Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule

Jocelyn B. Lamm†

As victims of actions that are almost universally condemned, victims of childhood incestuous abuse¹ are a group uniquely deserving of legal protection and remedies. Yet until recently, the law has failed to provide them with any such meaningful relief.² While the existence of criminal sanctions may provide some deterrent effect,³ criminal proceedings are rarely initiated against abusers; when they are, defendants are rarely successfully prosecuted.⁴ Even if criminal proceedings are successful, however, they do not adequately compensate the victims for the tremendous psychological injuries they suffer.⁵ As a result, incest victims have recently begun pursuing civil tort actions against their abusers, seeking compensatory damages for their emotional and physical injuries, costly psychological treatment, and lost wages resulting from the debilitating impact of the incest on their lives.⁶

† This Note originated as research in connection with the Brief of Amici Curiae to the Supreme Court of Rhode Island, *Doe v. LaBrosse*, M.P. No. 90-97 (filed Dec. 18, 1990) under the supervision of attorneys Melissa G. Salten and Eliot T. Kieval of Debevoise & Plimpton in New York City.

1. This Note defines incestuous abuse as any unwanted sexual contact between family members. See D. RUSSELL, *THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN* 59 (1986) (definition of incest not limited to intercourse). Because studies show that the overwhelming majority of incest victims are female and that most abusers are male, this Note will refer to victims as "she" and abusers as "he." See J. HERMAN, *FATHER-DAUGHTER INCEST* 18-19 (1981); Gelinas, *The Persisting Negative Effects of Incest*, 46 *PSYCHIATRY* 312, 313 (1983) (80-90% of victims are girls, 97-98% of perpetrators are male). Many incidents of incestuous abuse may not be reported, however, and there may be even more underreporting of cases involving boys. Hence, the best available working estimates of the breakdown of victims by sex do not appear to be completely reliable. See Blume, *The Walking Wounded: Post-Incest Syndrome*, 15 *SIECUS REP.* 5, 5 (1986); Summit, *Beyond Belief: The Reluctant Discovery of Incest*, in *WOMEN'S SEXUAL EXPERIENCE* 127, 128 n.1 (M. Kirkpatrick ed. 1982).

2. Comment, *Tort Remedies for Incestuous Abuse*, 13 *GOLDEN GATE U.L. REV.* 609, 609 (1983); Mithers, *Incest and the Law*, *N.Y. Times*, Oct. 21, 1990, § 6 (Magazine), at 44.

3. Moore, *Civil Remedies for Incest Survivors*, 1986 *RESPONSE TO VICTIMIZATION WOMEN & CHILDREN* 11, 11-12.

4. Comment, *supra* note 2, at 609; see also Mithers, *supra* note 2, at 44 (fact that children rarely criminally report incestuous abuse combined with evidentiary difficulty of child's word holding up against that of adult impedes criminal prosecution of incest abusers).

5. For a discussion of the possible range of psychological damage resulting from incest abuse, see Note, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 *HARV. WOMEN'S L.J.* 189, 199-202 (1984) (authored by Melissa G. Salten). See also *infra* text accompanying notes 31-50.

6. Moore, *supra* note 3, at 12; Comment, *supra* note 2, at 609-10.

In addition to the inherent psychological strain of bringing suit against a close family relative,⁷ however, and the substantive problems of meeting the burden of proof, adult survivors⁸ of childhood incest face a procedural obstacle: the statute of limitations, which restricts the period during which suits may be brought after the date of injury. If a suit is not brought within the statutory period, the cause of action is lost.⁹ Because of a variety of recognized psychological reactions, ranging from avoidance and denial to complete repression of the incestuous events,¹⁰ victims of incestuous abuse are often unable to bring their civil tort cases to court within the time-frame prescribed by the statute of limitations.¹¹ Preclusion of their suits by the statute of limitations effectively denies adult incest plaintiffs the only compensatory remedy available for the injuries they suffer as a result of their childhood victimization.¹²

The harsh results of this practice have recently persuaded a number of jurisdictions to liberalize these procedural constraints by allowing various exceptions to the statutes of limitations.¹³ The most frequently asserted exception is the delayed discovery rule.¹⁴ This rule was originally developed on fairness grounds to permit plaintiffs to sue for latent harm that could not reasonably have been discovered within the normal statute of limitations under a variety of circumstances; classic examples of such latent harm are asbestos damage and certain medical malpractice injuries.¹⁵ To avoid the harsh consequences of commencing the running of the statute of limitations upon the date of injury, judges developed the discovery rule to suspend the operation of the statute of

7. Rosenfeld, *The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy*, 12 HARV. WOMEN'S L.J. 206, 208-10 (1989).

8. The term "survivor" has a different connotation than the word "victim." In this Note, "survivor" is used to emphasize the attempts of women who were incestuously abused as children to end their victimization by seeking legal relief.

9. Note, *supra* note 5, at 190; *see also* United States v. Kubrick, 444 U.S. 111, 117 (1979) (purposes of statutes of limitations include avoiding stale claims where evidence is old or unavailable). Personal injury statutes of limitations range from one to six years in the United States. Comment, *Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation*, 50 OHIO ST. L.J. 753, 765 n.150 (1989). For examples of personal injury statutes of limitations, *see* N.Y. CIV. PRAC. L. & R. 214(5) (McKinney 1978) (three years); R.I. GEN. LAWS § 9-1-14 (1985) (three years).

10. *See* Rosenfeld, *supra* note 7, at 208.

11. Minority tolling statutes delay the running of the statute of limitations until the plaintiff reaches majority. *See, e.g.*, CAL. CIV. PROC. CODE § 352(a) (West 1982); N.Y. CIV. PRAC. L. & R. 208 (Consol. Supp. 1989); R.I. GEN. LAWS § 9-1-19 (1985). Such provisions, however, do not adequately preserve adult incest survivors' access to the courts.

12. *See* Note, *supra* note 5, at 190.

13. *See infra* text accompanying notes 82-100.

14. The delayed discovery rule is also commonly referred to as the discovery rule. *See, e.g.*, Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 115-16 (D.C. Cir. 1982); *Hammer v. Hammer*, 142 Wis. 2d 257, 264, 418 N.W.2d 23, 25-26 (Ct. App. 1987), *review denied*, 144 Wis. 2d 953, 428 N.W.2d 552 (1988). This Note will use both terms interchangeably.

15. *See, e.g.*, *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 464 A.2d 1020 (1983) (discovery rule applied in asbestos damage lawsuit); *Johnson v. St. Patrick's Hospital*, 148 Mont. 125, 417 P.2d 469 (1966), *aff'd on later appeal*, 152 Mont. 300, 448 P.2d 729 (1968) (discovery rule tolled statute of limitations for medical malpractice when doctor left sponge inside plaintiff's body, and injury was not discovered until 10 years later).

limitations until the plaintiff discovers or reasonably could have discovered her cause of action.¹⁶

In the last three years, a number of courts have applied the discovery rule in the context of civil incest claims,¹⁷ although there is a split of authority over exactly how the discovery rule should be applied in these cases. A few courts have allowed application of the discovery rule regardless of whether the plaintiff completely repressed the memory of the abuse. Under this interpretation, the plaintiff need claim only that she did not discover within the statutory period that her current psychological problems were caused by the abuse she suffered as a child.¹⁸ Other courts have taken a more restrictive approach, limiting discovery rule application to those cases in which the plaintiff blocked out all memory of the incestuous experience, recalling it only as an adult.¹⁹ In these jurisdictions, if a plaintiff failed to repress completely the memory of incest she cannot get the benefit of the discovery rule. These courts implicitly find as a matter of law that it is not reasonable for a plaintiff who never forgot that she was abused, or who remembered the abuse before reaching majority, to have waited so long to sue.

This Note argues that the approach of this latter group of courts is flawed because it ignores the special psychological characteristics of an incest victim. Incest victims often suffer from a host of psychological disorders that inhibit them from seeking legal relief for their past traumatic experiences until some event in adulthood, often therapy, triggers fuller recognition of their injuries.²⁰ Even if they had remembered particular incidents of abuse, many years may elapse before these victims realize the damaging effects of what happened to them as children.²¹ No principled reason exists to draw a distinction between plaintiffs who completely repress the memory of incest and those who do not. Restricting the benefit of the discovery rule to the former category unfairly denies the only available civil remedy to a group of deserving plaintiffs. Application of the discovery rule should allow equal access to the courts for both types of plaintiffs: those who repress all memory of incest, and those who remember some or all of the abuse but fail to comprehend for some period of time the causal connection between the incest and their psychological problems as adults.

