷ See SANFORD, *supra* note 60, at 171-72 for a discussion of typical incest-related symptoms. Perhaps the most serious consequence of incestuous abuse is its intergenerational effect. Sanford states that "[n]o victim intentionally marries a man who will victimize her children, yet statistical evidence shows that this frequently happens." *Id.* Many factors contribute to this dynamic, including confusion about sexuality and trust. *Id.* at 171. To some extent, we all "use the parenting we received as children as a model for how we parent our children. If that model was abusive, we are more likely to be abusive. In addition, we are likely to choose as a partner someone who has a similar view of parenting." JUSTICE, *supra* note 1, at 198-99.

sexually abused as children exhibit these behaviors more often than women who were not so abused.⁷⁸

Some women may not recognize incest-related injuries because the psychological symptoms may emerge long after the abusive relationship has ended.⁷⁹ Research indicates that for some victims the negative after-effects of incest have a "time bomb" quality, suddenly emerging after remaining hidden for many years.⁸⁰ This "time bomb" quality can be described clinically as chronic or delayed post-traumatic stress disorder.⁸¹ The essential feature of post-traumatic stress syndrome is the emergence of distinctive symptoms following an emotionally traumatic and unusual event.⁸² Although symptoms may develop immediately following the trauma, frequently the symptoms appear after a latency period of months or even years following the noxious event.⁸³ The psychological impairment may be mild or may encompass all aspects of the victim's life.⁸⁴

Psychological dysfunction generally emerges at any or all of three stages; first, during the abusive relationship itself; next, when the victim discloses the abuse and the incestuous relationship ends; and finally, the adult woman may experience difficulty in everyday functioning and exhibit other long-term negative effects of the childhood incest.⁸⁵ Indeed, certain developmental milestones, such as the onset of adult sexual activity, often trigger the symptoms' emergence.⁸⁶ Additionally, events, such as when a daughter approaches the age at which the survivor's abuse began, may trigger symptoms in the incest-survivor.⁸⁷ Thus, despite the child-victim's awareness that sexual contact has occurred, the long-term negative effects of the incest may not be apparent until long after the abuse has terminated.⁸⁸

In sum, incest is a widespread tragedy in our society. Because society has refused to acknowledge the problem, however, many incestuous abuse cases remain undisclosed. Incest victims experience great psychological pressures not to reveal their abusive treatment. The severe emotional damage that incest may cause to the child-victim often does

The increased public awareness of incest encourages victims to break the silence. This in turn allows the survivor to receive help and breaks the abusive cycle.

⁷⁸ HERMAN, *supra* note 1, at 32. See generally MEISELMAN, *supra* note 2, at 194-261.

⁷⁹ GELINAS, *supra* note 4, at 318. The term "traumatic neurosis" is used to describe the chronic symptoms described in notes 66-78 and accompanying text.

⁸⁰ *Id.*

⁸¹ See DSM-III, *supra* note 68, at 236-38. See *supra* note 72 for a description of the DSM-III diagnosis of post-traumatic stress disorder.

⁸² *Id.* at 236.

⁸³ *Id.* at 237.

⁸⁴ *Id.*

⁸⁵ JUSTICE, *supra* note 1, at 168.

⁸⁶ GELINAS, *supra* note 4, at 317-18.

⁸⁷ *Id.* at 318.

⁸⁸ There is some support for the theory that the incest victim subconsciously "blocks out" the incest acts as a method of coping with the trauma. See addendum to Brief for Plaintiff at A-2, *Tyson v. Tyson*, 107 Wash. 2d 72, 727 P.2d 226 (1986) (No. 51908-1) [hereinafter *Tyson*, Brief for Plaintiff] (affidavit of Lucy Berliner, social worker). It is more likely, however, that

[b]ecause incest tends to be a repetitive trauma . . . total denial about the occurrence of incest is not very common. Instead, incest victims may deny the importance of the experiences . . . They may also repress particularly disturbing elements or periods of time, initially reporting few memories of childhood, or of the incest experiences.

GELINAS, *supra* note 4, at 316 (emphasis added).

not become apparent until many years after the sexual relationship terminates. This time lapse between the abusive contact and the injuries' manifestation creates procedural and substantive obstacles to the survivor's legal action. Often by the time the survivor is able to seek redress, the statute of limitations will bar her claim.

II. STATUTES OF LIMITATION

A. Purpose and Application

A statute of limitations requires that all civil actions be brought within a specific statutory period.⁸⁹ Two primary justifications exist for placing time limitations on claims.⁹⁰ First, statutes of limitation operate to assure that the potential defendant will not be held liable for long-past actions.⁹¹ Second, the statutory period functions to prevent prosecution of stale claims when memories have faded and evidence and witnesses have disappeared.⁹² Underlying both considerations are concerns of fairness to the defendant.

Statutes of limitation begin to run when the cause of action accrues.⁹³ Typically, a cause of action accrues either at the time of the defendant's wrongful act or at the time of plaintiff's injury.⁹⁴ The accrual date is easy to calculate when the defendant's misconduct and the subsequent injury occur simultaneously. Such calculation, however, becomes complicated when substantial time elapses between the wrongful act and the injury.⁹⁵

Whether a tort is classified as intentional or negligent affects its accrual date. Because an intentional tort creates an immediate right to nominal damages without proof of harm, most courts measure the statutory period from the date the wrongful act occurs, regardless of when the plaintiff sustains the injury.⁹⁶ In a negligence action, in contrast, harm is an essential element and the statute of limitations generally does not begin to run until the harm actually results.⁹⁷

In some situations, fairness to the plaintiff recognizes exceptions to the statute of limitations. For example, state law permits the limitations period to be tolled,⁹⁸ and its

⁸⁹ Statutes of limitation are legislatively determined time periods, after which an action cannot be maintained. See BLACK'S LAW DICTIONARY 835 (5th ed. 1979). For examples of statutes, see e.g., CAL. CIV. PROC. CODE § 340.1 (West Supp. 1988); MASS. GEN. L. ch. 260, § 4 (Supp. 1987); N.J. REV. STAT. § 2A:14-1 (1987); N.Y. CIV. PRAC. L. & R. 213 (McKinney Supp. 1988).

⁹⁰ See generally *Developments*, *supra* note 14, at 1185.

⁹¹ See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938); *Equilease Corp. v. State Fed. Sav. & Loan Ass'n*, 647 F.2d 1069, 1073 (10th Cir. 1981). See also generally *Developments*, *supra* note 14, at 1185.

⁹² *Kubrick*, 444 U.S. 111, 117 (1979).

⁹³ E.g., *Kubrick*, 444 U.S. at 120.

⁹⁴ See, e.g., *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984); *Baron v. Allied Artists Pictures Corp.*, 717 F.2d 105, 108 (3d Cir. 1983). See also generally *Fischer*, *supra* note 14, at 4; *Developments*, *supra* note 14, at 1200.

⁹⁵ *Developments*, *supra* note 14, at 1200.

⁹⁶ See, e.g., *Albertson*, 749 F.2d at 228; *Deary v. Three Un-Named Police Officers*, 746 F.2d 185, 197 n.16 (3d Cir. 1984); *Menton v. Gessell*, 714 F.2d 87, 89 (9th Cir. 1983).

⁹⁷ See, e.g., *United States v. Gutterman*, 701 F.2d 104, 106 (9th Cir. 1983); *Steele v. United States*, 599 F.2d 823, 827 (7th Cir. 1979). See also RESTATEMENT (SECOND) OF TORTS § 899 comment e (1977); *Developments*, *supra* note 14, at 1201 (citing *Theurer v. Condon*, 209 P.2d 311 (Wash. 1949)).

⁹⁸ Tolling is described as the process of "delaying a cause of action's accrual, thus suspending the statute of limitations, until the applicable disability ends." *Fischer*, *supra* note 19, at 3.

running delayed, because the plaintiff suffers certain disabilities, such as the plaintiff's insanity, infancy or imprisonment, that makes it unreasonable to expect the plaintiff to assert his or her rights.⁹⁹ Typically, once the plaintiff is no longer disabled, the statutory period begins to run.¹⁰⁰

Furthermore, many state legislatures and courts recognize the principle of equitable tolling in circumstances involving fraud, undue influence or duress, breach of fiduciary relationships, and inherently undiscoverable injuries.¹⁰¹ Even though the plaintiff's right to recovery may already exist, equitable tolling delays the running of the limitations period until he or she either knows or should know of the injury.¹⁰² Courts reason that the plaintiff's ignorance of the injury is inherent in the tort, as well as the direct result of the defendant's wrongful conduct.¹⁰³ Similarly, courts often make an exception for undue influence or duress, recognizing that although the plaintiff may be aware of the basic facts, he or she is not likely to sue.¹⁰⁴ These exceptions for inherently unknowable harm apply when the plaintiff is unlikely to know of the injury before the statute expires, even if he or she could have recovered substantial damages during the limitations period.¹⁰⁵ For all such exceptions to the limitations periods, the statute is tolled until it is reasonable to charge a plaintiff, capable of bringing suit, with awareness of all the elements of a cause of action.

