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Civil Claims of Adults Molested As Children: Maturation of Harm and the Statute of Limitations Hurdle

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CIVIL CLAIMS OF ADULTS MOLESTED AS CHILDREN: MATURATION OF HARM AND THE STATUTE OF LIMITATIONS HURDLE

> The horror of incest is not in the sexual act, but in the exploitation of children and the corruption of parental love.[1]

I. Introduction

Adults who have been the victims of childhood incest abuse[2]

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1. J. HERMAN, FATHER-DAUGHTER INCEST 4 (1981).

2. For purposes of this Note, the term "incest abuse" refers to all unwanted and nonconsensual sexual contact between family members. *See* D. RUSSELL, THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN 59 (1986) [hereinafter SECRET TRAUMA]. Incestuous abuse involves "any kind of exploitive sexual contact or attempted sexual contact that occur[s] between relatives, no matter how distant the relationship, before the victim turn[s] eighteen years old." *Id.* For related definitions of acts constituting child sexual abuse under the New York Penal Law, Family Court Act and Social Services Law, see THE SEXUAL ABUSE OF CHILDREN I app. at 15-19 (1987) (R. Cohen & M. McCabe ed. 1987) (published by the New York State Department of Social Services in conjunction with the Supreme Court of the State of New York, Appellate Division, First Department) (child sexual abuse typified by nonconsensual sexual contact, and a child less than 17 years of age is legally incapable of consent to any sex offense under New York State Penal Law § 130.05) [hereinafter SEXUAL ABUSE OF CHILDREN]; *see also* GUIDELINES FOR REPORTING SEXUAL ABUSE AND MALTREATMENT OF CHILDREN 1 (1986) (official guidelines of the State of New York Department of Health and Department of Social Services) (sexually abused child is a child less than 18 years of age whose parent, or other person legally responsible for his care, commits or allows to be commited a sexual offense, as defined in the Penal Law, on such child).

One researcher surveyed a random sample of 930 women in San Francisco and reported prevalence rates of 16% for incest abuse occuring before the victim reached the age of 18, and 12% for incest abuse before the victim reached the age of 14. *See* SECRET TRAUMA, *supra*, at 60. After combining the prevalence statistics for physical and nonphysical (noncontact) abuse with the rates for intrafamilial and extrafamilial sexual abuse, this study reported an overall prevalence rate of 38% of physical sexual abuse and 54% of noncontact abuse. *See id.* at 61-62.

In another study, reviewing 583 cases of child sexual abuse, the offender was a family member in 47% of the cases. *See* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806,

have recently begun to seek civil redress[3] for latent injuries[4] caused by such abuse. Because courts have failed to recognize a tort of

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807 n.14 (1985). Moreover, it has been estimated that 75% of the incest occurring between family members involves incest between fathers and daughters. *See* Coleman, *Incest: A Proper Definition Reveals the Need for a Different Legal Response*, 49 Mo. L. Rev. 251, 251 n.1 (1984); *see also* Arthur, *Child Sexual Abuse: Improving the System's Response*, 37 Juv. & Fam. Ct. J. 4 (1986) [hereinafter Arthur]; Note, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 Harv. Women's L.J. 189, 193 n.18 (1984) [hereinafter Note, *Preserving the Victim's Remedy*].

The incidence of child sexual abuse in New York has been ascertained through reports of child abuse and maltreatment made to the New York State Child Abuse and Maltreatment Register. *See* McCabe, *Dynamics of Child Sexual Abuse*, in Sexual Abuse of Children, *supra*, at 1-2 (reporting 197% rise in sexual abuse reports in New York State during seven year period ending 1985, from 2,346 reports in 1979 to 6,963 reports in 1985) [hereinafter McCabe]. McCabe notes, however, that the true incidence of child sexual abuse may far exceed the current reporting levels. *See id.* at 3.

McCabe also has compiled separate data on the incidence of incest abuse in New York through a random sample of 201 child sexual abuse cases reported to the Child Protective Services agency in New York City. *See* McCabe, *supra*, at 5. McCabe reports: (1) 86% of the cases involve female victims, *see id.* at 5-7, at an average age of 10.9 at the time of the abuse, *see id.* at 6, 8; (2) 54% of the cases involve offenders who are fathers or father-figures, *see id.* at 9-10; (3) 29% of the cases occur over an extended period of time, *see id.* at 16-17; and (4) 28% of the cases involve intercourse as the most frequently committed sexual act against the victim. *See id.* at 14-15.

For a discussion of the prevalence of child sexual abuse in general, see D. Finkelhor, A Sourcebook on Child Sexual Abuse 20-21 (1986) (referring to 19 studies taking place from 1929 to 1985) [hereinafter Sourcebook]; McCabe, *supra*, at 3 (indicating 200% increase nationwide in reported sexual abuse cases from 1976 through 1982); Brody, *Therapists Seek Causes of Child Molesting*, N.Y. Times, Jan. 13, 1987, at C1, col. 1 (referring to 1985 national poll which indicates: (1) between 10.9 and 17.6 million American men have sexually abused a child; and (2) 27% of women and 16% of men have been molested as children; *see also* Watson, Lubenow, Greenberg, King & Junkin, *A Hidden Epidemic*, Newsweek, May 14, 1984, at 30 (similar statistics); Bailey, *Grueling Child-Abuse Cases Push Many Prosecutors to Their Limits*, Wall St. J., Nov. 19, 1986, at 35, col. 4 (reporting that nationwide the number of reported child molestation cases has jumped seventeen-fold since 1976 to more than 100,000).

3. *See* Tyson v. Tyson, 107 Wash. 2d 72, 73, 727 P.2d 226, 226-27 (1986); *see also* Smith v. Smith, No. 85 Civ. 285E, slip op. at 1 (W.D.N.Y. Nov. 7, 1986) (memorandum and order granting defendant's motion for summary judgment based on statute of limitations); Note, *Preserving the Victim's Remedy*, *supra* note 2, at 204 n.96; Galente, *New War on Child Abuse*, Nat'l L.J., June 25, 1984, at 26, cols. 2-3 (reporting that child molestation cases have prompted "adult survivor" suits).

While parents may attempt to raise the defense of parent tort immunity in response to the civil claims filed by their children, the parental immunity doctrine has been abandoned in whole or in part by a substantial number of jurisdictions. *See* Rousey v. Rousey, 499 A.2d 1199, 1201-2 (D.C. 1985) (summarizing positions that various jurisdictions have taken with respect to abrogating parent tort im-

incest, plaintiffs are most often confined to the traditional intentional tort and negligence causes of action[5] including assault, battery, false imprisonment and infliction of mental distress. These causes of action, usually governed by a one[6] to three[7] year statute of limitations period, often require the incest victim to commence suit before the injury occurs.

New York, as a general rule, computes statutes of limitations for personal injury claims from the date the plaintiff's cause of action accrues.[8] For tort purposes, courts fix the time of accrual as the date the defendant's wrongful conduct occurs rather than the date the plaintiff discovers the injury or the date the plaintiff recognizes a causal relationship between the injury and the defendant's conduct.[9] While personal injury statutes of limitations ordinarily begin to run from the date of the injury (*i.e.*, date of accrual), the statutory period is tolled by the plaintiff's infancy or insanity.[10] Nevertheless, the plaintiff, under a strict interpretation

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munity doctrine). New York eliminated the doctrine in Gelbman v. Gelbman, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194, 297 N.Y.S.2d 529, 532 (1969).

4. See *infra* notes 47-54 and accompanying text for a discussion of the latent or long-range injuries associated with incest abuse.

5. *See* Note, *Tort Remedies For Incestuous Abuse*, 13 GOLDEN GATE U.L. REV. 609, 617-28 (1983); Note, *Preserving the Victim's Remedy, supra* note 2, at 189-90; Note, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191, 195 n.28 (1985).

6. New York Civil Practice Law § 215(3) provides that "an action to recover damages for assault, battery [or] false imprisonment" shall be commenced within one year. N.Y. CIV. PRAC. L. & R. § 215(3) (McKinney 1972).

7. New York Civil Practice Law § 214(5) provides that "an action to recover damages for personal injury except as provided in sections 214-b, 214-c and 215" must be commenced within three years. N.Y. CIV. PRAC. L. & R. § 214(5) (McKinney 1972 & Supp. 1987); *see also* N.Y. CIV. PRAC. L. & R. § 214(5) practice commentary at 308 (McKinney Supp. 1987) (noting that § 215(3) applies to those actions in which the defendant evinces intent to affect plaintiff, whereas § 214(5) governs negligence actions in which the defendant evinces no such intent).

8. New York Civil Practice Law § 203(a) provides that "[t]he time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed." N.Y. CIV. PRAC. L. & R. § 203(a) (McKinney 1972).

9. *See* N.Y. CIV. PRAC. L. & R. § 203(a) practice commentary at 111-14, 57, (McKinney 1972 & Supp. 1987) (observing that although United States Court of Appeals for the Second Circuit has advocated discovery rule, the New York Court of Appeals has consistently refused to adopt such rule, choosing instead to defer to legislature); *see also* 1 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 201.02 (1963 & Supp. 1986) [hereinafter WEINSTEIN, KORN & MILLER].

10. New York Civil Practice Law § 208 provides, in pertinent part:

of the applicable New York law,[11] has at best three years upon reaching the age of eighteen[12] to commence suit against the sexually abusive family member. Many of the effects of childhood incest abuse, however, take years to manifest themselves,[13] thus rendering such tolling exceptions of little practical use to the victim of childhood incest litigating as an adult.[14]

Most jurisdictions have adopted some form of a discovery rule[15] in an attempt to solve the difficulty of maintaining a cause of action when the wrongful act and injury do not occur simultaneously or when the plaintiff is incapable of discovering the injury within the statutory period. The discovery rule provides that a cause of action accrues for statute of limitations purposes at the time the plaintiff, using reasonable diligence, discovers the injury.[16] New York, long in the minority of jurisdictions in failing to extend a discovery rule beyond a limited number of circumstances,[17] now

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> If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases, or the person under the disability dies, the time within which the action must be commenced shall be extended to three years after the disability ceases or the person under the disability dies, whichever event first occurs; if the time otherwise limited is less than three years, the time shall be extended by the period of disability.

N.Y. CIV. PRAC. L. & R. § 208 (McKinney Supp. 1987).

11. *See supra* notes 6-8 and accompanying text.

12. Section 208 was amended on Sept. 1, 1974, to lower the age of majority from 21 to 18. *See* N.Y. CIV. PRAC. L. & R. § 208 (McKinney Supp. 1987); *see also id.* § 105(j) (McKinney Supp. 1987).

13. *See infra* notes 47-68 and accompanying text.

14. *See id.*

15. *See* 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 n.41, 120 n.45 (1985) (distinguishing those jurisdictions that have legislatively adopted a time of discovery rule from those states that have judicially provided for discovery rule). The author found a total of forty-seven jurisdictions with some form of a discovery rule. *See id.* at 120.

16. *See* Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 432, 248 N.E.2d 871, 873, 301 N.Y.S.2d 23, 27 (1969) (foreign object exception); Dobbins v. Clifford, 39 A.D.2d 1, 3-4, 330 N.Y.S.2d 743, 746-47 (4th Dep't 1972) (extending *Flanagan* to negligently performed surgery); *see also* Note, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?*, 43 U. PITT. L. REV. 501, 502 (1982) [hereinafter Note, *Exception or the Law?*].