Part I of this Note draws upon the psychological literature on incest and explores the devastating psychological aftermath of childhood incestuous abuse. Part II focuses on the policy considerations underlying statutes of limitations and the discovery rule and details the split of opinion over the application of

16. See Note, *supra* note 5, at 213; see also *infra* notes 70-71 and accompanying text.

17. See *infra* text accompanying notes 82-100.

18. See *infra* text accompanying notes 84-91.

19. See *infra* text accompanying notes 92-100.

20. See Anderson & Bedor, *Statutes of Limitations in Sexual Abuse Actions*, MINN. TRIAL LAW., Summer 1988, at 9; see also *infra* text accompanying notes 31-50.

21. Anderson & Bedor, *supra* note 20, at 10.

the discovery rule to civil incest suits. In Part III, the rigid interpretation of the reasonableness standard used by the more restrictive courts in applying the discovery rule is contrasted with the broader and more sophisticated standard of reasonableness used by other courts. This latter standard of reasonableness takes into account the range of psychological problems that can delay the incest victim's discovery of her cause of action—a delay that may be an entirely reasonable response, given what is now known about the psychological aftermath of incest. The argument for a more sophisticated reasonableness standard for the civil incest victim will borrow from the discussion of standards of reasonableness in other contexts where law intersects with psychology and where expert testimony is needed to explain why seemingly unreasonable behavior may in fact be reasonable. Finally, the Note concludes that only by taking into consideration the range of psychological effects of incest will justice be served for all incest victims.

I. CHILDHOOD INCESTUOUS ABUSE: THE PATTERN AND RESULTING PSYCHOLOGICAL INJURIES

The statistics on incestuous child abuse are staggering: millions of women in this country have been victimized, and tens of thousands of children are abused each year.²² Yet despite its prevalence, until the late 1970's incest was rarely discussed, and the public was largely ignorant of the extent of the problem.²³

The pattern of child incestuous abuse is strikingly consistent.²⁴ In the typical situation, the incestuous child abuser uses the atmosphere of silence and denial surrounding incest to gain and maintain sexual access to his victim,²⁵ and tells her that the relationship is normal while simultaneously insisting that it must be kept a secret.²⁶ The typical victim, who may be exploited repeatedly from early childhood into adolescence,²⁷ initially submits passively to the assaults; she is completely dominated because of the extreme power imbalance

22. In one study, 16% of the respondents reported that they had been incestuously abused as children. D. RUSSELL, *supra* note 1, at 60. Other researchers have estimated that 12 to 15 million women in this country have been incest victims, half of whom were abused by their fathers or stepfathers. Mithers, *supra* note 2, at 44. Furthermore, incest occurs at every social and economic level. J. CREWDSON, *BY SILENCE BETRAYED* 83 (1988).

23. B. JUSTICE & R. JUSTICE, *THE BROKEN TABOO: SEX IN THE FAMILY* 14-15 (1979); Mithers, *supra* note 2, at 44.

24. See Note, *supra* note 5, at 193-99. The typical pattern of incestuous abuse and the resulting psychological damage experienced by the victim have been extensively chronicled in the psychological literature. For detailed descriptions of the problem, see Blume, *supra* note 1; Gelinas, *supra* note 1; Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 *CHILD ABUSE & NEGLECT* 177 (1983); Brief of Amici Curiae at 10-18, *Doe v. LaBrosse*, M.P. No. 90-97 (R.I. filed Dec. 18, 1990) [hereinafter Brief].

25. Brief, *supra* note 24, at 10-11. Much has been written about the "conspiracy of silence" surrounding incest. See S. BUTLER, *CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST* (1978); M. DE YOUNG, *THE SEXUAL VICTIMIZATION OF CHILDREN* 37 (1982); Note, *supra* note 5, at 196.

26. S. BUTLER, *supra* note 25, at 30-31; Brief, *supra* note 24, at 11.

27. J. HERMAN, *supra* note 1, at 85-86; Comment, *supra* note 2, at 614-16.

inherent in the relationship.²⁸ As she grows older and discovers with tremendous shame that her relationship with the perpetrator is taboo, the incest perpetrator typically threatens her with a chain of evil consequences if she refuses to submit to him or reveals the secret. Such threats include abandoning the family (which is usually dependent upon his income) or inflicting severe bodily harm on the victim or another family member.²⁹ As a result, most children keep the fact that they are being incestuously abused a secret.³⁰

With his persistent threats as to the consequences of disclosure, the incestuous father is able to manipulate his daughter into believing that she is a willing partner.³¹ This illusion of responsibility for the situation—an illusion that the child quickly adopts in order to have a sense of control over her life³²—compounds the psychological damage. Typically, a child who is subjected to incestuous abuse by her father or another close male relative develops a predictable combination of psychological coping mechanisms to withstand the physical and emotional traumas.³³ These coping mechanisms may well be necessary for the child's survival during the period of abuse,³⁴ but cannot prevent the ineluctably devastating effects that occur later on; in fact, the coping mechanisms themselves inevitably cause further debilitation later in life.³⁵ "The same mechanisms which allow psychic survival for the child become handicaps to effective psychological integration as an adult."³⁶

28. See Note, *supra* note 5, at 195-97.

29. S. BUTLER, *supra* note 25, at 32-33; M. DE YOUNG, *supra* note 25, at 38; Brief, *supra* note 24, at 11-12.

30. Donaldson & Gardner, *Diagnosis and Treatment of Traumatic Stress Among Women After Childhood Incest*, in TRAUMA AND ITS WAKE: THE STUDY AND TREATMENT OF POST-TRAUMATIC STRESS DISORDERS 360-61 (C. Figley ed. 1985); Summit, *supra* note 1, at 136.

Unfortunately, the victim's mother frequently fails to be a reliable ally. See J. HERMAN, *supra* note 1, at 77-82; Brief, *supra* note 24, at 12-13 (describing mothers' in incestuous families characteristic powerlessness and economic dependence on their husbands and their unavailability to their children due to extended hospitalization, emotional instability, or other causes). Typically, the incest occurs because the daughter is made to feel that she must step into the mother's role, which means first taking on household responsibilities and then taking on sexual "responsibilities." Note, *supra* note 5, at 194. Some experts believe that in many cases the mother may be aware at some level that the incestuous relationship is going on. J. HERMAN, *supra* note 1, at 88-89. But see Summit, *supra* note 24, at 187 (most mothers are not aware of ongoing abuse). Experts have also noted a generational cycle of abuse: mothers in incestuous families were frequently abused as children, Gelin, *supra* note 1, at 325, and daughters who are abused often go on to be victimized in other abusive relationships later in life, Note, *supra* note 5, at 201. Some victims may themselves become abusive and take out their suppressed rage on their own children. Summit, *supra* note 24, at 185.

31. See M. DE YOUNG, *supra* note 25, at 39-40; Brief, *supra* note 24, at 13-14.

32. See Note, *supra* note 5, at 197; Brief, *supra* note 24, at 14.

33. See Gelin, *supra* note 1, at 322-23; Summit, *supra* note 1, at 133-36; see also Brief, *supra* note 24, at 15.

34. See Summit, *supra* note 1, at 133-36.

35. See M. DE YOUNG, *supra* note 25, at 48 (vast majority of research demonstrates "clear correlation between incest victimization and both short- and long-term behavioral and psychological negative effects"); Gelin, *supra* note 1, at 317 ("any normal developmental occurrence" may precipitate symptoms in "a new area of functioning that apparently has been impaired or disordered because of the incest"); Summit, *supra* note 24, at 184-85 (coping mechanisms impede psychological development); Brief, *supra* note 24, at 14.