B. *The Discovery Rule*

The current judicial trend is to expand application of equitable tolling principles, especially in circumstances involving inherently unknowable harm.¹⁰⁶ Although the general rule is that ignorance of a cause of action does not postpone accrual,¹⁰⁷ courts apply

⁹⁹ See, e.g., CAL. CIV. PROC. CODE § 352 (West Supp. 1988); MASS. GEN. L. ch. 260 § 7 (Supp. 1987); N.Y. CIV. PRAC. L. & R. § 208 (McKinney Supp. 1988). Some states do not toll the statute of limitations for imprisonment. See, e.g., N.J. REV. STAT. § 2A:14-21 (1987).

While a plaintiff can easily establish infancy and imprisonment, insanity is more difficult to determine. For the purpose of statutes of limitation, insanity is an incapacity severe enough to render the individual unable to function in everyday life. *John R. v. Oakland Unified School Dist.*, 194 Cal. App. 3d 1454, 240 Cal. Rptr. 319 (1987). The *John R.* court declined "to hold that a condition that allows the [plaintiff] to continue normal daily activities and is completely undetectable . . . can nonetheless constitute mental incapacity within the meaning of [the statute]." *Id.* at 324, 240 Cal. Rptr. at 1463.

¹⁰⁰ See, e.g., ALA. CODE § 6-2-8 (1975) (The limitation is the lesser of the statutory limit or three years after removal of the disability.); DEL. CODE ANN. tit. 10, § 8116 (1986) (The statute of limitations runs for three years after disability is removed); MASS. GEN. L. ch. 260 § 7 (Supp. 1987) (the original statutory period runs after the disability is removed).

¹⁰¹ See generally *Developments*, *supra* note 14, at 1203-05, 1214-22.

¹⁰² *Stoleson v. United States*, 629 F.2d 1265, 1268 (7th Cir. 1980) (citing *United States v. Kubrick*, 444 U.S. 111, 120 n.7 (1980)).

¹⁰³ See *Developments*, *supra* note 14, at 1217 (citing *Schoedel v. State Bank of Newburg*, 245 Wis. 74, 13 N.W.2d 534 (1944); *Young v. Howard*, 120 F.2d 712 (D.C. Cir. 1941)). Because the plaintiff is usually forbidden by law to interfere in managing the trust, tolling the statutory period for breach of fiduciary duty acknowledges the plaintiff's ignorance of the malfeasance. *Developments*, *supra* note 14, at 1215.

¹⁰⁴ *Id.* at 1219.

¹⁰⁵ *Id.* at 1213.

¹⁰⁶ *Poffenberger v. Risser*, 290 Md. 631, 635, 431 A.2d 677, 680 (1981) (quoting *Harig v. John-Manville Prods.*, 284 Md. 70, 83, 394 A.2d 299, 306 (1978)).

¹⁰⁷ *Fischer*, *supra* note 19, at 5 (citing *April Enter. v. KTTV*, 147 Cal. App. 3d 805, 195 Cal. Rptr. 421 (1983)).

a "discovery rule" to toll the statute where it is equitable to do so.¹⁰⁸ Specifically, where the injury is insidious, latent, or hidden, the discovery rule tolls the limitations period until the plaintiff knew or reasonably should have known of the injury.¹⁰⁹ Thus, the discovery rule's purpose is to suspend the statute of limitations in situations where the policy behind the limitation¹¹⁰ is outweighed by the injustice that would result when a diligent plaintiff is barred completely from recovery through no fault of his or her own.¹¹¹

The original source of the discovery rule is the 1949 United States Supreme Court case of *Urie v. Thompson*.¹¹² In *Urie*, a fireman for the Missouri Pacific Railroad brought a negligence action for damages sustained from the constant inhalation of silica dust throughout his thirty years of employment with the railroad.¹¹³ As a result of this allegedly negligent exposure to the dust, Urie contracted silicosis, a permanently disabling pulmonary disease.¹¹⁴ The railroad claimed that the three year statute of limitations barred Urie's claim because his exposure to the silica dust for nearly thirty years meant that he must have contracted silicosis long before bringing suit.¹¹⁵

The Supreme Court rejected the defendant's argument, stating that if Urie were barred from bringing this action, his remedy would be meaningless.¹¹⁶ Because his symptoms had not emerged within the applicable statutory period, Urie could not have brought suit earlier.¹¹⁷ Reasoning that if a traditional statute of limitations was applied, Urie would have no rights to compensation when his disabling disease was discovered. The Court refused to accept that the legislature intended blameless ignorance to bar such an action, and thus permitted Urie's suit to proceed.¹¹⁸

The United States Court of Appeals for the Seventh Circuit, in *Stoleson v. United States*, clarified the *Urie* Court's enunciation of the discovery rule.¹¹⁹ The *Stoleson* court, holding that the discovery rule applied to actions brought under the Federal Torts Claim Act, delayed accrual of the claimant's cause of action until she reasonably should have discovered the cause of her injury.¹²⁰ *Stoleson's* job with the Badger Army Ammunition

¹⁰⁸ *Id.* (citing *Martinez-Ferrer v. Richardson-Merrell, Inc.*, 105 Cal. App. 3d 316, 324, 164 Cal. Rptr. 591, 595 (1980)).

¹⁰⁹ *Id.*

¹¹⁰ See *supra* notes 89-92 and accompanying text for a discussion of the policy and purposes of statutes of limitation.

¹¹¹ *Developments, supra* note 14, at 1205.

¹¹² 337 U.S. 163 (1949).

¹¹³ *Id.* at 165-66.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 169.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 169-70. The *Urie* Court stated that:

If Urie were held barred from prosecuting this action . . . it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time . . . Urie was charged with knowledge of the [injury]; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability . . . We do not think the humane legislative plan intended such consequences to attach to blameless ignorance.

Id.

¹¹⁹ 629 F.2d 1265 (7th Cir. 1980).

¹²⁰ *Id.* at 1269.

Plant exposed her to nitroglycerin. After one year of continuous exposure, the plaintiff experienced chest pains and angina attacks and was hospitalized for several weeks.¹²¹ She continued to experience these attacks until the plant terminated her employment.¹²² Although Stoleson suspected a causal connection between her illness and her exposure to nitroglycerin, Stoleson's physicians informed her that no medically recognized causal link existed to support her claim.¹²³ Three years after her initial hospitalization, however, an article was published in her union newspaper which suggested the connection between angina and chronic nitroglycerin exposure. Stoleson consulted a different physician, who concluded that her medical problems were definitely connected to her exposure. Stoleson filed a claim fifteen months later.¹²⁴

Stressing Stoleson's diligent pursuit of medical information to support her suspicion that nitroglycerin exposure caused her illness,¹²⁵ the court of appeals held that the plaintiff's blameless ignorance of the cause or existence of an injury tolled the statute of limitations.¹²⁶ The *Stoleson* court reaffirmed *Urie's* discovery rule, stating that the nature of the injury and the obstacles the plaintiff must overcome to discover the injury's cause determine the applicability of the discovery rule.¹²⁷ Thus, the court stated that a finding of "blameless ignorance" is critical, and any plaintiff who is faultlessly unaware of any injury or its cause will be granted the benefits of the discovery rule.¹²⁸

Although the discovery rule was initially applied in the areas of latent physical disease¹²⁹ and medical malpractice,¹³⁰ it is now used in many other areas of the law.¹³¹

¹²¹ *Id.* at 1266.

¹²² *Id.*

¹²³ *Id.* at 1267.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1270.

¹²⁶ *Id.* at 1269.

¹²⁷ *Id.*

¹²⁸ *Id.* The dissenting judge in *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952), eloquently described the discovery rule. As Judge Frank explained,

[e]xcept in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal 'axiom,' that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff.

Id. (Frank, J., dissenting) (footnotes omitted).

¹²⁹ See, e.g., *Urie v. Thompson*, 337 U.S. 163 (1949) (silicosis resulting from exposure to silica dust); *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381 (10th Cir. 1985) (leukemia resulting from exposure to radiation leaking from a uranium processing plant); *Stoleson*, 629 F.2d 1265 (7th Cir. 1980) (severe angina attacks resulting from industrial exposure to nitroglycerin while employed at munitions plant). But see *Joyce v. A.C. & S., Inc.*, 785 F.2d 1200 (4th Cir. 1986) (court held that discovery rule did not apply to asbestos-related diseases from exposure to asbestos where X-rays showed pleural thickening eleven years before plaintiff brought action).

¹³⁰ See, e.g., *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962) (transfusion of the wrong blood type caused stillbirth of child more than three years later); *Burke v. Washington Hosp. Center*, 293 F. Supp. 1328 (D.D.C. 1968) (foreign object left in plaintiff's wound for five years); *Ruth v. Dight*, 75 Wash. 2d 660, 453 P.2d 631 (1969) (surgical sponge left inside plaintiff for twenty-three years before discovery).