17. *See, e.g.*, Martin v. Edwards Laboratories, 60 N.Y.2d 417, 457 N.E.2d 1150, 469 N.Y.S.2d 923 (1983); Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 430 N.E.2d 1297, 446 N.Y.S.2d 244 (1981), *cert. denied sub nom.* Rosenberg v. Johns-Manville Sales Corp., 456 U.S. 967 (1982); Thornton v. Roosevelt Hosp.,

provides a discovery rule for for those plaintiffs suffering from the latent effects of exposure to toxic substances.[18]

Currently, the question has arisen whether the adult victim of childhood incest abuse can successfully litigate civil claims based on negligence and intentional tort by invoking common law doctrines and statutory tolling exceptions relating to statutes of limitations.[19] This question inevitably raises the additional issue of whether an incest victim, litigating as an adult, should be afforded the benefit of the discovery rule.[20] It is suggested that the discovery rule and its rationale are equally applicable to the incest victim's civil claims, for the injuries resulting from childhood sexual abuse often remain hidden from detection.[21] Thus, the incest plaintiff is as "blamelessly ignorant"[22] of the fact of injury as the victim of a toxic tort and is, therefore, equally deserving of the discovery rule's benefits.

This Note, focusing on New York law, demonstrates that the statute of limitations is the primary procedural difficulty that adult victims of childhood incest abuse encounter in bringing their civil claims.[23] Specifically, the traditionally short statutes of limitations for assault, battery and infliction of mental distress often preclude the adult victim of childhood incest from seeking a remedy within the statutorily prescribed time.[24] Part II of this Note presents an overview of the nature of incest abuse and its resultant injuries[25] and considers the purposes and policies behind statutes of limi-

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47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979); Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963); Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936). For those situations in which New York has adopted some form of a discovery rule for accrual purposes, see N.Y. CIV. PRAC. L. & R. § 213(5) (McKinney 1972) (action by state for spoilation of public property); *id.* § 213(8) (McKinney 1972 & Supp. 1987) (action based on fraud); *id.* § 214(7) (McKinney 1972 & Supp. 1987) (action to annul marriage based on fraud); *id.* § 214-a (McKinney Supp. 1987) (malpractice discovery exceptions for foreign objects); *id.* § 214-b (McKinney Supp. 1987) (agent orange exception for Vietnam veterans); *id.*, 214-c (McKinney Supp. 1987) (action for toxic tort injuries).

18. *See* N.Y. CIV. PRAC. L. & R. § 214-c (McKinney Supp. 1987).

19. *See infra* notes 88-169 and accompanying text.

20. *See infra* notes 170-74 and accompanying text.

21. *See infra* notes 201-04 and accompanying text.

22. Urie v. Thompson, 337 U.S. 163, 170 (1949) (plaintiff contracting silicosis after inhaling silica dust in workplace).

23. *See supra* notes 8-14 and accompanying text.

24. *See id.*

25. *See infra* notes 36-68 and accompanying text.

tations.[26] Part II also sets out the various common law countermeasures and statutory tolling exceptions[27] to statutes of limitations, including the discovery rule.[28] Next, Part III evaluates these common law doctrines and tolling exceptions to determine whether they are applicable to incest-based tort claims.[29]

Based on this analysis, the Note argues that New York's common law doctrines of equitable estoppel[30] and duress,[31] as well as its statutory tolling exception for mental disability,[32] if properly construed, would ordinarily enable the incest victim to prevail against a defendant's assertion of a statute of limitations defense.[33] Because courts tend to construe these doctrines and exceptions narrowly, however, Part III of this Note concludes that New York should enact a discovery rule applicable to incest-based tort victims.[34] Finally, in Part IV, the Note offers a proposed statute that addresses the particular difficulty that adult victims of childhood incest abuse encounter in seeking civil redress for their injuries.[35]

II. Background: Incest Abuse and Statutes of Limitations

As a backdrop for the legal analysis of the procedural difficulties that adult victims of childhood incest face in litigating their civil claims, this section will: (1) discuss the nature of incest abuse and its resultant injuries; and (2) present an overview of the purposes and policies behind statutes of limitations.

A. The Nature and Effects of Incestuous Abuse

Regardless of the desires that impel the offender to commit incest,[36] there are certain hallmarks of intrafamilial sexual abuse.[37]

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26. *See infra* notes 69-87 and accompanying text.
27. *See infra* notes 88-169 and accompanying text.
28. *See infra* notes 170-74 and accompanying text.
29. *See infra* notes 175-200 and accompanying text.
30. *See infra* notes 95-132 and accompanying text.
31. *See infra* notes 133-52 and accompanying text.
32. *See infra* notes 153-69 and accompanying text.
33. *See infra* notes 124-200 and accompanying text.
34. *See infra* notes 202-204 and accompanying text.
35. *See infra* notes 207-17 and accompanying text.
36. The most widespread form of incest has been called "true endogamous incest," and is typified by the father who seeks out a sexual relationship with his daughter because of his belief that nurturance and affection is unavailable from other sources, particularly his spouse. The father's need for emotional contact rather than sexual gratification per se is the distinguishing feature of this

Dr. Judith Herman, a noted expert in father-daughter incest at Harvard Medical School, summarizes the characteristics of such incest abuse:

> Incestuous abuse usually begins when the child is between the ages of six and twelve, though cases involving younger children, including infants, have been reported. The sexual contact typically begins with fondling and gradually proceeds to masturbation and oral-genital contact. Vaginal intercourse is not usually attempted until the child reaches puberty. Physical violence is not often employed, since the overwhelming authority of the parent is usually sufficient to gain the child's compliance. The sexual contact becomes a compulsive behavior for the father, whose need to preserve sexual access to his daughter becomes

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form of incest. *See* Sturkie, *Treating Incest Victims and Their Families*, in INCEST AS CHILD ABUSE: RESEARCH AND APPLICATIONS 132-33 (B. VanderMey & R. Neff ed. 1986).

Another form of incest with primarily nonsexual roots has been termed "imperious incest," and is motivated by the father's need to dominate and control his family sphere and to function as "emperor" within it. *Id.* at 134-35. Other researchers have found that families which are "father-dominant mysoginistic" have a higher incidence of incest. *Id.* at 135. The occurrence of incest in these families stems primarily from the father's fear and hatred of women. *See id.* Unable to express his anger towards his spouse, the father dominates and punishes his daughter with sexual liasons. *Id.*

Finally, several forms of incest are primarily motivated and maintained by the father's sexual preference for children. *See id.* at 135-37. They include pedophilic incest, so-called "perverse incest" and child rape. *Id.* In each of these forms of incest, the offender is preoccupied with children as a source of sexual gratification and may seek to involve the child in other deviant sexual practices. *See id.*; *see also* A. BAXTER, TECHNIQUES FOR DEALING WITH CHILD SEXUAL ABUSE 18-19 (1986) (indicating five theories of intrafamilial sexual abuse including sexually permissive family dynamics and practices, as well as role confusion between parents and between parent and child) [hereinafter BAXTER]; McCabe, *supra* note 2, at 20-25 (referring to seven factors leading to sexual abuse of children including learned abusive behavior from generation to generation, poor communication among family members, role reversal, social isolation of family within community and poor parental supervision); Arthur, *supra* note 2, at 3 (discussing theories advanced on basis of clinical experience with incarcerated offenders).

37. Although incest abuse is perpetrated by male and female family members alike, this Note focuses on incest abuse by male family members, a phenomenon more frequently documented by psychological researchers. *See* D. CLEVELAND, INCEST: THE STORY OF THREE WOMEN 3 (1986) [hereinafter CLEVELAND]; SOURCEBOOK, *supra* note 2, at 22-27; Finkelhor, *Implications for Theory, Research and Practice*, in PREVENTING CHILD SEXUAL ABUSE 133, 141 (M. Nelson & K. Clark ed. 1986).

For the purposes of this Note, a "father" may be defined as a natural parent as well as a foster, adoptive or step-parent, and may extend to any male who lives with the child and assumes a caretaking role with respect to the child.

> the organizing principle of family life. The sexual contact is usually repeated in secrecy for years, ending only when the child finds the resources to escape. The child victim keeps the secret, fearing that if she tells she will not be believed, she will be punished, or she will destroy the family.[38]

Similarly, the incidence and prevalence of incest abuse, as well as its effects, are well documented.[39] Empirical studies on the effects of incest abuse have been collected from a wide range of public and private sources,[40] reflecting a broad sample of adult, adolescent and child respondents.[41] The specific psychological impact of the incest abuse will vary from case to case,[42] depending on the age[43] of the incest victim when the abuse begins, the frequency or duration of its occurrence,[44] the type of sexual act involved[45] and the aggressive or sadistic nature of the abuse.[46] The most commonly reported long-term effects suffered by adult victims of incest abuse include depression,[47] self-mutilation and suicidal behavior,[48] eating

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38. Herman, *Recognition and Treatment of Incestuous Families*, 5 INT'L J. FAM. THERAPY 81, 82 (C. Barnard ed. 1983) (special issue on families, incest and therapy); *see also* BAXTER, *supra* note 36, at 33; McCabe, *supra* note 2, at 18-19.

39. *See* SOURCEBOOK, *supra* note 2, at 20-21 (discussing 19 prevalence studies of child sexual abuse). Finkelhor noted that "incidence" studies are attempts to estimate the number of new cases occurring in a given time; "prevalence" studies, on the other hand, attempt to estimate the proportion of a population that has been sexually abused during childhood. *Id.* at 16. For a summary of the clinical studies of incidence of intrafamilial sexual abuse, see *id.* at 17. For a summary of the empirical data documenting the effects of incest abuse, see *id.* at 145-46; *see also* BAXTER, *supra* note 36, at 23-24; Arthur, *supra* note 2, at 4-5.

40. Sources for research samples have included community drug treatment centers, sexual assault centers, health centers, random and college samples, court records, recruitment from prostitution arrest records, recruitment through mental health agencies, clients in therapy, as well as other clinical referrals and records. *See* SOURCEBOOK, *supra* note 2, at 145-46.

41. *See id.*

42. Finkelhor has distinguished between initial and long-term effects of childhood sexual abuse. *See id.* 144-63. He defines initial effects as those reactions occurring within two years of the termination of the abuse. *See id.* at 144. He states the initial effects reported in clinical literature include sleeping and eating disturbances, phobias, guilt, shame, anger, and heightened sexual precocity. *See id.* at 147-52.

43. *See id.* at 171-72; *see also* BAXTER, *supra* note 36, at 25 (observing that children seem to recover more easily from "stranger initiated" sexual abuse than from intrafamilial abuse).

44. *See* SOURCEBOOK, *supra* note 2, at 165-67.

45. *See id.* at 168-69.

46. *See id.* at 169-70.

47. *See id.* at 152.

