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CHILDHOOD SEXUAL ABUSE: PERCEPTIONS ON TOLLING THE STATUTE OF LIMITATIONS

[W]ith the first-born safely submerged and “sleeping” from the age of two, the other Troop members began to evolve one by one and to undergo the abuse for her. The evolution of yet other selves in effect buried the first-born child deeper over the years.¹

Truddi Chase was sexually abused by her stepfather from the age of two until the age of sixteen.² She has not filed a complaint against her abuser, nor does she intend to. Essentially she no longer exists. Truddi Chase’s body is a shelter for her inner world of ninety-two personalities³ that developed over forty years, enabling her to cope with the emotional and physical trauma that arises from sexual abuse.⁴

Like Truddi Chase, many sexually abused children are not aware of their psychological problems until they become adults.⁵ While Truddi Chase chose to contribute to the medical profession’s understanding and treatment of adult victims of incest, other victims of this abuse decide to sue their abusers in court. However, these lawsuits are often dismissed on procedural grounds⁶ and the victims never receive their day in court.

Statutes of limitations are imposed on both civil and criminal actions to assist the courts in their pursuit of the truth by barring stale claims and to

¹. Robert A. Phillips, Jr., Introduction and Author’s Note to THE TROOPS FOR TRUDDI CHASE, WHEN RABBIT HOWLS at xx (1987). Dr. Robert A. Phillips, Jr., Ph.D., served as the psychotherapist for a woman who retained ninety-two personalities within her own mind. The book is a factual documentation of Dr. Phillips’s treatment of the woman; it is written by the various personalities who make up the person known as Truddi Chase. Id. at xxiv-xxv (1987).

². Id. at xiii.

³. Id. at xxiv. Multiple personalities often occur in men and women who have experienced severe and repeated sexual and physical abuse over a significant period of time. Id. at xi. This reference to the development of multiple personalities is not meant to serve as the sole example of the effects of childhood sexual abuse, instead it is a rather extreme result that a victim may suffer. For purposes of this Comment, the example of Truddi Chase’s multiple personalities will be used only intermittently while other psychological effects of victims of childhood sexual abuse that have opted to sue the abuser will be thoroughly explored.

⁴. Id. at xiii.

⁵. Id. at xi-xii.

⁶. Because the abusive act has occurred years before, a victim of incest is subject to a limited time in which a civil claim against the abuser may be filed. The statutes of limitations for similar civil actions, or civil actions in general, vary from state to state. See infra notes 11-24 and accompanying text.
protect potential defendants from the protracted fear of litigation. Numerous courts have addressed policy concerns in limiting the time to bring certain tort claims, namely claims of intentional infliction of emotional harm. These policies: 1) question whether relevant evidence will become stale, lost, or destroyed; 2) recognize the need for judicial economy; 3) address "the possibility of continuing 'blackmail' by potential plaintiffs"; 4) perceive an unfairness to potential defendants who may be required to defend themselves long after the alleged act; and 5) acknowledge the need for "self-reformation by potential defendants." In deciding whether to allow a plaintiff's claim to proceed despite the lapse of the statute of limitations, the court will balance the harm to the plaintiff of being denied a remedy against the harm to the defendant of having to defend against old claims.

Statutes of limitations for torts ordinarily require an action for personal injuries to be brought within a specified period after the cause of action has accrued, usually from one to six years. Traditionally, the cause of action accrues at the time of the injury. However, the term "accrue" is not usually defined in the relevant statute and consequently is subject to judicial interpretation. By neglecting to define accrue, traditional tort statutes of limitations fail to address two problems: "the medical impossibility of determining the date of injury, even in retrospect . . . [and] the legal impossibility of maintaining an action for an injury inherently incapable of discovery within the limitation period." The response to these problems is a discov-

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10. See Annotation, supra note 7, § 18 (1970).
12. The term "accrue" refers to the date that the damage is sustained and not the date when the causes which ultimately produce injury are set in motion. BLACK'S LAW DICTIONARY 20-21 (6th ed. 1990).
13. See Susan D. Glimcher, Note, Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?, 43 U. PITT. L. REV. 501, 501 (1982). This is particularly true because normally "the injury immediately follows a defendant's tortious conduct and damages are easily established." Id.
very rule\textsuperscript{16} whereby the statute of limitations does not commence until a victim discovers or, in the exercise of reasonable diligence, should have discovered the injury.\textsuperscript{17}

An application of this discovery rule to claims of incestuous abuse\textsuperscript{18} poses a peculiar problem to victims, courts, and legislatures alike. The circumstances of the abuse and the nature of the related psychological injuries often prevent the victim from recognizing her injuries and their cause until after

\textsuperscript{16} The term “discovery rule” is used interchangeably with the term “delayed discovery rule.” For a discussion of the delayed discovery rule, see Melissa G. Salten, Note, \textit{Statutes of Limitations in Civil Incest Suits: Preserving the Victim’s Remedy}, 7 Harv. Women’s L.J. 189, 213 (1984).

\textsuperscript{17} See, e.g., Urie v. Thompson, 337 U.S. 163, 168-71 (1949). Petitioner was diagnosed with silicosis only a year before filing suit in which he alleged that he contacted the disease in the course of his employment and there was no suggestion that he should have been aware of his condition at an earlier date. The court held that the failure to diagnose the petitioner’s lung disease, whose symptoms were not yet apparent, did not constitute a waiver of his right to sue. \textit{Id.}

\textsuperscript{18} Although sexually abusive assailants may include step-fathers, mothers’ boyfriends, babysitters, neighbors, other family acquaintances, strangers, and people in authority, family members are the most frequent perpetrators of sexual abuse. See Jeffery B. Bryer et al., \textit{Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness}, 144 Am. J. Psychiatry 1426, 1427 (1987); Gloria A. Bachmann et al., \textit{Childhood Sexual Abuse and the Consequences in Adult Women}, 71 Obstetrics & Gynecology 631, 633 (1988). For this reason, the effects of sexual abuse on children will be discussed largely in regard to studies of incestuous abuse.

The likelihood that the abuser is a family member often has a direct relationship to the victim’s age. For example, “children under the age eleven are more likely to be sexually abused by a family member than are adolescents.” Bachmann, supra, at 633. Conversely, after the age of eleven, the percentage of cases involving a family member drops dramatically. \textit{Id.} at 633-34.

Incest is most likely to occur in a family where the supremacy of the father is pronounced, and the subordination of the mother is equally as noticeable. Salten, supra note 16, at 193; see also Judith L. Herman, \textit{Father-Daughter Incest} 54-57, 63 (1981). Nevertheless, sexual abuse has no relation to class, occupational status, urban or rural residency, or ethnicity. Bachmann, supra, at 634. In the incestuous family, the father typically believes strongly in the male privilege, while the mother is frequently overburdened with pregnancy and child care responsibilities. Salten, supra note 16, at 195; see also Bachmann, supra, at 635.

“The sexually abused child is usually the eldest daughter, who, by the age of eight or nine, has a major responsibility for family household and child-rearing tasks.” \textit{Id.} at 635; see also Margaret T. Allen, Comment, \textit{Tort Remedies for Incestuous Abuse}, 13 Golden Gate U. L. Rev. 609, 613-14 (1983). Consequently, the eldest daughter recognizes her mother’s relatively weak position in the family and does not perceive her as a dependable ally. Salten, supra note 16, at 195. On the other hand, the mother is often reluctant to intervene in the incestuous relationship if it is known to her because it would result in her own forced undertaking of sexual services to satisfy the abusive father’s expectations, which he demands from the daughter. \textit{Id.} at 194. “In order to protect her marriage, the mother indicates unequivocally that her husband’s needs take priority over her daughter’s and, therefore, she makes no attempt to stop the incestuous abuse.” Allen, supra, at 615.