¹³¹ See generally, *City of Aurora v. Bechtel Corp.*, 599 F.2d 382, 388-89 (10th Cir. 1979) (cause of action for malpractice against engineer or architect does not accrue until the plaintiff knew or reasonably should have known of all the elements of that action). Although most jurisdictions apply the discovery rule in some circumstances, Maryland is the only state whose courts have adopted a

For example, courts have applied its rationale to malpractice cases involving attorneys,¹³² dentists,¹³³ accountants,¹³⁴ architects and engineers.¹³⁵ Moreover, most courts will apply the discovery rule to almost any negligence action where the plaintiff is blamelessly ignorant of the injury.¹³⁶

Unlike negligence actions, in contrast, courts are reluctant to apply the discovery rule to intentional torts, even where the plaintiff has no means to detect the harm.¹³⁷ Most intentional torts involve the simultaneous occurrence of wrongful conduct and resulting harm.¹³⁸ Thus, the plaintiff usually is aware of the misconduct at the time of the violation. Some intentional torts, however, involve a plaintiff who could not discover his or her harm.¹³⁹ Despite such blameless ignorance, courts rarely toll the statute of

date of discovery rule for all civil actions. See *Poffenberger v. Risser*, 290 Md. 631, 636, 431 A.2d 677, 680 (1981).

¹³² See, e.g., *Levin v. Berley*, 728 F.2d 551 (1st Cir. 1984); *Byers v. Burleson*, 713 F.2d 856 (D.C. Cir. 1983); *Yazzie v. Olney, Levy, Kaplan & Tenner*, 593 F.2d 100 (9th Cir. 1979).

¹³³ See, e.g., *Faith v. Erhart*, 52 Cal. App. 2d 228, 126 P.2d 151 (1942).

¹³⁴ See, e.g., *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).

¹³⁵ See, e.g., *City of Aurora v. Bechtel Corp.*, 599 F.2d 382 (10th Cir. 1979); *Kundahl v. Barnett*, 5 Wash. App. 227, 486 P.2d 1164 (1971); *Banner v. Town of Dayton*, 474 P.2d 300 (Wyo. 1970).

¹³⁶ Cf., *DeGette v. Mine Co. Restaurant*, 751 F.2d 1143 (10th Cir. 1985) (in copyright infringement and theft of trade secret litigation, cause of action did not accrue until plaintiff's reasonable diligence revealed the infringement); *Gazija v. Nicholas Jerns Co.*, 86 Wash. 2d 215, 543 P.2d 338 (1975) (cause of action against insurance agent accrued when plaintiff reasonably discovered injury).

¹³⁷ Cf. *Fleury v. Harper & Row, Publishers, Inc.*, 698 F.2d 1022, 1028 (9th Cir. 1983). An incest survivor may bring a traditional tort action, such as assault, battery, or infliction of emotional distress in an effort to be compensated for her injury. Survivors have had limited success with these actions because of statute of limitations procedural problems. Cf. *Elkington v. Foust*, 618 P.2d 37 (Utah 1980). The classification of incestuous abuse as an intentional tort, however, presents other difficult procedural obstacles.

Intent, as used in the context of tort theory, suggests that the actor desires the consequences which flow from his act, or is substantially certain that the consequences will result from the act. See, e.g., *Garratt v. Dailey*, 46 Wash. 2d 197, 202, 279 P.2d 1091, 1094 (1955). See also RESTATEMENT (SECOND) OF TORTS, § 8A (1965). By definition, intent must be shown to establish a prima facie case of battery, assault, or intentional infliction of emotional distress. RESTATEMENT (SECOND) OF TORTS, §§ 18, 21, 46 (1965). An intentional tort does not require that the plaintiff show that an injury occurred because even absent harm, a plaintiff may maintain an action. *Id.* at § 7 comment a. Thus, the elements of an intentional tort are established, and the cause of action accrues, when the defendant commits the wrongful act. Inasmuch as incest is an intentional tort, the plaintiff's cause of action accrues at the time of the assault. An adult survivor's claim for incest-related injury is thus time-barred under traditional tort analysis. See *Tyson v. Tyson*, 107 Wash. 2d 72, 727 P.2d 226 (1986).

¹³⁸ See, e.g., RESTATEMENT (SECOND) OF TORTS, § 18 (1965) (battery).

¹³⁹ See, e.g., *id.* at § 559 (defamation). A majority of courts hold that a cause of action in defamation accrues at the time of publication. See, e.g., *Brown v. American Broadcasting Co.*, 704 F.2d 1296, 1299-1300 (4th Cir. 1983); *Lashlee v. Sumner*, 570 F.2d 107, 109 (6th Cir. 1978); *Morgan v. Hustler Magazine*, 653 F. Supp. 711, 717 (N.D. Ohio 1987); *L. Cohen & Co., Inc. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1425, 1429 (D. Conn. 1986). Some courts, however, delay accrual of a cause of action in defamation until the plaintiff reasonably can discover the injury. See, e.g., *Adler v. American Standard Corp.*, 538 F. Supp. 572, 576 (D.C. Md. 1982); *Sears, Roebuck & Co. v. Ulman*, 287 Md. 397, 401, 412 A.2d 1240, 1242 (1980). See also *U.S. Oil & Refining Co. v. State Department of Ecology*, 96 Wash. 2d 85, 633 P.2d 1329, 1333-34 (1981) (discovery rule tolls the statute of limitations against an oil company that polluted intentionally, in violation of their waste disposal permit).

limitations in such cases, other than for infancy, incapacity, or imprisonment.¹⁴⁰ Most courts reason that because an intentional tort victim has an immediate right to nominal damages without proof of harm, the cause of action accrues when the tort occurs.¹⁴¹

In sum, courts developed the discovery rule in order to mitigate the harsh results arising from mechanical application of statutes of limitation. The rule tolls the limitations period until the blamelessly ignorant plaintiff knew or reasonably should have known of the harm. Courts generally apply the discovery rule to negligence actions and are reluctant to extend the discovery rule to intentional torts. Because the plaintiff can maintain a legal action at the time the offensive contact occurs regardless of actual injury, courts are unwilling to read such exceptions into statutes of limitation and leave the potential defendant forever at risk.

III. CIVIL INCEST SUITS AND STATUTES OF LIMITATION

A. *Judicial Application of Statutes of Limitation to Civil Incest Suits*

Despite the growing public awareness of the child sexual assault problem,¹⁴² few courts have considered whether the discovery rule applies in the context of sexual abuse claims.¹⁴³ Courts generally apply the discovery rule to negligence claims where the plaintiff was blamelessly ignorant of the injury.¹⁴⁴ Because incestuous abuse is an intentional tort, courts generally have found that the victim's cause of action accrues at the time sexual contact occurs.¹⁴⁵ Recently, however, one court applied the discovery rule to the intentional tort of childhood sexual assault.¹⁴⁶

In September 1987, the California Court of Appeals upheld the discovery rule's application to a sexual assault case in which the child-victim did not inform his parents of the assault until the statute of limitations expired.¹⁴⁷ In *John R. v. Oakland Unified School District*, a school teacher sexually assaulted a minor child during a tutoring session at the teacher's home.¹⁴⁸ Although the child clearly knew the contact had occurred, he

¹⁴⁰ See, e.g., CAL. CIV. PROC. CODE § 352 (West Supp. 1988); MASS. GEN. L. ch. 260 § 7 (Supp. 1987); N.Y. CIV. PRAC. L. & R. § 208 (McKinney Supp. 1988). Some states do not toll the statute of limitations for imprisonment. See e.g., N.J. REV. STAT. § 2A:14-21 (1987).

¹⁴¹ See, e.g., *Albertson*, 749 F.2d at 228; *Deary v. Three Un-Named Police Officers*, 746 F.2d 185, 197 n.16 (3d Cir. 1984); *Menton v. Gessell*, 714 F.2d 87, 89 (9th Cir. 1983).

¹⁴² See *supra* notes 43-45 and accompanying text for a discussion of the increasing public awareness of the incest problem.

¹⁴³ In *Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986), the court applied the discovery rule to a sexual assault case. The *Simmons* court tolled the statute of limitations until the plaintiff discovered that her psychotherapist's conduct caused her post-traumatic stress disorder, where the psychotherapist wrongfully engaged her in a sexual relationship. *Id.* at 1367. *Simmons* did not sue the psychotherapist for his intentional assault, however, but brought suit against the government for negligent supervision under the Federal Torts Claim Act. *Id.* at 1363.

¹⁴⁴ See *supra* notes 96-97 and accompanying text for a discussion of tolling the statute of limitations in negligent tort actions.

¹⁴⁵ See, e.g., *Tyson v. Tyson*, 107 Wash. 2d 72, 727 P.2d 226 (1986).

