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Incest: A Proper Definition Reveals the Need for a Different Legal Response

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INCEST: A PROPER DEFINITION REVEALS THE NEED FOR A DIFFERENT LEGAL RESPONSE*

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I. INTRODUCTION

Searching for the love and affection he was denied in childhood and marriage, the incestuous adult male engages in sexual contact with his child.¹ The child, also deprived of “normal” childhood love and affection, allows the contact and promises to keep it secret. Thus begins, or continues, a cycle of destructive behavior which threatens the child, the family, and the fabric of society.

Definitions of incest vary from culture to culture,² among academic disci-

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1. Approximately 75% of all cases of incest are between father and daughter. Kempe, *Incest and Other Forms of Sexual Abuse*, in *THE BATTERED CHILD* 196, 204 (C. Kempe & R. Helfer 3d ed. 1980) [hereinafter cited as C. KEMPE & R. HELFER]. Sexual activity between fathers (or stepfathers) and their daughters is the most prevalent type of incest; therefore, this Article will focus on this type of sexual abuse.

2. For a discussion of cultural and historical differences, see Masters, *The High Cost of the Incest Prohibition*, in *PATTERNS OF INCEST* 1, 9-50 (R. Masters ed. 1963) [hereinafter cited as R. MASTERS]. Masters rejects the “universal incest taboo,” finding that certain groups tolerate incest, others encourage it, some have no concept of it, and some have “extremely unusual ideas about what constitutes incest.” *Id.* at 39. He has also observed:

Just why we ought to imitate the sexual morals of savages and semi-savages (though only when it is restrictive, never when it is permissive), is seldom explained.

The explanation is, however, plain. The antisexual moralist clutches al-

plines, and may vary even within a discipline. Legal definitions vary from state to state.³ Acknowledging these variations barely scratches the surface of the legal aspects of this problem, which threatens to destroy an increasing number⁴ of families.⁵ Approximately five thousand new cases of incest are reported

ways at every straw to attempt to justify the irrational prohibitions he would foist off upon his fellow man.

Id. at 38. Some commentators claim that the common incest taboo is directly related to the fact that the nuclear family is universal. *E.g.*, Parsons, *The Incest Taboo in Relation to Social Structure and the Socialization of the Child*, 5 BRIT. J. SOC. 102, 102 (1954); *see also* R. FINE, *THE PSYCHOANALYTIC VISION* 398-99 (1981) (prohibition against incest is closely connected with the regulation of sexuality and love).

Paternal incest appears to have existed during all periods of history and in all types of civilizations. *See* Lukianovicz, *Incest I: Paternal Incest*, 120 BRIT. J. PSYCHIATRY 301, 303 (1972). White rejects the assertion, however, that the universality theory presumes an instinctive human revulsion to incest. "To say that prohibitions against incest are 'instinctive' is of course to declare that there is a natural, inborn and innate feeling of revulsion towards unions with close relatives. But if this were the case, why should societies enact strict laws to prevent . . . something that everyone already wishes passionately to avoid?" White, *The Definition and Prohibition of Incest*, in R. MASTERS, *supra*, at 233, 234. White also argues that the assumption that instinct varies among tribes is ridiculous, and that "[c]ertainly when we consider our own legal definitions of incest, which vary from state to state, to claim that a biological instinct can recognize state boundary lines is somewhat grotesque." *Id.* *But cf.* R. FOX, *THE RED LAMP OF INCEST* 2 (1980) (although they vary among cultures, there are some universal notions concerning incest).

3. *See* text accompanying notes 15-31 *infra*.

4. The recent focus on children's rights has brought the problem of child sexual abuse to the attention of the general population. Despite a growing awareness of the problem, statistics on the incidence of child sexual abuse, especially incest, remain uncertain. The estimates have varied. *See, e.g.*, Y. TORMES, *CHILD VICTIMS OF INCEST* 5 (Childrens Div., Am. Humane Ass'n Pub. No. 35 1969) (40 cases per million people); S. WEINBERG, *INCEST BEHAVIOR* (1955) (1.9 cases per million people). An earlier report, however, claimed that "while incest material, wishes, defenses against these wishes, and conflict engendered by it are among the most frequently encountered deeply repressed material in any intense psychotherapy with children and adults, it is quite a rare thing to encounter an actual, verifiable clinical example." Wahl, *The Psychodynamics of Consummated Maternal Incest*, 3 ARCHIVES GEN. PSYCHIATRY 188, 189 (1960). Wahl's review of the literature revealed only 34 reported cases of father-daughter incest and only four of mother-son incest, with the latter "only mentioned rather than described." *Id.*

Recent estimates have exceeded earlier reports, but no national incest statistics exist. Available figures reflect only reported cases, and sexual abuse is the most under-reported form of child abuse. J. BULKLEY & H. DAVISON, *CHILD SEXUAL ABUSE: LEGAL ISSUES AND APPROACHES* 2 (rev. ed. 1981). Cases seen at Santa Clara County Child Abuse Sexual Treatment Program suggest that the true incidence could be as high as 800-1000 cases per million. U.S. DEPT. OF HEALTH & HUMAN SERVICES, PUB. NO. 30166, *CHILD SEXUAL ABUSE: INCEST, ASSAULT AND SEXUAL EXPLOITATION* 2 (1981) [hereinafter cited as *SEXUAL EXPLOITATION*].

5. Incest may cause psychological damage and adverse social consequences for the individual family member. J. BETHSCHEIDER, J. YOUNG, P. MORRIS & D. HAYES, *A STUDY OF FATHER-DAUGHTER INCEST IN THE HARRIS COUNTY CHILD WELFARE UNIT* 2 (IV Criminal Justice Monograph No. 4, 1973). "Father-daughter incest is

nationally each year. For every reported case, ten to twenty remain unreported.⁶ Others estimate the figure may be even higher,⁷ with projections that approximately one in twenty women have experienced at least one incestuous incident.⁸ Incest generally occurs in families which suffer from severe disorganization.⁹ The incest creates further tensions and dysfunction.¹⁰ Because of the destructive effect incest has on the family, its individual members, and those with whom they interact, the problem of incest must be faced and resolved.

This Article will explore definitions of incest, illustrate that the plethora of definitions arise from confusion surrounding traditional reasons advanced for the prohibition, and show that without a clear understanding of why incest is "bad", lawmakers cannot draft sensible legislation. Thus far, legislators have produced a myriad of laws with inconsistent penalties resulting in confusing prosecutions and no resolution of the incest problem. After reviewing the reasons for the prohibition and various statutes which attempt to restrict incest-

viewed as a family problem which is the result of a breakdown in the nuclear family structure. This type of behavior is incompatible with family life because it disorganizes its very foundations." *Id.* at 6.

Incest and sexual misuse or abuse within a family involves the whole family and not just the person who initiates the activity. The nonparticipating spouse is involved in terms of directly or indirectly encouraging the activity. The child is involved in terms of often being an active, not passive, participant or welcoming the activity as a form of special attention. The whole environment of the family is involved in terms of contributing to the conditions under which incest or sexual misuse occurs.

B. JUSTICE & R. JUSTICE, *THE BROKEN TABOO* 32 (1979). Small, highly mobile, vertical families and the decline of the extended family may encourage incestuous relationships. Henderson, *Incest: A Synthesis of Data*, 17 *Can. Psychiatric Ass'n J.* 299, 304 (1972), reprinted in *TRAUMATIC ABUSE AND NEGLECT OF CHILDREN AT HOME* 423, 429 (G. Williams & J. Money ed. 1980) [hereinafter cited as G. WILLIAMS & J. MONEY].

6. S. JANUS, *THE DEATH OF INNOCENCE* 127 (1981).

7. See, e.g., Katz, *Incestuous Families*, 1983 *DET. C.L. REV.* 79, 79 (several hundred thousand incest incidents per year).

8. H. DAVIDSON, R. HOROWITZ, T. MARVELL & O. KETCHAM, *CHILD ABUSE AND NEGLECT LITIGATION, A MANUAL FOR JUDGES* 149 (1981) [hereinafter cited as *MANUAL*].

9. Disorganized families may "become 'centrifugal' in nature by projecting family difficulties on one another and by casting members into rigid, inflexible roles; or they may become 'centripetal' in that they express their difficulties through social isolation." M. DEYOUNG, *THE SEXUAL VICTIMIZATION OF CHILDREN* 18 (1982). In cases of paternal incest, two patterns have been discovered. One, "the chaotic, multi-problem family characterized by rigid, uncompromising roles and symptomatic acting out" equates with the centrifugal family. The second, "the secretive, enmeshed family which meets all of its needs, including sexual needs, within the family unit," fits the description of the centripetal family. "Both are by virtue of their disorganization and ineffective coping skills, incest-prone families." *Id.*

10. See *United States v. Allery*, 526 F.2d 1362, 1366 (8th Cir. 1975) (father's incestuous assault of his twelve-year-old daughter is a serious offense against the child, family harmony, and society).

tuous relationships, this Article will propose suggestions to assist in the drafting of more uniform and effective incest legislation.