\textsuperscript{19} For purposes of this Comment, the incest victim will be referred to as a member of the
the occurrence of the last incestuous incident. In such cases, a cause of action might not be filed until well beyond the statutory time limit, requiring the court to dismiss the complaint. To remedy the unfair dismissal of such inherently offensive claims, courts and legislatures must implement the policies underlying statutes of limitations without violating the constitu-

female gender, which appears to be the prevalent gender in incestuous abuse cases in light of the available literature. Studies reveal that boys are abused far less often than girls. HERMAN, supra note 18, at 14. For example, one clinical social worker found that 30% of the female population and 10% of the male population had been sexually abused. Laurie C. Kilgore, Effect of Early Childhood Sexual Abuse on Self and Ego Development, 1988 SOC. CASEWORK: J. CONTEMP. SOC. WORK 224, 224.

The reference to the female gender is not intended to ignore incestuously victimized males or suggest that their hidden injuries are undeserving of civil remedies. In fact, a recent comparative study addresses the association between the male gender and molestation history. See generally John Briere et al., Symptomatology in Men Who Were Molested As Children: A Comparison Study, 58 AM. J. ORTHOPSYCHIATRY 457 (1988).

Another study suggests that females under the age of 18 are treated for sexual abuse more often than males of the same age because of a greater number of genital injuries to young females. See Bachmann, supra note 18, at 633.


Victims of incest are often subject to sadistic sexual abuse, brutal beatings, and emotional torment. Some abusers minimize the physical abuse by limiting their behavior to erotic touching or fondling of genitals, both of which result in severe emotional damage to the victim. Phillips, supra note 1, at xi-xii.

For a discussion of other policy arguments that courts address, see Harshaw, supra note 9 and accompanying text. Similar policy considerations are reviewed by legislatures wishing to extend the statutes of limitations for such tort claims.

In addition to the policy concerns, evidentiary problems require the use of statutes of limitations despite the offensive nature of the tortious act. For example, a critical witness may have died or it may be impossible to locate the witness by the time the action is brought; witnesses'
memories may fade or be colored by intervening events and experiences; and physical evidence may be overlooked at the time of the alleged wrong or misplaced at some point thereafter. Tyson v. Tyson, 727 P.2d 226, 227-28 (Wash. 1986) (citing Ruth v. Dight, 453 P.2d 631, 634 (Wash. 1969)).

24. Regardless of the typical policy arguments and possible evidentiary problems involved in mandating statutes of limitations, it is arguable that the statutory time limits imposed on such incestuous abuse actions are a violation of the equal protection clause of the United States Constitution. For an extensive evaluation of the constitutional issues involved, see generally Harshaw, supra note 9.

The constitutional argument essentially offers the reasoning of three United States Supreme Court cases which acknowledges the need to address unique factors in determining the constitutional validity of a time limitation statute, while providing courts with the ability to recognize the special impact of such circumstances on the individual involved and her subsequent inability to redress the wrongs earlier. Id. at 755. As such, this judicial acknowledgment of such extraordinary factors should require heightened scrutiny when evaluating the constitutional validity of tort statutes of limitations for child sexual abuse claims because, otherwise, states that impose one statute of limitations for personal injuries treat dissimilarly situated people similarly. Id. For instance, a plaintiff sexually abused as a child is given the same amount of time to file her claim as a plaintiff injured in an automobile accident.

While these constitutional issues are indeed relevant to the development of new policies addressing incestuous abuse actions, this Comment focuses on the methods by which the courts and legislatures can modify the unfair situation before the issue faces time-consuming litigation on the constitutional questions.


In applying the delayed discovery rule to the area of tort law, these courts have been guided by the principle that plaintiffs should be put on notice before their claims are barred by the passage of time. Fidler v. Eastman Kodak, 714 F.2d 192, 196 (1st Cir. 1983). For a general discussion on the policy of delayed discovery as construed by courts, see Salten, supra note 16, at 206-13.

27. See supra note 21 and accompanying text.
focusing on how and when the cause of action was recognized. The court then takes into account, if applicable, the possibility that professional intervention induced the victim to discover her psychological injury and its most likely cause.\textsuperscript{28}

In 1986, the Washington Supreme Court decided the seminal case in the application of the discovery rule to childhood sexual abuse actions.\textsuperscript{29} This Comment begins with a brief discussion of the majority and dissenting opinions in \textit{Tyson v. Tyson} and the subsequent enactment of statutes affecting the commencement of actions based upon childhood sexual abuse. The Comment then compares the effect of \textit{Tyson} on the developing case law in California, Indiana, Illinois, Michigan, Montana, New Jersey, North Dakota, Washington, and Wisconsin—all of which have addressed similar issues in recent years. It then discusses the different results in some jurisdictions based on policy considerations and the unique facts of each case.

Section II of this Comment discusses the need to establish a uniform approach to the discovery rule in incest cases. In doing so, this Comment focuses on the need for a consistent application of expert clinicians testimony as an impartial, reasonable basis for construing the date of discovery for legal purposes. By establishing a reliable method of assessing an adult victim's psychological injuries, courts can effectively maintain fundamental fairness by allowing tort claims for childhood sexual abuse to overcome an otherwise applicable time restriction. The Comment also analyzes the capacity of legislative bodies to promulgate extensions of statutes of limitations for actions based on sexual abuse of a child.\textsuperscript{30} This Comment concludes by suggesting that these two methods provide an equitable preservation of a victim's potential remedy.\textsuperscript{31}

I. \textbf{\textit{Tyson v. Tyson}}

A case from the Washington Supreme Court offers two distinct views on the application of the discovery rule to childhood abuse cases. In \textit{Tyson v. Tyson},\textsuperscript{32} the majority refused to apply a discovery rule to an incestuous abuse claim without objective, verifiable evidence of the original wrongful act.\textsuperscript{33} The majority concluded that methods of investigation by treating psy-
chologists and psychiatrists are primarily subjective, are not based on physically observable evidence, and therefore, provide no means of independently corroborating a victim's allegations. Conversely, the dissent highlighted the inequity of denying adult survivors of childhood sexual abuse a legal remedy and credited mental health care professionals with the ability to reliably assist the trier of fact in search of the truth.

The 5-4 decision in Tyson and the response by the Washington legislature two years earlier reveal that the issue of applying a delayed discovery rule to a complaint filed by an adult survivor of child sexual abuse remains essentially unresolved. After the Washington Supreme Court stated that the delayed discovery rule is indeed applicable "when the risk of stale claims is outweighed by the unfairness of precluding justified causes of action," it decided that it is not proper to allow the claim to proceed when the alleged acts cannot be independently verified, and rests solely on the vague recollection of the victim. In 1988, however, the Washington legislature amended the personal injury statute of limitations to provide for the tolling of time limitation statutes in incestuous abuse cases. While Tyson has effectively been superseded by the statute, it is important to note that not all jurisdictions

34. Id.
35. Id. at 235 (Pearson, J., dissenting).
36. Id. at 233 (Pearson, J., dissenting).
37. See WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1991) (amending WASH. REV. CODE ANN. § 4.16.340 to clarify any possible confusion that may exist in interpreting the statute of limitations provisions for child sexual abuse civil actions in § 4.16.190, which provides that the time limit for commencement of civil actions is tolled until the child reaches the age of eighteen).
38. Tyson, 727 P.2d at 228-29.
39. WASH. REV. CODE ANN. § 4.16.340(1) (West Supp. 1991), states in pertinent part: All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within three years of the act alleged to have caused the injury or condition, or three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act, whichever period expires later. Provided, that the limit for commencement of an action under this action is tolled for a child until the child reaches the age of eighteen years.

Id.