36. Summit, *supra* note 24, at 185.

The classic psychological responses to incest trauma are numbing, denial, and amnesia.³⁷ During the assaults the incest victim typically learns to shut off pain by "dissociating," achieving "altered states of consciousness . . . as if looking on from a distance at the child suffering the abuse."³⁸ To the extent that this defense mechanism is insufficient, the victim may partially or fully repress her memory of the assaults and the suffering associated with them: "Many, if not most, survivors of child sexual abuse develop amnesia that is so complete that they simply *do not remember that they were abused at all*; or . . . they minimize or deny the effects of the abuse so completely that they cannot associate it with any later consequences."³⁹ Many victims of incest abuse exhibit signs of Post-Traumatic Stress Disorder ("PTSD"), a condition characterized by avoidance and denial that is associated with survivors of acute traumatic events such as prisoners of war and concentration camp victims.⁴⁰ Like others suffering from PTSD, incest victims frequently experience flashbacks and nightmares well into their adulthood.⁴¹

Experts have also noted a strong correlation between incest and long-term damage: severe anxiety and depression, sexual dysfunction, and multiple personality disorder.⁴² Additionally, the internalization of the anger and anxiety that the incest victim has not been allowed to express frequently results in a profound self-hatred that causes self-destructive behavior later on:⁴³ incestuous childhood victimization commonly leads to other abusive relationships, self-mutilation, prostitution, and drug and alcohol addiction.⁴⁴

Finding that the coexistence of these psychological and emotional disorders is unique to and characteristic of incest victims, experts have joined them under the heading "Post-Incest Syndrome."⁴⁵ Those suffering from this syndrome will "persistently avoid any situation, such as initiating a lawsuit, that is likely to force them to recall and, therefore, to re-experience the traumas."⁴⁶ Although the victim may know that she has psychological problems, the syndrome impedes recognition of the nature and extent of the injuries she has suffered,

37. See Gelinas, *supra* note 1, at 316 (mentioning "massive ideational denial and emotional numbing of the traumatic events"); Rosenfeld, *supra* note 7, at 208; Brief, *supra* note 24, at 15.

38. Summit, *supra* note 24, at 185; see also Anderson & Bedor, *supra* note 20, at 9.

39. Blume, *supra* note 1, at 5; see also Donaldson & Gardner, *supra* note 30, at 370.

40. Rosenfeld, *supra* note 7, at 209.

41. Donaldson & Gardner, *supra* note 30, at 368-69.

42. See *id.* at 361; Gelinas, *supra* note 1, at 317; Note, *Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle*, 15 FORDHAM URB. L.J. 709, 718 (1987); Note, *supra* note 5, at 200.

43. See Note, *supra* note 5, at 198-200.

44. See B. JUSTICE & R. JUSTICE, *supra* note 23, at 187-88; J. RENVOIZE, *INCEST: A FAMILY PATTERN* 160 (1982) (describing one study where more than 44% of female drug users reported that they had been victims of incestuous abuse); Blume, *supra* note 1, at 6; Donaldson & Gardner, *supra* note 30, at 359, 361. High suicide attempt rates have also been noted among incest victims. See J. HERMAN, *supra* note 1, at 99 (in one study, 38% of incest victims had attempted suicide at some point in their lives).

45. See Blume, *supra* note 1, at 5 (advocating distinct diagnostic category); Rosenfeld, *supra* note 7, at 208-09.

46. Rosenfeld, *supra* note 7, at 210.

either because she has completely repressed her memory of the abuse, or because the memories, though not lost, are too painful to confront directly. Thus, until she can realize that her abuser's behavior caused her psychological harm, the syndrome prevents her from bringing suit.⁴⁷ Often it is only through a triggering mechanism, such as psychotherapy, that the victim is able to overcome the psychological blocks and recognize the nexus between her abuser's incestuous conduct and her psychological pain.⁴⁸ Such understanding may develop in stages over a period of time during which the incest victim breaks through the layers of denial and repression in a painful process.⁴⁹ Typically, full recognition that she has been tortiously injured occurs after the victim has reached majority, long after the wrongful acts were committed.⁵⁰

II. THE LEGAL HURDLE

Traditionally, the judicial response to incest has been limited to occasional criminal prosecution.⁵¹ Recently, however, victims have been pursuing civil tort claims for their injuries.⁵² Civil remedies benefit victims of incestuous abuse for several reasons. Access to civil proceedings enables the victim to place the blame for the incest on her abuser publicly,⁵³ thereby exonerating herself in her own view. As a result, the very act of filing suit can be a step in the healing process.⁵⁴ Additionally, a plaintiff's victory may lead to needed

47. *Id.*; see also Note, *supra* note 5, at 202.

48. See Anderson & Bedor, *supra* note 20, at 9; Note, *supra* note 5, at 202; Mithers, *supra* note 2, at 53. Most incest victims originally seek therapy not for the incest itself, but for severe depression. Gelinas, *supra* note 1, at 327.

49. Donaldson & Gardner, *supra* note 30, at 370-71; Brief, *supra* note 24, at 17-18.

50. Note, *supra* note 5, at 202.

51. See Moore, *supra* note 3, at 12. Father-daughter incest is a crime in every state except New Jersey, Wulkan & Bulkley, *Analysis of Incest Statutes*, in CHILD SEXUAL ABUSE AND THE LAW 52, 52 (J. Bulkley ed. 1981), and child sexual abuse is a crime in every state, Kocen & Bulkley, *Analysis of Criminal Child Sex Offense Statutes*, in CHILD SEXUAL ABUSE AND THE LAW, *supra*, at 1, 1.

Victims' compensation funds in a number of states and criminal restitution orders may provide limited financial relief to victims when their abusers are criminally punished, but the amounts involved usually do not adequately cover their actual economic losses. See Note, *Criminal Restitution*, 31 HOW. L.J. 423 (1988); Note, *Developing a Victims' Suit for Injuries Caused by a Compulsorily Released Prisoner*, 17 U. MICH. J.L. REF. 99, 102-03 & n.18 (1983).

52. Note, *supra* note 42, at 709 & n.3. The possible causes of action for incestuous abuse are the traditional torts of assault, battery, intentional infliction of emotional distress, and negligent infliction of emotional distress. See *id.* at 710; Comment, *supra* note 2, at 618-28.

53. Moore, *supra* note 3, at 12.

54. *Id.*; see also Mithers, *supra* note 2, at 58. Civil incest suits may not be the right answer for all victims, however: "This is a very aggressive legal system, and people need to be in a position where they can withstand that." *Id.* at 58 (quoting California therapist Eliana Gil, who works with victims of childhood sexual abuse). Some potential plaintiffs may feel that the strain on themselves and their families would outweigh the benefits from such a lawsuit: "For these women, creative out-of-court settlements may be appropriate." Moore, *supra* note 3, at 13. The specter of large damage awards may also provide incentives to some defendants to settle out of court. *Id.* In some cases, settlements may be as psychologically beneficial to civil incest plaintiffs as in-court victories, and may spare families great emotional strain. *Id.*

compensation for lost wages and the costs of psychological treatment.⁵⁵ Moreover, monetary awards, particularly if they include punitive damages, can punish the incest perpetrator and serve a deterrent function as well.⁵⁶ In fact, society as a whole is served when civil incest suits are brought because they increase public awareness of the problem and break down the secrecy surrounding incest that exacerbates the problem.⁵⁷

Despite the potential benefits of bringing suit, victims of childhood incestuous abuse face a traumatic ordeal if they choose to pursue their tort claims against their abusers. They are forced to relate and thus re-experience the victimization they experienced as children, and to confront the hostile attitudes of the defendant, his attorney, and perhaps even the judge or jury.⁵⁸ Bringing such suits may also put a great strain on other family members.⁵⁹ Moreover, in addition to these psychological obstacles, adult survivors of incest often face a legal obstacle that must be overcome before they get to present their substantive cases in court: as a result of psychological impediments, the victim may not have brought her claim until after the normal statute of limitations for personal injuries has run.⁶⁰

A. *Statutes of Limitations and the Delayed Discovery Rule*

Statutes of limitations require plaintiffs to bring their suits within a specified period of time after the cause of action "accrues." In straightforward personal injury tort cases where harm is immediately recognized that date is usually the date of injury.⁶¹ The Supreme Court in *United States v. Kubrick*⁶² explained the underlying policies behind statutes of limitations:

These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the

55. Moore, *supra* note 3, at 12; see also Hill, *Giving Sexually Abused Children up to 20 Years to File Charges*, Christian Sci. Monitor, July 21, 1988, at 5, col. 1 (citing high costs of psychotherapy and lost earning potential). Although juries may award large damages, see Note, *Use of the Massachusetts Discovery Rule by Adult Survivors of Father-Daughter Incest*, 24 NEW ENG. L. REV. 1243, 1280 n.330 (1990), the availability of an actual recovery will clearly depend on the defendant's financial state, particularly whether he carries homeowner's insurance that covers such losses. There is currently a debate over whether homeowners' policies insure against the tort of incest, which may have both intentional and negligent aspects: insurance may cover only liability for negligent torts. See Comment, *Litigating Incest Torts Under Homeowner's Insurance Policies*, 18 GOLDEN GATE U.L. REV. 539, 545-57 (1988).