II. DEFINITIONS

The incest taboo is actually a prohibition of two kinds of relationships. Marriage¹¹ and certain types of sexual activity are prohibited between persons within a certain degree of consanguinity.¹² These two types of prohibited relationships are often intermingled in thought and law,¹³ but this Article will focus on restrictions concerning sexual activity between related persons.¹⁴

The legal definitions of incest and the penalties imposed for incestuous conduct vary widely.¹⁵ Although a few states have recently expanded their coverage,¹⁶ virtually all statutes still limit the criminal act of incest to sexual intercourse.¹⁷ Sexual intercourse requires penetration¹⁸ and thus, to have a successful incest prosecution, penetration must be proved.¹⁹ Such a limitation makes it extremely difficult to convict under an incest statute. Consequently, incest laws are often utilized in conjunction with other criminal child sexual offense provisions.²⁰ The state often will prosecute under another criminal statute rather than incest. Several factors may lead a prosecutor to choose a different sex offense statute.²¹

11. Incestuous marriages are void in many states. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-101 (1976).

12. *E.g.*, ILL. ANN. STAT. ch. 38, §§ 11-10, -11 (Smith-Hurd 1979). The degree of relationship which is prohibited for sexual activity is sometimes decided by reference to that prohibited for marriage. *E.g.*, ARIZ. REV. STAT. ANN. § 13-3608 (1978).

13. Incest statutes attempt to prevent: (1) marriages between closely related individuals, and (2) sexual abuse of children by relatives. "The purpose of the first is to protect the *genetic pool*. The purpose of the second is to protect the *child*. The tendency to mix both purposes in one statute can be problematic." Fraser, *Sexual Child Abuse: The Legislation and the Law in the United States* in SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES 55, 65 (P. Mrazek & C. Kempe eds. 1981) [hereinafter cited as P. MRAZEK & C. KEMPE].

14. *See generally* Storke, *The Incestuous Marriage—Relic of the Past*, 36 U. COLO. L. REV. 473 (1964).

15. *See* Wulkan & Bulkley, *Analysis of Incest Statutes*, in CHILD SEXUAL ABUSE AND THE LAW 52, 67-80 (3d ed. J. Bulkley 1982)(graphic comparison of the basic elements of state incest laws).

16. *See, e.g.*, IND. CODE § 35-46-13 (1977) (incest includes "sexual intercourse or deviate sexual conduct").

17. Wulkan & Bulkley, *supra* note 15, at 52.

18. *Surcey v. State*, 4 Tenn. Crim. App. 542, —, 474 S.W.2d 167, 168 (1971). Intercourse necessarily includes penetration. *State v. McCall*, 245 Iowa 991, 995, 63 N.W.2d 874, 876 (1954); *Svehla v. State*, 168 Neb. 553, 561, 96 N.W.2d 649, 655 (1959). The slightest penetration is sufficient. *Rhoades v. State*, 504 S.W.2d 291, 294 (Mo. Ct. App. 1973); Annot., 76 A.L.R.3d 163, 178-83 (1977).

19. *See, e.g.*, FLA. STAT. § 826.04 (1981). This definition does not prohibit homosexual, oral, or anal sexual contact.

20. Wulkan & Bulkley, *supra* note 15, at 52.

21. In a nationwide survey, approximately 300 prosecuting attorneys were asked

First, in all but five states,²² criminal incest statutes prohibit only sexual intercourse.²³ Because this narrow prohibition does not encompass all intrafamily sexual contact which may be harmful to the child, most incest laws would not apply to parent-child sexual contact which does not include penetration. Second, in many states incest is a crime only between blood relatives,²⁴ thus preventing prosecutions against stepparents, adoptive parents²⁵ or those in parental roles. Third, more severe penalties may be imposed under other sex offense statutes than under the incest statute.²⁶ Sometimes, where the facts will support an incest charge, many prosecutors file under both statutes to encourage plea bargaining. If the child is above the age of consent such that child sex offense statutes do not apply, the prosecutor will utilize only the incest statute, because it generally does not include an age restriction.²⁷ Prosecutorial discretion can also lead to inconsistent results when the prosecutor chooses the charge which carries the penalty he deems appropriate.

Inconsistencies in prosecutions among the states stem from wide variations in the class of persons encompassed within the incest statutes, and the penalties for violation of these statutes. While every state²⁸ prohibits parent-

to indicate under which statutory provisions intrafamily sex offenders were charged. These offenses included incest, assault and battery, or sexual offenses, including non-consenting intercourse or forcible rape, consenting intercourse, sexual contact, and sodomy. The results indicated an almost even distribution under all crimes except assault and battery, where there were significantly fewer indictments. J. BULKLEY, *INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES* 3-4 (2d ed. 1982).

22. See ILL. ANN. STAT. ch. 38, §§ 11-10, -11 (Smith-Hurd 1979); IND. CODE ANN. § 35-46-1-3 (Burns 1979); KAN. STAT. ANN. §§ 21-3602, -3603 (Supp. 1983); OR. REV. STAT. § 163.525 (1981); TEXAS PENAL CODE ANN. § 25.02 (Vernon 1974).

23. J. BULKLEY, *supra* note 21, at 4.

24. In 29 jurisdictions, incest is a crime only among blood relatives. *Id.* at 18 n.6.

25. The crime of incest is statutory, *People v. Baker*, 69 Cal. 2d 44, 47, 442 P.2d 675, 676, 69 Cal. Rptr. 595, 596 (1968), and thus can be committed only by those to whom the statute applies. See *State v. Moore*, 158 Conn. 461, 465, 262 A.2d 166, 168 (1969). Thus, an incest statute based on consanguinity would not preclude sexual activity between a stepfather and his stepdaughter or an adoptive father with his adoptive daughter. *State v. Rogers*, 260 N.C. 406, 409, 133 S.E.2d 1, 3 (1963).

26. J. BULKLEY & H. DAVISON, *supra* note 4, at 7.

27. J. Bulkley, *supra* note 21, at 4.

28. Only New Jersey has entirely repealed its incest laws. See Act of Aug. 10, 1978, ch. 95, 1st Reg. Sess., 1979 N.J. Laws 482, 687-88. Nevertheless, the state has "one of the most comprehensive criminal sexual offense laws protecting children, including age differentials between victims and perpetrators, specifically defined relationships between victims and perpetrators, and graduated penalties." Wulkan & Bulkley, *supra* note 15, at 56; see N.J. STAT. ANN. § 2C: 14-2 (West 1982).

In Michigan, New Hampshire, Ohio, and Vermont, incestuous marriage, but not sexual intercourse, is prohibited. Such marriages are void but there are no criminal penalties. Sexual abuse of a minor by a relative would not be incest in these states. In Maine, only persons over the age of 18 can commit incest. Consequently, in these five states, sexual abuse of a minor is not covered by these incest statutes but only by criminal sexual offense provisions. Wulkan & Bulkley, *supra* note 15, at 79 n.2.

child incest,²⁹ a large number of additional relations—by affinity and consanguinity—are included in some laws. For example, the incest statute in South Dakota prohibits sexual relations between second cousins but does not prohibit such conduct with an uncle or aunt of the half blood.³⁰ North Dakota's statute prohibits sexual intercourse between a child and its uncle or aunt of the half blood but ignores such relationships between second cousins.³¹

The penalties for incest vary considerably from state to state. In Tennessee, the parent who sexually abuses his child may receive a twenty-one-year sentence³² while the Maine parent who commits the same act risks less than one year in jail plus a fine of less than one thousand dollars.³³ While many states provide for severe penalties, judges and juries often seem reluctant to punish the incestuous father.³⁴

In contrast with the narrow legal definition of incest, psychologists, psychiatrists, and social workers define harmful incestuous behavior more broadly. According to psychologists Drs. Blair and Rita Justice, "[i]ncest is any sexual activity—intimate physical contact that is sexually arousing—between nonmarried members of a family."³⁵ Susan Forward, M.S.W., defines incest as "any overtly sexual contact between people who are either closely related or perceive themselves to be closely related. . . . If that special trust that exists between a child and a parent-figure or sibling is violated by a sexual act, that act becomes incestuous."³⁶

The National Center on Child Abuse and Neglect substitutes the phrase "intrafamily sexual abuse" for incest. Prohibited abuse by a member of the child's "family group" is not limited to sexual intercourse but includes "any act designed to stimulate a child sexually, or to use a child for the sexual stimulation, either of the perpetrator or of another person."³⁷

Definitions used by women's groups focus on the victimization of the female child by the adult male. From her "frankly feminist" perspective, psychiatrist Judith Lewis Herman views incest as an abuse of power by a patriarchal father who exercises absolute control in the home and treats his children as his personal possessions.³⁸ Use of this power by the father for his sexual gratification is incest. In harmony with this theme of abuse of power is the conclusion

29. Note, *The Crime of Incest Against the Minor Child and the States' Statutory Responses*, 17 J. FAM. L. 93, 115 (1978).