This legislation was initiated primarily by Patti Barton, a 35-year-old woman who was sexually abused for five years beginning when she was five and who subsequently blocked the memories for 29 years until she sought counseling for her failing marriage. In light of the 1986 Tyson decision, however, Mrs. Barton had no legal recourse against her abuser for money damages resulting from her costly psychotherapy. In 1987, she and her husband pioneered the Washington legislation, which essentially sets the statute of limitations in motion at the time the victim realized she had been abused as a child rather than at the time the victim turned 18. See Annabel Lund, Victim's Bill Puts Abusers on Notice, JUNEAU EMPIRE, Apr. 5, 1989, at 2. For a discussion of the impact of this legislation on other states, see infra notes 156-62 and accompanying text.
have adopted a similar statute.40

In *Tyson*, the plaintiff alleged that she was the victim of sexual abuse between 1960 and 1969; the suit was filed in 1983.41 The twenty-six-year-old complainant further alleged that the sexual assaults caused her to suppress all memories of the acts until 1983 when she entered psychological therapy, which triggered her knowledge of the sexual abuse and her recognition that the abuse caused the emotional problems she experienced as an adult.42 The court stated that the discovery rule only applied when the objective nature of the evidence provides substantial certainty that the facts can be fairly determined despite the considerable length of time that has passed since the alleged acts occurred.43 In deciding whether to apply a delayed discovery rule to this situation, the court distinguished sexual abuse cases from medical malpractice actions, which present "objective evidence, often accompanied by medical diagnosis,"44 and concluded that application of a delayed discovery rule to an incestuous abuse action was inappropriate because the alleged acts were based solely on the purported recollection of the events repressed from the plaintiff's consciousness for over thirteen years.45

The *Tyson* majority relied primarily on a single law review article46 that questions the imprecise and subjective nature of psychology and psychiatry.47 The author of that article suggests that the psychoanalyst, in the course of therapy, takes numerous steps away from discovering what really happened to the victim.48 For instance, if the patient reports her memories

40. Presently, only the California, Missouri, Montana, and Vermont legislatures have adopted similar statutes of limitations for injuries caused by childhood sexual abuse. *See, e.g., Cal. Civ. Proc. Code* § 340.1 (West Supp. 1991), which reads:

(a) In any civil action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness after the age of majority was caused by the sexual abuse, whichever occurs later.


42. *Id.*

43. *Id.* at 229.

44. *Id.* at 228.

45. *Id.* at 228-29. Although it was suggested that the subjectivity of the plaintiff's claim could be eliminated at trial through the testimony of the psychologists treating her, the court rejected the validity of such testimony. *Id.* at 229.


47. *Tyson*, 727 P.2d at 229.

and dreams in the chaotic way in which they first come into her mind, then
the analyst is required to supply a critical organizing principle to make sense
of the report.49 The psychoanalyst's interpretation of the patient's narrative
unwittingly influences her to experience memories which do not accurately
 correspond to her history but fit into the analyst's understanding of the
event.50 The majority in Tyson adhered to the notion that the psychoana-
lytic process can result in a distortion of the truth when reconstructing the
events of the patient's past life.51 They also reasoned that in a legal proceed-
ing which presents expert testimony by a psychologist or psychiatrist, the
trier of fact is precluded from assuming that the psychoanalysis produced an
accurate account of the events of the individual's past.52

The Tyson dissent vehemently opposed the majority's "perception of the
history, purpose, and prior application of the discovery rule,"53 their dis-
creditation of mental health care professionals as expert witnesses,54 and
their disregard for the enormity of the problem of childhood sexual abuse.55
The dissent recognized the expansion of the discovery rule in other con-
texts56 and reasoned that fundamental fairness, rather than availability of
objective evidence, is the linchpin of the discovery rule.57 In so doing, the
dissent framed the issue to be whether the court should apply the discovery
rule only when the victim's cause of action is otherwise time-barred.58 The
dissent found the majority's focus on possible evidentiary problems—those a
plaintiff might encounter at trial in convincing the trier of fact of the reason-
ableness of the late discovery in incestuous abuse—irrelevant.59

The dissent also supported the role of the psychotherapist expert in assist-
ing the trier of fact's determination of the time of discovery.60 It suggested
that society and the court have an obligation to understand how and why
repression occurs, because this understanding will encourage the courts to

49. Id. at 335.
50. Id.
51. Tyson, 727 P.2d at 229.
52. Id. at 229.
53. Id. at 230 (Pearson, J., dissenting).
54. Id. at 232 (Pearson, J., dissenting).
55. Id. at 233-34 (Pearson, J., dissenting).
56. Id. at 231. The dissent cited White v. Johns-Manville Corp., 93 P.2d 687 (Wash.
1983) (products liability); Ruth v. Dight, 453 P.2d 631 (Wash. 1969) (medical malpractice);
57. Tyson, 727 P.2d at 231 (Pearson, J., dissenting).
58. Id. (Pearson, J., dissenting).
59. Id. (Pearson, J., dissenting).
60. Id. at 233 (Pearson, J., dissenting).
provide an equitable remedy to adult victims by applying a delayed discovery rule.61

The statutory amendment in Washington exemplifies society's growing concern for victims of childhood sexual abuse and their legal recourse, or lack thereof. Traditionally, statutes of limitations read: "actions for injuries to the person shall be commenced and sued within [x] years after the cause of action shall accrue, and not after."62 The respective tolling statutes may also provide, for example, that if a person entitled to bring an action is a minor, insane, or imprisoned on a criminal charge, the action will not commence until [x] years after the disability ceases.63 Further modifications of special limitation statutes to include incestuous abuse suggest that legislatures are reviving civil common law actions for sexual molestation which otherwise are barred because the statute of limitations has run.64

Without child molestation statutes,65 similar relief in childhood sexual abuse cases can still be rendered by a broad reading of the statute of limitations.66 However, these same statutes of limitations may be construed narrowly, and without the benefit of a child molestation statute, the discovery rule is inapplicable.67 Consequently, the reasoning of both the majority and dissenting opinions in Tyson has a strong impact on decisions in many jurisdictions where the question of how to interpret the applicable statute of limitations is at issue.

61. Id. at 234-35 (Pearson, J., dissenting).


64. Liebig v. Superior Court, 257 Cal. Rptr. 574, 574-75 (Ct. App. 1989) (upholding the legislative enactment which retroactively made all civil actions for claims involving childhood sexual abuse subject to a three-year period as opposed to the one-year period after reaching the age of majority in which to bring all other tort actions).

65. For a list of those jurisdictions which have enacted specific child molestation statutes, see supra notes 39-40.


67. See, e.g., Lindabury v. Lindabury, 552 So. 2d 1117 (Fla. Dist. Ct. App. 1989). Other jurisdictions where the courts had narrowly construed the statute of limitations in the absence of a specific child molestation statute have since promulgated this type of statute, thereby precluding future dismissals of such civil claims. For an overview of the cases, see supra note 25 and accompanying text. For a discussion on the relevant statutory enactments, see supra note 39-40 and accompanying text.
tations remains open. 68

Although Tyson has precedential value only in Washington, it provides a backdrop for factually similar cases in other jurisdictions. In light of this, many courts apply the reasoning of either the majority or minority in Tyson to tort actions involving childhood sexual abuse. 69 The present analysis focuses on two distinct classes 70 of tort actions involving psychological injuries arising from childhood sexual abuse. Type 1 cases are those in which the plaintiff claims she knew about the sexual assaults at or before the age of majority but was unaware of the causal connection between the prior sexual abuse and her physical and psychological problems. 71 Type 2 cases are those in which the plaintiff claims that the trauma of the experience caused her to have no recollection of the sexual abuse until shortly before filing suit. 72 A brief overview of the cases reveals an even split on the disposition of type 1 cases, 73 yet a more uniform approach to type 2 cases. 74


69. There are many cases revealing similar fact patterns which are resolved through different approaches to the delayed discovery rule. See, e.g., Smith v. Smith, 830 F.2d 11 (2d Cir. 1987) (ruling that insanity will not extend the right to sue to twenty years after the incident); Hildebrand, 763 F. Supp. 1512 (holding that fraudulent concealment will toll statute of limitations if concealment is active and intentional in preventing plaintiff from obtaining information as to the cause of action); Snyder v. Boy Scouts of America, Inc., 253 Cal. Rptr. 156 (Ct. App. 1988) (holding that post-traumatic syndrome developed during minority does not render victim "insane" so as to toll the statute of limitations); Lindabury, 552 So. 2d 1117 (holding that "rediscovery" of repressed memories will not allow untimely suit to stand when complaint was filed twenty years after the last acts of sexual abuse); State v. Bentley, 721 P.2d 227 (Kan. 1986) (threatening a child may constitute concealment so as to toll the statute of limitations); E.W., 754 P.2d 817 (holding that statute of limitations was tolled until complainant reached age of majority); Jones, 576 A.2d 316 (holding that insanity will toll statute of limitations).