¹⁴⁶ See *John R. v. Oakland Unified School Dist.*, 194 Cal. App. 3d 1454, 240 Cal. Rptr. 319 (1987).

¹⁴⁷ *Id.* at 1466, 240 Cal. Rptr. at 326. The *John R.* court stated that "[t]he interests of justice require that a cause of action based on the sexual assault of a minor by his or her teacher is deemed to accrue at the time the parent discovers, or should have discovered, the assault." *Id.*

¹⁴⁸ *Id.* at 1469, 240 Cal. Rptr. at 328.

did not tell his parents of the incident until almost one year later. By that time, the statute of limitations barred the parents' claim even though they acted diligently and filed a claim within eight months.¹⁴⁹ Reasoning that the rationale for delayed discovery applied to child sexual abuse claims, the court held that where the blameless child understands the injury but delays disclosure to a responsible adult because of threats arising from the sexual assault itself, rather than his own dilatory conduct, the child's knowledge should not bar suit.¹⁵⁰ Thus, the *John R.* court found that although the discovery rule's application to an intentional tort broke new legal ground, it was appropriate where the tort's effects are latent.¹⁵¹

Similarly, in 1986 the Washington Supreme Court, in *Tyson v. Tyson*, considered the discovery rule's application to a father-daughter incestuous abuse claim, and held, in a five-to-four decision, that it did not.¹⁵² In *Tyson*, the plaintiff, twenty-six year old Tyson, filed a claim against her father alleging a pattern of sexual assault that occurred when she was between three and eleven years of age.¹⁵³ Tyson stated that she had suppressed the memory of the incest until she entered psychotherapy when she was twenty-five years old. The defendant claimed that the three year statute of limitations barred the action.¹⁵⁴ In response, Tyson argued that a parent owes the highest possible fiduciary duty to his child and that parental authority causes the victim to believe she must tolerate the incest.¹⁵⁵ Because most incest victims accept the blame for the sexual abuse, Tyson also asserted it is reasonable for a survivor to be unable to make the causal connection between childhood incest and adult psychological problems.¹⁵⁶ Thus, the plaintiff claimed that she filed her claim as soon as she reasonably could, and her cause of action was timely.¹⁵⁷

¹⁴⁹ *Id.* at 1458, 240 Cal. Rptr. at 320.

¹⁵⁰ *Id.* at 1466, 240 Cal. Rptr. at 326. Other courts have considered the degree of the abuser's authority over the child and the severity of the threat in order to decide whether to apply the discovery rule. The courts review whether the victim failed to discover the injury because of the underlying tort's continuing effects. *See, e.g., State v. Bentley*, 239 Kan. 334, 335, 338, 721 P.2d 227, 228, 230 (1986) (uncle's threat to his niece not to reveal the assault or he would "try to do it again" held not sufficient to toll the statute of limitations); *State v. Danielski*, 348 N.W.2d 352, 356 (Minn. App. 1984) (statute of limitations in criminal incest case tolled until the child no longer was subject to the parental authority that prevented her from reporting the sexual abuse at the time it occurred); *State v. French*, 392 N.W.2d 596, 598-600 (Minn. App. 1986) (applying the *Danielski* test, the court held that the uncle's authority over his niece was not sufficient to toll the statute of limitations when the victim had limited contact with the defendant following the abusive acts).

¹⁵¹ 194 Cal. App. 3d at 1463, 240 Cal. Rptr. at 324. The court stressed the narrowness of its holding, stating that "we do not believe the rationale for the [discovery] rule can survive an unconditional incursion into this area [of intentional torts], it may be appropriate where the effects of the tort itself are latent or otherwise suppressed." *Id.*

¹⁵² 107 Wash.2d 72, 79-80, 727 P.2d 226, 230 (1986). *See generally* Note, *Balancing the Statute of Limitations and the Discovery Rule: Some Victims of Incestuous Abuse are Denied Access to Washington Courts* — *Tyson v. Tyson*, 10 U. PUGET SOUND L. REV. 721 (1987).

¹⁵³ *Tyson*, 107 Wash. 2d at 74, 727 P.2d at 227.

¹⁵⁴ *Id.*

¹⁵⁵ *Tyson*, Brief for Plaintiff, *supra* note 88, at 16-17, B-5 (affidavit of Nelson, Ph.D.).

¹⁵⁶ *See* Brief of Amicus Curiae, Northwest Women's Law Center, at 21, *Tyson v. Tyson*, 107 Wash. 2d 72, 727 P.2d 226 (1986) (No. 51908-1). The four dissenting judges agreed that if the discovery rule applies to the breach of an adult's trust by a professional — trusted doctor, attorney or employee — then certainly the "breach of a child's trust by a father or other authority figure who exploits the child for sexual gratification" presents an even stronger case for tolling the statute. *Tyson* at 91-92, 727 P.2d at 236 (Pearson, J., dissenting).

¹⁵⁷ *Tyson*, 107 Wash. 2d at 75, 727 P.2d at 227.

A four judge plurality granted summary judgment for the defendant on the ground that the three year statute of limitations barred the action.¹⁵⁸ The plurality reasoned that with stale claims, reliable evidence is often lacking. Absent objective, verifiable evidence of the alleged wrongful act and the resultant injury, the court determined that their fact-finding abilities would be impaired.¹⁵⁹ Thus, applying the discovery rule to claims of emotional damages remembered only years after the limitations period expired would put the defendant at an unacceptable risk, undermining the statute's purpose.¹⁶⁰

The plurality also rejected Tyson's contention that even absent objective, verifiable facts proving the incest, such as witnesses, police reports, or medical records, psychological testimony would produce the evidence to support her claim.¹⁶¹ The court stated that unlike the biological sciences, psychological investigation is not based on concrete, physical observations. Reasoning that recollection of long-past events through psychotherapy does not prove their occurrence, the plurality rejected the assumption that psychotherapists have any special truth-determining abilities.¹⁶²

Four judges dissented, arguing that the discovery rule should toll the limitations period for Tyson's claim.¹⁶³ Stating that the purpose of the discovery rule is to prevent the injustice that results from the mechanical application of statutes of limitation, the dissent asserted that the majority relied on an inaccurate understanding of the discovery rule's purpose and application.¹⁶⁴ The dissent reasoned that the existence of "objective, verifiable evidence" of the alleged wrong is simply one factor to be weighed in balancing the plaintiff's right to sue against the defendant's risk of defending a stale claim. According to the dissent, because fundamental fairness, not objective proof, is the crux of the discovery rule, the majority erred in barring plaintiff's claim as a matter of law.¹⁶⁵ The dissent argued that summary judgment for the defendant should be denied because the plaintiff must be afforded the opportunity to convince the fact-finder that she discovered or should have discovered her cause of action only after the statute of limitations expired.¹⁶⁶ To decide otherwise, the dissent asserted, denies adult incest survivors a legal remedy.¹⁶⁷

The dissent further noted that the majority discredited the value of mental health professionals as expert witnesses.¹⁶⁸ Contending that the majority premised its assumption that psychological testimony is inherently unreliable on a single law review article, the dissent argued that such testimony is merely an aid to the fact-finder, for it to accept or reject.¹⁶⁹ Maintaining that the legal system relies on psychological expertise in a variety of situations, the dissent declared the majority's rejection of this evidence as an attempt to "disinvent the wheel."¹⁷⁰

¹⁵⁸ *Id.* at 79-80, 727 P.2d at 230. Justice Goodloe also concurred in the majority opinion.

¹⁵⁹ *Id.* at 75-76, 727 P.2d at 228.

¹⁶⁰ *Id.* at 76, 727 P.2d at 228.

¹⁶¹ *Tyson*, 107 Wash. 2d at 78-79, 727 P.2d at 229.

¹⁶² *Id.* at 78, 727 P.2d at 229.

¹⁶³ *Id.* at 80, 727 P.2d at 230 (Pearson, J., dissenting).

¹⁶⁴ *Id.* at 80-82, 727 P.2d at 230-01 (Pearson, J., dissenting).

¹⁶⁵ *Tyson*, 107 Wash. 2d at 82, 727 P.2d at 231 (Pearson, J., dissenting).

¹⁶⁶ *Id.* at 82-84, 727 P.2d at 231-32 (Pearson, J., dissenting).

¹⁶⁷ *Id.* at 89, 727 P.2d at 235 (Pearson, J., dissenting).

¹⁶⁸ *Id.* at 85-87, 727 P.2d at 232-33 (Pearson, J., dissenting).

¹⁶⁹ *Tyson*, 107 Wash. 2d at 86, 727 P.2d at 233 (Pearson, J., dissenting) (citing Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331 (1985)).

¹⁷⁰ *Id.* at 87, 727 P.2d at 233 (Pearson, J., dissenting) (citing *Barefoot v. Estelle*, 463 U.S. 880, 896).