30. S.D. CODIFIED LAWS ANN. §§ 22-22-19, 25-1-6 (1979). See also I. SLOAN, ED., PROTECTION OF ABUSED VICTIMS: STATE LAWS & DECISIONS 98 (1983).

31. N.D. CENT. CODE §§ 12.1-20-11, 14-03-03 (1976).

32. TENN. CODE ANN. § 39-4-306 (1982).

33. ME. REV. STAT. ANN. tit. 17-A, § 556.1252(1)(D) (Supp. 1981).

34. F. RUSH, *THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN* 137-38 (1980).

35. B. JUSTICE & R. JUSTICE, *supra* note 5, at 25.

36. S. FORWARD & C. BUCK, *BETRAYAL OF INNOCENCE* 3-4 (1978).

37. B. JUSTICE & R. JUSTICE, *supra* note 5, at 27.

38. See generally J. HERMAN & L. HIRSCHMAN, *FATHER-DAUGHTER INCEST* (1982).

of S. Janus: "Whatever else it may be, incest is an exercise in dominance; its psychodynamics always include elements of a need for the assertion of power over a dependent and relatively weaker person. . . . The need is for total dominance and control over the life of the individual."³⁹

Are uniform definitions and solutions⁴⁰ to the incest problem necessary, or can each state effectively combat the growing number of incest cases with existing disparate legislation? To answer this question, the reasons advanced for the prohibition must be explored.

III. REASONS FOR THE TABOO

If it is true that "a form of behavior becomes deviant when it is defined as violating the norms of some collectivity,"⁴¹ then sexual acts only become deviant when they meet with social disapproval⁴² or taboo. There is no single historical derivation of the incest taboo.⁴³ Therefore, an analysis of several reasons advanced to explain the origin of the incest prohibition is important in

39. S. JANUS, *supra* note 6, at 133. Butler uses the phrase "incestuous assault," which includes "any sexual activity or experience" imposed on a child by an adult family member which results in emotional, physical or sexual trauma, including "any manual, oral or genital sexual contact or other explicit sexual behavior." S. BUTLER, *CONSPIRACY OF SILENCE, THE TRAUMA OF INCEST 4-5* (1978). Kee MacFarlane, after acknowledging that the problem is too complex to fit within a single definition, defines child sexual abuse as "sexual contacts or interactions between a child and an adult when the child is being used as the object of gratification for adult sexual needs or desires." MacFarlane, *Sexual Abuse of Children*, 3 SAGE Y.B. WOMEN'S POL'Y STUD. 81, 85 (1978).

Parents may be concerned about the line between appropriate affection and inappropriate sexual conduct. "The single most helpful guideline is the criterion of secrecy. If incest is defined as any physical contact between parent and child that has to be kept a secret, the parents can judge for themselves if their behavior is becoming overly eroticized." Herman, *Incest: Prevention is the Only Cure*, Ms., Nov. 1981, at 63, 64.

40. Each community should be given the opportunity to treat incestuous families in a manner that is neither permissive nor punitive. "A national position must be taken on the incest taboo and laws that are effective and consistent must be enacted. The community must publicize these statutes and the penalties for violating them." Giarretto, *The Treatment of Father/Daughter Incest: A Psycho-Social Approach*, CHILDREN TODAY, July-Aug. 1976, at 2, 35, reprinted in G. WILLIAMS & J. MONEY, *supra* note 5, at 466, 474-75.

The MODEL PENAL CODE § 230.2 (Proposed Official Draft 1962) states that a person is guilty of incest if "he knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood." "Cohabit" means to "live together under the representation or appearance of being married." *Id.* The Code includes "blood relationships without regard to legitimacy, and relationship of parent and child by adoption." *Id.*

41. Gagnon & Simon, *Introduction to DEVIANT BEHAVIOR AND SEXUAL DEVIANCE 2-3* (J. Gagnon & W. Simon ed. 1967).

42. If no valid reason can be found to support societal condemnation of the incest taboo, removal of the overt condemnation should eliminate the problem.

43. Even if a historical reason could be found, it would not necessarily be relevant today. R. MASTERS, *supra* note 2, at 52.

determining whether the incest taboo remains relevant in contemporary society⁴⁴ and, if so, exactly what type of behavior should be prohibited. Reasons advanced for the origin of the incest taboo include: protection against genetic defects in offspring; protection of the child victim; protection of the family unit; and protection of society.

A. Preventing Genetic Defects

It is generally assumed that a child born of an incestuous relationship will suffer some mental or physical defect.⁴⁵ Incestuous couplings may increase the frequency of passing congenital family defects to offspring. Excessive inbreeding leads to a loss of variation and may, over a period of time, limit adaptability of the species.⁴⁶ Nevertheless, the once-popular notion that the source of the incest taboo is biological is now under attack. The incest taboo predates even the most rudimentary knowledge of genetics. It existed in cultures in which there was no clear understanding of the relationship between sexual intercourse and pregnancy.⁴⁷ Consequently, it is incorrect to argue that the prohibition was initially established to protect against genetic defects. In some cases, inbreeding actually produces physically and mentally superior children.⁴⁸ Thus, current scientific understanding at least partially refutes the ge-

44. Arguably there is a hierarchy in the incest taboo. The most unacceptable form of incest is mother-son, then father-daughter, and then brother-sister. Other relationships, such as cousins and uncles, follow. Step-kinships are not included, although certain statutes now include these groups in the prohibition. Renshaw & Renshaw, *Incest*, in WILLIAMS & MONEY, *supra* note 5, at 415.

There are individuals who argue that sex between children and trusted adults is desirable because the adult will be able to teach the child about sex in a nonthreatening, helpful way. The Rene Guyon Society motto "Sex by year eight or else it's too late" is illustrative of this theory. S. FORWARD & C. BUCK, *supra* note 36, at 16. Fortunately, there seems to be little popular support for this idea.

45. D. WALTERS, *PHYSICAL AND SEXUAL ABUSE OF CHILDREN: CAUSES AND TREATMENT* 112 (1975).

46. R. FOX, *supra* note 2, at 10-11.

47. P. Mrazek, *Definition and Recognition of Sexual Child Abuse: Historical and Cultural Perspectives*, in P. MRAZEK & C. KEMPE, *supra* note 13, at 10.

48. Renshaw & Renshaw, *Incest*, in G. WILLIAMS & J. MONEY, *supra* note 5, at 415, 417. A popular claim is that there is some instinctive revulsion to incest. S. FORWARD & C. BUCK, *supra* note 36, at 7. People generally assume the taboo is a reflection of human decency and that sex with a son or daughter is unnatural and inherently repulsive. The opposite may be true; the taboo may be a practical defense against a natural experience. People who live together and depend on each other for love and support may develop a sexual attraction for each other. Summit & Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 AM. J. ORTHOPSYCHIATRY 237, 239 (1978).

Dr. Martin Weich argues that language is one way of denying incestuous feelings created by living together. Through the use of terms such as "mother" and "father" instead of proper names the child is describing the function of the individual (one who mothers or fathers) and

not the total person including his feelings, sexuality, desires, etc. Using

netic theory.⁴⁹ "In the last analysis it is the taboo itself, whether or not it conforms to scientific knowledge, that provides the justification."⁵⁰

Incest laws do not reflect the reasoning that incestuous sexual intercourse should be prohibited because of adverse genetic consequences. For example, if inheritable genetic defects are truly the concern, statutes would prohibit sexual intercourse only between persons capable of having children. Intercourse between people either too young or too old to have children, or where one or both are sterile, would not be prohibited. Furthermore, homosexual activity as well as any sexual conduct short of actual intercourse, would also not be prohibited. Protection from genetic defects is not the desired objective of most incest statutes. Nevertheless, a New York court recently acknowledged the genetics argument in a case in which a man sought to create a familial relationship by adopting his adult male lover. Calling the incest argument a "makeweight issue," the supreme court said "the taboo against incest, grounded in eugenics . . . has little application in a relationship which can hardly result in offspring."⁵¹ Considering that the biological theory is under scientific attack, it would make little sense to redraft legislation reflecting the genetic argument.

B. *Protection of the Child Victim*

Another reason to prohibit incest is to protect children. To sustain such a rationale, it must first be determined that children are being subjected to sexual abuse by family members, and that such children are likely to suffer physical harm, mental harm, or both as a result of such abuse.

the mother's proper name would make her too much like a "real" person or a peer, with whom all is possible, and the incestuous conflict together with wishes and anxieties would be reawakened. The term "mother" or "father" serves to establish the parent as an authority or godlike figure. . . .

Weich, *The Terms "Mother" and "Father" as Defenses Against Incest*, 16 AM. PSYCHOANALYTIC ASS'N J. 783, 787 (1968). When adolescents use parental first names, adults became angry at the child's "'disrespect' but at least part of their reaction is the discomfort of the unconscious incestuous conflict being brought nearer to consciousness." *Id.*

According to one theory about the taboo, relevant to both childrearing and sibling incest, continual contact between brothers and sisters prior to puberty creates a sexual aversion to one another in adolescence. Support for this theory is found in the observation of children raised in Israeli kibbutzim. These children almost always marry outside their own kibbutz. Although the origin of the aversion may be continued contact, it could also be repression of the desire to do the opposite. "It is common to find that strong aversions on emotional issues have their roots in repressed wishes." Poznanski & Blos, *Incest*, MED. ASP. HUM. SEXUALITY, Oct. 1975, at 46, 69.