48. *See id.* at 154.

disorders and sleep disturbances,[49] drug or alcohol abuse,[50] sexual dysfunction,[51] inability to form intimate relationships,[52] tendencies towards promiscuity and prostitution[53] and a vulnerability towards revictimization.[54]

Mental health professionals and researchers have also found that incest victims often meet the diagnostic criteria for Post-Traumatic Stress Disorder (PTSD).[55] PTSD is a clinically diagnosed mental disorder[56] in which the victim avoids situations that stimulate recall of traumatic events or experiences.[57] The victim attempts to repress psychologically unacceptable experiences until a later time in life when it might be possible to cope with them.[58] An adult who has been incestuously abused during infancy and childhood may develop PTSD as a way of coping with the magnitude of the trauma associated with prolonged incest abuse.[59] Similarly, the incest victim often avoids situations that remind her of the abuse and that, in turn, trigger restimulation of the unresolved traumas. The psychic difficulties associated with re-experiencing the trauma of past incestuous abuse might, for instance, prevent an incest victim from taking civil action against the offender within the applicable statute of limitations period.[60]

Incest victims suffering from PTSD may also present the symptoms of lack of sexual response, depression, suicidal tendencies, promiscuity and alcohol and substance abuse.[61] By definition, PTSD is a disorder that manifests itself after the stressful event and, in the case of PTSD with delayed onset, often commences during

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49. *See id.* at 155.
50. *See id.* at 162.
51. *See id.* at 159.
52. *See id.* at 157-58.
53. *See id.* at 160-61.
54. *See id.* at 158.
55. Donaldson & Gardner, *Diagnosis & Treatment of Traumatic Stress Among Women After Childhood Incest*, in TRAUMA AND ITS WAKE: THE STUDY AND TREATMENT OF POST-TRAUMATIC STRESS DISORDER 356 (C. Figley ed. 1985) [hereinafter Donaldson & Gardner].
56. C. SCRIGNAR, POST-TRAUMATIC STRESS DISORDER: DIAGNOSIS, TREATMENT, AND LEGAL ISSUES 9-10 (1984).
57. *See id.* at 26.
58. Donaldson & Gardner, *supra* note 55, at 370.
59. *See id.* at 361.
60. *See* Complaint at 4, Smith v. Smith, No. 85 Civ. 285E (W.D.N.Y. filed Feb. 22, 1985).
61. Donaldson & Gardner, *supra* note 55, at 362-63.

adulthood.[62] Thus, the mental injury of PTSD and its symptoms may be neither discovered nor treated until years after the incidents of abuse occurred.

Clinical research also shows a clear relationship between childhood incest abuse and the tendency for victims to dissociate[63] and, more seriously, to develop multiple personality disorder (MPD).[64] MPD, like PTSD, is an elaborate defense mechanism utilized to block the memory of experiences too painful to recall.[65] Little evidence suggests a biological cause for multiple personality disorder, indicating that its etiology is primarily environmental.[66] Most importantly, while the onset of the disorder is early,[67] diagnosis does not usually occur until the third or fourth decade of life.[68] Thus,

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62. *See id.* at 362.

63. *See* SOURCEBOOK, *supra* note 2, at 155.

64. Braun & Sachs, *The Development of Multiple Personality Disorder: Predisposing, Precipitating, and Perpetuating Factors*, in CHILDHOOD ANTECEDENTS OF MULTIPLE PERSONALITY 37, 46-47 (R. Kluft ed. 1985) [hereinafter Braun & Sachs]; Goodwin, *Credibility Problems in Multiple Personality Disorder Patients and Abused Children*, in CHILDHOOD ANTECEDENTS OF MULTIPLE PERSONALITY 1, 2-7 (R. Kluft ed. 1985); Putnam, *Dissociation as a Response to Extreme Trauma*, in CHILDHOOD ANTECEDENTS OF MULTIPLE PERSONALITY 65, 76-77 (R. Kluft ed. 1985) [hereinafter Putnam]; Wilbur, *The Effect of Child Abuse on the Psyche*, in CHILDHOOD ANTECEDENTS OF MULTIPLE PERSONALITY 21, 29 (R. Kluft ed. 1985); *see also* Arthur, *supra* note 2, at 4; Note, *Preserving the Victim's Remedy*, *supra* note 2, at 201-202 nn.88-90.

Braun & Sachs summarize the nature of multiple personality disorder as follows:

> Multiple personality disorder is one of five dissociative disorders delineated in the current DSM-III [Diagnostic and Statistical Manual of Mental Disorders (3d ed. 1980)]. The common feature of all dissociative disorders is a spontaneous and temporary fluctuation in the normal integrative functions and consciousness. In multiple personality disorder, this feature manifests itself as a temporary alteration in awareness of one's identity. Instead of sustaining an ongoing continuity of identity, afflicted individuals may assume a new identity or personality. Often, an alter personality will be aware of the original or "host" personality. However, the "host" personality usually claims to be unaware of the existence of other personalities. In addition, information acquired while the other personalities had executive control of the body may not be accessible to the "host" personality.

See Braun & Sachs, *supra* note 64, at 40.

65. *See* Bowman, Blix & Coons, *Multiple Personality in Adolescence: Relationship to Incestual Experiences*, J. AM. ACAD. CHILD PSYCHIATRY 109 (1985).

66. *See id.* at 112.

67. Putnam has found that the period of vulnerability to develop multiple personality disorder extends from age 6 months to 12 years. *See* Putnam, *supra* note 64, at 77.

68. *See id.* at 80. Putnam has found that multiple personality disorder tends

the adult victim of childhood incest who develops MPD effectively blocks out a recognition of the cause of her injury and may in fact fail to recognize that she is injured at all, because of the fragmentation of her personality into alternates with varying levels of awareness of the incest abuse.

B. The Policies and Purposes of Statutes of Limitations

Statutes of limitations are legislative enactments prescribing fixed periods of time within which legal rights are actionable.[69] The limitations period for any given cause of action is said to commence when the right "accrues" or comes into existence.[70] In the absence of legislative definition, a cause of action "accrues" when the plaintiff can first maintain the action.[71] It has thus been largely left to the judiciary to determine at what point the statutory period begins to run.[72] In cases of personal injury, for instance, the cause of action accrues from the time of injury or, stated otherwise, from the date the defendant's wrongful conduct occurs.[73] Despite the judiciary's role in determining when causes of action accrue, it is within the exclusive authority of the legislature to set the specific statutory lengths of time within which legal rights are actionable.[74] The legislature rarely proffers a rationale to explain

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to be diagnosed when a person has reached her late 20s to early 30s. *See id.* at 79. Upon a review of 38 case reports, Putnam found a mean age of 28 years. *See id.* Putnam also cites: the research of Bliss and Allison who report average ages at diagnosis of 30 and 29.4, respectively, *see id.* at 79-80; the findings of Kluft, who reported a mean age of 36.1, *see id.*; and a survey of 100 independent cases of MPD that isolates an average age of 31.3. *See id.*; *see also* Note, *Preserving the Victim's Remedy, supra* note 2, at 202 n.90.

69. BLACK'S LAW DICTIONARY 835 (5th ed. 1979).

70. *See* N.Y. CIV. PRAC. L. & R. § 203(a) (McKinney 1972).

71. *See* WEINSTEIN, KORN & MILLER, *supra* note 9, ¶ 201.02. The commentators noted that:

> [Cause of action] has been defined to mean a "right to sue to some substantial end," at the center of which "is a grievance that is judicially cognizable, in the sense that a court can provide some remedy for it." The cause of action accrues, for purposes of measuring the period of limitations, at the time the plaintiff is first able to commence the particular action.

Id. ¶ 203.01.

72. *See* 2 H. WOOD, LIMITATIONS OF ACTIONS 684-85 (1916).

73. *See id.* at 839.

74. New York Civil Practice Law § 201 provides in pertinent part that "[n]o court shall extend the time limited by law for the commencement of an action." N.Y. CIV. PRAC. L. & R. § 201 (McKinney 1972).

the differences between statutory periods, and the prescribed statutory periods themselves are, to a certain extent, arbitrary.[75]

Nevertheless, a number of policy considerations supporting statutes of limitations help to explain the legislature's prescription of differing periods of limitations and rules of accrual. Policy concerns have been framed in broad terms embracing societal interests,[76] as well as in more particular terms addressing the interests of individual litigants.[77] One of the most ingrained policies stems from the belief that with the passage of time, the defendant's right to repose supplants the plaintiff's right to a remedy. As phrased originally by the Supreme Court in 1944, "the right to be free of stale claims in time comes to prevail over the right to prosecute them."[78] The notion that a defendant should be protected from stale claims is founded, however, on the assumption that a plaintiff who has "slumbered"[79] on a known right has been afforded a reasonable time and opportunity in which to learn of the wrong and seek a remedy.[80]

A second policy consideration, one that reflects a concern with judicial efficiency and fairness, is the court's belief that the truth-seeking process is better served by a bar on stale claims.[81] Although they rarely articulate this consideration, courts may presume that a plaintiff who delays in seeking redress for his grievance has a less meritorious claim than a plaintiff who seeks a remedy within the statutorily prescribed period.[82] Cited with greater frequency by the courts, however, is the rationale that evidence becomes less

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75. *See* WEINSTEIN, KORN & MILLER, *supra* note 9, ¶ 201.01.

76. 1 H. WOOD, LIMITATIONS OF ACTIONS 9 (1916) (statutes of limitations regarded as devices "essential to the security of all men" and which ensure "peace and welfare in society"); *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) (observing disruptive effect that unsettled claims have on commercial intercourse); Dawson, *Estoppel and Statutes of Limitation*, 34 MICH. L. REV. 1, 4 (1935) (maintaining that statutes of limitations are necessary for sake of stability and permanence in social relationships) [hereinafter *Estoppel and Limitations*].

77. *See* Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944) (claims were timely pursued even though plaintiff did not show "reckless haste" in commencing suit).

78. *Id.*

79. *Id.*

80. *See id.*; *see also* United States v. Kubrick, 444 U.S. 111, 118 (1979) (cause of action accrues when plaintiff knows both existence and cause of his injury, not when he knows that legal duty is breached).

81. *See* WEINSTEIN, KORN & MILLER, *supra* note 9, ¶ 201.01.

82. *Id.*

available and reliable with the passage of time.[83] By barring claims after a given period of time, it is believed, therefore, that statutes of limitations increase the likelihood that courts will resolve factual disputes more fairly and accurately.[84]

Finally, it has been suggested that the time-of-injury accrual rule for personal injury causes of action reflects not so much a concern with the defendant's right to repose as it does a desire for a rule that addresses itself to the garden-variety tort claim, the harm of which is readily apparent.[85] Thus, statutes of limitations exceptions, primarily the time of discovery rule, address those atypical tort situations in which the plaintiff is "blamelessly ignorant" of the injury.[86] Underlying such exceptions as the discovery rule is a policy concern with fairness and a willingness to balance the risk of stale claims against the inequity of precluding justified causes of actions in those situations where the plaintiff is constructively denied a meaningful opportunity to seek a remedy.[87]

C. Exceptions to a Strict Application of Limitations Periods and Personal Injury Accrual Rules

Although New York has consistently maintained that a court may not extend the statutory periods fixed by the legislature to commence an action,[88] it has also developed certain statutory provisions that either toll the statute of limitations or alter the date of accrual.[89] Additionally, courts have developed common law doc-

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83. *Order of R.R. Telegraphers*, 321 U.S. at 348-49; *Kubrick*, 444 U.S. at 117; Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 430, 248 N.E.2d 871, 872, 301 N.Y.S.2d 23, 25 (1969); Conklin v. Furman, 48 N.Y. 527, 529 (1872).