56. Moore, *supra* note 3, at 12.

57. See Rosenfeld, *supra* note 7, at 219.

58. *Id.* at 210.

59. Moore, *supra* note 3, at 13.

60. See Note, *supra* note 5, at 202. This time limit generally includes a minority tolling provision that allows the plaintiff's claim to accrue only after she reaches majority. Rosenfeld, *supra* note 7, at 211.

61. Note, *supra* note 5, at 191.

62. 444 U.S. 111 (1979).

loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.⁶³

Other courts have noted that the statutes supply a mechanism to keep plaintiffs from "sleeping on their rights"⁶⁴ and generally promote judicial economy.⁶⁵

Notwithstanding these sound policies, the rule that the statute of limitations period begins to run at the time of injury is not absolute.⁶⁶ One of the most important exceptions is the common law delayed discovery rule. Courts developed the discovery rule in the context of latent harm, such as in cases of certain medical malpractice injuries or damage from long-term exposure to hazardous substances, where the plaintiff could remain blamelessly ignorant of his injury for years.⁶⁷ The discovery rule, based on principles of fundamental fairness,⁶⁸ "was formulated to avoid the harsh results produced by commencing the running of the statute of limitations before a claimant was aware of any basis for an action."⁶⁹ The rule operates to postpone the date of accrual until the plaintiff discovers, or reasonably should have discovered, some critical element of his cause of action.⁷⁰ In applying the discovery rule, courts have variously held that this critical element may be discovery of the wrongful act, the injury, or the causal connection between the two.⁷¹

The "blameless ignorance" rationale for the discovery rule in the context of latent torts applies with equal force in the context of civil incest suits brought by adult survivors. First, many of the injuries from incestuous abuse, especially those disorders that are sexual in nature, do not become manifest until adulthood.⁷² Additionally, incest victims suffering from Post-Incest Syn-

63. *Id.* at 117 (citations omitted).

64. *Romano v. Westinghouse Electric Co.*, 114 R.I. 451, 461, 336 A.2d 555, 560 (1975).

65. *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 665, 464 A.2d 1020, 1026 (1983).

66. *See, e.g., Wilson v. Johns-Manville*, 684 F.2d 111, 120 (D.C. Cir. 1982) ("[P]otential defendant's interest in repose is counterbalanced and outweighed by other factors, including evidentiary considerations, securing fair compensation for serious harm, and deterring uneconomical anticipatory lawsuits."); *Anthony v. Abbott Laboratories*, 490 A.2d 43, 46-47 (R.I. 1985) (weighing policy of avoiding stale claims against fairness to plaintiff).

67. Note, *supra* note 5, at 218.

68. *Hammer v. Hammer*, 142 Wis. 2d 257, 264, 418 N.W.2d 23, 26 (Ct. App. 1987), *review denied*, 144 Wis. 2d 953, 428 N.W.2d 552 (1988).

69. *Id.*

70. Note, *supra* note 5, at 213. The reasonableness component of the discovery rule has serious implications for the civil incest plaintiff. *See infra* text accompanying notes 105-13.

71. Courts, in their discretion, apply the discovery rule by interpreting the word "accrue." "There are at least four points at which a . . . cause of action may accrue: (1) When the defendant breaches his duty; (2) when the plaintiff suffers harm; (3) when the plaintiff becomes aware of his injury; and (4) when the plaintiff discovers the causal relationship between his harm and the defendant's misconduct." *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 168, 371 A.2d 170, 172 (1977); *see also* Comment, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200 (1950).

A number of states have enacted statutory discovery rules. Note, *Toward a Time-of-Discovery Rule for the Statute of Limitations in Latent Injury Cases in New York State*, 13 FORDHAM URB. L.J. 113, 118-20 & nn.41-45 (1985) (listing states with statutory discovery rules and states that have judicially provided for discovery rule).

72. *See* Note, *supra* note 5, at 199-202.

drome have very real psychological disabilities that inhibit them from confronting the damage done to them, as described above.⁷³ Finally, total repression of memories of abuse is common, which obviously prevents any "discovery" at all of a cause of action.⁷⁴

In fact, incest survivors may have even stronger arguments for application of the discovery rule to their cases than do other tort plaintiffs. First, while the pro-defendant policy of repose—providing potential defendants peace of mind—is sound, in general the defendant's interest in repose becomes less compelling the more egregious his alleged conduct. For example, statutes of limitations for serious criminal offenses are longer than those for minor offenses.⁷⁵ A few states do not have statutes of limitations for criminal childhood sexual abuse.⁷⁶ Since the crime of childhood incestuous abuse is predicated on the same shocking facts as the civil incest tort, considerations of justice to the plaintiff should outweigh a defendant's interest in repose in the civil suit.⁷⁷ Additionally, the equitable estoppel argument—"that no man may take advantage of his own wrong"⁷⁸—is particularly persuasive in the context of the incest survivor's attempt to sue her abuser. This principle of equity dictates that statutes of limitations should not bar an action when the very damage a plaintiff wishes to sue for prevents her from knowing she was injured—in other words, where the defendant's conduct is what caused the plaintiff's delay in initiating the lawsuit.⁷⁹ Unlike the classic latent tort situation, in the case of the civil incest plaintiff, the psychological injury complained of is exactly what caused her delay in filing suit.⁸⁰

73. See *supra* text accompanying notes 37-50.

74. See *supra* text accompanying note 39.

75. E.g., CAL. PENAL CODE §§ 799-801 (West 1985) (statutes of limitations for serious felonies longer than those for minor crimes); N.Y. CRIM. PROC. LAW § 30.10 (McKinney 1981) (same).

76. South Carolina and Wyoming have no statutes of limitations for any crimes; Alabama has no limitations period for sexual offenses involving a victim under age 16; Kentucky, Maryland, North Carolina, Virginia, and West Virginia do not impose statutes of limitations for felonies. See ALA. CODE § 15-3-5(a)(4) (Supp. 1990); KY. REV. STAT. ANN. § 500.050(1) (Michie/Bobbs-Merrill 1990); MD. CTS. & JUD. PROC. CODE ANN. § 5-106 (Supp. 1989); N.C. GEN. STAT. § 15-1 (Supp. 1990); VA. CODE ANN. § 19.2-8 (1990); W. VA. CODE § 61-11-9 (1989); see also Note, *Child Sexual Abuse and Criminal Statutes of Limitation: A Model for Reform*, 65 WASH. L. REV. 189, 191 & nn.13-14 (1990). Many other states do impose statutes of limitations for the criminal offense of child sexual abuse, however. *Id.* at 191 & n.12; see also Mithers, *supra* note 2, at 44 (most criminal statutes of limitations for child sexual abuse are five years).

77. Civil and criminal suits predicated on similar facts obviously differ in a number of ways, including the disparate burdens of proof. In a civil suit, the plaintiff must prove her claim by a preponderance of the evidence, whereas in a criminal suit, the prosecution has the burden of proving the defendant's guilt beyond a reasonable doubt. Criminal defendants also have additional constitutional protection. See Lloyd, *The Corroboration of Sexual Victimization of Children*, in CHILD SEXUAL ABUSE AND THE LAW, *supra* note 51, at 103, 105. Thus, it may be more difficult for a prosecutor to convict an incest perpetrator than for a plaintiff to prevail in a civil incest suit.

78. See Rosenfeld, *supra* note 7, at 316-17 (quoting *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232 (1959)).

79. For a more detailed discussion of the equitable estoppel argument and its application to civil incest suits, see *id.* at 216-18.