The dissent also asserted that the majority's decision ignored the severity of the child sexual abuse problem.¹⁷¹ Because of the nature of father-daughter incest, including the father's demand for secrecy and the delayed emergence of incest-related injuries, the dissent argued that the survivor's need for maturity before she can confront her childhood assault often makes it impossible to file suit within the limitations period.¹⁷² The dissent asserted, therefore, that imposing a literal application of the statute of limitations to childhood sexual abuse actions effectively denies incest-survivors a remedy.¹⁷³ The dissent concluded that fundamental fairness required applying the discovery rule to civil incest actions.¹⁷⁴

A concurring opinion accepted the plurality's decision, yet acknowledged the dissent's compelling arguments.¹⁷⁵ The concurring judge asserted that judicial application of the discovery rule was inappropriate in the face of legislative inaction, and that to adopt the dissent's position would result in improper judicial policy-making. The concurring judge was unwilling to invade what he considered the legislature's exclusive province, and thus, for this reason only, joined in the court's decision.¹⁷⁶

Similarly, courts have held that the discovery rule barred incestuous abuse claims where the plaintiff knew of the sexual abuse and was aware of some degree of emotional distress, however slight, when the injury occurred.¹⁷⁷ These courts found that the cause of action accrued at the time of the incestuous incident.¹⁷⁸ No court since *Tyson*, however, has applied the discovery rule to childhood sexual abuse claims where the plaintiff alleges that she was totally unaware of both the existence of the tort and any injury until after the statute of limitations expired. It is clear, however, that where the plaintiff

¹⁷¹ *Id.* at 87, 727 P.2d at 233-34 (Pearson, J., dissenting).

¹⁷² *Id.* at 88-89, 727 P.2d at 234-35 (Pearson, J., dissenting).

¹⁷³ *Tyson*, 107 Wash. 2d at 89, 727 P.2d at 235 (Pearson, J., dissenting).

¹⁷⁴ *Id.* at 90, 727 P.2d at 235 (Pearson, J., dissenting).

¹⁷⁵ *Id.* at 80, 727 P.2d at 230 (Goodloe, J., concurring).

¹⁷⁶ *Id.* (Goodloe, J., concurring).

¹⁷⁷ See, e.g., *Raymond v. Ingram*, 47 Wash. App. 781, 737 P.2d 314 (1987); *Smith v. Smith*, No. CIV-85-285E (W.D.N.Y. Nov. 10, 1986) (WESTLAW, Allfeds database).

¹⁷⁸ In May 1987, the Washington Court of Appeals followed the *Tyson* ruling in *Raymond v. Ingram*, holding the plaintiff's claim time-barred. 47 Wash. App. 781, 737 P.2d 314 (1987). Unlike *Tyson*, the plaintiff in *Raymond* did not claim that she was unaware of the assault until after the statutory period had expired. Instead, *Raymond* admitted that she remembered both the assault and the associated mental distress before she entered therapy. *Id.* at 787, 737 P.2d at 317. Her claim was that she did not know that her current problems were connected with the childhood abuse until she entered therapy. *Id.* at 783, 737 P.2d at 315. The court of appeals affirmed the trial court's holding that, because *Raymond* was aware of the abuse and experienced some degree of emotional distress during the statutory period, her cause of action for sexual assault accrued when she reached the age of majority and was thus time-barred. *Id.* at 787, 737 P.2d at 317.

Similarly, in November 1986, the United States District Court for the Western District of New York decided the case of *Smith v. Smith*, holding that the discovery rule barred the plaintiff's childhood incest claim. No. CIV-85-285E (W.D.N.Y. Nov. 10, 1986) (WESTLAW, Allfeds database). The *Smith* plaintiff alleged that her father sexually abused her from the ages of one to twelve years. *Id.* at 1. Although the plaintiff, *Smith*, claimed that she had suppressed the worst and most traumatic acts of abuse until she entered therapy, she admitted that she knew before the statutory period had expired that her father had sexually assaulted her. *Id.* at 2, 4. Consequently, the *Smith* court, in granting summary judgment for the defendant, held that her cause of action accrued upon majority and was time-barred when she filed suit. *Id.* at 5. *Accord DeRose v. Carswell*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (1987).

concedes that she knew the abuse caused her injury during the statutory period, the action accrues at the date sexual contact occurred.¹⁷⁹

B. *The Legislative Response*

Presently, California is the only state that has enacted legislation specifically extending the statute of limitations in civil actions for incestuous abuse.¹⁸⁰ The California statute extends the statute of limitations from one to three years in any civil action for injury related to sexual contact with a child under the age of fourteen and a member of the child's household.¹⁸¹ Under the statute, the definition of incest-related injury expressly includes psychological injury or illness, whether or not accompanied by physical symptoms.¹⁸² The California legislature explicitly declined to preclude judicial application of the discovery rule, intending this statute to require at the minimum a limited tolling of the statutory period.¹⁸³

Similar legislation filed during the 1987 Massachusetts legislative session, proposed extending the statute of limitations for civil claims arising out of childhood sexual abuse.¹⁸⁴ A fact sheet issued by co-sponsor State Senator Carol Amick described the victim's tendency to blame herself, the exploitation of familial trust and the assailant's demand for secrecy, and concluded that these factors often prevent the victim from exercising her legal rights within the existing statutory period.¹⁸⁵ The Massachusetts House version of the bill extends the limitations period from three to twenty years and applies to all cases of childhood sexual assault.¹⁸⁶ The Senate version applies only to incestuous abuse and extends the time within which a victim can bring suit for damages to ten years following the plaintiff's eighteenth birthday.¹⁸⁷

In November 1987, the Massachusetts legislature enacted a statute that extended the limitations period for criminal prosecution of sexual crimes against children.¹⁸⁸ The

¹⁷⁹ See *supra* note 178 for a discussion of two cases involving plaintiffs that knew within the statutory period that childhood abuse had occurred.

¹⁸⁰ CAL. CIV. PROC. CODE § 340.1 (West Supp. 1988).

¹⁸¹ *Id.* § 340.1(a). The statute provides that:

(a) In any civil action for injury or illness based upon lewd or lascivious acts with a child under the age of 14 years . . . in which this conduct is alleged to have occurred between a household or family member and a child where the act upon which the action is based occurred before the plaintiff attained the age of 18 years, the time for commencement of the action shall be three years.

Id.

¹⁸² *Id.* § 340.1(b) ("Injury or illness . . . includes psychological injury or illness, whether or not accompanied by physical injury or illness.").

¹⁸³ *Id.* Section 340.1(d) provides that "[n]othing in this bill is intended to preclude the courts from applying delayed discovery exceptions to the accrual of a cause of action for sexual molestation of a minor." *Id.*

¹⁸⁴ S. 722, 175 Leg., 1st Sess., 1987 Mass.; H.R. 5745, 175 Leg., 1st Sess., 1987 Mass.

¹⁸⁵ S. 722 Fact Sheet, 175 Leg., 1st Sess. Mass. 1987 (Sen. Carol Amick).

¹⁸⁶ H.R. 5745, 175 Leg., 1st Sess., 1987 Mass.

¹⁸⁷ S. 722, 175 Leg., 1st Sess., 1987 Mass. Both Massachusetts bills recognize the need to extend the time in which a victim can bring suit in order to give her a reasonable opportunity to seek redress as an adult.

¹⁸⁸ Mass. Gen. L. ch. 277, § 63 (amended Nov. 10, 1987). Under this new statute, the limitations period does not begin to run until the violation is reported or the victim reaches the age of sixteen. This extension applies to crimes of indecent assault and battery on a child under the age of fourteen, rape, and other sex offenses. *Id.*

legislature lengthened the statute of limitations from six to ten years, beginning when the child reaches the age of sixteen or reports the assault to legal authorities, whichever occurs first. The amended statute of limitations applies to sexual assault victims under age sixteen.¹⁸⁹

In sum, because incest is an intentional tort, courts hesitate to apply the discovery rule to delay the cause of action's accrual. As a result, most courts deny relief to adult incest survivors. In light of the seriousness of the incest problem and the unique circumstances which surround its occurrence, the law should become more responsive to incest claims. It is the obligation of the state legislatures to act, by adopting legislation to preserve the rights of adult incest survivors.