84. *See* Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. 1175, 1182-83 (1986) [hereinafter Epstein].

85. *See* Note, *Preserving the Victim's Remedy*, *supra* note 2, at 207.

86. *See* Urie v. Thompson, 337 U.S. 163, 170 (1949).

87. *See* N.Y. CIV. PRAC. L. & R. § 214-c (McKinney Supp. 1987).

88. While New York Civil Practice Rule 3018(b) requires the defendant to plead the statute of limitations affirmatively, *see* N.Y. CIV. PRAC L. & R. 3018(b) (McKinney 1974 & Supp. 1987), the defendant may also make a motion under New York Civil Practice Rule 3211(a)(5) to dismiss the action based on the expiration of the statute of limitations. *See id.* 3211(a)(5) (McKinney 1970); *see also* WEINSTEIN, KORN & MILLER, *supra* note 9, ¶ 201.10.

89. *See* N.Y. CIV. PRAC. L. & R. § 208 (McKinney 1972 & Supp. 1987); *id.* § 213(5) (McKinney 1972) (action by state for spoilation of public property); *id.* § 213(8) (McKinney 1972 & Supp. 1987) (action based on fraud); *id.* § 214(7) (McKinney 1972 & Supp. 1987) (action to annul marriage based on fraud); *id.* § 214-a (McKinney Supp. 1987) (malpractice discovery exceptions for foreign objects); *id.* § 214-b (McKinney Supp. 1987) (agent orange exception for Vietnam veterans); *id.* § 214-c (McKinney Supp. 1987) (action for toxic tort injuries).

trines that operate to estop the defendant from interposing a statute of limitations defense.[90] The exceptions have been extended to situations in which: (1) the defendant induces the plaintiff to forego timely suit because of the defendant's inequitable conduct;[91] (2) the plaintiff is unable to commence timely suit because of conduct on the defendant's part constituting duress or undue influence;[92] (3) the plaintiff suffers from an overall mental disability at the time the cause of action accrues;[93] or (4) the plaintiff is unable to discover the injury because of its inherently unknowable nature.[94]

1. Equitable Estoppel

The legislature has provided the courts with the equitable authority to estop the defendant from asserting the affirmative defense that the statute of limitations has expired.[95] The doctrine of equitable estoppel thus allows the plaintiff to appeal to the court to prevent the defendant from asserting a statute of limitations defense when the defendant's own misconduct makes it inequitable for him to interpose it.[96]

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90. *See* Simcuski v. Saeli, 44 N.Y.2d 442, 377 N.E.2d 713, 406 N.Y.S.2d 259 (1978) (construing doctrine of equitable estoppel to prevent defendant from asserting defense of statute of limitations); General Stencils, Inc. v. Chiappa, 18 N.Y.2d 125, 219 N.E.2d 169, 272 N.Y.S.2d 337 (1966) (same); *see also* Baratta v. Kozlowski, 94 A.D.2d 454, 458-60, 464 N.Y.S.2d 803, 806-807 (2d Dep't 1983) (discussing potential availability of doctrines of duress and undue influence as means of estopping defendant from asserting statute of limitations defense).

91. *See Simcuski*, 44 N.Y.2d 442, 377 N.E.2d 713, 406 N.Y.S.2d 259 (1978); *General Stencils, Inc.*, 18 N.Y.2d 125, 219 N.E.2d 169, 272 N.Y.S.2d 337 (1966).

92. *See Baratta*, 94 A.D.2d at 458-60, 464 N.Y.S.2d at 806-807.

93. *See* Barnes v. County of Onondaga, 103 A.D.2d 624, 628, 481 N.Y.S.2d 539, 544 (4th Dep't 1984), *aff'd*, 65 N.Y.2d 664, 481 N.E.2d 245, 491 N.Y.S.2d 613 (1985) (plaintiff required to show overall inability to function in society in order to invoke mental disability tolling exception of New York Civil Procedure Law § 208).

94. *See* N.Y. CIV. PRAC. L. & R. § 213(5) (McKinney Supp. 1972); *id.* § 213(8) (McKinney 1972 & Supp. 1987); *id.* § 214(7) (McKinney 1972 & Supp. 1987); *id.* § 214-a (McKinney Supp. 1987); *id.* § 214-b (McKinney Supp. 1987); *id.* § 214-c (McKinney Supp. 1987).

95. The common law doctrine of equitable estoppel has been codified in New York General Obligations Law § 17-103(4)(b) (formerly New York Personal Property Law § 34(4)(b)) and provides that a promise to waive, extend or not plead the statute of limitations "does not affect the power of the court to find that by reason of conduct of the party to be charged it is inequitable to permit him to interpose the defense of the statute of limitations." N.Y. GEN. OBLIG. LAW § 17-103(4)(b) (McKinney 1978).

96. *See id.*

Equitable estoppel cases tend to fall into two categories.[97] First, when the effect of the defendant's conduct is to lull the plaintiff into inactivity or otherwise obstruct the plaintiff in prosecuting a known claim,[98] the court may estop the defendant from asserting a statute of limitations defense. Second, the defendant may be estopped when, by fraudulent acts or representations, he conceals an unknown cause of action from the plaintiff.[99] Moreover, when the defendant and plaintiff stand in a relationship of trust and confidence so that a fiduciary duty is owing, and the defendant fails to disclose facts that he has a duty to reveal, then such non-disclosure itself is deemed to be fraudulent concealment sufficient to invoke the doctrine of equitable estoppel.[100] An overarching restriction on equitable estoppel's inherently flexible nature,[101] however, is the requirement that the plaintiff prove he has exercised due diligence in discovering the wrong.[102]

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97. *See* WEINSTEIN, KORN & MILLER, *supra* note 9, ¶ 201.13.

98. *See id.; see also* Simcuski v. Saeli, 44 N.Y.2d 442, 337 N.E.2d 713, 406 N.Y.S.2d 259 (1978) (physician concealing condition of plaintiff's severed nerve to avoid malpractice action); Valenti v. Trunfio, 118 A.D.2d 480, 449 N.Y.S.2d 955 (1st Dep't 1986), *appeal dismissed*, 69 N.Y.2d 661, 503 N.E.2d 1376, 511 N.Y.S.2d 839 (1986) (record failed to disclose any misrepresentations made by defendant hospital); McIvor v. Di Benedetto, 121 A.D.2d 519, 503 N.Y.S.2d 836 (2d Dep't 1986) (plaintiff failed to allege specific misrepresentations made by defendant physician); Rains v. Metropolitan Transp. Auth., 120 A.D.2d 509, 501 N.Y.S.2d 709 (2d Dep't 1986) (wilful intent to mislead plaintiff is required); Jordon v. Ford Motor Co., 73 A.D.2d 422, 426 N.Y.S.2d 359 (4th Dep't 1980) (manufacturer alleged to have concealed defective fuel tank); *see, e.g.*, Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959) (plaintiff induced to delay commencing suit due to defendant's representation that he had twelve years to begin suit); Cerbone v. Int'l Ladies Garment Workers' Union, 768 F.2d 45, 49-50 (2d Cir. 1985) (defendant's conduct must cause plaintiff to delay suit); Anisfeld v. Cantor Fitzgerald & Co., 631 F. Supp. 1461, 1466-67 (S.D.N.Y. 1986) (conduct must be strong inducement to forego suit).

99. *See* WEINSTEIN, KORN & MILLER, *supra* note 9, ¶ 201.13; *see also* General Stencils, Inc. v. Chiappa, 18 N.Y.2d 125, 219 N.E.2d 169, 272 N.Y.S.2d 337 (1966); Erbe v. Lincoln Trust Co., 13 A.D.2d 211, 214 N.Y.S.2d 849 (4th Dep't 1961), *appeal dismissed*, 11 N.Y.2d 754, 181 N.E.2d 629, 226 N.Y.S.2d 692 (1962) (breach of fiduciary duty by trustee to secretly buy securities from estate); *cf.* Greenfield v. Kanwit, 87 F.R.D. 129, 132 (S.D.N.Y. 1980) (defendant who conceals relevant facts to commencement of timely suit is estopped).

100. *See* WEINSTEIN, KORN & MILLER, *supra* note 9, ¶ 201.13 n.103; *see also* Rockwell v. Ortho Pharmaceutical Co., 510 F. Supp. 266, 270 (N.D.N.Y. 1981).

101. *See* N.Y. GEN. OBLIG. LAW § 17-103(4)(b) (McKinney 1978).

102. *See Simcuski*, 44 N.Y. 2d at 450-51, 377 N.E.2d at 717, 406 N.Y.S.2d at 263; *General Stencils, Inc.*, 18 N.Y.2d at 128-29, 219 N.E.2d at 171, 272 N.Y.S.2d at 340; Schroeder v. Brooklyn Hosp., 119 A.D.2d 564, 500 N.Y.S.2d 733 (2d Dep't 1986); Roe v. Bonura, 132 Misc. 2d 390, 503 N.Y.S.2d 977 (Sup.

The New York Court of Appeals in *General Stencils, Inc. v. Chiappa*[103] exercised its equitable powers in holding that equitable estoppel may be invoked "where it is the defendant's affirmative wrongdoing . . . which produce[s] the long delay between the accrual of the cause of action and the institution of the legal proceedings."[104] *General Stencils* involved a conversion claim against an embezzling bookkeeper.[105] Based on the inherent secrecy in the very nature of the defendant's actionable conduct, the court held that a defendant standing in a fiduciary relationship to the plaintiff may be equitably estopped from asserting the statute of limitations as a defense because of his own affirmative wrongdoing and intentional concealment.[106] Furthermore, the *General Stencils* court set out three elements that the plaintiff must prove in order for equitable estoppel to apply on the grounds of fraudulent concealment. The plaintiff must show: (1) that he was diligent in enforcing his rights; (2) that a fiduciary relationship existed between the plaintiff and the defendant; and (3) that misconduct occurred in the relationship to the detriment of the plaintiff.[107] The primary function of equitable estoppel is thus "the protection of expectations aroused by misleading conduct."[108]

Ct. Suffolk County 1986); *see also* Renz v. Beeman, 589 F.2d 735, 751-52 (2d Cir. 1978), *cert. denied*, 444 U.S. 834 (1979) (timely knowledge exists where plaintiff can discover relevant facts with reasonable diligence); Barrett v. Hoffman, 521 F. Supp. 307, 322 (S.D.N.Y. 1981) (plaintiff must demonstrate he was not negligent in discovering wrong), *rev'd*, 689 F.2d 324 (1982), *cert. denied*, 462 U.S. 1131 (1983); *Rockwell*, 510 F. Supp. at 271 (plaintiff must pursue claim diligently); Augstein v. Levey, 3 A.D.2d 595, 162 N.Y.2d 269 (1957), *aff'd*, 4 N.Y.2d 791, 149 N.E.2d 528, 173 N.Y.S.2d 27 (doctrine of equitable estoppel applicable when plaintiff has "timely knowledge" sufficient to impose duty of inquiry and ascertainment of relevant facts).

103. 18 N.Y.2d 125, 219 N.E.2d 169, 272 N.Y.S.2d 337 (1966).

104. *See id.* at 128, 219 N.E.2d at 171, 272 N.Y.S.2d at 340.