80. Other factors argue for application of the discovery rule in civil incest suits. The very existence of minority or infancy tolling statutes, which allow plaintiffs to toll the statute of limitations until they reach majority, demonstrates that other policy concerns may outweigh both the policy of avoiding stale claims

B. *The Split of Opinion over the Application of the Discovery Rule to Civil Incest Suits*

Recognizing these arguments, scholars in recent years have unanimously rejected a strict application of statutes of limitations in tort cases brought by survivors of childhood incest.⁸¹ These commentators have described the unique nature of incest, its impact on victims, and the applicability of the discovery rule as developed in other tort contexts. Increasingly aware of widespread sexual victimization of children, and persuaded by the reasoning of these commentators,⁸² a number of courts in the last few years have applied the discovery rule to suits brought by adult incest survivors.⁸³

The courts have not applied the rule uniformly, however, and a split of authority recently has developed over the types of cases where application of the discovery rule is appropriate. A few courts hold that the statute of limita-

and the policy of repose. Giving full force to a minority tolling statute but not applying the discovery rule produces an odd result. For example, assuming the age of majority is 18, if a child is sexually abused from ages 5 to 7 and the statute of limitations is 3 years, she will have until she turns 21 to bring her suit. At this point, the gap between the abusive events and the lawsuit will be 14 years. In such a case, evidence will not be considered overly "stale" so as to bar the suit because of the tolling statute. If she is victimized until age 18, however, the statute will still bar her action at age 21. If she discovers that the incest caused injury and brings her suit at 22, one year after the period of limitations has expired, she will be denied access to the courts on the ground that her claim is "stale" even though the gap now is only 4 years. This argument, which was developed by Eliot T. Kieval in conjunction with the Brief, *supra* note 24, could also be made against strict statutes of limitations in other legal contexts, but it is particularly relevant in the context of torts such as incestuous child abuse that are, by definition, committed against minors.

81. See, e.g., Anderson & Bedor, *supra* note 20; Moore, *supra* note 3; Rosenfeld, *supra* note 7; Note, *supra* note 42; Comment, *supra* note 2; Note, *supra* note 5; Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191 (1985).

82. See, e.g., Johnson v. Johnson, 701 F. Supp. 1363, 1370 (N.D. Ill. 1988) (citing Note, *supra* note 5, and applying discovery rule); Hammer v. Hammer, 142 Wis. 2d 257, 264, 418 N.W.2d 23, 26 (Ct. App. 1987), *review denied*, 144 Wis. 2d 953, 428 N.W.2d 552 (1988) (same).

83. Despite this emerging trend, a few courts recently have refused to apply the discovery rule to any civil incest case. Amongst these, the 1986 Washington Supreme Court case Tyson v. Tyson, 107 Wash. 2d 72, 727 P.2d 226 (1986) is the leading decision flatly holding that the discovery rule does not apply in such a case. The court, in a five-to-four decision, held that although the plaintiff had completely repressed the memory that she had been sexually abused by her father from ages 3 to 11, her action, filed at age 26 at the time she recovered her memory, was time-barred. *Id.* at 79, 727 P.2d at 230. Refusing to adopt the discovery rule in the context of a civil incest case, the court emphasized the policy considerations underlying statutes of limitations: "[S]tale claims present major evidentiary problems which can seriously undermine the courts' ability to determine the facts. . . . The discovery rule should be adopted only when the risk of stale claims is outweighed by the unfairness of precluding justified causes of action." *Id.* at 76, 727 P.2d at 228. The decision rested on concerns over the difficulty of verifying the plaintiff's allegations after so many years had elapsed due to the lack of "empirical, verifiable evidence" in incest suits and the subjectivity and imprecision of psychological evidence in general—problems that set the incest suit apart from the classic latent injury tort cases, where more "objective" evidence is available. *Id.* at 76-78, 727 P.2d at 228-29; *accord* Lindabury v. Lindabury, 552 So. 2d 1117 (Fla. Dist. Ct. App. 1989), *cause dismissed*, 560 So. 2d 233 (Fla. 1990); Whatcott v. Whatcott, 790 P.2d 578 (Utah Ct. App. 1990); St. Michelle v. Robinson, 52 Wash. App. 309, 759 P.2d 467 (1988).

Subsequent legislation enacted in Washington State, providing for application of the discovery rule to civil incest suits, supersedes Tyson. See WASH. REV. CODE ANN. § 4.16.340 (Supp. 1990) (providing that actions for child sexual abuse are to be brought within "three years of the time the victim discovered or reasonably should have discovered" that injury was caused by sexual abuse).

tions runs from the date that the plaintiff discovers the cause of her injuries, regardless of whether she has previously blocked out memory of the abuse. Other courts take an intermediate position, holding that a plaintiff who represses her memory of the abuse may be entitled to the discovery rule, but absent repression the statute of limitations will bar her action.

1. *The Hammer v. Hammer Approach: Application of the Discovery Rule in the Absence of Repression*

A few courts have applied the discovery rule liberally in cases arising from childhood incest abuse by tolling the statute of limitations even when the plaintiff had not completely repressed being abused. The first reported decision of this kind came in the case of *Hammer v. Hammer*.⁸⁴ The plaintiff in *Hammer* had been sexually abused by her father "on an average of three times a week, beginning . . . when she was five years old and ending . . . when she was fifteen. The conduct included, but was not limited to, indecent touching and oral intercourse."⁸⁵ The plaintiff never claimed she had forgotten the ten-year period during which she was molested by her father. Because of the psychological distress caused by the abuse and the mechanisms that she developed in order to cope with that distress, however, she claimed that she had been unable to comprehend the nature of her injuries and their cause until after she entered psychological counseling during adulthood.⁸⁶ The Wisconsin Court of Appeals, recognizing that to apply the statute of limitations strictly would work an "intolerable perversion of justice,"⁸⁷ reversed the trial court's summary judgment ruling that the statute of limitations had elapsed, and held that the discovery rule applied. The court then remanded to the trial court the factual question of when the plaintiff discovered or should have discovered her injuries and their cause.⁸⁸

The Supreme Court of North Dakota reached a similar conclusion two years later in *Osland v. Osland*⁸⁹ when faced with a woman's suit against her father for childhood sexual assault and battery. The court upheld the trial court's determination that the severe emotional trauma experienced by the plaintiff, who had been sexually abused by her father from ages ten to fifteen, prevented her from discovering her cause of action during the applicable statutory limitations period. Thus, the court permitted application of the discovery rule and allowed the action to proceed.⁹⁰

84. 142 Wis. 2d 257, 418 N.W.2d 23 (Ct. App. 1987), *review denied*, 144 Wis. 2d 953, 428 N.W.2d 552 (1988).

85. *Id.* at 261, 418 N.W.2d at 24.

86. *Id.* at 261-63, 418 N.W.2d at 24-25.

87. *Id.* at 267, 418 N.W.2d at 27 (quoting Comment, *supra* note 2, at 631).

88. *Id.* at 268, 418 N.W.2d at 27.

89. 442 N.W.2d 907 (N.D. 1989).

90. *Id.* at 909.

In addition to these appellate opinions, at least three trial courts have applied a similar liberal discovery rule in civil suits alleging childhood sexual abuse.⁹¹ Even considered together, however, the jurisdictions that have done so remain in the minority.

2. *The More Restrictive Approach: The Johnson v. Johnson Emphasis on the Plaintiff's Memory*

Other jurisdictions that have adopted the discovery rule have declined to do so as liberally as the courts described above. Courts in these jurisdictions have tended to distinguish between cases where the plaintiff repressed all memory of the abuse, only to recall it as an adult, and cases where the plaintiff remembered the incest, but was only able to discern in adulthood the causal connection between her injuries and the abuse. These courts have applied the discovery rule only to the former category.