70. These two classes, "type 1" and "type 2," were identified in Johnson, 701 F. Supp. 1363. While cases prior to Johnson had not referred to the suits as type 1 or type 2, for purposes of this analysis such language will be substituted to provide a clearer distinction between the two cases and their accompanying policy arguments.


72. Id.

73. For example, California, Montana, and Washington courts have refused to apply the discovery rule in type 1 cases. See DeRose v. Carswell, 242 Cal. Rptr. 368 (Ct. App. 1987); Snyder, 253 Cal. Rptr. 156; E.W., 754 P.2d 817; Raymond v. Ingram, 737 P.2d 314 (Wash. Ct. App. 1987). On the other hand, North Dakota and Wisconsin courts have applied the discovery rule in type 1 cases. See Osland v. Osland, 442 N.W.2d 907 (N.D. 1989); Hammer v. Hammer, 418 N.W.2d 623 (Wis. Ct. App. 1987).
A. Awareness of Childhood Sexual Assault

The disposition of type 1 cases relies heavily, if not exclusively, on the ability of the victim to understand the nature of the wrongful conduct.\textsuperscript{75} Courts disfavoring a delayed discovery rule in this context suggest that it is irrelevant whether the psychological injuries are fully manifest before bringing suit,\textsuperscript{76} and that it is unnecessary for the victim to know the total extent of her damages caused by the abusive act before the statute of limitations begins to run.\textsuperscript{77} These courts have held that the victim's knowledge of the wrongful act is sufficient to require inquiry into the cause of a subsequent injury.\textsuperscript{78} Consequently, if a minor reaches the age of majority and becomes aware of psychological problems caused by a childhood sexual abuse incident, such courts may decide that all pertinent facts are known and the cause of action has accrued.\textsuperscript{79}

These same courts advance certain policy considerations in refusing to apply a delayed discovery rule.\textsuperscript{80} For example, in Raymond v. Ingram\textsuperscript{81} the plaintiff alleged that her paternal grandfather sexually abused her from the time she was four until the time she was seventeen and that her paternal

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\textsuperscript{75} Only one case has followed the rationale of Tyson in refusing to apply the delayed discovery rule to type 2 cases, see Lindabury v. Lindabury, 552 So. 2d 1117 (Fla. Dist. Ct. App. 1989), while at least three courts have zealously opposed this approach. See Johnson, 701 F. Supp. 1363; Mary D. v. John D., 264 Cal. Rptr. 633 (Ct. App. 1989); Jones v. Jones, 576 A.2d 316 (N.J. Super. Ct. App. Div. 1990).

Procedurally, type 2 cases present courts with an opportunity to address the issues at trial. In such cases, the injury and its cause must both be recognized for a cause of action to accrue. To establish those points in time for purposes of the statute of limitations, medical testimony is offered to the court. In permitting this evidence, the court essentially acknowledges the traumatic impact that sexual abuse has on a child throughout her life and the need to provide a tort remedy for adult survivors. See Salten, \textit{supra} note 16, at 189. Medical testimony allows the plaintiff to establish genuine issues of material fact and, therefore, precludes a summary judgment motion. See \textit{supra} note 21 and accompanying text.

Conversely, courts presiding over type 1 cases do not have the same opportunity because the key element, the awareness of the sexual abuse, need not be demonstrated through medical testimony because it has already been established by the victim herself. Therefore, type 1 cases do not present the same need to admit extensive medical testimony on the victim's traumatic experience.

\textsuperscript{76} See \textit{E.W.}, 754 P.2d at 820.

\textsuperscript{77} See \textit{id.} at 818.

\textsuperscript{78} \textit{Raymond}, 737 P.2d at 317.

\textsuperscript{79} \textit{E.W.}, 754 P.2d at 820.

\textsuperscript{80} "To allow a plaintiff, who fails to inquire into the cause of an injury, to avoid the time bar under the guise of 'discovery' would hopelessly demolish the protection afforded defendants by the statute of limitations." Much v. Sturm, Ruger & Co., Inc., 502 F. Supp. 743, 745-46 (D. Mont. 1980), aff'd, 685 F.2d 444 (9th Cir. 1982); see also Tyson v. Tyson, 727 P.2d 226, 227-28 (Wash. 1989).

\textsuperscript{81} 737 P.2d 314 (Wash. Ct. App. 1987).
grandmother negligently allowed such abuse to continue. Plaintiff admitted that, prior to therapy, "she remembered the assaults and realized that as a child she had mental anguish associated with the sexual abuse." The court rejected the contention that her cause of action did not accrue until she went to therapy and realized that her insomnia and stomach problems were related to the earlier sexual abuse. Specifically, the court found that while the causes of all her physical and psychological problems were not established until therapy, she was previously aware that the sexual abuse caused some type of injury. Consequently, the Raymond court held that "with traumatic injury . . . the cause of action accrues on that day, even if the full extent of the injury is not known at that time."

The Court of Appeal for the Sixth District of California addressed a similar issue in the 1987 case of DeRose v. Carswell. In DeRose, the plaintiff alleged that her step-grandfather sexually abused her twenty years prior to when the suit was filed. She maintained that the action was timely because she did not understand the causal relationship between the alleged assaults and her emotional injuries until the time she filed suit. The court disagreed, expressly stating that the only time in which a delayed discovery rule should be invoked is when the plaintiff has not discovered all of the facts essential to the cause of action. In DeRose, the plaintiff was aware, at the time of the assaults, of all the facts necessary to state a cause of action against the defendant, as evidenced by her recollection that "at the times of [the] said sexual molestation, . . . [she] felt great fear . . . of his greater size and strength and . . . his threats of harm." Therefore, the court barred application of a delayed discovery rule.

The court in DeRose conceded that there were situations in which awareness of a wrongful act would not carry with it awareness of harm, but that

82. Id. at 315.
83. Id. at 317.
84. Id.
85. Id.
86. Id. (quoting Lessee v. Union Pacific R.R., 690 P.2d 596 (Wash. Ct. App. 1984)).
88. Id. at 369.
89. Id. at 370.
90. Id. at 371.
91. Id.
92. Id. at 372.
93. Id. at 371. The court preserved the issue of whether the delayed discovery rule may be invoked when the plaintiff alleges that she repressed the memories of the sexual assault and it is illogical to charge the plaintiff with awareness of the harm if she was unaware of the assaults. Id.
an assault was not one of them. Therefore, because there was knowledge of the unconsented and offensive nature of defendant's acts, the court ruled that the sexual assaults caused harm as a matter of law. The court found it irrelevant that the plaintiff was unable to recognize the causal connection between the assaults and the subsequent emotional harm.