105. *See id.* at 126, 219 N.E.2d at 170, 272 N.Y.S.2d at 338.

106. *See id.* at 127, 219 N.E.2d at 339, 272 N.Y.S.2d at 339 (court noting that equitable estoppel neither suspends nor changes date on which cause of action accrues; rather, it represents successful counter-defense by disallowing defendant's initial defense that statute of limitations has lapsed).

107. *See id.* at 128-29, 219 N.E.2d at 171, 272 N.Y.S.2d at 340.

108. *Estoppel and Limitations, supra* note 76, at 1. Dawson also notes that equitable estoppel usually requires "misleading conduct which relates to existing facts." *Id.* at 3.

Commentators have noted that the lines between equitable estoppel and fraud and fraudulent concealment often blur when the equitable estoppel is based on the fraudulent acts or misrepresentation of the defendant. *See* Comment, *Estoppel and the New York Statute of Limitations*, 26 ALB. L. REV. 38, 44 (1962); *see*

The doctrine of equitable estoppel was recently asserted in *Smith v. Smith*,[109] a New York federal civil suit brought by an adult plaintiff suing for damages attributable to childhood incest abuse. In *Smith*, the acts of sexual abuse began shortly after plaintiff's birth and continued until she was twelve years old.[110] The plaintiff, who brought the action at age thirty-two (twenty years after the last incident of abuse and ten years after the statutory period of limitations expired), alleged that the defendant fraudulently concealed from plaintiff the fact that she had a cause of action by indoctrinating her with misrepresentations and deceits throughout her childhood.[111] These alleged misrepresentations included: (1) that the sexual activities defendant performed on plaintiff were normal and not damaging; (2) that the plaintiff must not tell anyone about the defendant's sexual assaults because she would not be believed and would be punished; (3) that she must not disclose the sexual assaults or her family would be destroyed and she would die; and finally (4) that it was her own fault that her father was having sexual relations with her because she was a bad and seductive child.[112]

The court in *Smith*, however, found the doctrine of equitable estoppel wholly inapplicable to the plaintiff's claim. Specifically, the court rejected the plaintiff's contentions that the defendant had fraudulently concealed a cause of action *unknown* to the plaintiff or, in the alternative, that the defendant engaged in conduct or made statements that induced the plaintiff to forego suit on a *known* cause of action.[113] The plaintiff in *Smith* had argued that under either of the above theories in which equitable estoppel has

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also Estoppel and Limitations, supra note 76. Dawson describes those situations in which equitable estoppel merges with fraud and fraudulent concealment as the "outer boundaries" of the types of misleading conduct sufficient to invoke the estoppel exception. *Estoppel and Limitations, supra* note 76, at 4. When this is the case, an analytical distinction between equitable estoppel based on whether the claim is known or unknown to the plaintiff has been deemed "artificial." *Id.* at 24.

109. No. 85 Civ. 285E, slip op. at 1 (W.D.N.Y. Nov. 7, 1986).

110. *See id.* at 1.

111. Affidavit in Opposition to Defendant's Motion for Summary Judgement and in Support of Plaintiff's Motion to Strike at 5, Smith v. Smith, No. 85 Civ. 285E (W.D.N.Y. filed Feb. 28, 1986) [hereinafter Smith Affidavit].

112. *See id.*

113. Smith v. Smith, No. 85 Civ. 285E, slip op. at 3-4 (W.D.N.Y. Nov. 7, 1986). After this issue went to print, the Second Circuit affirmed this opinion on essentially the same grounds. Smith v. Smith, No. 86-7993 (2d Cir. September 30, 1987).

been held to apply, the defendant had interfered with the prosecution of her cause of action.[114]

First, with respect to the defendant's having fraudulently concealed a cause of action unknown to the plaintiff, the plaintiff alleged that while she knew she had had sexual contact with her father when she was a child, she could not know that this contact constituted sexual abuse and that it could cause permanent damage.[115] Moreover, her father's direct misrepresentations, devised to conceal the existence of the wrong[116] and the identity of the wrongdoer[117] compounded the plaintiff's inability to perceive the wrong. Thus the plaintiff, while aware of the conduct, was unaware that she had been wronged until after the statutory period had expired.[118]

The court, however, characterized the plaintiff's complaint as having alleged an unawareness that legal redress was available, which is generally regarded as insufficient to toll the statute of limitations.[119] Interpreted as such, the plaintiff would unquestionably have failed to assert proper grounds for the application of equitable estoppel.[120] The plaintiff also alleged, however, that the defendant's sexual abuse coupled with the fraudulent concealment of the harmfulness of the abuse and the identity of the wrongdoer constituted a breach of the fiduciary relationship that exists between parent and child.[121] Thus, the plaintiff claimed that on the basis

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114. *See id.* at 4.

115. *See* Smith Affidavit, *supra* note 111, at 5.

116. *See id.* (alleging defendant's fraudulent representation that "the sexual activities he performed on [plaintiff] were normal and not damaging").

117. *See id.* (alleging defendant fraudulently represented that "it was [plaintiff's] own fault that her father was having the sexual relationship with her because she was a bad and seductive child").

One commentator has noted that there is "abundant authority for the proposition that direct misrepresentations or other active steps to conceal the identity of the wrongdoer do justify delay and suspend the statute." *See* Dawson, *Fraudulent Concealment and Statutes of Limitations*, 31 MICH. L. REV. 875, 914 n.110 (1933) (citing Dodds v. McColgan, 229 A.D. 273, 241 N.Y.S. 584 (1st Dep't 1930) (suspension of statute granted when testatrix's fraudulent acts and misrepresentations were designed to conceal her liability for payment)).

118. Smith v. Smith, No. 85 Civ. 285E, slip op. at 1 (W.D.N.Y. Nov. 7, 1986).

119. *See* 2 H. WOOD, LIMITATIONS OF ACTIONS 839 (1916) ("ignorance of facts makes no exception to the rule that statute commences to run from the date of the tort").

120. Smith v. Smith, No. 85 Civ. 285E, slip op. at 3 (W.D.N.Y. Nov. 7, 1986).

121. Smith Affidavit, *supra* note 111, at 5.

of the defendant's wrongful conduct and continuing misrepresentations, the defendant concealed the plaintiff's cause of action until after the statutory period had lapsed.[122]

The court, however, stated that "the defendant . . . cannot be said to have fraudulently concealed or misrepresented . . . the *wrong* [from the plaintiff] . . . once she had achieved majority status. The plaintiff, upon reaching majority, understood that wrongs had been committed."[123] This latter observation reveals an unwillingness of the court to go beyond the most constricted interpretation of the elements of equitable estoppel.

The court found the plaintiff's alternative argument, that the defendant caused her to forego timely suit on a known cause of action, equally unpersuasive.[124] The court apparently rejected the argument that because plaintiff suffered from Post-Traumatic Stress Disorder she was truly incapable of pursuing her legal remedy.[125] More specifically, the court did not accept the plaintiff's argument that the defendant indirectly caused her to forego timely suit by having directly caused her to suffer from a psychological disorder which prevented her from being able to confront the alleged wrong within the statutory time period.[126] Separating the defendant's conduct from its effect on the plaintiff, the court reasoned that "the defendant did not actively conceal these wrongs through fraud, deception or misrepresentation once the plaintiff had achieved her majority."[127] In sum, the court in *Smith* concluded that the defendant had not breached a fiduciary duty to plaintiff and thus had no obligation to inform the plaintiff of her cause of action.[128] The

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122. Smith v. Smith, No. 85 Civ. 285E, slip op. at 4 (W.D.N.Y. Nov. 7, 1986)
123. *See id.* (emphasis added).
124. *See id.*
125. *See id.*
126. *See id.*
127. *Id.*
128. *See id.* at 3. Presumably this conclusion follows because the court found no fraudulent concealment. The court, however, supported its conclusion by citing Goldin v. Scalise, 87 A.D.2d 959, 451 N.Y.S.2d 215 (3d Dep't 1982), which presented a situation in which no relationship of trust or confidence existed between the parties so that a fiduciary duty was owing. *See Goldin*, 87 A.D.2d at 959, 451 N.Y.S.2d at 215. The court in *Smith* failed to consider that a fiduciary relationship, here between parent and child, may constitute an exception to the usual rule that "there is no duty upon a potential defendant to inform an adversary of the existence of a cause of action." *Goldin*, 87 A.D. 2d at 959, 451 N.Y.S.2d at 216; *see also* WEINSTEIN, KORN & MILLER, *supra* note 9,

court held that the doctrine of equitable estoppel did not apply because it found that the defendant's misrepresentations ceased before the statute of limitations period had expired and that by the time the plaintiff reached majority she was aware of at least some of the acts of incest.[129] The court therefore concluded that a strict statute of limitations had to be applied and the defendant's statute of limitations defense was upheld.[130]

The reasoning in *Smith* seems to have been based primarily on the dictum of the court of appeals in *Simcuski v. Saeli.*[131] In *Simcuski* the court observed:

> [I]f the conduct relied on (fraud, misrepresentation or other deception) has ceased to be operational . . . within a reasonable time prior to the expiration of such period, many courts have denied application of the doctrine [of equitable estoppel] on the ground that the period during which the plaintiff was justifiably lulled into inactivity had expired prior to the termination of the statutory period, and that the plaintiff thereafter had sufficient time to commence his action prior to the expiration of the period of limitations.[132]

Stated another way, when a court determines that a defendant's tactics of obstruction cease within a reasonable time prior to the expiration of the applicable statute of limitations, then it is un-

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¶ 201.13. The commentators note that:

> It has been said that a finding of fraudulent concealment requires some affirmative act of misrepresentation by the defendant. But, where there is a fiduciary relationship between the parties, the fiduciary will be held to a higher standard, and if he intentionally fails to disclose facts which he has a duty to reveal, he will be guilty of fraudulent concealment.

WEINSTEIN, KORN & MILLER, *supra* note 9, ¶ 201.13.

129. Smith v. Smith, No. 85 Civ. 285E, slip op. at 3 (W.D.N.Y. Nov. 7, 1986).

130. *See id.*

131. 44 N.Y.2d 442, 377 N.E.2d 713, 406 N.Y.S.2d 259 (1978).

132. *Id.* at 449-50, 377 N.E.2d at 717, 406 N.Y.S.2d at 263.

The court observed, however, that for purposes of pleading, the plaintiff may have two separate causes of action available when the defendant's fraudulent acts or representations have caused the plaintiff to forego timely suit. *See id.* at 448, 377 N.E.2d at 715-16, 406 N.Y.S.2d at 262. Thus the plaintiff may sue on both the original time-barred cause of action (such as assault or malpractice) which is the target of the estoppel; and a separate cause of action for intentional fraud. *See id.* In sum, when a defendant resorts to tactics of obstruction that amount to fraud, the plaintiff may plead both causes of action as "supplementary devices" to each other. *Estoppel and Limitations, supra* note 76, at 24.

reasonable to attribute the plaintiff's inactivity in commencing suit to the defendant's conduct.