The case of *Johnson v. Johnson*⁹² standardized this distinction—whether the plaintiff lost or retained her memory of the incestuous abuse—as the basis for analysis, which other jurisdictions have since adopted. In *Johnson*, the plaintiff alleged that she had repressed all memories of being sexually abused over a ten-year period by her father.⁹³ Twenty years later, at age thirty-two, she suddenly remembered the incest during psychotherapy, discovered its causal link to her present injuries, and promptly filed suit. The Illinois federal district court, reviewing the limited existing case law on incestuous abuse in other jurisdictions, divided incest cases into two categories. Type 1 situations were those “where the Plaintiff claimed she knew about the sexual assaults at or before majority, but . . . was unaware that other physical and psychological problems were caused by the prior sexual abuse.”⁹⁴ Type 2 were those “where the Plaintiff claims due to the trauma of the experience she had no recollection or knowledge of the sexual abuse until shortly before she filed suit.”⁹⁵

The *Johnson* court noted that only the Wisconsin court in *Hammer v. Hammer* had adopted the discovery rule for a Type 1 case.⁹⁶ Several other courts, meanwhile, had decided not to apply the discovery rule to Type 1 cases, but had expressly reserved judgment on whether they would apply it to a Type

91. See, e.g., *Doe v. St. George's School*, No. 88-0676B (D.R.I. May 30, 1989); *Anonymous v. Anonymous*, (Mass. Super. Ct. June 21, 1988) (Docket No. *confidential*), discussed in *Court Says Woman Can Sue Over Alleged Childhood Incest*, Boston Globe, Aug. 9, 1988, at 17, col. 2; *Doe v. LaBrosse*, No. WM 89-0062 (R.I. Super. Ct. Jan. 9, 1990).

92. 701 F. Supp. 1363 (N.D. Ill. 1988).

93. *Id.* at 1364.

94. *Id.* at 1367.

95. *Id.* at 1368.

96. *Id.* (quoting *Hammer v. Hammer*, 142 Wis. 2d 257, 264, 418 N.W.2d 23, 26 (Ct. App. 1987), review denied, 144 Wis. 2d 953, 428 N.W.2d 552 (1988)).

2 case.⁹⁷ The *Johnson* court identified the case before it as Type 2 and allowed the action to proceed under the discovery rule. Although the court limited its holding to the facts and did not state that the discovery rule would not apply in a Type 1 case, the *Johnson* plaintiff's "blameless ignorance," due to her total memory loss, appears to have been the decisive factor in the holding.⁹⁸

Subsequent cases have cited *Johnson* as persuasive authority for decisions based on the Type 1/Type 2 dichotomy.⁹⁹ In other recent cases, courts, without citing *Johnson* directly, have made this same distinction, highlighting the plaintiff's memory as the dispositive factor.¹⁰⁰ The common conclusion in these cases is that while total repression of memory renders a civil incest plaintiff so "blamelessly ignorant" that it would be unfair to time-bar her suit, it is not similarly "reasonable" for a plaintiff who was aware of the abuse not to have brought her action within the statutory period.

97. One of these was *E.W. v. D.C.H.*, 231 Mont. 481, 754 P.2d 817 (1988), in which the plaintiff alleged that her step-uncle began to molest her sexually at age five. By age nine, she was forced to engage in sexual intercourse with him regularly. *Id.* at 483, 754 P.2d at 818. Because the plaintiff "consistently acknowledged that she 'always knew' she had been molested as a child," even though she was unable to associate her psychological problems with the abuse, the court refused to apply the discovery rule to permit her action to go forward. *Id.* at 486, 754 P.2d at 820. Thus, the deciding factor for the Montana court was the plaintiff's lack of memory suppression. The dissent in *E.W.* argued that a child abuse victim who knows of the abuse and of her emotional problems should nonetheless be able to sue later when she discovers that the problems are "a result of the sexual molestation she suffered as a child." *Id.* at 489-90, 745 P.2d at 822 (Weber, J., dissenting). Subsequent to *E.W.*, the Montana legislature amended the statute of limitations to allow for application of the discovery rule in childhood sexual abuse cases. *See* MONT. CODE ANN. § 27-2-216 (1989). It is unclear, however, whether the Montana courts will apply the rule equally in Type 1 and Type 2 cases, as a Type 1 case has yet to arise under the new law.

Similarly, in *DeRose v. Carswell*, 196 Cal. App. 3d 1011, 1018, 242 Cal. Rptr. 368, 371 (1987), where the plaintiff alleged that she had never forgotten being abused, the court refused to apply the discovery rule but stated that it would have held otherwise had she repressed her memories of the assaults. *But see infra* note 130 and accompanying text (describing legislative change in California).

98. *Johnson*, 701 F. Supp. at 1370.

99. For example, in *Mary D. v. John D.*, which relied heavily on *Johnson*, the court held conclusively that the discovery rule would apply in Type 2 but not in Type 1 cases. 216 Cal. App. 3d 285, 291-92, 264 Cal. Rptr. 633, 636-37 (1989), *review granted*, 268 Cal. Rptr. 283, 788 P.2d 1155, *review dismissed and cause remanded*, 275 Cal. Rptr. 380, 800 P.2d 858 (1990); *accord* *Evans v. Eckelman*, 216 Cal. App. 3d 1609, 265 Cal. Rptr. 605 (1990). *But see infra* note 130 and accompanying text (describing legislative change in California).

100. *See, e.g.,* *Raymond v. Ingram*, 47 Wash. App. 781, 737 P.2d 314 (1987). Several similarly analyzed cases have involved non-incestuous child sexual abuse. *See, e.g.,* *Snyder v. Boy Scouts of America, Inc.*, 205 Cal. App. 3d 1322, 253 Cal. Rptr. 156 (1988); *Meiers-Post v. Schafer*, 170 Mich. App. 174, 427 N.W.2d 606 (1988); *Peters v. Medaglia*, No. 55208, 1989 WL 36709 (Ohio Ct. App.). In one recent civil incest case, *Nicolette v. Carey*, 751 F. Supp. 695 (W.D. Mich. 1990), the federal district court, applying Michigan law, invoked the "repressed memory" requirement, yet refused to grant the defendant's motion for summary judgment, and allowed the action to proceed, finding that the "repressed memory" requirement was satisfied even though the plaintiff had an earlier memory of incestuous abuse. *Id.* at 698-99. The plaintiff presented expert testimony in the form of affidavits that described the psychological effects—depression, dissociation, and repression—of childhood incest abuse. *Id.* She thus persuaded the court that her partially repressed memory entitled her to overcome the statute of limitations: "[E]ven if plaintiff was capable of remembering one incident of abuse more than a year prior to filing suit [the statutory tolling period], the continued repression of further incidents within the tolling period saves her cause of action from lapsing." *Id.* at 699. Thus, even though the court used the Type 1/Type 2 distinction, it was able to reconcile the plaintiff's case with the "repressed memory" requirement by recognizing the complex nature of psychological damage from incest abuse.

III. RECOGNIZING THE UNIQUE PSYCHOLOGICAL CIRCUMSTANCES OF THE CIVIL INCEST PLAINTIFF

Although *Johnson* and its progeny have helped to establish the applicability of the discovery rule to incest suits, these decisions have also severely restricted the availability of the discovery rule to a class of incest survivors without any principled justification. As a consequence of the distinction courts draw between plaintiffs who suppress all memory of incest and those who remember it but are unable to recognize it as the cause of their suffering, these courts summarily deny relief to a group of incest victims without fully considering the psychological effects of incestuous abuse. This raises a critical question: Why do some courts' analyses depend on the plaintiff's memory? Historically, the discovery rule has not compelled line-drawing between those plaintiffs who remember and those who do not; this distinction is a product of more recent judicial interpretation. Furthermore, the disparate outcomes of the Type I incest plaintiffs' cases do not necessarily relate to which formulation of the discovery rule—discovery of the wrongdoing, the injury, or the causal connection between the two¹⁰¹—is used.¹⁰² Although, not surprisingly, the courts that apply the discovery rule to the broadest class of plaintiffs have favored causation-discovery rules,¹⁰³ many of the more restrictive opinions have used causation-discovery rules as well.¹⁰⁴ Therefore, the basis for the split of opinion over the Type I incest plaintiff ultimately is not linked to differing constructions of the discovery rule.