IV. APPLYING THE DISCOVERY RULE TO CIVIL INCEST

Incest clearly is traumatic for the child or adolescent who must endure either the sexual abuse or the consequences of disclosure.¹⁹⁰ It is the adult survivor of childhood incest, however, whose suffering is the hardest to diagnose, treat, and redress.¹⁹¹ Despite the fact that all states outlaw sexual contact with children, child sexual abuse cases rarely are prosecuted and it is even more rare that an offender is punished.¹⁹²

Although every state has enacted a statute that prohibits intrafamilial sexual relations with children,¹⁹³ the threat of criminal sanctions does little to protect the incest victim. Although the penalties for sexual relations with a child appear to be harsh, in practice abusers are rarely discovered or prosecuted.¹⁹⁴ To begin with, victims are often afraid to complain. Most incestuous fathers are acutely aware of the penalties for sexual crimes against children, and often silence their daughters by portraying horrifying results if the incest is revealed.¹⁹⁵ Because most children do not want to punish their fathers no matter how terrible the abuse, the severe penalties for sexual crimes may do more to reinforce the secrecy of the relationship than to deter the parent's abusive conduct.¹⁹⁶

Civil remedies must be available to survivors to supplement criminal sanctions. Not only may the victim need pecuniary compensation for her injuries, but the award of damages acts as an emotional catharsis, relieving her from blame for the abusive rela-

¹⁸⁹ *Id.*

¹⁹⁰ See *supra* notes 59-65, 192-96 and accompanying text for a discussion of the problems faced by incest victims and the criminal justice system's response when childhood sexual abuse is disclosed.

¹⁹¹ See generally GELINAS, *supra* note 4. See also *supra* notes 66-88 and accompanying text for a discussion of the difficulties presented by the delayed emergence of symptoms many years after the incestuous abuse ceases.

¹⁹² See *supra* notes 193-96 and accompanying text for a discussion of the criminal justice system's inability to deal with the problem of incest. See generally HERMAN, *supra* note 1, at 162-76.

¹⁹³ See generally Bienan, *The Incest Statutes*, in HERMAN, *supra* note 1, at 221-59.

¹⁹⁴ HERMAN, *supra* note 1, at 163. Even when criminal charges are brought against an incestuous father, it is unlikely that he will be prosecuted, convicted, or jailed. *Id.* at 164. In a study of 250 police reports of sexual assaults on children in New York City, in seventy-five percent of the cases either no arrest was ever made or the accused was arraigned but never tried. *Id.* at 167. Of the number of men brought to trial and convicted, more than half received fines, suspended sentences or probation. *Id.* Only nine percent were sent to prison, with the average sentence consisting of one year or less. *Id.* Clearly the criminal justice system does not adequately respond to the problem of incestuous abuse.

¹⁹⁵ *Id.* at 163.

¹⁹⁶ *Id.*

tionship and proving that society will not condone incest.¹⁹⁷ If the fact-finder awards punitive damages, her father's culpability is underscored.¹⁹⁸ Furthermore, granting monetary damages benefits victims of incest as a class. If the father is subject to civil liability for incest-related injuries, society will recognize the survivor's lack of culpability and will begin to understand the injury to innocent victims.¹⁹⁹ Society then will encourage victims to end the abusive relationship and to seek assistance from appropriate sources. Thus, because the criminal justice system is unable to address effectively the problem of incestuous abuse, meaningful tort remedies must be available to vindicate the incest victim's rights.

A. Judicial Application of the Discovery Rule to Incest is Inappropriate

The discovery rule generally does not apply to intentional torts. Incestuous abuse is an intentional tort.²⁰⁰ Like other assault victims, an abused child knows that contact has occurred. In contrast to other assault victims, however, the incest victim probably does not know that the contact is wrong or that her father may be held liable in a court of law for his actions. Although a victim's ignorance of his or her legal rights does not ordinarily bar a claim's accrual under traditional tort theory, courts do toll statutes of limitation for legally incompetent or blamelessly ignorant plaintiffs.²⁰¹

For example, courts frequently toll limitations periods in situations involving fraud, undue influence or duress, fiduciary relationships, and inherently undiscoverable harm.²⁰² In deciding whether to apply the discovery rule, courts balance the defendant's rights to be free from stale claims against the plaintiff's reasons for failing to bring a timely action.²⁰³ Courts applying the discovery rule reason that the plaintiff's ignorance of harm is inherent in the wrong itself, and the result of the defendant's deliberate actions.²⁰⁴ Thus, courts often delay a cause of action's accrual until the plaintiff knew or should have known of the harm.²⁰⁵

Given the courts' rationale for delaying accrual for fraud and breach of fiduciary duty claims, tolling the limitations period in incestuous abuse complaints until the victim knew or should have known of the injury seems appropriate.²⁰⁶ Indeed, in 1987 the

¹⁹⁷ See HERMAN, *supra* note 1, at 169. Moreover, civil damage assessment underscores the liability of defendants who escape conviction altogether.

¹⁹⁸ Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U.L. REV. 609, 617 (1983).

¹⁹⁹ Note, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 189-90 n.2 (1984).

²⁰⁰ Classification of incest as a negligent tort would remove most procedural obstacles to the discovery rule's application. It would, however, alter the definition of negligence beyond recognition.

²⁰¹ *United States v. Kubrick*, 444 U.S. 111, 122 (1979). See also *supra* notes 98-105 and accompanying text for a discussion of tolling the statute of limitations.

²⁰² See *supra* notes 101-05 and accompanying text for a discussion of these tolling provisions.

²⁰³ See *supra* notes 98-105 and accompanying text for a discussion of the factors weighed by the court to determine discovery rule application.

²⁰⁴ *Developments*, *supra* note 14, at 1217.

²⁰⁵ The distinction between immediate and delayed accrual traditionally rests on the classification of the tort as intentional or negligent. Inasmuch as an intentional tort creates an immediate right to recovery without proof of harm, the statutory period is usually measured from the time of the wrongful act regardless of when injury is sustained. *Developments*, *supra* note 14, at 1200-01. In contrast, since actual injury is a necessary element of an action in negligence, the statute of limitations is often not tolled until the harm actually results. *Id.* at 1201.

²⁰⁶ *Cf. John R. v. Oakland Unified School Dist.*, 194 Cal. App. 3d 1454, 240 Cal. Rptr. 319 (1987). See *supra* notes 147-51 for a discussion of *John R.*

California Court of Appeals, in *John R. v. Oakland Unified School District*, analogized the circumstances surrounding a schoolteacher's sexual assault of a minor to cases of fraud or breach of fiduciary duty.²⁰⁷ The *John R.* court, in a well reasoned opinion, applied the discovery rule, thus tolling the parents' cause of action against the teacher where their son did not tell his parents of the assault until after the statutory period had expired. The court reasoned that the child's injury itself prevented his disclosure. Therefore, the *John R.* court, facing an assault victim's blameless ignorance, applied the discovery rule to an intentional tort.²⁰⁸

Despite the *John R.* decision, most courts do not extend the discovery rule to incestuous abuse claims.²⁰⁹ For example, in 1986 the Washington Supreme Court in *Tyson v. Tyson* refused to apply the discovery rule to a twenty-six year old woman's claim that her father sexually abused her during childhood.²¹⁰ The *Tyson* court found that expert psychological testimony is useless to substantiate the plaintiff's claim, reasoning that when incestuous abuse claims are filed years after the abuse, they lack "objective, verifiable evidence" and present insurmountable problems of proof.²¹¹ The court boldly dismissed all previous judicial reliance on mental health expertise, a step that the United States Supreme Court has explicitly refused to take.²¹² Rather than allowing the plaintiff to attempt to persuade the fact-finder that her inability to discover her injury was reasonable, the court decided that as a matter of law, her claim was forever barred.

The *Tyson* dissent correctly pointed out, however, that the plurality's decision effectively bars any adult's claim that she was sexually abused as a child, because of the symptoms' delayed emergence.²¹³ Incest survivors present a typical symptomatic picture, similar to "post-traumatic stress disorder."²¹⁴ Although it is very difficult to separate the effects of incest from other noxious life events, a psychologist or psychiatrist can make reasonably objective observations of various emotional characteristics and determine whether the plaintiff's symptoms are more likely associated with incest than with some other trauma.²¹⁵ Although the incestuous abuse is not proved by showing this connection, experts agree that it is suggested.²¹⁶ It should be left to the fact-finder to weigh all the evidence and decide whether the sexual abuse did in fact occur, and whether that abuse caused the recently discovered harm. Thus, according to the dissent, although the

²⁰⁷ *Id.* at 1464, 240 Cal. Rptr. at 325.

²⁰⁸ *Id.* at 1469, 240 Cal. Rptr. at 328.

²⁰⁹ See, e.g., *Tyson v. Tyson*, 107 Wash. 2d 72, 727 P.2d 226 (1986).

²¹⁰ *Id.* at 79-80, 727 P.2d at 230.

²¹¹ *Id.* at 77-79, 727 P.2d at 229.

²¹² *Barefoot v. Estelle*, 463 U.S. 880, 896, 899 (1983), cited with approval in *Tyson*, 107 Wash. 2d at 86-87, 727 P.2d at 233 (Pearson, J., dissenting).

The *Tyson* court relied heavily on a single law review article to conclude that the use of psychotherapy to discover wrongful acts does not validate their occurrence. See *Tyson*, 107 Wash. 2d at 85-86, 727 P.2d at 233 (citing Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331 (1985)).

²¹³ *Id.* at 89-90, 727 P.2d at 235 (Pearson, J., dissenting).