49. Renshaw & Renshaw, *supra* note 48, at 417.

50. W. WEYRAUCH & S. KATZ, *AMERICAN FAMILY LAW IN TRANSITION* 394 (1983).

51. *In re Adult Anonymous II*, 88 A.D.2d 30, 34, 452 N.Y.S.2d 198, 201 (1982) (citation omitted).

1. Truthfulness of Childrens' Claims of Sexual Abuse

After stating that little girls want to marry father and little boys want to have sex with mother,⁵² Sigmund Freud concluded that many reports of incest were based on children's fantasy.⁵³ He developed this theory because of his own inability to accept the truthfulness of the accusations of incest by his young female patients against their fathers.⁵⁴ Although thirty years later Freud acknowledged that his patients were probably telling the truth,⁵⁵ many professionals continue to disbelieve children who complain about incest, at least partially because of their own need to deny its occurrence. Many professionals, such as medical doctors, are not properly trained to identify sexual abuse problems. Even assuming suspicion of sexual abuse, some physicians may choose not to conduct a complete examination, mistakenly concluding that the exam will further traumatize the child. Lawyers and the legal system also fear the possibility that a child will make up a story of incestuous assault.⁵⁶ Like rape, it is said, incest is a charge easily made but difficult to disprove.⁵⁷ There is little evidence, however, to support the idea that children invent these stories. It is far more likely that the child will, under pressure from other family members, withdraw the original truthful complaint rather than make up a false story of abuse.⁵⁸

Notwithstanding evidence to the contrary, the perceived high risk of false accusations has caused the legal system to create extraordinary safeguards to protect an accused incest offender. One of these protections, which is falling

52. Renshaw & Renshaw, *supra* note 48, at 417.

53. Goodwin, Sahd & Rada, *Incest Hoax: False Accusations, False Denials*, 6 BULL. AAPL 269, 269 (1977). A review of psychiatric papers on incest published over the past five years found no recent case report of a false accusation of incest. *Id.* See generally Rosenfeld, Nadelson & Krieger, *Fantasy and Reality in Patients Reports of Incest*, 40 J. CLIN. PSYCHIATRY 159 (1979). Attributing these claims to fantasy is particularly distressing, as estimates are that there are probably many times more cases of child sexual abuse than physical abuse. H. STOENNER, PLAIN TALK ABOUT CHILD ABUSE 11 (Children's Div., Am. Humane Ass'n Pub. No. 47, 1973).

54. Butler, *Incest: Whose Reality, Whose Theory?*, in THE CRIMINAL JUSTICE SYSTEM AND WOMEN 323, 326 (B. Price & N. Sokoloff ed. 1982).

55. M. POSTER, CRITICAL THEORY OF THE FAMILY 10 (1978). Historically, psychiatrists have erred in attributing most cases of child sexual abuse to fantasy. Discounting or ignoring reports of sexual assaults on children harms the psychological well-being of the child victim. Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. PSYCHOTHERAPY 398, 420 (1976).

56. Butler, *supra* note 54, at 326.

57. Rape "is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though ever so innocent." M. HALE, PLEAS OF THE CROWN 625 (1847), *quoted in* Note, *Repeal of the Corroboration Requirement: Will It Tip the Scales of Justice?*, 24 DRAKE L. REV. 669, 669 (1975). See generally Younger, *The Requirement of Corroboration in Prosecutions for Sex Offenses in New York*, 40 FORDHAM L. REV. 263 (1971).

58. Butler, *supra* note 54, at 326.

into disrepute, is the necessity for corroboration⁵⁹ of the victim's claim.⁶⁰ Many times this requirement operates to effectively preclude prosecution. Nevertheless, corroboration is still required in some jurisdictions, not only because of the general fears associated with sex offense accusations, but also due to the fact that incest prosecutions suffer additional problems. Many people believe that children often are unreliable as witnesses.⁶¹ For example, defendant's conviction for "taking indecent liberties" with an 11-year old girl was reversed because it was based solely on the uncorroborated testimony of the child.⁶² The court expressed concern that the "aura of mystery" adults create about sexual activity confuses and fascinates children.

The child also may not comprehend the serious consequences of the charges. Thus, the competency of the child to testify is an issue in incest cases. The fact that the prosecutrix is a child, however, does not automatically preclude the use or acceptance of her testimony. The competency of the child to testify is a matter within the discretion of the trial judge.⁶³ For example, where defendant's 12-year-old daughter testified he forced her to have sexual intercourse with him, the court rejected the argument that it was reversible error for the trial judge to have failed to require testing to establish the competency of the minor child. "[A]n accurate determination of the child's . . . sensitivity can be made by the trial judge through his personal observation while the child is being questioned."⁶⁴

While recognizing that as a practical matter corroboration is often difficult to establish in an intrafamily sex crime, some courts still require such evidence. For instance, the United States Court of Appeals for the District of Columbia affirmed the need for corroboration, stating that the reasons for a corroboration requirement in sex crime cases are equally applicable in incest

59. See Note, *United States v. Bear Runner: The Need for Corroboration in Incest Cases*, 22 St. LOUIS U.L.J. 747 (1979).

60. *State v. Foust*, 588 P.2d 170, 173 (Utah 1978) (absent a law requiring corroboration, "a complainant is free to designedly point the finger of guilt at one who, for the lack of an alibi or witness, may find himself unlawfully incarcerated").

61. Conte & Berliner, *Prosecution of the Offender in Cases of Sexual Assault Against Children*, 6 VICTIMOLOGY 102, 102 (1983).

62. *Wilson v. United States*, 271 F.2d 492, 493 (D.C. Cir. 1959).

63. *State v. Harvell*, 45 N.C. App. 243, 247, 262 S.E.2d 850, 852 (1980). The trial judge also has broad discretion in choosing methods to determine competency to testify. *Kelluem v. State*, 396 A.2d 166, 172 (Del. 1978). Thus, in *Kelluem* it was not an abuse of discretion for the trial judge not to have participated in the questioning of a three-year, eleven-month-old child in a pretrial competency hearing. The psychologist who spoke with the child stated he had "no doubt" as to the child's capacity to understand and perceive the events and the importance of telling the truth." *Id.* at 168. The court also refused to rule that a child of this age is incompetent to testify as the sole witness in an uncorroborated charge of sexual abuse for reasons which are "self-evident or inherent in the nature of such an offense and the circumstances under which it usually occurs, namely without the presence of any third party." *Id.*

64. *Harvell*, 45 N.C. App. at 243, 262 S.E.2d at 852. Defendant's counsel had stipulated that the child was competent to testify. *Id.* at 247, 262 S.E.2d at 852-53.

cases, "particularly if account is taken of the complexity and intensity inherent in family relationships."⁶⁵

Where corroboration is required, however, the rule is flexible and the quantum of proof necessarily varies depending on such factors as the age and impressionability of the child and the presence or absence of any motive to falsify or exaggerate.⁶⁶ Corroborative evidence can be either direct or circumstantial and the amount necessary depends on the facts of each case.⁶⁷ A recent example of the use of circumstantial evidence is a case in which defendant's sexual activity with the 10-year-old daughter of his common law wife was discovered by a reference in the child's diary.⁶⁸ The diary disappeared and the evidence indicated that defendant destroyed it. The court noted the evidence was "circumstantial and not conclusive of his guilt of the substantive crime, nevertheless, it was a factor tending to bolster the child's story."⁶⁹ Further, acknowledging that "the sexual molestation of prepubescent girls is not, as a rule, performed before corroborating witnesses," the court stated to require direct evidence would "raise a hurdle to prosecution of such offenses which could not frequently be cleared."⁷⁰

Courts may be lenient in determining what constitutes corroboration. For example, in a recent Colorado case where the 11-year-old victim was the chief prosecution witness,⁷¹ the court stated that corroboration "is not essential" in all prosecutions for sexual crimes, but rather the "need for corroboration is determined through an ad hoc assessment of the character of the prosecuting witness, the probability or improbability of her testimony, and any internal conflicts or contradictions in that testimony."⁷² In a tacit acknowledgement of the difficulty of obtaining corroboration in these cases, the court stated that a complaint about a sexual assault made soon after the incident can constitute corroboration.⁷³

Some jurisdictions require corroboration only where the victim has "consented" to the incest. In these circumstances, the victim is viewed as an ac-

65. *United States v. Ashe*, 427 F.2d 626, 628-29 (D.C. Cir. 1970).

66. *Fitzgerald v. United States*, 412 A.2d 1, 6 (D.C. Cir. 1980).

67. *Douglas v. United States*, 386 A.2d 289, 294 (D.C. Cir. 1978) (allegedly uncorroborated testimony of a 12-year-old boy in a nonincestuous prosecution).