A more satisfying explanation for the more restrictive courts' reliance on the state of the plaintiff's memory lies in their treatment of the issue of the plaintiff's reasonableness with respect to her discovery. According to all formulations of the discovery rule, the statutory clock is tolled until the plaintiff either discovers *or reasonably should discover* some particular element—again, the wrongdoing, injury, or causal connection—of her claim.¹⁰⁵ As the court in *Johnson* stated: "At some point the injured person becomes possessed of sufficient information concerning his injury and its cause to put a *reasonable person* on inquiry to determine whether actionable conduct is involved. At that point,

101. See *supra* note 71 and accompanying text.

102. The formulation of the discovery rule that allows the cause of action to accrue at the moment of the plaintiff's discovery of the causal connection between the wrongdoing and her injury is more helpful to the Type I incest plaintiff than a wrongdoing- or injury-discovery rule because of the unique nature of her injuries which prevent earlier recognition of the causal link—recognition that is crucial to her realization that she has a legal claim. For this reason, this Note advocates the use of causation-discovery rules in civil incest suits within the context of the broader and more sophisticated standard of reasonableness that should be incorporated into the rule. See *infra* text accompanying notes 124-28.

103. E.g., *Hammer v. Hammer*, 142 Wis. 2d 257, 267, 418 N.W.2d 23, 27 (Ct. App. 1987), *review denied*, 144 Wis. 2d 953, 428 N.W.2d 552 (1988) ("[P]laintiff has leeway to not start an action until she knows more about the injury and its probable cause.").

104. E.g., *Johnson v. Johnson*, 701 F. Supp. 1363, 1370 (N.D. Ill. 1988); *Evans v. Eckelman*, 216 Cal. App. 3d 1609, 1618, 265 Cal. Rptr. 605, 611 (1990).

105. E.g., *Johnson*, 701 F. Supp. at 1370.

under the discovery rule, the running of the limitations period commences."¹⁰⁶ Courts engaging in the Type 1/Type 2 analysis thus appear to accept that it may be reasonable for someone who represses all memory of incestuous abuse not to have discovered it earlier.¹⁰⁷ These same courts, however, apparently do not accept that it may be equally reasonable for someone with serious psychological problems and childhood memories of incestuous abuse not to have discovered the connection between the two, and thus to have delayed filing suit.¹⁰⁸ Thus, these courts dismiss such actions as a matter of law without further inquiry into what might have prevented the plaintiff from realizing the crucial connection between her injuries and the defendant's wrongful acts.¹⁰⁹

None of the civil incest cases thoroughly discusses the standard by which the reasonableness element of the discovery rule is to be evaluated. Nonetheless, the case law demonstrates that the use of different standards of reasonableness lies at the heart of the split of opinion over the Type 1 civil incest plaintiff. Courts that apply a reasonableness standard that takes into account the particular experiences and condition of the incest victim accommodate the incest plaintiff who did not necessarily forget being abused.¹¹⁰ Courts that apply a less sophisticated, nominally more "objective" standard do not.¹¹¹

The so-called "objective" standard of reasonableness seriously and unfairly disadvantages the incest survivor who never forgot the abuse. Incest victims, because of their past traumas and their subsequent psychological disorders, cannot be expected to behave in the same manner as someone who was not repeatedly abused as a child. In fact, experts agree that the psychological disabilities of the incest victim are natural consequences of her childhood victimization, however incomprehensible this may seem to others.¹¹² But many courts, by drawing a distinction in discovery rule analysis between plaintiffs who repress their memory and those who do not, have been insensitive to the proven, particularized psychological havoc that incest creates. Such

106. *Id.* (emphasis added).

107. *See, e.g.,* *E.W. v. D.C.H.*, 231 Mont. 481, 754 P.2d 817 (1988).

108. *See id.*

109. For example, the *DeRose v. Carswell* court stated that the plaintiff's "failure to appreciate the causal relationship between the assaults and the subsequent emotional injuries—for whatever reason she failed to appreciate them—is irrelevant." 196 Cal. App. 3d 1011, 1028, 242 Cal. Rptr. 368, 378 (1987).

110. *E.g.,* *Hammer v. Hammer*, 142 Wis. 2d 257, 266 n.6, 418 N.W.2d 23, 26 n.6 (Ct. App. 1987), *review denied*, 144 Wis. 2d 953, 428 N.W.2d 552 (1988) ("[Plaintiff's] conduct is to be measured against that of a reasonable person in her circumstances.").

111. The most restrictive decisions—those that refuse to apply the discovery rule in any sexual abuse case—give the least weight to subjective considerations. For example, in dismissing as a matter of law an incest plaintiff's case as barred by the statute of limitations, one court stated that it simply could not comprehend how alleged psychological problems could have prevented the plaintiff from filing suit within the statutory period. *Whatcott v. Whatcott*, 790 P.2d 578, 581 (Utah Ct. App. 1990). The court emphasized that the plaintiff had attended college, married, and held down a job during the whole period the statute was running, and therefore concluded that the apparently "normal" plaintiff should have been able to file a timely suit. Thus, the court absolutely refused to acknowledge that other behavior that would be expected of the typical tort plaintiff, such as filing suit within the statute of limitations, could be beyond the capabilities of a traumatized incest victim.

112. *See* Blume, *supra* note 1, at 6; Rosenfeld, *supra* note 7, at 210; Summit, *supra* note 24, at 184-86.

an approach to the reasonableness issue is wholly inappropriate. Rather than dismissing as "unreasonable" as a matter of law the claim that psychological impairment resulting from incest caused the plaintiff's delay, courts should fashion a principled approach to the issue, and define a reasonableness standard that takes into account the special circumstances of the incest survivor.¹¹³ Such a standard has been recognized in other contexts, and should be recognized in civil incest suits as well.

A. Reasonableness Standards in Other Legal Contexts

Courts have incorporated the victim's psychological impairment into the reasonableness standard in discovery rule doctrine in another sexual abuse context. Two courts, applying the discovery rule to cases involving alleged sexual abuse of a patient by therapists, have declined to determine at the pretrial stage what and when the plaintiff reasonably should have known about her injury. The courts emphasized that these issues require a thorough factfinding process that considers all of the plaintiff's psychological characteristics. In *Simmons v. United States*,¹¹⁴ the Ninth Circuit took the plaintiff's psychological circumstances into account and held that her cause of action against her sexually abusive therapist did not accrue until she was subsequently advised by another psychiatrist and learned for the first time that the counselor's conduct, which she had never blocked from her mind, caused her emotional injury. Similarly, in *Greenberg v. McCabe*,¹¹⁵ the court stated:

In a case such as this, where the central factual inquiries concern the reasonableness of plaintiff's ignorance and of her diligence under all the circumstances, and where the injury and cause thereof are subtler and more complicated than in the normal malpractice case, it seems particularly inappropriate to determine as a matter of law what the plaintiff should have known.¹¹⁶

The law has also adopted broader standards of reasonableness for categories of people in contexts other than delayed discovery, recognizing that children¹¹⁷ and the mentally ill¹¹⁸ should be held to different standards of reasonable behavior in tort law. In the criminal law, particularly for purposes of evaluating self-defense claims, the modern trend is toward incorporating psychological characteristics into the reasonableness standard for defendants suf-

113. As the *Hammer* court stated, whether the discovery rule applies is a question of law; whether the plaintiff satisfies its requirements is a question of fact. *Hammer*, 142 Wis. 2d at 268, 418 N.W.2d at 27.

114. 805 F.2d 1363 (9th Cir. 1986).

115. 453 F. Supp. 765 (E.D. Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir.), *cert. denied*, 444 U.S. 840 (1979).

116. *Id.* at 772.

117. See, e.g., *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859 (1961).

118. See *Ellis, Tort Responsibility of Mentally Disabled Persons*, 1981 AM. B. FOUND. RES. J. 1079.

fering from psychological disorders resulting from their experiences as hostages, prisoners of war, or others under sustained, life-threatening conditions.¹¹⁹

Finally, perhaps the most persuasive analogy supporting the use of a broader standard of reasonableness based on the typical psychological consequences of abuse for incest survivors is the use of psychological evidence in establishing the self-defense claims¹²⁰ of battered women who kill their abusers.¹²¹ In an effort to aid juries in evaluating battered women's self-defense claims, attorneys defending women who kill their batterers generally attempt to introduce expert psychological testimony on the Battered Woman's Syndrome.¹²² This testimony addresses the issue of the reasonableness of the defendant's actions, helping to elucidate for the trier of fact why the battered woman perceived herself to be in imminent danger by clarifying the reasonableness of her fear of escalation of the abuser's violence and the reasonableness of her response. The testimony generally focuses on the issue of why the defendant stayed in the battering relationship and was unable to take any action other than killing the abuser to stop the violence. Expert testimony on the "learned helplessness" component of the Battered Woman's Syndrome thus puts the evidence of prior

119. See *State v. Hundley*, 236 Kan. 461, 467, 693 P.2d 475, 479 (1985).

120. Self-defense laws typically provide that the use of deadly force is permitted only when the victim reasonably believes it is necessary to prevent imminent death or bodily injury. W. LAFAYE & A. SCOTT, *CRIMINAL LAW* 454, 456 (2d ed. 1986).