A similar type of case was argued under the premise that the adult victim's insanity effectively tolls the statute of limitations for intentional torts. The plaintiff in Smith v. Smith brought suit against her father alleging that he repeatedly sexually abused her until she was twelve years old. Medical and psychological experts opined that the plaintiff was suffering from a post-traumatic stress disorder, which precluded her from instituting litigation because of the potential to stimulate traumatic recall of the childhood events. The applicable statute of limitations provided that a cause of action be tolled based on insanity. It had been held by another court, however, that insanity under this disability provision does not apply to a person "claiming a mere post traumatic neurosis," and, therefore, is not a question of fact for the jury. The court found that the victim was aware she had

94. Id. (citing Sonbergh v. MacQuarrie, 247 P.2d 133, 135 (Cal. Dist. Ct. App. 1952)).
95. DeRose, 242 Cal. Rptr. at 371.
96. Id.
97. 830 F.2d 11 (2d Cir. 1987).
98. Id. at 12.
99. In 1980, the American Psychiatric Association recognized this psychological trauma can result from child sexual abuse. Harshaw, supra note 9, at 755. This anxiety disorder features the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience. There is often intense psychological distress when the person is exposed to events that resemble an aspect of the traumatic event. In addition, there is persistent avoidance of stimuli associated with [the trauma]. The person commonly makes deliberate efforts to avoid thoughts or feelings about the traumatic event and about activities or situations that arouse recollections of it. This avoidance of reminders of the trauma may include psychogenic amnesia for an important aspect of the traumatic event.

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF DISORDERS § 309.89 at 247-48 (3d rev. ed. 1987) [hereinafter DSM-III]. Consequently, it is common for the symptoms of post-traumatic stress disorder to emerge after a latency period of months or years following the trauma. Meiers-Post v. Schafer, 427 N.W.2d 606, 608 (Mich. Ct. App. 1988). A sexually abused child suffering from this disorder may repress or delay disclosing the abuse until after the applicable statute of limitations for personal injury has run. Harshaw, supra note 9, at 756. For a discussion of the victim's repression and accommodation of her traumatic experience, see infra note 118.
100. Smith, 830 F.2d at 12.
been sexually abused, the abuse had harmed her, the post-traumatic neurosis which she suffered did not result from a separate and independent wrong, and she was properly held to be time-barred by the statute of limitation.103

The most recent evaluation of a type 1 case was by the Montana Supreme Court in 1988.104 The plaintiff in *E.W. v. D.C.H.* allegedly suffered seven years of sexual attacks from the time she was five by her step-uncle, a close family member.105 After her parents inadvertently discovered the abusive incidents, medical examinations confirmed the sexual activity,106 but the possible psychological effects of the abuse were not addressed by the attending physician.107 As a young adult, the plaintiff suffered emotional disorders.108 Subsequent psychiatric counseling, in connection with the second of two divorces, indicated a possible causal connection between her ongoing emotional problems and the childhood attacks.109 The court, however, found it inappropriate to extend the discovery doctrine to instances of sexual molestation when the plaintiff acknowledged that she “always knew” she was molested as a child and suffered from psychological problems since late adolescence.110 Since the plaintiff was clearly aware of the wrongful con-


105. Id. at 818.

106. Id. Generally, if the parents fail to take action against known physical abuse, they may be subject to criminal neglect charges. See J.E. Keefe, Jr., Annotation, *Failure to Provide Medical Attention for Child as Criminal Neglect*, 12 A.L.R.2d 1047 (1950). Under extraordinary circumstances, parental rights over the child may be terminated. Mary J. Cavins, Annotation, *Sexual Abuse of Child by Parent as Grounds for Termination of Parent’s Right to Child*, 58 A.L.R.3d 1075 (1974). In a number of cases, courts have found sufficient evidence to justify termination of a parent’s inherent right to control and care for his child where there has been either sexual abuse of a child by the parent or acquiescence by the parent to such abuse. See, e.g., *In re Betty J.W.*, 371 S.E.2d 326 (W. Va. 1988); *In re Corrigan*, 286 P.2d 32 (Cal. Ct. App. 1955); *In re Van Vlack*, 185 P.2d 346 (Cal. Ct. App. 1947); *In re Armetrout*, 485 P.2d 183 (1971); *In re T.J.A.*, 407 S.W.2d 573 (Mo. Ct. App. 1966); Baker v. Vidal, 363 S.W.2d 158 (Tex. Civ. App. 1962). A legal guardian also may have her guardianship rights terminated under similar circumstances. See, e.g., MONT. CODE ANN. § 41-3-101(b) (1991) (stating in its declaration of policy that the state seeks to “compel in proper cases the parent or guardian of a youth to perform the moral and legal duty owed to the youth”) (emphasis added); OHIO REV. CODE ANN. § 2919.22 (Baldwin Supp. 1991) (explaining that in addition to the natural parents, the child endangering statute covers guardians and custodians, persons having temporary control of a child, and persons standing in the place of parents). Additionally, some states mandate the conditions and procedures under which the parent-child relationship may be terminated, specifically where the child is considered neglected, deprived, or endangered. See, e.g., IDAHO CODE §§ 16-2001 to -2015 (1979 & Supp. 1991); MONT. CODE ANN. §§ 41-3-601 to -612 (1991). Under the Montana statute, the defendants in *E.W.* could have been penalized for criminal neglect if they had not protected the child from her abusive step-uncle.


108. Id.

109. Id.

110. Id. at 820.
duct, her failure to fully understand her legal rights or the causal relationship between the acts and her injuries was insufficient to toll the statute of limitations.  

Fundamental fairness considerations have caused other courts to follow the Tyson dissent and apply the discovery rule in factually similar type I cases when protecting the defendant at the expense of the adult victim works an "intolerable perversion of justice." These courts take into account studies of victims of sexual assault explaining the psychological distress caused by the abuse and the development of coping mechanisms, which render the victim unable to perceive or to know the existence or nature of her psychological and emotional injuries.

In a case of first impression, the Wisconsin Court of Appeals applied a delayed discovery rule in a type I case. In *Hammer v. Hammer*, the plaintiff alleged that between 1969 and 1978 her father abused her on the average of three times a week beginning at the age of five. The abusive incidents occurred in secret, were accompanied by harmful threats, and were blamed on the plaintiff repeatedly by her abuser. The court recognized that both the acts themselves and the circumstances of the victim's childhood caused her to develop various coping mechanisms and symptoms of psychological distress, including great shame, embarrassment, guilt, self-blame, denial, depression, and disassociation from the experiences.

111. Id.
113. Symptoms of psychological coping mechanisms include, but are not limited to, "great shame, embarrassment, guilt, self-blame, denial, depression, disassociation from experiences, and multiple personalities." Id. at 24; see also Phillips, supra note 1, at xiii-xvi. A child victim deals with the emotionally overloading experience of repeated sexual abuse through such processes, which essentially becomes a very functional means to survive. Phillips, supra note 1, at xi, xiii.
116. Id. at 24.
117. Id. These are typical circumstances imposed by the abuser. See Allen, supra note 18, at 614-15.
118. *Hammer*, 418 N.W.2d at 24. These are common psychological effects of sexual abuse. See Allen, supra note 18, at 616; Virginia Cruz et al., *Developmentally Disabled Women Who Were Molested as Children*, 1988 SOC. CASEWORK: J. CONTEMP. SOC. WORK 411; Kilgore, supra note 19, at 224. Additionally, the victim of incest is forced to deal with the situation alone when the other parental figure does not offer relief. Allen, supra note 18, at 615. For a discussion of the mother's role in an incestuous family, see supra note 18.

Because the child must cope alone, she often internalizes her feelings of self-blame, anger, fear, confusion, and sadness resulting from the incest. See Sandy Rovner, *Healthtalk: Facing
The *Hammer* court relied on an affidavit submitted by the plaintiff's psychological counselor which declared that the plaintiff demonstrated a normal post-traumatic stress reaction to intrafamilial sexual abuse.\textsuperscript{119} According to the expert, the plaintiff was unable to perceive the incestuous conduct as injurious because: 1) the long duration and frequency caused her to perceive it as normal behavior; 2) secrecy and isolation had been imposed upon her; 3) the abuse had essentially "depersonalized" her, leading her to think of herself as an object to be used rather than a person with rights; 4) she had been told by her abuser that such conduct was normal and his right; and 5) the abuse by an authority figure on whom she was dependent made her distrustful of other authority figures who might have helped her.\textsuperscript{120}

To establish when this cause of action accrued, the *Hammer* court carved out an exception for cases of incestuous abuse involving minors and held it "will not accrue until the victim discovers, or in the exercise of reasonable diligence should have discovered, the fact and cause of the injury."\textsuperscript{121} Specifically, the cause of action does not accrue until the plaintiff "had information to a reasonable probability of the nature of her ailment and the factual information to a reasonable probability that the defendant's . . . [act] was the cause of her injuries."\textsuperscript{122} Therefore, although some tort claims will accrue at the time of the negligent act or the injury, an incestuous abuse claim may not accrue until the victim had information as to the reasonable probability of

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\textsuperscript{119} *The Aftermath of Incest*, WASH. POST, Jan. 6, 1984, at D5. This internalization or repression of anger and anxiety is a survival mechanism known as accommodation. Salten, *supra* note 16, at 198.