2. *Duress and Undue Influence*

The common law doctrines of duress and undue influence[133] in the appropriate situation also may provide the plaintiff with a method of precluding a defendant's statute of limitations defense. Although a factually sufficient claim of duress or undue influence does not prevent the accrual of the cause of action, it does suspend the statute of limitations period until the duress ceases.[134] It is thus a question of fact as to precisely when the circumstances constituting the duress or undue influence terminate or when the plaintiff should reasonably know that the duress has ceased.[135] Similarly, New York adopts both an objective and subjective test of discovery, which takes into account a particular plaintiff's unique circumstances and perceptions.[136] The doctrine as formulated recognizes that "the pressure applied does not have to be such as to overcome the will of a brave or courageous [person], or even that of a [person] of ordinary firmness, but is sufficient if it in fact overcomes the will of the person against whom it is applied."[137]

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133. Black's Law Dictionary provides that:

> Duress consists in any . . . threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do the act contrary to his free will. . . . [Duress is] [d]istinguishable from undue influence, because in the latter, the wrongdoer is generally in a fiduciary capacity or in a position of trust and confidence with respect to the victim of the undue influence.

BLACK'S LAW DICTIONARY 452 (5th ed. 1979).

134. *See* Baratta v. Kozlowski, 94 A.D.2d 454, 458-59, 464 N.Y.S.2d 803, 806 (2d Dep't 1983) (defendant's death threats when plaintiff filed suit); Pacchiana v. Pacchiana, 94 A.D.2d 721, 462 N.Y.S.2d 256 (2d Dep't 1983) (continuing duress may toll statute of limitations although not applicable to antenuptial agreement); Kamenitsky v. Corcoran, 97 Misc. 384, 161 N.Y.S. 756, *rev'd on other grounds*, 177 A.D. 605, 164 N.Y.S. 297 (1917) (duress may be exercised by threats to take away plaintiff's news stand license and is not dependent upon actual power to carry out such threats).

135. *See* Piper v. Hoard, 107 N.Y. 67, 71 (1887); *see also* Annotation, *Duress or Undue Influence as Tolling or Suspending Statutes of Limitations*, 121 A.L.R. 1294, 1295 (1939). *See generally* 49 N.Y. JUR. 2D 62 (1985).

136. *See* Sylvan Mortgage Co. v. Stadler, 113 Misc. 659, 663, 185 N.Y.S. 293, 297 (1920), *rev'd on other grounds*, 115 Misc. 311, 118 N.Y.S. 165, *aff'd*, 199 A.D. 965, 191 N.Y.S. 955 (1921) (in contract situation "the condition of mind produced by threats which render a person incapable of exercising his free will . . . should be the only inquiry").

137. 49 N.Y. JUR. 2D 62, 63 (1985).

The New York courts have imposed a curious limitation, however, on the plaintiff's use of the doctrine of duress as a counter-measure to a defendant's assertion of a statute of limitations defense. The courts require that when the underlying cause of action is not based on and is unrelated to the duress, duress will not suspend the running of the statute of limitations period.[138] Conversely, when the plaintiff proves that the duress or undue influence is part of the underlying cause of action, duress will estop the defendant from asserting a statute of limitations defense.[139]

The defenses of duress and undue influence are of particular potential use to the adult victim of childhood incest abuse, for the court will, in considering any claim of duress, evaluate the unique circumstances of the particular plaintiff in light of her perceived threats.[140] Specifically, the incest plaintiff's complaint will usually contain an allegation that the defendant compelled her to have unwanted sexual contact.[141] It is unquestionable that the defendant had no right to commit the acts and that the plaintiff had a right to be free from them.[142] As formulated in New York, duress consists of conduct that coerces the will or induces the performance of an act that would otherwise not be performed.[143] Similarly, New York law provides that the plaintiff's fear alone will not constitute duress when there are insufficient allegations of defendant's misconduct directed towards the plaintiff.[144] New York recognizes, however, that threats alone may constitute duress.[145] The allegations of a complaint for incest abuse, which set forth the defendant's actions and threats[146] as well as facts pertaining to the plaintiff such as

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138. *See Baratta*, 94 A.D.2d at 459, 464 N.Y.S.2d at 806-807 (following Piper v. Hoard, 107 N.Y. 67 (1887)).

139. *See id.*

140. *See supra* note 136 and accompanying text.

141. *See* Complaint at 2, Smith v. Smith, No. 85 Civ. 285E (W.D.N.Y. filed Feb. 22, 1985).

142. *See* Gerstein v. 532 Broad Hollow Road Co., 75 A.D.2d 292, 429 N.Y.S.2d 195 (1st Dep't 1980); *see also* Kazaras v. Manufacturers Trust Co., 4 A.D.2d 227, 164 N.Y.S.2d 211 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 930, 151 N.E.2d 356, 175 N.Y.S.2d 172 (1958).

143. *See Gerstein*, 75 A.D.2d at 297, 429 N.Y.S.2d at 199; *see also Kazaras*, 4 A.D.2d at 237, 164 N.Y.S.2d at 220.

144. *See In re* White's Estate, 182 Misc. 223, 46 N.Y.S.2d 917, *aff'd*, 268 A.D. 759, 49 N.Y.S.2d 275, *appeal dismissed*, 293 N.Y. 767, 57 N.E.2d 845 (1943).

145. Kamenitsky v. Corcoran, 97 Misc. 384, 161 N.Y.S. 756, *rev'd on other grounds*, 177 A.D. 605, 164 N.Y.S. 297 (1917).

146. *See* Complaint at 2-3, Smith v. Smith, No. 85 Civ. 285E (W.D.N.Y. filed Feb. 22, 1985).

her infancy[147] during the period of abuse and her involuntary capitulation,[148] are arguably sufficient to constitute circumstances of duress suffered by the plaintiff.[149]

Thus, under the New York rule as explained in *Baratta v. Kozlowski*,[150] the adult victim of childhood incest abuse can potentially make out the grounds for estopping the defendant's statute of limitations defense based on the assertion that the duress was not collateral, but rather was part of the underlying claim.[151] The incest victim is thus presenting a situation wholly distinguishable from *Baratta*, in which the underlying claim of conversion was free from any duress or undue influence—the circumstances evidencing duress occurring years later, in response to threat of suit.[152]

3. *Mental Disability*

Section 208 of the New York Civil Procedure Law and Rules[153] suspends the running of the statute of limitations when the plaintiff is under a mental disability at the time the cause of action accrues.[154] The courts have shown a willingness to apply section 208 to mental disabilities that have arisen as a result of the defendant's wrongful conduct as well as to those mental disabilities that predate a given cause of action.[155] Nevertheless, the courts have shown a general reluctance to apply the insanity tolling exception to what they consider to be "temporary mental afflictions"[156] and have chosen to define the term "insanity" narrowly.[157]

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147. *See id.* at 2.

148. *See id.*

149. *See id.* Plaintiff's complaint would arguably satisfy the requirements of New York Civil Practice Rule 3016(b) which provides that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." N.Y. CIV. PRAC. L. & R. 3016(b) (McKinney 1974).

150. 94 A.D.2d 454, 464 N.Y.S.2d 803 (2d Dep't 1983).

151. *See id.* at 459, 464 N.Y.S.2d at 807.

152. *See id.*

153. *See* N.Y. CIV. PRAC. L. & R. § 208 (McKinney 1972 & Supp. 1987); *see also* WEINSTEIN, KORN & MILLER, *supra* note 9, ¶ 208.01.

154. *See supra* note 153.

155. *See* McCarthy v. Volkswagen of Am., Inc., 55 N.Y.2d 543, 435 N.E.2d 1072, 450 N.Y.S.2d 457 (1980) (court considering whether New York Civil Practice Law § 208 is applicable to plaintiff's post-traumatic neurosis which he developed after defendant's negligent conduct caused plaintiff's car to explode).

156. *Id.* at 547, 549 n.3, 435 N.E.2d at 1074, 1075 n.3, 450 N.Y.S.2d at 459, 460 n.3 (the court also overruled Prude v. County of Erie, 47 A.D.2d 111, 364

In the absence of statutory definition,[158] insanity is defined by the courts as an overall inability to function in society and an incapacity to pursue one's legal rights.[159] Similarly, the New York Court of Appeals has explicity rejected any claim of "post-traumatic neurosis" as constituting insanity for purposes of section 208.[160] Presumably, the plaintiff in *Smith*, suffering from Post-Traumatic Stress Disorder,[161] would also have been unsuccessful in countering the defendant's affirmative defense of the statute of limitations with a claim of mental disability.[162]

The adult incest victim who suffers from multiple personality disorder[163] is possibily in a factually different situation under section 208. While both PTSD and MPD are elaborate coping devices, they are radically different in the effect that they each have on the plaintiff's "overall ability" to function in society. The victim suffering from PTSD is almost always a fused and integrated individual who, although in tremendous psychic pain, nevertheless is able to lead an otherwise productive life.[164] The MPD victim may present a much different situation. One personality may be quite capable of functioning, while the alternates may in turn be suicidal, homicidal, amnesic—in sum, unable to function, discover, comprehend or seek redress for the injury.[165] Accordingly, the

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N.Y.S.2d 643 (4th Dep't 1975) (holding that post-traumatic neurosis could constitute "insanity" for purposes of New York Civil Practice Law § 208) and Hurd v. County of Allegany, 39 A.D.2d 499, 336 N.Y.S.2d 952 (4th Dep't 1972) (same)).

157. *See id.* at 548-49, 435 N.E.2d at 1074-75, 450 N.Y.S.2d at 459-60.

158. *See id.* at 547, 435 N.E.2d at 1074, 450 N.Y.S.2d at 459.

159. *See id.*

160. *See id.* at 548-49, 435 N.E.2d at 1075, 450 N.Y.S.2d at 460.

161. *See supra* notes 55-62 and accompanying text.

162. *But see* Barnes v. County of Onondaga, 103 A.D.2d 624, 481 N.Y.S.2d 539 (4th Dep't 1984), *aff'd*, 65 N.Y.2d 664, 481 N.E.2d 245, 491 N.Y.S.2d 613 (1985) (plaintiff's depressive reaction held to be more serious than neurosis, since the plaintiff was able to show that her overall ability to function in society was severly limited); Wheeler v. State of New York, 104 A.D.2d 496, 498, 479 N.Y.S.2d 244, 246 (2d Dep't 1984) (plaintiff's evidence of manic-depressive illness may be sufficient under New York Civil Practice Law § 208 to toll statute of limitations).

163. *See supra* notes 63-68 and accompanying text.

164. *See generally* Donaldson & Gardner, *supra* note 55.

165. *See* Graboi v. Kibel, 432 F. Supp. 572, 579 (S.D.N.Y. 1977) (court espoused standard of pragmatism in determining whether person is mentally disabled for purposes of New York Civil Practice Law § 208, and stressed consideration of "all the relevant facts and circumstances" which may result in incapacity to "pursue [one's] lawful rights" or "manage one's affairs").

mental disability tolling exception of section 208 may be more readily applicable to the multiple personality victim. In addition, MPD would constitute a mental disability that as a factual matter may be found to have existed continuously, and that merely takes decades to diagnose.[166] The fact that the diagnosis for MPD is made after the plaintiff reaches majority should not affect the ability to use the mental disabilty tolling provision under section 208. Because MPD is treatable and responsive to psychotherapy, an incest victim suffering from the disorder, once achieving a stable fusion of the personality, could commence suit at this time and terminate the period of disability for purposes of section 208.[167]

Nevertheless, under New York law, the mental disabilty tolling exception for the statute of limitations is probably the least desirable for most incest plaintiffs. This undesirability is not due to a possible stigmatization of the plaintiff as "insane." Rather, section 208 loses its attractiveness in light of both the narrow meaning the courts have given to the term "insanity" up to the present,[168] and the ten year outside limit on the statutory tolling provision for mental disability.[169]

4. *New York's Discovery Rule and the Incest Plaintiff*

New York, until quite recently, was one of the few jurisdictions that, except in limited circumstances,[170] generally failed to recognize a discovery rule for determining when a cause of action accrues. The New York Legislature has recently amended the Civil Practice Law and Rules, however, to provide for a statute of limitations discovery rule for past and future toxic tort victims suing for damages caused by the latent effects of exposure to certain substances and materials.[171] The amendment provides in pertinent part:

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166. *See supra* notes 67-68 and accompanying text.