68. *People v. King*, 41 Col. App. 177, 581 P.2d 739 (1978).

69. *Id.* at ____, 581 P.2d at 741.

70. *Id.* at ____, 581 P.2d at 741.

71. *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980).

72. *Id.* at 219, 606 P.2d at 1293.

73. *Id.*, 606 P.2d at 1294. A child's delay in complaining does not necessarily preclude prosecution. In *Hunt v. State*, 44 Ala. App. 479, 480, 213 So. 2d 664, 665 (1968), the prosecutrix, defendant's 15-year-old daughter, waited nine months to complain about the incest. The court found that the father had dominated his daughter and threatened to kill her if she divulged the relationship. She was also reluctant to complain because of her participation in the incestuous conduct. The delay was not sufficient to protect the defendant from prosecution. *Id.* at 480, 213 So. 2d at 666.

complice⁷⁴ and courts apply the rule that corroboration of the testimony of an accomplice is necessary to convict. Thus, in a case which illustrates an astonishing lack of understanding of the dynamics of incest, a Texas court referred to the well-established rule that “a female who consents to or voluntarily enters into an incestuous intercourse is an accomplice witness.”⁷⁵ Because the defendant “never threatened her or put her in fear of being spanked or punished” if she refused to have sex with him, the court said the 13-year-old prosecutrix was an accomplice as a matter of law.⁷⁶ Consequently, defendant’s conviction, based on the child’s uncorroborated testimony, was reversed.

Some jurisdictions that require corroboration of accomplice testimony recognize incest victims may be legally incapable of consent. In one case an 11-year-old child was considered legally incapable of consenting to sexual intercourse with her father and was, for the purpose of corroboration, held to be a victim rather than an accomplice.⁷⁷ While this court found the child legally incapable of consent because of her age, The real issue is whether a child can ever “consent” to incest.⁷⁸ Incest is an abuse of family power. The father takes unfair advantage of his position in the family by forcing his daughter to engage in sexual activity with him. It is irrelevant whether this “coercion” is actual “fear of being spanked or punished,”⁷⁹ or whether she engaged in intercourse to get new clothes.⁸⁰ The issue is whether she could choose not to consent, because it is questionable whether any child has the real ability to ignore the power structure in the family. Children are taught to obey their parents.⁸¹ In most incestuous families the father is domineering, autocratic, and powerful⁸² in his relationship with his children. Thus, it is highly unlikely that the child can choose not to consent.

Another way to avoid the corroboration requirement is to admit evidence

74. Annot., 74 A.L.R.2d 705 (1960).

75. *Bolin v. State*, 505 S.W.2d 912, 914 (Tex. Crim. App. 1974).

76. *Id.* at 913-14.

77. *State v. Goff*, 86 S.D. 354, 356-57, 195 N.W.2d 521, 522-23 (1972).

78. Annot., 36 A.L.R.2d 1299 (1954).

79. *Bolin*, 505 S.W.2d at 913.

80. *Tindall v. State*, 119 Tex. Crim. 153, 155, 43 S.W.2d 1101, 1102 (1931).

81. G. FORWARD & S. BUCK, *supra* note 36, at 21. The father generally has no need to use force or violence because of “tremendous psychological coercion ‘built into the father-daughter relationship.’ Not only has the daughter been taught to obey her father, but she looks to him for moral guidance. If daddy says it’s all right, it must be.” *Id.*

82. J. HERMAN, *supra* note 38, at 60-63. “The more democratic the family and the less rigid the sexual division of labor, the less likely that fathers will abuse their daughters.” *Id.* at 63. *But cf.* MacFarlane, *supra* note 39, at 89 (notion that incestuous fathers or stepfathers are “highly sexed and aggressive men” is generally false). As the daughter reaches adolescence, the father generally becomes extremely possessive and overprotective toward her. Many times the incest is revealed when the father becomes too restrictive, refusing to allow his daughter any social life. R. JUSTICE & B. JUSTICE, *supra* note 5, at 79-80.

of other sexual activity between the parties.⁸³ While it is generally true that proof of other acts is inadmissible unless part of the *res gestae*, an exception may be made for prior sexual activity between the parties admissible as corroboration of the particular act charged.⁸⁴ For example, the Kansas Supreme Court allowed evidence of prior sexual conduct between a 14-year-old child and her stepfather.⁸⁵ In cases of illicit sex between an adult and child, evidence of prior similar acts between the same parties is admissible "where the evidence is not offered for the purpose of proving distinct offenses, but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness as to the act charged."⁸⁶

A California appellate court recently upheld an incest conviction based upon the testimony of complaining witnesses of a long series of sexual offenses by defendant.⁸⁷ Even in the face of precedent to the effect that a prosecuting witness cannot give testimony regarding "defendant's prior sex offenses *with that witness*, for such evidence 'add[s] nothing to the prosecution's case . . . [and] involves a substantial danger of prejudice to the defendant,'"⁸⁸ the court said prior cases had established "no *absolute rule*" and that questions of admissibility are within the discretion of the trial court.⁸⁹ When the court must decide between relevancy and the protection of the accused against bias and prejudice from the admission of relevant evidence, "a balancing process must take place—a weighing of the probative value of the evidence offered against the harm it is likely to cause."⁹⁰ Therefore, evidence of unrelated deviant sexual behavior by the defendant is generally not admissible in an incest prosecution.⁹¹

Nevertheless, under some circumstances courts will allow testimony of similar conduct between defendant and others. For example, a Michigan court allowed testimony from complainant's three sisters "to corroborate and lend

83. See, e.g., *Barzee v. Cupp*, 29 Or. App. 705, 707-08, 564 P.2d 1366, 1367 (1977); *Commonwealth v. Niemetz*, 282 Pa. Super. 450, —, 422 A.2d 1369, 1374 (1980); *Commonwealth v. Leppard*, 271 Pa. Super. 317, —, 413 A.2d 424, 425 (1979); *Martin v. State*, 584 S.W.2d 830, 834 (Tenn. Crim. App. 1979); *Sanderson v. State*, 548 S.W.2d 337, 338 (Tenn. Crim. App. 1976).

84. *People v. Long*, 55 Ill. App. 3d 764, 773, 370 N.E.2d 1315, 1322 (1977).

85. *State v. Crossman*, 229 Kan. 384, 387, 624 P.2d 461, 464 (1981).

86. *Id.*

87. *People v. Martinez*, 135 Cal. App. 3d 819, 185 Cal. Rptr. 610 (1982).

88. *Id.* at 823, 185 Cal. Rptr. at 611 (quoting *People v. Thomas*, 20 Cal. 2d 457, 469, 573 P.2d 433, 439, 143 Cal. Rptr. 215, 221 (1978)).

89. 135 Cal. App. 3d at 823, 185 Cal. Rptr. at 611.

90. *Id.* (quoting *People v. Stanley*, 67 Cal. 2d 812, 818-19, 433 P.2d 913, 917, 63 Cal. Rptr. 825, 829 (1967)).

91. See *Coler v. State*, 418 So. 2d 238, 239 (Fla. 1982) (testimony from children of other examples of defendant's deviant sexual behavior excluded as irrelevant and because it "served only to prove the defendant's bad character and was obviously prejudicial"). But see *id.* at 242 (Adkins, J., dissenting) (evidence "admissible to prove motive, state of mind, or pattern of criminality").

credence to complainant's testimony."⁹² Defendant, charged with sexual penetration of one of his daughters, denied the assault and implied that the daughter fabricated the story against him. The court held that admission of the complainant daughter's testimony concerning prior sexual acts committed upon her by defendant supported the admission into evidence of testimony of her sisters as to similar sexual acts against them. Since the principal issue confronting the jury was the credibility of the complainant daughter, the court reasoned that prohibiting the sisters from testifying would undermine the complainant daughter's testimony and might cause the jury to wonder why the defendant would engage in such conduct with only one of four daughters. "To prevent such an erroneous question from reaching the jury's consideration, we hold that under the facts of the instant case the testimony of the complainant's sisters was properly admitted to corroborate and lend credence to the complainant's testimony."⁹³

A California appellate court has also allowed testimony of incestuous conduct with a daughter other than complainant. The testimony was admissible on two grounds. First, it tended to "show a continuing plan or design on the part of the accused to use minor female members of his own household, his minor daughters and minor stepdaughter, to satisfy his sexual gratifications and wants."⁹⁴ Second, "where proof necessarily depends on the credibility of testimony of child witnesses about sexual acts performed in private, and where the accusations of misconduct are flatly denied by the accused, evidence of similar acts may be received on the issue of the credibility of the minor witnesses."⁹⁵ The Supreme Court of California, however, refused to allow evidence of prior similar sex offenses by defendant with another daughter where the alleged prior offenses occurred between 10 and 18 years before the current alleged offense.⁹⁶

Although the prior offenses bore one important similarity with the present offenses, namely, molestation of, and intercourse with, defendant's own daughters, . . . the prior conduct was simply too remote in time to be relevant. . . . The fact that defendant had molested one daughter a decade or more ago would not establish the fact that he had a continuing common plan or scheme to molest all of his daughters.⁹⁷

92. *People v. Hammer*, 98 Mich. App. 471, 476, 296 N.W.2d 283, 286 (1980).