Accommodation leads to dissociation, where the victim is prevented from recognizing the nature and extent of the injuries she has suffered as a result of the incestuous abuse. Kilgore, *supra* note 19, at 224, 227. Often, it is not until adulthood that a victim of sexual abuse as a child will begin to exhibit signs of incest trauma. Although the victim may feel she is injured, until she is able to place blame for the incest on her abuser, it is impossible for her to realize that her abuser's behavior caused her psychological disorder. Frequently, it is only through a triggering event such as psychotherapy that the victim is able to recognize the causal link between the incestuous conduct and the damages to her from the traumatic experience. Allen, *supra* note 18, at 630. Other triggering events have included a television program about the sexual exploitation of students by a teacher, see Meiers-Post v. Schafer, 427 N.W.2d 606 (Mich. Ct. App. 1986), and the presentation by an attorney, who herself was a victim, to a jury in a factually similar case, see Carol L. Mithers, *Incest and the Law*, N.Y. TIMES, Oct. 21, 1990, § 6 (Magazine), at 44. As demonstrated, awareness of the traumatic experience many times does not occur until long after the wrongful acts were committed.

\textsuperscript{119} *Hammer*, 418 N.W.2d at 25.

\textsuperscript{120} *Id.* Although the court did not cite to any secondary authority, other scholars have acknowledged similar perceptions of these young victims. See Kilgore, *supra* note 19, at 224; Newberger & De Vos, *supra* note 114, at 505.

\textsuperscript{121} *Hammer*, 418 N.W.2d at 25-26 (emphasis added).

\textsuperscript{122} *Id.* at 26 (quoting Borello v. U.S. Oil Co., 388 N.W.2d 140, 151 (Wis. 1986)).
the nature of her injuries and the cause thereof.123

B. Repressed Memories

The distinguishing feature between type 1 and type 2 cases is the plaintiff’s awareness of the abuse.124 In type 2 cases, there is essentially no conscious memory of the abuse because of the psychological condition of the victim subsequent to the abuse.125 Consequently, courts approach type 2 cases cautiously. Adopting the approach taken by the dissent in Tyson, some courts have made effective use of expert clinical testimony addressing the psychological ramifications of sexual abuse on the adult victim.126 These cases often show that the adult victim is diagnosed as having post-traumatic stress disorder.127 The recognition of this psychological phenomena as manifested through repression provides a stronger factual predicate for applying the delayed discovery rule to type 2 cases.128 Thus, a court no longer views only the policy reasons for permitting a suit to be filed a substantial number of years after the incident. Instead, the court is forced to analyze the important diagnostic tools in psychotherapy as a crucial element in establishing the existence of a cause of action based on a childhood event.

The lone case upholding the Tyson majority’s refusal to apply a delayed discovery rule with respect to type 2 cases denied an adult woman’s action against her parents for sexual battery.129 In his dissenting opinion in Lindabury v. Lindabury,130 Judge Jorgenson expounds on the position that expert medical testimony serves a useful purpose to both the courts and litigants with respect to past events, thereby agreeing with the Tyson dissent.131 The

123. Id. The Hammer court also provided a footnote asserting that even though an incest victim may know that she has been injured, it is impossible for her to realize that her abuser’s behavior caused her psychological disorders until she is able to shift the blame for the abuse from herself to her father. Id. at 26 n.7 (citing Allen, supra note 18, at 630).

124. See supra notes 70-74 and accompanying text.


128. See Jones, 576 A.2d at 319-20 (holding that plaintiff’s allegations of mental impairment caused by father’s sexual abuse should not have been resolved summarily).


130. Id.

131. Id. at 1118 (Jorgenson, J., dissenting). The dissent describes the difficulty of accepting the premise that psychiatry offers precise and accurate determinations with regard to foresee-
Lindabury dissent also offers a perspective on how other courts in Florida have treated expert testimony as an aid in determining the effects of other psychological syndromes, such as battered wife syndrome, rape trauma syndrome, and post traumatic stress syndrome in child victims of sexual assault, concluding that expert testimony in childhood sexual abuse cases should be treated similarly. Because a victim's reaction to these traumatic episodes is unique among all forms of violent assault and because the complexity of that reaction is beyond the understanding of the ordinary layperson sitting on a jury, expert testimony on the subject matter would assist the trier of fact. The exact point in time when a victim comes to know, or reasonably should have known, of her injury and that her injury was caused by the wrongful acts of another is also unique to every victim of childhood sexual assault because of the psychological trauma. Therefore, expert testimony is necessary to help establish that point in time for statute of limitations purposes.

Since 1988, three courts have favored application of a delayed discovery rule in type 2 cases. In Jones v. Jones, the court relied on a psychologist's affidavit to establish the commonality of psychological disability on the part of a victim. The court ultimately held that the mental trauma resulting from a pattern of incestuous sexual abuse may constitute insanity under the respective state statute so as to toll the statute of limitations.

In 1989, the Court of Appeal for Sixth District of California, the same court which decided DeRose v. Carswell only two years earlier, ruled favorably on the delayed discovery issue. Although the plaintiff in Mary D. v.
John D. failed to present any psychiatric testimony corroborating her claim that she repressed all memories of the abuse, the court reversed the grant of the summary judgment for the defendant and remanded to the lower court. The court stated that it would allow the delayed discovery doctrine to apply if the plaintiff could establish that her lack of memory of the tortious actions was due to psychological repression.

Finally, in Johnson v. Johnson, which established the type 1 and type 2 distinction, the court held that a genuine issue of material fact existed as to when the adult plaintiff in a childhood sexual abuse case knew or should have known of her injury and its wrongful cause. The federal district court, applying Illinois law, noted that courts in Illinois applied the discovery rule in numerous contexts on a case-by-case basis. These decisions take into account both the equitable considerations and problems of proof. The Johnson court concluded that the affidavit presented by the plaintiff’s therapist dispelled any problems of proof in her claim that she had no memory of the sexual abuse.

Regardless of the lack of precedential value a dissent carries over a majority opinion, courts have been reluctant to adhere to stringent majority opinions like that offered in Tyson. Consequently, more courts than not have resolved these type 2 cases in favor of a delayed discovery rule.

II. UNIFORM APPROACH FOR EQUITABLE RESULTS

The prospect of avoiding such an inequitable result in granting a defendant’s motion for summary judgment in incestual abuse cases can be addressed either by the courts or by the legislature. Decisional law has the capacity to maintain a uniform system of admitting clinical testimony as an objective evaluation of the psychological development of the particular adult victim, possibly in a manner analogous to the rules of evidence. Likewise, the legislature has the ability to promulgate both a specific statute of limitations which applies a liberal discovery rule to civil actions involving child-

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143. Id. at 635.
144. Id. at 639.
146. Id. at 1370.
147. Id. at 1369-70.
148. Id. at 1370.
149. See, e.g., Osland v. Osland, 442 N.W.2d 907, 909 (N.D. 1989). “We refuse to apply the rationale of Tyson to this case. We agree with Justice Pearson, dissenting in Tyson, that concern about the availability of objective evidence should not preclude application of the discovery rule.” Id.
150. See supra note 74 and accompanying text.
hood sexual abuse and a criminal statute with no statute of limitations defense for one accused of sexually abusing children. In these legislative efforts, the policy concerns for allowing a civil action for childhood incestuous abuse to overcome a statutory time restriction and for establishing an unrestricted time period for prosecuting the child molester in the same incident and upon the same facts are the same.