121. Melissa G. Salten originally suggested the analogy between the incest victim and the battered woman.

122. Testimony on Battered Woman's Syndrome places the battered woman in a class of battered women whose experiences are "beyond the ken" of the average juror and explains her symptomatic "learned helplessness." Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 198-202 (1986). As the New Jersey Supreme Court explained:

[E]xperts point out that one of the common myths, apparently believed by most people, is that battered wives are free to leave. To some, this misconception is followed by the observation that the battered wife is masochistic, proven by her refusal to leave despite the severe beatings; to others, however, the fact that the battered wife stays on unquestionably suggests that the "beatings" could not have been too bad for if they had been, she certainly would have left. The expert could clear up these myths, by explaining that one of the common characteristics of a battered wife is her inability to leave despite such constant beatings.

State v. Kelly, 97 N.J. 178, 205, 478 A.2d 364, 377 (1984).

Evidence on Battered Woman's Syndrome must meet the standards for expert testimony. *Dyas v. United States*, 376 A.2d 827 (D.C.), cert. denied, 434 U.S. 973 (1977), established the criteria for admissibility of expert testimony on scientific subjects, including psychology. The testimony must be related to a subject that is sufficiently "beyond the ken of the average layman" that the opinion of an expert would assist the trier of fact, and must be given by a qualified expert who has some special skill, knowledge, or experience in the area. *Id.* at 832 (emphasis omitted). The courts are split on the admissibility of evidence on Battered Woman's Syndrome, but the clear trend appears to be toward admitting such testimony. See C. EWING, *BATTERED WOMEN WHO KILL* 54 (1987); Note, *A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman Syndrome*, 25 J. FAM. L. 373 (1986) (discussing various states' approaches to admissibility of expert testimony on Battered Woman's Syndrome). Most appellate courts have ruled that this testimony is admissible, and commentators have supported its admissibility. See Schneider, *supra*, at 195-96 & n.5. See generally N. Diller, *Battered Women Who Kill in Self-Defense* 12-22 (Apr. 9, 1990) (unpublished manuscript on file with author).

abuse into perspective, and shows the jury that "what, in some cases, may seem patently unreasonable is, in fact, reasonable."¹²³

B. A Reasonableness Standard for Incest Victims

The similarities between the experiences of incest victims and those of battered women are compelling, supporting the adoption of a broader standard of reasonableness for incest victims.¹²⁴ Battered Woman's Syndrome and Post-Incest Syndrome are both disorders that result from experiences that are "outside the range of usual human experience."¹²⁵ As in the case of the battered woman, a reasonableness standard that takes into account the psychological disorders of the incest victim helps explain that the individual's behavior may have been reasonable in light of what she has suffered.

Courts should not find as a matter of law that an incest plaintiff's action is barred by the statute of limitations if she does not allege in her complaint that she completely repressed her memory of being incestuously abused.¹²⁶ Instead of dismissing the complaint as time-barred, a judge should use an appropriately broad standard of reasonableness in determining discovery rule application and construe in the most favorable light the plaintiff's allegation that she was unable to discover at an earlier date that the abuse caused her psychological injuries.¹²⁷ At the summary judgment stage, such allegations ideally would be supported by expert psychological testimony concerning the proven psychological effects of incest that frequently prevent incest victims

123. C. EWING, *supra* note 122, at 51; see also Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 143 (1985).

124. Both incest victims and battered women depend upon their abusers, and both are conditioned to feel powerless because under the influence of their abusers for so long. Both are rarely believed if and when they seek help; they thus live in a constant state of isolation, shame, and anxiety, which over time produce a profound state of helplessness.

The role of the reasonableness standard in the two contexts does differ in some respects, however. Although testimony on the psychological characteristics of the battered woman will not ensure a successful defense, a jury that is instructed to take her psychological state into consideration is much more likely to acquit (or mitigate murder to a lesser charge for imperfect use of self-defense) than one that is not so instructed. C. EWING, *supra* note 122, at 54. By contrast, the civil incest plaintiff seeks an acknowledgment that her delay in filing suit was reasonable so that she may avoid a procedural obstacle and present her claim in court. Application of the discovery rule does not guarantee her a court victory, or even substantively assist her factual case. Thus, the case for allowing psychological evidence as part of the reasonableness determination is even more compelling in the context of civil incest cases.

125. See AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL HEALTH DISORDERS 247 (rev. 3d ed. 1987).

126. As the dissent in *Tyson v. Tyson* argued:

The purpose [of extending the discovery rule to adult survivors of incest] is to provide an opportunity for an adult who claims to have been sexually abused as a child to prove not only that she was abused and that the defendant was her abuser, but that her suffering was such that she did not and could not reasonably have discovered all the elements of her cause of action at an earlier time.

Tyson v. Tyson, 107 Wash. 2d 72, 93-94, 727 P.2d 226, 237 (1986) (Pearson, J., dissenting).

127. In considering motions to dismiss, this is in fact what procedural law requires. See *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

from making the causal connection between what happened to them as children and their later psychological injuries until many years later, even if their memories of the abuse are not completely repressed.¹²⁸ The factfinder should then take this evidence into account at a hearing to determine whether the individual plaintiff's inability to file a timely suit was reasonable.¹²⁹ If it was, the discovery rule will allow the suit to proceed. This approach does not diminish the plaintiff's incentive to bring suit as soon as possible; she must initiate suit within the statutory period once she has made the necessary connection between her injury and the abuse. Rather, it simply ensures that the statutory period begins to run at the appropriate moment, considering the special circumstances of the incest survivor.

CONCLUSION

In less than a decade, the application of the discovery rule to civil incest suits has evolved from a theoretical proposal into a reality. Legislatures are also getting involved in this process: most recently, in September 1990, California passed a statutory discovery rule for all civil childhood sexual abuse cases, which became effective January 1991.¹³⁰ The bill explicitly allows victims, no matter how old they are, to sue within three years after discovering their injuries, or eight years after reaching majority, whichever date occurs later.

Such legislation demonstrates that the law is indeed responding to the needs of incest victims. In furtherance of this trend, courts should move away from the growing tendency to differentiate between those plaintiffs who completely repress their memory of incest and those who do not. If the law continues to draw this distinction, deserving plaintiffs will be denied access to the courts without a full consideration of the psychological ramifications of incestuous abuse and the special circumstances they create for incest victims. To avoid this tragic consequence, the law should abandon arbitrary line-drawing and provide individualized justice to the victims it has too long ignored.

128. See *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 255 (1986) (at summary judgment, all justifiable inferences must be drawn in favor of nonmoving party).

129. See Comment, *supra* note 81, at 216 & n.129 (whether plaintiff satisfies discovery rule is question of fact to be determined at factual hearing).

130. CAL. CIV. PROC. CODE § 340.1 (West Supp. 1991); see also Mithers, *supra* note 2, at 44. Other states that have enacted statutory discovery rules specifically for civil childhood sexual abuse suits are Iowa, Maine, Montana, and Washington. See 1990 Iowa Adv. Legis. Serv. 2268 (amending IOWA CODE § 668.15 (Supp. 1989)) (giving plaintiffs four years after discovery of both injury and causal connection to file suit); ME. REV. STAT. ANN. tit. 14, § 752-C (Supp. 1990) (six years after act, or three years after plaintiff discovered or reasonably should have discovered harm); MONT. CODE ANN. § 27-2-216 (1989) (three years after plaintiff discovered or reasonably should have discovered causal connection between act and injury); WASH. REV. CODE ANN. § 4.16.340 (Supp. 1990) (three years after plaintiff discovered or reasonably should have discovered injury and causal connection).