93. *Id.* at 476, 296 N.W.2d at 285-86.

94. *People v. Fritts*, 72 Cal. App. 3d 319, 324, 140 Cal. Rptr. 94, 96 (1977).

95. *Id.* at 324-25, 140 Cal. Rptr. at 96-97; *see also* *People v. Kazee*, 47 Cal. App. 3d 593, 596, 121 Cal. Rptr. 221, 223 (1975) (testimony by stepsisters that defendant forced himself on them admissible as corroboration); *People v. Covert*, 249 Cal. App. 2d 81, 89, 57 Cal. Rptr. 220, 225 (1967) (where offenses described by 19-year-old daughter of defendant during her childhood and adolescence had identical character with those allegedly inflicted upon 16-year-old prosecutrix, evidence of defendant's sexual activity with 19-year-old daughter was admissible).

96. *People v. Thomas*, 20 Cal. 3d 457, 573 P.2d 433, 143 Cal. Rptr. 215 (1978).

97. *Id.* at 466, 573 P.2d at 437, 143 Cal. Rptr. at 219.

Other jurisdictions attempt to sidestep the issue by requiring either corroboration or "clear and convincing"⁹⁸ testimony of the complaining witness.

Weary of such judicial and legislative gymnastics, many jurisdictions have eliminated the corroboration requirement. Corroboration of the sexually-abused victim's testimony was unnecessary at common law.⁹⁹ At least thirty-five states now reject any corroboration requirement for rape.¹⁰⁰ "[T]he testimony of the complainant ought to be scrutinized carefully but . . . it may be accepted though uncorroborated if, after considering the entire evidence, the jury believe (sic) beyond a reasonable doubt that her testimony is true. . . ."¹⁰¹ It is logical for a court to uphold an incest conviction based on the "uncorroborated testimony of the daughter if such testimony suffices to establish all the elements of the offense beyond a reasonable doubt."¹⁰²

Medical evidence can be especially important where it is impossible to obtain corroborative witnesses to incestuous sexual acts. It is essential that medical personnel conduct proper, victim-oriented examinations. If the examination is handled correctly by a supportive doctor, critical rapport can be established between the doctor and patient. This can produce important medical evidence to support or refute a charge of incest.¹⁰³

Probably the most startling aspect of the literature on incest is the pervasiveness of the theory of the seductive child.¹⁰⁴ Susan Forward, M.S.W., herself a victim of incestuous abuse, says the "daughter may be seductive."¹⁰⁵ Despite the fact that Ms. Forward hastens to point out that the father is ultimately responsible for the incestuous act,¹⁰⁶ any reference to the "seductive" child tends to inappropriately reapportion the blame.

It cannot be denied that there is sensuality between family members. Many even argue incestuous fantasies are necessary for children to grown into healthy adults.¹⁰⁷ Although these fantasies may be important, it is essential that the adult control overt expression of these feelings.¹⁰⁸ Such feelings go uncontrolled most often when parents lack fulfillment in their marriage and seek a substitute loving relationship with the child.

98. See, e.g., *People v. Willmore*, 24 Ill. App. 3d 291, 293, 320 N.E.2d 333, 334 (1974).

99. *People v. Gibson*, 301 N.Y. 244, 245, 93 N.E.2d 827, 827 (1950).

100. *United States v. Bear Runner*, 574 F.2d 966, 966 (8th Cir. 1978).

101. *United States v. Shipp*, 409 F.2d 33, 36 (4th Cir.) (quoting *United States v. Smith*, 303 F.2d 341, 342 (4th Cir. 1962)), *cert. denied*, 396 U.S. 864 (1967).

102. *State v. Vincent*, 278 N.C. 63, 64, 178 S.E.2d 608, 609 (1971).

103. J. RENVOIZE, *WEB OF VIOLENCE* 178-79 (1978).

104. See, e.g., J. MACDONALD, *PSYCHIATRY AND THE CRIMINAL* 30 (1976): "[I]t is well known that little girls will sometimes act in a very seductive manner toward strangers, and their behavior may be the first link in the chain which leads to their being assaulted. . . . False accusations of sexual assault are not unknown. . . ."

105. S. FORWARD & C. BUCK, *supra* note 36, at 4.

106. *Id.*

107. See generally H. WELLS, *THE SENSUOUS CHILD* (1978).

108. L. PINCUS & C. DARE, *SECRETS IN THE FAMILY* 78-82 (1978).

If the victim is very young, most people experience a feeling of outrage toward the incestuous parent. If, however, the victim is a fully developed adolescent, the discomfort many adults feel with normal adolescent sexual behavior leads them to condemn the victim as seductive and as having taken advantage of a weak, older male.¹⁰⁹ As previously mentioned, many professionals who are inadequately trained¹¹⁰ are unable to deal with the reality of child sexual abuse and thus acquiesce in the perpetuation of the myth of the seductive child.

The claim that the child shares responsibility because of her seductive behavior is patently absurd, confusing and extremely damaging to the child. Most young girls are aculturated to manipulate males by acting "cute and sexy."¹¹¹ At the same time, they are taught to internalize guilt for such learned behavior. The child then feels she must have done something "bad" to have caused the abuse, inappropriately shifting responsibility for incestuous behavior onto the child herself.¹¹²

2. *Likelihood of Harm to the Child*

To justify incest legislation as protection of the child victim, evidence is necessary to support the belief that incest is harmful to the child. Such evidence does exist,¹¹³ but arguably a legal system that pits the child against a parent can cause more harm than the incestuous act itself. This is not a valid reason to eliminate incest laws but rather to amend them to achieve the positive results of deterring incest without the negative effect of further harming

109. S. BUTLER, *supra* note 39, at 34-37.

110. Lawyers, similar to other professionals and the general population, seem to deny the existence of incest. They manifest this by charging offenders under other sex offense statutes. Poznanski & Blos, *supra* note 48, at 76.

111. Little girls learn at an early age how to be provocative and coy. Their sexuality may be encouraged before they are old enough to understand it, and they become confused as to the appropriate purpose and function. "The very behavior and dress they use to get adult attention and approval may make them vulnerable to kinds of sexual exploitation" they are unable to manage, either emotionally or developmentally. MacFarlane, *supra* note 39, at 105.

112. S. BUTLER, *supra* note 39, at 34-37. Arguments that the child intended to seduce her father are really an adult interpretation of a child's wishes. The child wants something, but could have a variety of nonsexual forms of relationship in mind. No matter what the child's fantasies, the adult is responsible if the relationship is translated into a sexual one. No other adult crimes are attributable to the reason that "[t]he child wanted me to do it." L. SANFORD, *THE SILENT CHILDREN* 162-64 (1980).

113. See generally Weeks, *The Sexually Exploited Child*, 69 *SO. MED. J.* 848 (1976). But see Yorukoglu & Kempf, *Children Not Severely Damaged by Incest With a Parent*, 5 *J. AM. ACAD. CHILD PSYCHIATRY* 111 (1966). These doctors present two cases of parent-child incest in which the victims seem to have suffered no real psychological damage as a result of the experience. The children, one involved in father-daughter and the other in mother-son incest, were thought to be able to withstand the trauma because of their having "developed healthy ego functioning prior to the incestuous experience." *Id.* at 124.

the victim.

Aside from the obvious physical dangers¹¹⁴ to the victim of incest, such experience is as devastating to normal development as any type of child abuse.¹¹⁵ Experts do not agree as to the actual damage suffered by an incest victim, and the harm varies depending on the individual and other factors.¹¹⁶ Most experts do agree, however, that the experience creates problems for the child,¹¹⁷ which may include extreme feelings of guilt¹¹⁸ and aggressive, anti-social, runaway, delinquent or criminal behavior.¹¹⁹

The likelihood of harm to the victim explains an existing strong public policy for protection of children from sexual abuse. Illustrative of this policy is the fact that all 50 state statutes mandate reporting of suspected child abuse by certain professionals.¹²⁰ Further, many of the statutes specifically abrogate the privileged status of confidential communications between doctor and patient.¹²¹ A recent California Supreme Court case concluded that "the child

114. F. RUSH, *supra* note 34, at 1. Differences in age and strength create these physical dangers.

115. Incest victims believe that they are "defenseless, worthless, guilty, at risk, and threatened on all sides, particularly from their fathers and mothers, who would be expected to be their protectors." Kempe, *supra* note 1, at 209.

116. These include

the child's age and developmental status, the relationship of the abuser to the child, the amount of force or violence used by the abuser, the degree of shame or guilt evoked in the child for his or her participation, and, perhaps most importantly, the reactions of the child's parents and those professionals who become involved in the case.

SEXUAL EXPLOITATION, *supra* note 4, at 5.