The present method of allowing courts to determine the fate of these suits based on their own sense of justice is not an equitable solution to this social dilemma. As such, a moderate, logical approach to the problem should be presented to all courts of general jurisdiction to allow the adult victim an opportunity to convince a court or jury that there were genuine reasons that she discovered or should have discovered her cause of action after it would otherwise have been foreclosed by the statute of limitations. 151 This date of discovery determination of psychological injuries should logically lie in the hands of a person familiar with the victim's psychological conditions. Because of the nature of the victim's familial background152 and perhaps her inability to actively participate in a relationship,153 the person most familiar with the victim is a psychotherapist whom the victim confided in when no one else was available.154

While many scholars may skoff at the weight given to evidence developed during psychotherapy,155 the nature of these cases provides very little in the way of alternatives. The victim has psychologically repressed traumatic events from her memory;156 this psychological phenomenon should not preclude her cause of action. To alleviate the skepticism, it is possible for the courts to establish an objective administrative guideline to weigh the

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151. In providing potential plaintiffs with the opportunity to bring suit after the statute of limitations has passed, one state judge has proposed that the plaintiff's action be divided into two distinct arguments. The plaintiff must prove first that the application of the discovery rule is warranted in her case and, second, that she suffered injury, which was the result of childhood sexual abuse, and that the defendant was her abuser. See 31 ATLA L. REP. 389 (1988) (citing Unnamed Plaintiff v. Unnamed Defendant, Mass., Suffolk County Superior Court, No. confidential, June 21, 1988) (court files sealed except for Judge Abram's order and memorandum opinion).

152. See supra note 18.

153. HERMAN, supra note 18, at 31-32.

154. Bryer et al., supra note 18, at 1430.

155. See generally Wesson, supra note 46. Despite such skepticism, the fact remains that it is the function of the jury to determine the weight of expert testimony once the issue reaches the trial level. Additionally, testimony of a psychoanalyst is essential prior to the trial—to assist the judge in determining whether application of the delayed discovery rule is appropriate under the circumstances of the case. For this reason, it becomes necessary to consider a standard weight that expert testimony should be given by the court in this preliminary matter.

156. See supra notes 99 and 118 and accompanying text.
credence of the psychiatric expert.\textsuperscript{157} Skeptics of psychoanalysis also contemplate the various transformations that separate the historical truth from the psychoanalytic truth, or rather what really happened and what the psychotherapist has interpreted to have happened.\textsuperscript{158} Because of the possibility that, in the process of talking with the patient about her memory, the therapist may unintentionally supply a phrase or description\textsuperscript{159} which the patient may incorporate into her private experience,\textsuperscript{160} the implications of psychoanalysis—may be viewed as a construction—rather than a reconstruction—of the past events.\textsuperscript{161} Consequently, it may be necessary to present a neutral third party evaluation of the adult victim’s mental condition. In essence, this could be a court appointed neutral expert who is theoretically an “expert on psychological experts,” capable of evaluating the long-term clinical treatment of an adult victim of childhood sexual abuse.\textsuperscript{162}

The legislature’s role in relieving the potential inter-jurisdictional, as well as possible intra-jurisdictional, discrepancies of these otherwise untimely cases may have a very persuasive impact on the policy arguments of victims of childhood sexual abuse. Within the last three years, legislatures across the country have begun to recognize an adult victim’s right to bring a civil action against her abuser without regard to the long period of time between the wrongdoing and the suit.\textsuperscript{163} This widespread acknowledgment of previously inadequate remedies for childhood sexual assault victims was initially set in motion by Patti Barton, a thirty-five-year-old victim of sexual assault.

\textsuperscript{157} This theoretical framework is presented in Kilgore, supra note 19. Kilgore recognizes that sexual abuse is uncovered in the latent context presented during traditional therapy and the potential that this evidence provides in understanding the associated features of sexual abuse. The article attempts to fill the gaps between understanding these descriptive findings and predicting and applying those findings to clinical practice. Kilgore, supra note 19. In particular, the article integrates the most recent literature on the characteristics of early childhood sexual abuse and its victims with theories of ego-development psychology. Therefore, courts must understand the effects of childhood sexual abuse on social and emotional development of the victim before judging her action as inexcusably untimely.

\textsuperscript{158} Wesson, supra note 46, at 335-38.

\textsuperscript{159} This is an element of “countertransference,” which is affected by the therapist’s own psychodynamic process. The analyst is bound on occasion to hear a production in a certain way because it fits into his or her own preconceived interpretation of what happened in the patient’s past. See id. at 336.

\textsuperscript{160} This is labeled “transference,” the feelings that a patient has about the analyst. For example, the patient may embellish a vague or elusive memory of childhood with the expectation of pleasing the analyst with a detailed description. See id.

\textsuperscript{161} Id. at 335-38.


\textsuperscript{163} For specific legislation enacted, see supra notes 39-40 and accompanying text.
that began when she was five. With the legal assistance of the Seattle-based Northwest Women's Law Center (Law Center), Patti Barton and her husband succeeded in creating the first piece of state legislation in the country to amend the statute of limitations to provide a delayed discovery rule to traumatized victims of childhood sexual abuse.

Agencies and organizations throughout the country have supported legislative efforts as well. A prime example is the efforts outside of Washington by the Law Center and Barton's newly formed group, the Legal Rights for Survivors of Childhood Sexual Abuse. Even within the state of Washington, lobbying efforts have afforded these organizations the opportunity to proclaim that "the discovery rule is particularly well-suited to cases involving childhood sexual abuse." Supporters of this discovery rule are seeking to end the unfair protection afforded the abuser and instead force him to face the victim when she is an adult and able to stand up for herself. By permitting the victim to sue when she discovers the injury and its cause, it is more likely that abusers will eventually be held accountable to pay, and ultimately there will be a decline in the incidence of childhood sexual assault.

The criminal side of childhood sexual assault is closely related to the delayed discovery issue in civil actions. Sexual assault and child molestation assault have been recognized as crimes in the United States since the early

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164. For a brief discussion of the reasons leading to her participation in the legislative arena, see supra note 39.
165. See Mithers, supra note 118, at 58.
166. In addition to lobbying efforts, agencies from Massachusetts to California have taken the side of many adult victims bringing civil actions against their abusers in cases of first impression. For example, a Rhode Island trial court's application of a delayed discovery rule to allow two sisters to maintain a civil suit against their father was upheld by that state's Supreme Court. Doe v. LaBrosse, 588 A.2d 605 (R.I. 1991). Twenty-six private organizations and state agencies joined in filing a friend-of-the-court brief. See generally Br. of Amici Curiae, Doe v. Marc LaBrosse, 588 A.2d 605 (R.I. 1991) (No. 90-97). These include, for instance, the National Organization for Women, the Massachusetts Society for the Prevention of Cruelty to Children, the State of Connecticut Commission on Victim Services, the National Association of Social Workers, the Alaska Network on Domestic Violence and Sexual Assault, and the Rhode Island Office of the Child Advocate. Paul E. Parker, 26 Agencies Back Sisters' Suit Against Father Accused of Rape, PROVIDENCE J., Dec. 22, 1990, at B3.
167. For example, in April, 1989, the Bartons testified before the Alaska House Judiciary Committee in support of similar legislation. Lund, supra note 39. They have also provided extensive background information to Rhode Island legislators seeking to enact a delayed discovery rule. Letter from Kelly and Patti Barton to Representative Batastini (Apr. 22, 1989) (responding to the latter's request for compiled materials used in support of Washington legislation).
168. Memorandum from Py Bateman of "Alternatives to Fear" to the Washington legislature 6-7 (Jan. 1, 1988) (on file with author) (citing Surgeon General's Northwest Regional Conference on Interpersonal Violence (Sept. 12, 1987)).
1800s.\footnote{170} State legislatures have the capacity to determine the applicable statutory time limit on bringing such criminal actions against a defendant.\footnote{171} If child molestation and sexual abuse crimes have no statute of limitations,\footnote{172} prosecution of such crimes can occur years or even decades after the incidents took place. Thus, this lack of statutes of limitations relating to criminal acts similarly disfavors limiting the time in which an action for the tortious injuries of sexual abuse can be brought in a civil action involving the same incident.