²¹⁴ See *supra* notes 67-78 and accompanying text for a description of classic incest survivor symptoms.

²¹⁵ MEISELMAN, *supra* note 2, at 195.

²¹⁶ *Id.* at 196. The author analogizes the "proof" of incest in this situation to the "proof" that cigarette smoking causes cancer. He rightfully asserts that "the high rate of lung cancer in heavy smokers versus the low rate in non-smokers is not absolute proof of a causal relationship, but it certainly suggests one." *Id.*

discovery rule's application would not be automatic, neither would the statute of limitations always bar plaintiff's claim. Although agreeing with the dissent's arguments, the concurring judge argued that reading the discovery rule into the statute of limitations for intentional torts amounts to improper judicial policy-making.²¹⁷ The concurrence accurately states the need for legislative action.

Courts also suspend statutes of limitation where the plaintiffs lack the capacity to sue.²¹⁸ In these cases, the statutory period begins to run when the disability is removed.²¹⁹ If, for example, the victim was a minor or imprisoned at the time of the wrongful act, the disabilities toll the statute of limitations until the victim attains the age of majority.²²⁰ The plaintiff in *John R.* advanced a "localized impairment" theory, arguing that the minor child's inability to reveal the abuse should toll the statutory period until he regained his "competency."²²¹ In *John R.*, the plaintiff argued that a teacher's sexual assault of a fourteen year old student rendered the boy mentally incapacitated to the extent that he could not disclose the incident to his parent.²²² The court rejected the plaintiff's claim, holding that the only type of mental incapacity that tolls the statutory period is one that renders an individual unable to attend diligently to daily activities with the care expected of average persons. Under this standard, the minor in *John R.* was not impaired, although the court delayed accrual of his cause of action on other grounds.²²³

Even if the courts interpreted mental incapacity broadly, the fact-finder would likely find for the defendant on this issue. Although psychological research indicates that a child's psychological development is seriously disrupted by incest, and similar traumatic experiences,²²⁴ it is difficult to declare incompetent the adult woman who apparently functions normally in her everyday life. In addition, requiring the incest survivor to brand herself "incompetent" in order to recover simply adds insult to injury. Thus, an incest victim whose childhood abuse impairs her development is unable to toll the limitations period because of incompetency.

Courts and legislatures apply the discovery rule in many situations where the plaintiff is blamelessly ignorant for the delay in discovering the wrong.²²⁵ Furthermore, public policy considerations justify applying the discovery rule where the defendant's intentional acts cause the plaintiff's delay.²²⁶ Courts are reluctant, however, to apply the discovery rule to torts such as incest, and incest survivors often have no meaningful tort remedies

²¹⁷ *Tyson*, 107 Wash. 2d at 80, 727 P.2d at 230.

²¹⁸ See *supra* notes 98-100 and accompanying text for a discussion of disabilities which toll the statute of limitations.

²¹⁹ See, e.g. CAL. CIV. PROC. CODE § 352 (West Supp. 1988); MASS. GEN. L. ch. 260 § 7 (McKinney Supp. 1987); N.Y. CIV. PRAC. L. & R. 208 (Supp. 1988).

²²⁰ See, e.g. CAL. CIV. PROC. CODE § 352 (West Supp. 1988); MASS. GEN. L. ch. 260 § 7 (McKinney Supp. 1987); N.Y. CIV. PRAC. L. & R. 208 (Supp. 1988).

²²¹ 194 Cal. App. 3d 1454, 1462-63, 240 Cal. Rptr. 319, 323-24 (1987).

²²² See *id.*

²²³ The *John R.* court delayed the cause of action's accrual for a minor's sexual assault until the parent reasonably discovered the injury, because the tort itself caused the child to conceal the assault. *Id.* at 1466, 240 Cal. Rptr. at 326.

²²⁴ SANFORD, *supra* note 60, at 165.

²²⁵ See *supra* notes 114-41 and accompanying text for a discussion of the discovery rule's application.

²²⁶ Brief for Plaintiff, *supra* note 88, at 5.

to vindicate their rights.²²⁷ The law should become more responsive to incest claims. It is the obligation of the state legislatures to act, by enacting laws which apply the discovery rule to certain intentional torts, such as incestuous abuse, where the defendant's own actions prevent a blamelessly ignorant victim from bringing a timely claim.

B. Legislative Recommendations

Strong public policy and fairness considerations disfavor barring an alleged incest survivor's claim against her parent as a matter of law.²²⁸ The incest survivor's injury is often long-lasting yet slow to emerge.²²⁹ Even as an adult, the victim often retains feelings of shame and guilt and may blame herself for the childhood abuse.²³⁰ Moreover, there remain some residual effects of her father's admonitions not to tell, and a strong reluctance to disclose her secret.²³¹ Denying the fact-finder the opportunity to determine whether a survivor's delay in bringing suit was reasonable effectively denies most incest victims any legal remedy for their injuries.

Unrestricted judicial application of the discovery rule, however, is not the answer. Although it may seem more appropriate to apply the discovery rule when the defendant's intentional acts cause the plaintiff's delay than where both parties may be equally blameless,²³² the nature of a civil incest suit must be taken into account. The public views a father charged with sexually molesting his child as a pariah, whether charged criminally or in a civil action.²³³ In the zealotry to combat the problem of childhood sexual abuse, care must be taken not to relax procedural safeguards too far. It will not help incest survivors as a class to ignore entirely statutes of limitation any time a plaintiff claims to be too traumatized to bring suit within the statutory period.²³⁴ If a large number of unsubstantiated and meaningless claims are filed, society's eagerness to disbelieve a problem as abhorrent as incest will make recovery even more difficult for the survivors.²³⁵

The legislature, not the courts, therefore, must extend statutorily the discovery rule's application to incestuous abuse claims. Civil incest laws must recognize the plaintiff's privacy rights and emotional health while maintaining the defendant's legal right to be free from defending stale claims. Current statutory enactments are a step in the right direction, but legislatures must enact more comprehensive laws than those that currently exist.

²²⁷ *Tyson*, 107 Wash. 2d 72, 727 P.2d 226. Cf. *John R.*, No. A032560 at 14 (Cal. Ct. App. Sept. 24, 1987) (LEXIS, Allstates library, Omni file).

²²⁸ See *supra* notes 197-99 and accompanying text for a discussion of the need for civil remedies for incestuous abuse.

²²⁹ See *supra* notes 66-88 and accompanying text for a discussion of incest's negative consequences.

²³⁰ See HERMAN, *supra* note 1, at 97 ("[The incest survivors] felt that they had committed an unpardonable sin which left them permanently stigmatized.").

²³¹ See *supra* notes 59-65 and accompanying text for a discussion of the incest victim's difficulties with disclosure.

²³² Brief for Plaintiff, *supra* note 88, at 5.

²³³ Brief for Defendant at 13, *Tyson v. Tyson*, 107 Wash. 2d 72, 727 P.2d 226 (1986) (No. 51908-1).

²³⁴ Cf. *id.* at 3 (defendant did not relate this conclusion to the plight of incest survivors as a class).

²³⁵ See generally Aesop, *The Shepherd's Boy* in AESOP, AESOP'S FABLES, 102-03 (Schoken ed. 1966) (commonly known as "The Boy Who Cried Wolf").

A civil incest statute must balance the plaintiff's harm in being denied a remedy against the defendant's harm in defending a stale claim. The plaintiff's rights must be protected by tolling the limitations period until she has discovered or reasonably should have discovered the incest-related injury. The defendant's interests must be safeguarded by applying a short statute of limitations once the cause of action accrues. Furthermore, the defendant's protection must be ensured through an explicit definition of psychological injury that is causally connected to childhood incestuous abuse. Before an individual is found liable for incest-related psychological injury, the plaintiff must show that her trauma was directly caused by the incest. This showing must be made through expert psychological testimony.²³⁶ Finally, such a legislative enactment serves the purpose of extending the statute of limitations for the intentional tort of incest, while preventing the undesirable encroachment of the discovery rule into the realm of intentional torts.²³⁷ Thus, the legislature, not the judiciary, must apply the discovery rule to incest claims, tolling the statute of limitations until a victim can reasonably discover her injury.