167. New York Civil Practice Law § 208 provides, however, that the mental disability toll cannot result in an extension of more than ten years from the accrual of the claim. *See* N.Y. CIV. PRAC. L. & R. § 208 (McKinney 1972 & Supp. 1987).

168. *See supra* notes 154-56 and accompanying text.

169. *See id.*

170. *See* N.Y. CIV. PRAC. L. & R. § 213(5) (McKinney 1972); *id.* § 213(8) (McKinney 1972 & Supp. 1987); *id.* § 214(7) (McKinney 1972 and Supp. 1987); *id.* § 214-a (McKinney Supp. 1987); *id.* § 214-b (McKinney Supp. 1987); *id.* § 214-c (McKinney Supp. 1987).

171. *See* N.Y. CIV. PRAC. L. & R. § 214-c (McKinney Supp. 1987).

> [A]n action to recover damages for personal injury . . . caused by the latent effects of exposure to any substance [must be commenced within three years] and shall be computed from the date of discovery of the injury by the plaintiff or the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.[172]

New York's toxic tort discovery rule is also significant in that it permits plaintiffs to commence actions, not only upon discovery of the injury, but also upon discovery of the cause of the injury.[173] It is plaintiff's burden, however, to prove that "technical, scientific or medical knowledge . . . sufficient to ascertain the cause of [the] injury had not been discovered . . . prior to the expiration of the period within which the action . . . would have been authorized."[174] Thus New York, with one broad enactment, has moved from among the ranks of the least active jurisdictions in the area of developing the time-of-discovery rule to among the most liberal and farsighted of jurisdictions.

III. The Current Inadequacies of Applying Common Law and Statutory Tolling Exceptions to Incest-Based Tort Claims and a Proposed Solution

Under current interpretations of the common law doctrines of equitable estoppel[175] and duress,[176] as well as under the statutory

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172. *Id.*

173. New York Civil Practice Law § 214-c(4) provides in pertinent part:

> [W]here the discovery of the cause of the injury is alleged to have occurred less than five years after discovery of the injury or when with reasonable diligence such injury should have been discovered, whichever is earlier, an action may be commenced . . . within one year of such discovery of the cause of the injury.

Id. § 214-c(4) (McKinney Supp. 1987); *see also* Rheingold, *The New Statute of Limitations in Tort Actions in New York*, N.Y.L.J., July 29, 1986, at 1-3, col. 4 (explaining that "[i]f within five years after discovery of the injury there is discovery of the cause of the injury, then the person has one year within which to sue from the date of discovery of the cause of the injury") [hereinafter Rheingold].

174. N.Y. CIV. PRAC. L. & R. § 214-c(4) (McKinney Supp. 1987); *see also* Rheingold, *supra* note 173, at 3, col. 1. Rheingold inquires whether the burden is on the plaintiff to prove that "within the period otherwise allowed to bring suit (namely, three years from date of discovery of the injury), he could not have known the cause of his condition? Or does it mean that [he] must prove that no one . . . including the defendant knew that the substance could cause the condition?" Rheingold, *supra* note 173, at 3, col. 1. Rheingold concludes that the latter proposition would be an absurd result. *See* Rheingold, *supra* note 173, at 3, col. 1.

175. *See supra* notes 95-132 and accompanying text.

176. *See supra* notes 133-52 and accompanying text.

tolling exception for mental disability,[177] adult incest victims have thus far been unsucccessful in litigating their civil claims. Were these exceptions construed more broadly and balanced more fairly against the traditional policy concerns that underlie statutes of limitations,[178] the incest victim might have an existing solution to her considerable procedural obstacle.

One can readily see for instance, that the articulated objective of time-barring claims because evidence decays with the passage of time is not served by a bar on the adult civil incest suit. Commentators have observed that not all evidence is made stale simply by the passage of time.[179] Moreover, as recently pointed out by the dissent in *Tyson v. Tyson*,[180] the average case of incest abuse occurs when the child is eleven or twelve years old.[181] Thus, under the applicable statutes of limitations, the plaintiff currently has until the age of nineteen or twenty-one to file suit.[182] The dissent corrrectly points out, however, that because the plaintiff can take advantage of this infancy tolling exception, the evidence will already be between eight to ten years old by the time the plaintiff commences suit.[183] By extension, when the plaintiff is unable to commence suit within the applicable statute of limitations period, the evidence she relies on is "not logically so much less 'verifiable' that it warrants . . . foreclosing a potentially meritorious claim."[184]

Turning to the *Smith* court's failure to apply the doctrine of equitable estoppel to an incest-based tort claim,[185] one is struck with the almost offhand application of the case law of equitable estoppel to the facts of the incest victim's claim. Quite clearly, fraudulent representations of the incest offender, made to the victim throughout her childhood in order to force continued sexual compliance, should furnish sufficient grounds to invoke the doctrine

177. *See supra* notes 153-67 and accompanying text.
178. *See supra* notes 76-87 and accompanying text.
179. *See* Epstein, *supra* note 84, at 1183.
180. *See* 107 Wash. 2d 72, 727 P.2d 226 (1986) (Pearson, J., dissenting).
181. *But see supra* note 38 and accompanying text extract, suggesting that the average case of incest abuse commences earlier than age eleven or twelve. Herman's statistic, however, would only bolster the dissent's argument.
182. *See supra* notes 11-12 and accompanying text.
183. *See Tyson*, 107 Wash. 2d at 85, 727 P.2d at 232.
184. *Id.* at 86, 727 P.2d at 232.
185. Smith v. Smith, No. 85 Civ. 285E, slip op. at 3 (W.D.N.Y. Nov. 7, 1986).

of equitable estoppel, even if the misrepresentations ended before the statute of limitations expired.

The defendant's conduct, in perpetrating the sexual abuse throughout the plaintiff's childhood[186] and in consistently misrepresenting the nature and consequences of the abuse as well as the identity of the wrongdoer,[187] created a situation in which the plaintiff was obstructed in the prosecution of her claim, whether it was known or unknown. Although the plaintiff in *Smith* was aware that she had sexual contact with her father, she was unaware that it constituted sexual abuse and could cause permanent damage.[188] The plaintiff, in addition to being under the domination of the parent and dependent upon him for survival, was arguably too young to distinguish truth from falsity.[189] The defendant, thus took advantage of the plaintiff's ignorance and miseducated her as to the wrongfulness of the incest by a process of indoctrination.

The misrepresentations of the father committing incest thus serve a two-fold purpose, one immediate, the other long-range. The immediate goal of such misrepresentations is to gain ongoing sexual access to the daughter in secrecy.[190] The second purpose, no less intended by the defendant, and which may be more accurately characterized as a causal result of such misrepresentations, is to scar the daughter psychologically in such a way as to render her unable to blame the defendant fully, much less be able to recognize a legal wrong in his conduct.[191]

For purposes of determining whether equitable estoppel applies to incest-based tort claims, the adult plaintiff's "present understanding" of the wrongs should be considered in light of the long-lasting effects of the defendant's wrongdoing and continuing deceits, which are calculated only to conceal his culpability from the plaintiff. The shame and guilt the defendant often succeeds in inflicting on the plaintiff,[192] making it difficult for her to recognize

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186. *See* Smith Affidavit, *supra* note 111, at 1.

187. *See id.* at 5; *see also* BAXTER, *supra* note 36, at 33.

188. *See* Smith Affidavit, *supra* note 111, at 4-5; *see also* McCabe, *supra* note 2, at 19.

189. *See* Smith Affidavit, *supra* note 111, at 1; *see also* BAXTER, *supra* note 36, at 12.

190. *See supra* note 38 and accompanying text; *see also* BAXTER, *supra* note 36, at 33; McCabe, *supra* note 2, at 18-19.

191. *See* CLEVELAND, *supra* note 37, at 98.

192. *See id.* at 106; SOURCEBOOK, *supra* note 2, at 152; Arthur, *supra* note 2, at 2; McCabe, *supra* note 2, at 19.

the wrong or wrongdoer, should be evaluated as factually sufficient grounds to invoke the doctrine of equitable estoppel on the basis of fraudulent concealment.

The notion that a plaintiff is automatically free to perceive and then press a claim upon discovery that the defendant has fraudulently represented the existence of the harm or concealed the cause of action, may assume too much in the case of the adult survivor of childhood incest abuse. The defendant's misrepresentations, while known intellectually to be false by the plaintiff, may emotionally scar and confuse the plaintiff so as to render her paralyzed rather than lulled into inactivity after she has reached majority.[193] While as an adult, the plaintiff may recognize that she did nothing wrong, that she did not invite the offender's conduct and that the defendant deceived her into believing these assertions, she may on a deeper level believe the representations to be true, well into adulthood, long after the applicable statutes of limitations have expired.[194] The quality of the relationship between parent and child, with trust placed by the child in the parent, and the complete reliance which such a relationship engenders in the child,[195] is a factor that the court should not ignore in determining whether equitable estoppel bars a defendant's statute of limitations defense.

The court in *Smith*, however, substantially vitiates the doctrine of equitable estoppel in two ways. First the court finds the doctrine inapplicable to situations in which the plaintiff has a substantial inability to perceive the wrongfulness of the defendant's conduct. Moreover, the court fails to invoke the doctrine even when the plaintiff's incapacity is directly attributable to the defendant's abuse of the fiduciary relationship between parent and child in order to conceal the wrong.[196]

Such a mechanistic application of the elements of equitable estoppel imposes an unrealistic and unfair burden upon the adult

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193. *See* SOURCEBOOK, *supra* note 2, at 152; McCabe, *supra* note 2, at 19.

194. *See* CLEVELAND, *supra* note 37, at 106.

195. *See Simcuski*, 44 N.Y.2d at 449, 377 N.E.2d at 716, 406 N.Y.S.2d at 263 (discussing doctor-patient relationship).