Forty states, however, currently do impose limitations on criminal prosecution.\footnote{173} States which maintain statutes of limitations for rape, child sexual abuse,\footnote{174} and incest,\footnote{175} and recognize the date on which to toll the statute, essentially have accepted the same policy reasons for providing a discovery rule in civil actions. For instance, legislators have begun to realize that the relationship between the powerful, authoritarian adult offender and the helpless, dependent child victim makes reporting such abuse highly unlikely.\footnote{176} In these states, the statute of limitations is tolled until the victim reaches a


\footnotesize{171. Twenty-four states impose a statute of limitations for child sexual abuse, yet do not provide statutory or common law provisions for tolling the criminal statute. They are: California, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, Ohio, Oregon, South Dakota, Texas, Utah, and Vermont. \textit{Id.} at 191 n.12.}

\footnotesize{The following nine states have no limitation period for felony offenses, including child molestation: Alabama, Kentucky, Maryland, North Carolina, Rhode Island, South Carolina, Virginia, West Virginia, and Wyoming. In fact, Wyoming and South Carolina have no statute of limitations for any criminal offense. \textit{Id.} at 191 n.12.}

\footnotesize{Still, 16 other states have specifically addressed child sexual assault crimes by mandating that the limitations period for these crimes does not begin to run until: 1) the offense is discovered; 2) the child victim reaches a minimum age; or 3) the abuse is reported to a law enforcement agency. These states include: Alaska, Arkansas, Arizona, Colorado, Florida, Louisiana, Massachusetts, Nevada, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, Washington, and Wisconsin. \textit{Id.} at n.15.}

\footnotesize{172. For a list of nine states with no applicable time limitation, see \textit{id.} at n.14.}

\footnotesize{173. \textit{See id.} at nn.12, 15.}

\footnotesize{174. State legislatures are expanding the definition of "sexually abusive behavior" in an effort to criminalize more harmful conduct, recognizing the power imbalance between offenders and child victims. \textit{See id.} at 195. For example, such offenses now include an assailant who abuses his position of authority to coerce the victim into an abusive relationship. See, e.g., M\textsc{inn. Stat. Ann.} § 609.342(1)(b) (West 1990); N\textsc{m. Stat. Ann.} § 30-9-11 (Michie Supp. 1991); W\textsc{ash. Rev. Code Ann.} § 9A.44.093(1) (West Supp. 1991).}

\footnotesize{175. Incest has been held to fall within a charge of rape. D.H. Webster, Annotation, \textit{Incest as Included Within Charge of Rape}, 76 A.L.R.2d 484 (1961). Where applicable, a rape prosecution will be held to include the more specific charge of incest if the latter is not addressed otherwise.}

\footnotesize{176. Mindlin, \textit{supra} note 170, at 195 n.33, 197.}
certain age, but the victim is still required to report the assault within the statutory time period, leaving intimidated victims very little protection from such traumatizing crimes.

On the other hand, some state legislatures have been creative in tolling the statute of limitations under particular circumstances. For example, the prescribed time period within which a suit must be commenced may not include any time in which the fact of the crime is concealed, particularly when the accused person has concealed evidence of the crime and other evidence sufficient to charge him with the offense is unknown or can not be attained by the prosecuting authorities in the exercise of due diligence. In interpreting such statutes, courts have construed this exception to the statutory time period in two very different ways. For instance, Kansas courts have held that a defendant who threatens and compels a victim not to reveal the crime to anyone does not constitute concealment for purposes of tolling the statute of limitations. The reasoning behind such a holding is that although sexual abuse of children by its nature occurs in secrecy, the victim herself knew that the crime had been committed as soon as it occurred and, therefore, the crime was not concealed. However, the language of the court's opinion in State v. Bentley reveals that the majority of the Kansas Supreme Court was unlikely to extend the statute of limitations beyond the stated two-year period in any case.


178. Mindlin, supra note 170, at 195.


183. Bentley, 721 P.2d at 230.


185. The opinion reads in pertinent part:

Threats ... are an effective way to keep child victims from reporting sexual offenses. They are commonplace in the aftermath of a sexual assault on a child. Therefore, the practical effect of construing a threat to a sexually abused child as concealment would be to extend the statute of limitations beyond its stated two-year period in nearly every case of this nature. Where would it end—upon the child attaining the age of majority? Id. at 230.
The dissent in Bentley maintains that a young, naive, horrified victim does not "necessarily know" that the acts of a trusted adult constitute a crime punishable at law\textsuperscript{186} and, therefore, any action by the accused designed or calculated to prevent discovery of the crime is "concealment."\textsuperscript{187} When the effects of sexual abuse on a child are considered,\textsuperscript{188} it becomes apparent that this latter rationale is appropriate in these criminal prosecutions. Courts which do not follow Bentley undoubtedly offer a more just solution to construing "concealment of a crime."\textsuperscript{189} Additionally, if courts interpret this concealment fairly, they will employ the same reasoning for allowing application of the discovery rule for civil actions involving sexual abuse in which the personal injury is psychologically concealed or repressed from the plaintiff\textsuperscript{190} just as the malicious crime is concealed from authorities.

The rationale for prescribing sexual abuse as a criminal offense can be used for the related civil action as well. The evidence and witnesses in the criminal action are the same as in the civil action and, therefore, both actions should be on equal footing with regard to the statutory time limit in which to file an action. Until such time as a specific tort of incest is recognized by enacting a statute of limitations for such a tort, courts should adopt the policy considerations of the analogous criminal statute of limitations for the offensive act.

\section*{III. Conclusion}

The latent nature and psychologically crippling effects of many incest-related injuries present unusual problems to courts adjudicating tort claims arising from these childhood events. However, the nearly epidemic proportions of sexual abuse incidents demonstrates the urgency in addressing these serious acts. A tort action for incestuous injuries detected later in the victim's life is perhaps the paradigmatic example of the special circumstances which require equitable preservation of a potential remedy.

Since medical professionals have called public attention to the traumatic effects of childhood sexual abuse, it is unreasonable to deny a plaintiff the right to present this evidence on behalf of discovery principles. Such discov-

\textsuperscript{186} Id. at 231; see also Walstrom v. State, 752 P.2d 225, 228 (Nev. 1988).
\textsuperscript{187} Bentley, 721 P.2d at 231.
\textsuperscript{188} See supra notes 18 and 118.
\textsuperscript{189} See, e.g., Crider v. State, 531 N.E.2d 1151, 1154 (Ind. 1988) (where the victim and her sister had not told anyone of repeated attacks upon them by their father because he threatened to "put them in the hospital," the defendant successfully concealed facts of his crimes by intimidating his victims and, therefore, the statute of limitations did not begin to run until the victim made her disclosure to authorities).
\textsuperscript{190} For a discussion of the psychological repression, see supra notes 98 and 118.
ery principles should provide all plaintiffs similarly situated with the preceden-
tial benefit of a successful claim. However, unless a uniform approach to
the discovery rule is established, plaintiffs will face a difficult, if not impossi-
ble, obstacle of an extremely short statutory time limit. To permit judges to
continue to apply different discovery rule principles across the country or to
refuse to implement a statute of limitations for specific sexual abuse acts
advocates public ignorance of this serious and troublesome problem.

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