At present, California is the only state that has enacted legislation specifically extending the statute of limitations in civil actions for incestuous abuse.²³⁸ Although the California law recognizes that the unique circumstances of incest require a unique response, it is neither precise enough nor sufficient. Although the law includes psychological illness within its definition of injury, it fails to define psychological injury and does not require expert psychological testimony.²³⁹ In addition, the California statute does not preclude courts from applying a common law discovery rule to incestuous abuse claims.²⁴⁰ To its credit, however, the California enactment precisely defines incestuous abuse.²⁴¹ The law also understands that incest is relationally-based sexual abuse, and includes close relatives and household members within its offender class.²⁴²

In 1987, the Massachusetts legislature took steps to aid victims of sexual abuse by proposing to extend the statute of limitations in both criminal and civil actions for childhood sexual abuse.²⁴³ Because the Massachusetts legislature was willing to extend the statutory period for criminal cases, thereby subjecting the defendant to an increased risk of severe punishment, the legislature probably will approve the proposal to extend the statute for civil suits.²⁴⁴ The Massachusetts House version of the bill extends the statutory period to twenty years in all cases of childhood sexual abuse, not just incestuous

²³⁶ Expert psychological testimony necessarily plays a significant role in connecting the symptoms to the alleged abuse. Most mental health professionals are aware that distortions and fantasy are possible. Moreover, if the therapist sees the survivor regularly, the therapist may judge the veracity of the plaintiff's reports based on observations over a period of time. See generally MEISELMAN, *supra* note 2, at 196. In questionable cases of incest, brought many years after the abusive relationship terminates, this type of clinical judgment is often the best available. See *id.* at 41.

²³⁷ See *supra* notes 106-36 and accompanying text for a discussion of the discovery rule.

²³⁸ See CAL. CIV. PROC. CODE § 340.1 (West Supp. 1988). See *supra* notes 180-83 and accompanying text for a discussion of the California legislation.

²³⁹ *Id.* § 340.1(b).

²⁴⁰ *Id.* § 340.1(d).

²⁴¹ *Id.* § 340.1(a).

²⁴² *Id.* § 340.1(c).

²⁴³ S. 722, 175 Leg., 1st Sess., 1987 Mass.; H.R. 5745, 175 Leg., 1st Sess., 1987 Mass.

²⁴⁴ The 1987 legislative session ended without either bill being signed into law. See *supra* notes 188-89 and *infra* notes 247-48 and accompanying text for a discussion of the Massachusetts criminal statute.

abuse cases.²⁴⁵ The legislature should reject the House bill in favor of the Senate version, which extends the statutory period to within ten years of the victim's eighteenth birthday for incest claims only, and not for all childhood sexual abuse claims, because the rationale behind a discovery rule for incest does not apply to all sexual assault cases.²⁴⁶ The child sexually injured by a stranger may feel guilt and shame, but not the betrayal of trust and overwhelming fear of disclosure that the child who is subjected to an ongoing relationship with her assailant must endure. Furthermore, a twenty-year limitation period subjects the defendant to an excessive risk of stale claims, and does not encourage the plaintiff to pursue her claim diligently. Thus, the Massachusetts legislature should adopt the Senate's proposed ten-year statute of limitations period.

The Massachusetts legislature enacted a law in November 1987 that, although not incest specific, extends the statute of limitations for prosecution of sexual crimes against children from six to ten years.²⁴⁷ The limitations period does not begin to run until the child reaches the age of sixteen or reports the assault to a law enforcement agency, whichever occurs first.²⁴⁸ The Massachusetts criminal law strikes the appropriate balance between the defendant's interests in repose and freedom from defending stale claims against the victim's rights to redress and compensation for her injuries. Although some valid actions probably will be barred for falling outside the ten-year period, this result is justified because extending the statute of limitations beyond ten years tips the balance too far in favor of the rights of the plaintiff, at the expense of the defendant.

Civil incest laws must recognize the incest victims' right to a remedy, while protecting the legal interests of potential defendants. Current legislative enactments are a beginning, but more comprehensive laws must be promulgated. To be effective and complete, a civil incest statute must first define incest.²⁴⁹ The law must then require the plaintiff to connect causally the occurrence of childhood incestuous abuse to the later emergence of her distress.²⁵⁰ To address criticisms regarding the subjective and unprovable nature of psychological injury, the statute should objectify the harm by requiring a mental health professional to diagnose a characteristic pattern of incest-related symptoms.²⁵¹ Finally, accrual of the cause of action must be delayed only until the plaintiff had reasonable time to discover the injury and its relationship to the childhood abuse.²⁵² This note proposes the following Model Statute based on these recommendations.

*A Model Civil Incest Act*²⁵³

Action for injury or illness arising out of incestuous relationship; definitions.

(1) In any civil action for injury or illness based on sexual contact between a child and an adult in a position of parental authority, where the alleged incestuous acts

²⁴⁵ H.R. 5745, 175 Leg., 1st Sess., 1987 Mass.

²⁴⁶ See *supra* notes 106-36 and accompanying text for a discussion of the discovery rule.

²⁴⁷ MASS. GEN. L. ch. 277, § 63 (amended Nov. 10, 1987).

²⁴⁸ *Id.*

²⁴⁹ See *supra* note 38 for a definition of incest.

²⁵⁰ See *supra* notes 79-88, and accompanying text for a discussion of the delayed emergence of incest-related injuries.

²⁵¹ See *supra* notes 66-78 and accompanying text for a discussion of the characteristic pattern of symptoms.

²⁵² See *supra* notes 985-105 and accompanying text for a discussion of a delayed accrual of causes of action.

²⁵³ This proposed Model Civil Incest Act is patterned after California Civil Procedure Code section 340.1 (West Supp. 1988), adopting the best parts of the California statute while remedying its weaknesses.

occurred before the child was 18 years of age, the cause of action will accrue at the time of reasonable discovery of the injury and its causal relationship to the incestuous acts. Any such action shall be brought within one year after reasonable discovery, but no more than ten years after the alleged incestuous acts occurred.

(2) "Incest" as used in this section shall be defined as any activity which sexually stimulates a child or uses a child for the sexual stimulation of others.

(3) "Injury or illness" as used in this section includes psychological and/or physical injury.

(a) For the purposes of application of this section, the allegation of psychological illness or injury requires a diagnosis of a characteristic pattern of incest-related trauma, for example post-traumatic stress syndrome, based on the criteria set forth in the most current edition of the Diagnostic and Statistical Manual of Mental Disorders (at present, volume III), as it may relate to sexual abuse or trauma.

(b) Psychological diagnosis shall be made by any qualified licensed psychiatrist or psychologist.

(4) The question of whether the alleged incest survivor reasonably should have discovered her/his injury and its causal relationship to the alleged incestuous abuse is a matter of fact. The availability of mental health services in the survivor's locality and the expense of such services are factors to be considered when assessing this reasonableness.

This proposed statute balances the competing interests of both the plaintiff and the defendant in a civil action. It includes a simple, yet precise definition of incest. It requires a causal connection to be drawn by a qualified mental health expert between the injury and the emergence of specific, incest-related symptoms. Finally, the plaintiff must show diligent pursuit of his or her claim, by filing the civil action within one year after discovery of the harm. This statute considers the unique circumstances surrounding incestuous abuse and applies an appropriate statute of limitations to ensure that the incest-survivor has an effective civil remedy. Moreover, the statute meets the needs of incest victims, while limiting the discovery rule's expansion.

CONCLUSION

Incest is a major problem in our society. Because criminal statutes proscribing incest are not enforced adequately, penal sanctions are insufficient to protect fully the victim's rights. Civil remedies are therefore necessary adjuncts to criminal laws to compensate the victim for her injury. Unfortunately, procedural and substantive obstacles preclude civil incest claims. Incestuous abuse often causes long-term emotional injury to the survivor, with symptoms frequently not emerging until years after the sexual contact terminates. Many blamelessly ignorant survivors, therefore, can not pursue civil claims until the limitations period has expired.

Statutes of limitation constitute valuable procedural safeguards for defendants because they prevent plaintiffs from bringing civil actions many years after the event, when memories have faded and claims are stale. Courts have created exceptions to the statutory period, however, where equity demands it. Thus, in negligence actions, courts toll the statute of limitations where the blamelessly ignorant plaintiff could not reasonably have been aware of the injury. The "discovery rule" tolls the limitations period until the plaintiff discovered or reasonably should have discovered the harm.

In intentional tort actions, in contrast, most courts refuse to toll the statute of limitations. Courts reason that an intentional tort creates an immediate legal right to

nominal damages without proof of harm, and thus the statutory period begins to run from the date of the wrongful act, no matter when injury occurs. Because incest is an intentional tort, most courts bar incest claims brought by adult survivors beyond the statutory period. Some courts recognize, however, the unique circumstances surrounding incestuous abuse. An abused child is under extreme familial and social pressure to remain silent. Furthermore, the abused child frequently is blamelessly ignorant of the harm until many years after the abuse ceases. Thus, the statute of limitations for incestuous abuse must be extended.

The legislature, rather than the judiciary, must extend the discovery rule to incestuous abuse claims because the discovery rule's expansion must not go unchecked. If the judiciary were to apply the discovery rule to all intentional torts, the exceptions would swallow the rule and statutes of limitation would become obsolete. Given the balance between the strong public policy underlying limitations periods and an incest survivor's unique situation, however, legislatures must act now to preserve and enhance both the victim's rights and advance statutes of limitations underlying purpose. A statute which limits the discovery rule's application to intentional torts to incest claims will serve this purpose.

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