117. The trend toward sexual liberation has led some to view child-adult sex as harmless. Some professionals have defended the claims of organized pedophiles that they have a right to have sex with children. One professional has stated that according to unpublished evidence "some incest may be a positive, healthy experience or at worst dull and neutral." F. RUSH, *supra* note 34, at 1. This is contrasted with the statement of Dr. Suzanne M. Sgroi: "I have never knowingly talked to a happy, well-adjusted unconcerned incest victim." *Id.*

118. The problems also may include the following: anguish, guilt, shame, and humiliation; intense fear, anxiety and confusion (leading to later use of alcohol and drugs to relieve the stress); regressive behavior or a variety of personality and physical disorders; long term, dormant after-effects which make the victim a "psychological time bomb" (often leading to depression and self-destructive or even suicidal behavior); mistrust of adults and their ability to provide protection and proper nurturance; increased susceptibility to sexual exploitation by others (sometimes leading to promiscuity or prostitution); fear of all sexual contact (possibly leading to frigidity and an inability to ever have a normal, healthy sexual relationship); and alienation from peers and normal childhood experiences. J. BULKLEY & H. DAVISON, *supra* note 4, at 3-4.

119. *But see* Gruber & Jones, *Does Sexual Abuse Lead to Delinquent Behavior? A Critical Look at the Evidence*, 6 VICTIMOLOGY 85, 87-88 (1983) (while sexual abuse may "cause" misbehavior in juveniles, delinquent behavior may also increase the probability that a young person will be sexually assaulted).

120. *People v. Stritzinger*, 137 Cal. App. 3d 135, 186 Cal. Rptr. 750 (1982), *rev'd*, 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983).

121. *Id.* at _____, 186 Cal. Rptr. at 752.

abuse reporting obligation . . . takes precedence over the physician-patient privilege . . . so that incidents of suspected child abuse might be promptly investigated and prosecuted."¹²²

Notwithstanding a strong protective public policy, the criminal justice system is often insensitive to the problems of the victim.¹²³ Criminal incest laws are designed to punish incestuous behavior and deter any such conduct in the future. But "[t]he system, in its zeal to prosecute the criminal, must not forget the purpose of these laws—to protect children."¹²⁴

Assuming that protection of the child is at least one important purpose of incest laws,¹²⁵ it is questionable whether current legislation achieves this purpose. Some state statutes are inadequate because they do not recognize that incest can be progressive. The incestuous relationship may begin when the child is a toddler and continue into adulthood.¹²⁶ The adult begins to tentatively fondle the child and slowly, sometimes over a period of years, may progress to sexual intercourse.¹²⁷ "The incestuous behavior runs the full range of sex experiences from indecent exposure, fondling and finger insertion to oral sex, sodomy, and full intercourse."¹²⁸ The harmful violation begins as soon as the parent steps across the line into inappropriate behavior with his child.¹²⁹

122. *Id.* at _____, 186 Cal. Rptr. at 752-53.

123. There are two different types of state laws on sexual abuse. See Fraser, *supra* note 13, at 55. The first type prohibits certain acts as crimes against the state. The purpose is to punish and deter. Criminal statutes and courts do not provide services or treatment to the abused child or his family. The penalty for violation of the statute is generally a fine, sentence, or both. In some circumstances, an agreement to undergo treatment may substitute for punishment.

The second type is child protection statutes, designed to protect the child and provide treatment if necessary. Because certain incestuous acts are considered potentially harmful to the child, courts are given the power to intervene in the family unit. The child can be transferred into foster care or parental rights may be terminated. *Id.* at 55-56.

124. Davidson, *Sexual Exploitation of Children, An Overview of Its Scope, Impact and Legal Ramifications*, PROSECUTOR, Winter, 1982, at 6, 10.

125. *People v. York*, 29 Ill. App. 3d 113, 115, 329 N.E.2d 845, 846-47 (1975) (one rationale behind punishing incest is the "desire to protect children from the abuse of parental authority"). Incest is almost always a devastating experience for the victim. S. FORWARD & C. BUCK, *supra* note 36, at 4. The psychological damage, if any, may stem "not from the abuse but from the interpretation of the abuse and the handling of the situation by parents, medical personnel, law enforcement and school officials, and social workers." D. WALTERS, *supra* note 45, at 113.

126. Kempe, *supra* note 1, at 207. Estimates of the median age for commencement of this behavior vary, but it is usually somewhere between nine and ten. Father-daughter incest tends to involve middle-aged men between 30 and 50. *Id.*

127. Katz, *supra* note 7, at 83-84; see also Giarretto, *supra* note 40, at 466-67. Intercourse occurred in more than half of the cases reported in a study between 1970-76 in Minnesota. J. DAVIS, HELP ME. I'M HURT 111-12 (1982).

128. Note, *The Crime of Incest Against the Minor Child and the States' Statutory Responses*, 17 J. FAM. L. 93, 96 (1978).

129. J. HERMAN, *supra* note 38, at 70. Some evidence indicates that incest involving intercourse has the most long lasting effect. Other studies find that

Inappropriate behavior is not necessarily limited to sexual intercourse. Yet, most state statutes require sexual intercourse as an element of incest. Therefore, state statutes that only prohibit sexual intercourse are not designed to fully protect the child against the entire range of sexual abuse. The main purposes of criminal statutes are to punish and deter the offender¹³⁰ rather than to protect any particular victim. But without society's perception of the harm to the child and the resulting negative effects on the family and society as a whole, there would be no impetus toward sanctioning incest in the first place.

The other primary source of harm to the child victim is what happens after discovery of incest. This may be broken down into: the reaction of the mother; the reaction of the community, including "helping" professionals; and the involvement in the criminal justice system.

Many experts insist the mother must have been aware of the incestuous assault on her daughter, if only on a subconscious level.¹³¹ Thus, the victim often feels betrayed by her mother's failure to protect her from the abuse.¹³² But whatever the mother's actual knowledge, once the child says she has been abused by her father and the father denies it—which 80 percent of incestuous fathers do, at least initially—the mother must choose between her husband and her daughter.¹³³ This problem is exacerbated by what is reported to be an almost uniform estrangement of the mother and daughter preceding the oc-

"nonintercourse incest seemed to have just as serious an outcome. . . . [I]t is not the sexual activity itself that is the problem but the kind of disturbed and troubled relationships in the family that lead to the incest." B. JUSTICE & R. JUSTICE, *supra* note 5, at 202.

Two criteria by which a parent may judge whether affection has spilled over into sex are: "(1) if the parent keeps getting an erection, turned on, or sexually aroused by what he or she is doing with the child, the line has been crossed; or (2) if the child starts having unexplained problems of sleeping, eating, and physical complaints or . . . becomes preoccupied with sex, there has been too much stimulation for the child to handle." *Id.* at 210.

130. W. LEFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 5 (1972).

131. S. FORWARD & C. BUCK, *supra* note 36, at 45. Approximately 80-90% of all victims' mothers probably are involved. There is a broad range of possible involvement, however. For example, a mother may merely ignore signs that incest is occurring or she may go so far as to actually promote it. *Id.* In some cases, the mother dislikes sex and is "glad to avoid it without driving the husband into a strange woman's arms." J. RENVOIZE, *supra* note 103, at 179-80. Many incestuous fathers seem to believe they are doing nothing wrong so long as they do not have intercourse with anyone other than family members. MacFarlane, *supra* note 39, at 90. Incestuous families live by a very strict moral code. The source of this code may be religion, military experience, or even political beliefs; the code stresses that they are not to go outside the family to meet their needs. L. SANFORD, *supra* note 112, at 159.

132. C. FORWARD & S. BUCK, *supra* note 36, at 46. Many victims express more anger toward their mothers for failure to protect them than they do toward the incestuous father. Peters, *supra* note 55, at 412.

133. Simpson, *Incest, Society's Last and Strongest Sexual Taboo*, in J. BULKLEY, *supra* note 21, at 39.

currence of incest.¹³⁴

While incest occurs in families from all social, economic, religious and racial backgrounds,¹³⁵ many mothers in incestuous situations share some common personality traits. Where the mother is passive,¹³⁶ powerless,¹³⁷ or infantile,¹³⁸ the possibility of incest increases and the likelihood that these women will be able to protect their daughters from assault or help them once the incestuous behavior has occurred decreases.¹³⁹ Most often, mothers respond to disclosure by denying the truthfulness of the child's complaint.¹⁴⁰ If the mother persists in this denial, she hurts the child in two ways: further betraying the parental trust a child is entitled to by essentially abandoning her,¹⁴¹ and denying her daughter the strong mother-child relationship which

134. Burgess, Holmstrom & McCausland, *Divided Loyalty in Incest Cases in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* 115-16 (A. Burgess, A. Groth, L. Holmstrom & S. Sgroi ed. 1978) [hereinafter cited as A. BURGESS].