196. *See* Renda v. Frazer, 75 A.D.2d 490, 429 N.Y.S.2d 944 (4th Dep't 1980) (malpractice action by patient suffering facial paralysis held to present question of fact as to whether physician intentionally deceived patient by his prognosis). The court noted that in order to raise an estoppel to bar a statute of limitations defense, "it is not necessary for the trier of fact to find that [the defendant] specifically intended to delay [the plaintiff's] institution of [the] malpractice action, only that he intentionally misrepresented the fact or consequences of the malpractice." *Id.* at 495 n.3, 429 N.Y.S.2d at 947 n.3 (citation omitted).

victim of childhood incest abuse. Arguably, the *Smith* court should have considered the traumatic nature of the wrong involved and the long-term harm it causes to the victim's psyche[197] to determine if the conduct on which plaintiff relied ceased to be operational *after* or before the expiration of the statute of limitations period. Under the approach endorsed in *Simcuski v. Saeli*,[198] the inquiry would then become whether the plaintiff has acted with due diligence in bringing her claim after the facts giving rise to the estoppel ceased to be operational.[199] Similarly, once the court allows the plaintiff to prove the elements of equitable estoppel, the court can consider whether the incest victim's burden of showing due diligence in bringing her cause of action is satisfied by such actions as having sought a course of psychological treatment, which often precipitates the discovery of repressed incest abuse.[200]

In the absence of the court's willingness to extend the common law counter-measures and tolling exceptions of statutes of limitations to incest-based tort claims, the adult victim of childhood incest should have the benefit of the discovery rule. The reasons to avoid burdening the victims of incest-based torts with a strict time of injury accrual date are analogous to the justifications for the toxic tort discovery rule.[201] The injuries in both situations are slow-starting, and the incest victim may not know at the time the applicable statute of limitations expires that she has suffered any harm.[202] As with the rationale for the toxic tort victim, the incest plaintiff, who could not have known of her cause of action, cannot be accused of "slumbering" on her rights.[203]

One difficulty, however, prevents a complete analogy between the toxic tort victim and the adult victim of childhood incest abuse. This difficulty arises from the requirement that the nature of the injury be "inherently unknowable,"[204] during the statutory limitations period and beyond, until the date of its discovery. In cases

197. *See* SOURCEBOOK, *supra* note 2, at 186-87; *see also supra* notes 42-68 and accompanying text.

198. 44 N.Y.2d 442, 377 N.E.2d 713, 406 N.Y.S.2d 259 (1978).

199. *See id.* at 450, 377 N.E.2d at 717, 406 N.Y.S.2d at 263; *see also supra* note 102 and accompanying text.

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

201. *See* N.Y. CIV. PRAC. L. & R. § 214-c (McKinney Supp. 1987).

202. *See supra* notes 55-62 and accompanying text.

203. Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944).

204. Urie v. Thompson, 337 U.S. 163, 169 (1949).

of incest abuse, the victim employs coping defenses, the most common of which is repression and in some cases includes fragmentation of the personality. An elusive distinction in the degree of inherent unknowability may emerge when one compares the lack of knowledge of an incest victim who has repressed the memory of the abuse with that of a person who inhales silica dust but fails to manifest symptoms of silicosis until fifteen years later. Arguably, the legislature would have to make a conceptual leap in equating repression of knowledge with inherent lack of knowledge if incest victims suing in adulthood are to avail themselves of the discovery rule. The legislature should, however, recognize both the powerful role that repression plays in the life of the incest victim,[205] as well as the psychotherapist's potential role in aiding the trier of fact in its determination of when repression has ceased for time-of-discovery purposes.[206]

IV. Legislative Proposal

The courts in New York are statutorily barred from extending statutes of limitations.[207] Furthermore, the court of appeals has consistently deferred to the legislature by holding that any modification in the time of injury accrual should be statutory.[208] Therefore, it is incumbent upon the legislature to enact a

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205. *See supra* notes 55-62 and accompanying text.

206. *See* Tyson v. Tyson, 107 Wash. 2d at 86, 727 P.2d. at 233 (Pearson, J., dissenting); *see also In re* Nicole V., 123 A.D.2d 97, 510 N.Y.S.2d 567 (1st Dep't 1987) (reprinted in the N.Y.L.J., Jan. 14, 1987, at 1, col. 6) (child sexual abuse proceeding).

In *Nicole V.*, the court held a flexible corroboration requirement to be an appropriate standard to determine whether sexual abuse occurred. *See id.* at 104, 510 N.Y.S.2d at 572. Furthermore, the court found that when there is "a lack of medical evidence or inconclusive medical reports, no eyewitnesses, no admission from the accused parent and a reluctance on the part of the victim, due to age and *post traumatic stress* . . . an expert['s] validation interview is critical. . . . [The] expert confirms or fails to confirm the existence of . . . post traumatic stress . . . [and the] expert testimony [in the instant case] was found to be of help to the trier of fact in assessing the reliability of complainant's allegations." *Id.* at 106-107 (emphasis added); *see also In re* Ryan D., slip op. at 12-15 (4th Dep't 1987) (no docket number in original) (LEXIS, States library, N.Y. file) (child sexual abuse proceeding citing with approval *Nicole V.* and role of expert testimony in explaining reticence of child sexual abuse victims to disclose abuse).

207. *See* N.Y. CIV. PRAC. L. & R. § 201 (McKinney 1972).

208. *See* Martin v. Edwards Labs, 60 N.Y.2d 417, 457 N.E.2d 1150, 469 N.Y.S.2d 923 (1983) (statute of limitations for personal injury caused by defective

rule applicable to the adult victims of childhood incest abuse that embraces the unique circumstances attendant to its civil redress. The following is a suggested proposed amendment to the Civil Procedure Law and Rules:

> Section 214-d. Certain actions to be commenced within two years of discovery.[209]
>
> A cause of action for personal injury under section 214.5 or under section 215, based on incest abuse,[210] is deemed to have accrued on the date when the plaintiff discovers, or when a plaintiff in circumstances substantially similar to the plaintiff[211] should have reasonably discovered, the injury caused by such incest abuse, and shall be commenced within two years of whichever date is later.[212]

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implanted or inserted device runs from date of malfunction); Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 430 N.E.2d 1297, 446 N.Y.S.2d 244 (1981) (cause of action for inhalation of asbestos runs from date of last exposure); Thornton v. Roosevelt Hosp., 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979) (cause of action for injection of carcinogenic substance runs from date of last exposure); Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963) (same); Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936) (negligence cause of action for inhalation of dust accrues upon inhalation).

209. *See* N.Y. CIV. PRAC. L. & R. § 203(f) (McKinney 1972 & Supp. 1987) (providing outside maximum of two years from discovery of the wrong).

210. An analysis of the legal remedies for civil claims of adult victims of extrafamilial sexual abuse (such as in a pre-school setting) exceeds the scope of this Note. The proposed statute is drafted narrowly to encompass only the claims of victims of incest abuse. Similarly, it is not suggested that the former class of claims lack merit. Rather, the purpose of the proposed statute is to address the unique circumstances and attendant injuries of incestuous abuse, which include the heightened emotional trauma often resulting from compelled sexual activity between family members and the frequently long-term duration of such sexual conduct. *See supra* notes 37-44 and accompanying text.

211. *See, e.g.*, N.Y. PENAL LAW § 35.15 (McKinney 1975 & Supp. 1987) (penal law article 35 recognizes the defense of justification and posits an objective and subjective inquiry for determining self-defense). Section 35.15 provides: "[A] person may . . . use physical force upon another person when and to the extent he *reasonably believes* such to be necessary to defend himself . . . from what he *reasonably believes* to be the use or imminent use of unlawful physical force by such other person." *Id.* (emphasis added); *see also* People v. Goetz, 68 N.Y.2d 96, 107, 497 N.E.2d 41, 47, 506 N.Y.S.2d 18, 24 (1986) (construing "reasonably believes" in § 35.15 to require consideration of circumstances of the incident to determine "whether the defendant's conduct was that of a reasonable man in the defendant's situation"). The standard is thus that of a reasonable person in the defendant's situation, and the background and other relevant characteristics of a particular actor will not be ignored. *Goetz*, 68 N.Y.2d at 114, 497 N.E.2d at 52, 506 N.Y.S.2d at 29. By analogy, the standard under the proposed statute should be a reasonable person in the incest victim's situation.

212. One author has noted the tendency of some jurisdictions to "couple a

(a) As used in this section, the term "incest" is not limited to the meaning specified in section 255.25 of the New York Penal Law[213] but shall also include any unwanted sexual contact with a family member.[214]

(b) As used in this section, "abuse" shall be defined as (1) any pattern of unwanted sexual contact which may be characterized as ongoing, or continuing or (2) any singular episode of unwanted sexual contact, sufficiently traumatic in the means of commission.[215]

At least two compelling reasons support this proposed legislation. First, the common law doctrines and statutory tolling provisions regarding statutes of limitations have thus far failed to achieve the results that could be obtained by the legislative enactment of a discovery rule for incest-based tort claims.[216] The purpose of uniformity would be served if the law were no longer applied on an *ad hoc* basis. Similarly, legislative action has the decisive advantage in this particular area of precluding erroneous construction and misapplication of law with the tragic result of foreclosing a worthy plaintiff from proceeding to the merits of her claim. Second, legislation has the effect of administrative convenience. This proposal supplies a durable solution to a complex issue that otherwise would consume much judicial energy. Moreover, a legislative solution is in keeping with the policies and purposes behind statutes of limitations in New York.[217]

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liberal statute of limitations, usually including a discovery provision, with a statute of repose that creates an absolute outer cut-off date from the time of the wrongful act." *Exception or the Law?, supra* note 16, at 521; *see also* Epstein, *supra* note 84, 1183 n.19.

While it is beyond the scope of this Note, a statute of repose of perhaps ten to fifteen years (which serves to eliminate the cause of action) coupled with a latent injury exception for incest victims may strike a balance between prompt claim resolution on the one hand and the unwarranted foreclosure of meritorious causes of action on the other.

213. New York Penal Law § 255.25 provides that: "[a] person is guilty of incest when he marries or engages in sexual intercourse with a person whom he knows to be related to him, either legitimately or illegitimately, as an ancestor, descendant, brother or sister of either the whole or the half blood, uncle, aunt, nephew or niece." N.Y. PENAL LAW § 255.25 (McKinney 1980 & Supp. 1986).

214. For a definition of "family member," see *supra* note 1.

215. Some means of commission of incest abuse are so patently traumatic to the child that they may not have to occur again to constitute compensable injury. *See* Wilbur, *The Effect of Child Abuse on the Psyche*, in CHILDHOOD ANTECEDENTS OF MULTIPLE PERSONALITY 21 (R. Kluft ed. 1985).

216. *See supra* notes 175-200 and accompanying text.

217. *See supra* notes 69-87 and accompanying text.

V. Conclusion

A strict application of the statute of limitations for negligence and intentional tort does not afford adequate protection to victims of childhood incest abuse litigating as adults. A rational interpretation of those statutes presupposes a type of injury that is readily apparent, while injuries from incest abuse may not manifest themselves until years after the abuse actually ceases. Diagnosis of injuries resulting from incest abuse may not occur until even later. Considerations of fairness suggest that a policy of allowing the defendant to repose should not overcome the legitimate claim of a blamelessly ignorant plaintiff. When the adult victim of childhood incest abuse has repressed all conscious memory of the abuse or is otherwise unable to file suit because of the defendant's misconduct, then, in addition to attempting to utilize the doctrines of equitable estoppel, duress and the statutory tolling exception for mental disability, the plaintiff should be afforded the benefit of a discovery rule. To this end, the New York Legislature should enact a discovery rule applicable to incest-based tort claims that would redress a fundamental inequity and hardship that is worked upon adult victims of childhood incest abuse when traditional rules of accrual are applied to their civil claims.

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