135. Note, *Incest and the Legal System: Inadequacies and Alternatives*, 12 U.C.D. L. REV. 673, 676 n.19 (1979). Because current literature reflects studies of people who have contact with legal, social welfare, or psychiatric agencies as a result of their sexual activity, it is difficult to assess the true extent of the problem. Rosenfeld, Nadelson, Krieger & Backman, *Incest and Sexual Abuse of Children*, 16 J. AM. ACAD. CHILD PSYCHIATRY 327, 338 (1977). Most of the available data on incest is based on court-referred cases, usually involving people in lower socioeconomic groups and disorganized families. More affluent persons tend to find help in noncorrectional facilities. These factors limit generalization from these studies. *Id.* at 332. Oddly, there is a high incidence of incest in families with strong religious beliefs. C. LINEDECKER, *CHILDREN IN CHAINS* 94-95 (1981).

One author argues that social factors "undoubtedly" affect the occurrence of incest. J. RENVOIZE, *supra* note 103, at 181. Though more is known about the incidence of incest among the underprivileged, it has been suggested that the consequences of incest are better understood in middle class families. The underprivileged are more likely to report the problem to the police or a social service agency, thus contributing to reported statistics, while middle class families may have better access to professional counseling. Incest in middle class families is more likely to imply some dysfunction in the marital relation. Referring to findings which suggest incest is more likely to occur where poverty brings loss of privacy and other problems, Renvoize states some experts believe in "really severe slum conditions . . . incest is acknowledged by most of the inhabitants as a way of life." *Id.* at 181-82.

136. Some authorities point to a second distinctive type: the "stronger mother who frequently is working and can be financially independent. This woman takes a strong parenting role and can verbally express her ambivalence toward her daughter and her rage toward her husband, whom she casts out upon learning of the incest." J. DAVIS, *supra* note 127, at 117.

137. McFarlane, *supra* note 39, at 91.

138. Heims & Kaufman, *Variations on a Theme of Incest*, 33 AM. J. ORTHO-PSYCHIATRY 311, 311 (1963).

139. Y. TORMES, *supra* note 4, at 35.

140. Mothers often "blame the child for lying, for initiating the sexual activity, or for being responsible for having 'Daddy sent away.'" C. LINEDECKER, *supra* note 135, at 92.

141. Butler, *supra* note 54, at 330.

has proven necessary for effective treatment.¹⁴²

"[T]ypical community intervention in incest cases, rather than being constructive, has the effect of a knockout blow to a family already weakened by serious internal stresses."¹⁴³ Often when incest is disclosed, community members are shocked and adopt a punitive attitude toward the sexual offender. Most jurists tend to want to "throw the book at the 'monster' who commits incest."¹⁴⁴ Arguably such a punitive attitude is not beneficial to the victim, the offender, or society.¹⁴⁵ The victim suffers because added to the guilt and shame she is already experiencing as a result of the incest¹⁴⁶ is the feeling of guilt for sending her father to prison and destroying her family.¹⁴⁷ The offender suffers because he is spurned by his family and friends and is not given treatment which might help him become or remain a productive member of society¹⁴⁸ while eliminating the destructive aspects of his behavior. Furthermore, society suffers because its basic unit, the family, is threatened.¹⁴⁹

Community reaction also includes responses of those engaged in the helping professions. Unfortunately, the training received by many of these professionals¹⁵⁰ does not prepare them to cope with the incest problem.¹⁵¹ After the victim discloses the incest, she requires a great deal of support, especially if

142. Typical treatment is to reconcile the mother-child relationship and to rebuild the family around this nucleus. Cobey & Minzer, *Santa Clara County Child Sexual Abuse Treatment Program*, in J. BULKLEY, *supra* note 21, at 30.

143. Giarretto, *Humanistic Treatment of Father-Daughter Incest*, in CHILD ABUSE AND NEGLECT, THE FAMILY AND THE COMMUNITY 148 (R. Helfer & C. Kempe ed. 1976).

144. S. FORWARD & C. BUCK, *supra* note 36, at 145.

145. "It is not enough to condemn, pity or pass legislation. Our justice system is being used in increasingly creative ways to help repair and ameliorate some of the damage caused to children and families by the existence of child sexual abuse." McFarlane, *Forward* to J. BULKLEY, *supra* note 21, at 1.

146. Guilt is the major factor not only at the time of incest but as "a potent motivating force in the development and continuation of psychopathological responses in the child." Schechter & Roberge, *Sexual Exploitation*, in R. HELFER & C. KEMPE, *supra* note 1, at 140.

147. J. BULKLEY & H. DAVISON, *supra* note 4, at 8.

148. While incest is found throughout our society, many of the fathers are productive, well-respected members of the community. Most of the families appear respectable. "The father has been a good provider and often insists on such things as regular church attendance." J. DAVIS, *supra* note 127, at 116.

149. Giarretto, *supra* note 143, at 144. The man is generally the primary wage earner, and if he is incarcerated, the family may become dependent on society.

150. In a survey of protective service workers in the Iowa Department of Social Services, 95% stated they needed more training in incest dynamics. Seventy-six percent believed their education was deficient in preparing them for dealing with incest cases. Similar deficiency probably exists in training mental health practitioners. De Young, *Case Reports: The Sexual Exploitation of Incest Victims by Helping Professionals*, 6 VICTIMOLOGY 92, 99 (1983); see also Kaplan, *Foreword* to S. BUTLER, *supra* note 39, at x.

151. Supportive behavior of professionals and family members can minimize the effects of childhood sexual trauma. Peters, *supra* note 55, at 420.

she is experiencing adverse family pressure. The professional who disbelieves her or is repulsed by her story can be particularly devastating.¹⁵²

Due to the nature of the criminal justice system, some professionals argue that the system does more harm to the child victim than the incest.¹⁵³ Although the ultimate goal may be to deter child sexual abuse and thus protect children, the focus of the criminal courts is correction and punishment of the offender.¹⁵⁴ "[T]he criminal justice system, seeking sound, indisputable evidence, descends on the child and family with terrifying force."¹⁵⁵

Of the instances of incest actually reported to authorities, eighty percent are initially reported to the police.¹⁵⁶ Because this is such a difficult time for the child and the family, this initial contact is very important. Law enforcement personnel should be aware of this and treat the victim carefully, keeping in mind that proper treatment and understanding may affect the child positively and decrease the probability of long term psychological damage.¹⁵⁷ Police should also recognize that the child is in the embarrassing position of having to discuss her sexual activity with strangers. This embarrassment will be heightened if the interrogators show shock, amusement, repulsion, or contempt.¹⁵⁸

If an arrest follows, the child will be questioned by the prosecuting attorney.¹⁵⁹ The child will also have to testify during a preliminary hearing, possibly before a grand jury, and during what could be an open trial before a jury.¹⁶⁰ Taking into account all the people involved in an incest investigation,

152. Incest victims have been harmed by professionals who engage in sexual activity with them. "[S]exual encounters between patients and helping professionals are almost universally negative" for the patients, possibly because they are "symbolically incestuous." De Young, *supra* note 150, at 98.

153. Conte & Berliner, *supra* note 61, at 102; *see also* Parker, *The Child Witness Versus the Press: A Proposed Legislative Response to Globe v. Superior Court*, 47 ALB. L. REV. 408, 408 (1983) (discussing the problem of the child victim *vis-a-vis* defendant's right to a public trial). Proposals have been made to remove family law matters from the judicial system. *See generally* Foley, *Introduction: Future Challenges in Family Law*, 66 MARQ. L. REV. 433 (1983).

154. SEXUAL EXPLOITATION, *supra* note 4, at 8.

155. Giaretto, *supra* note 143, at 144.

156. H. STOENNER, *supra* note 53, at 14. Child abuse statutes indemnify persons who report known or suspected incest against civil and criminal liability. S. FORWARD & C. BUCK, *supra* note 36, at 146.

157. Keefe, *Police Investigation in Child Sexual Assault*, in A. BURGESS, *supra* note 134, at 159, 162.

158. R. JUSTICE & B. JUSTICE, *supra* note 5, at 175.

159. *See generally* Burgess & Holmstrom, *The Child and Family During the Court Process*, in A. BURGESS, *supra* note 134, at 205.

160. R. JUSTICE & B. JUSTICE, *supra* note 5, at 175. Defendants are entitled to a public trial under the sixth amendment. Some state statutes, however, allow for exclusion, at the discretion of the judge, of the public during testimony concerning sex offense victims under 16. *See, e.g.*, FLA. STAT. ANN. § 918.16 (West Supp. 1983). Even if the judge excludes the public, the child is still forced to tell her story before several strangers, including judge and jury. H. STOENNER, *supra* note 53, at 14.

from police to physicians, prosecuting attorneys, and guardians ad litem,¹⁶¹ it is not unusual for a child to have to repeat her story six or seven times, even if the case never goes to court.¹⁶² Recognizing that testifying in open court is a stressful situation even for the most secure adult,¹⁶³ it is little wonder that the child suffers severe psychological damage when testifying in an unfamiliar place before strangers about sexual abuse by her father. " 'The damnable part of the whole criminal court procedure,' " according to Dr. Vincent DeFrancis, " 'is that no protection is given to the child through these gruesome experiences and he may be suffering gross emotional damage.' " ¹⁶⁴ As a result, some professionals recommend avoiding the criminal justice system in child sexual abuse cases. Others, however, insist that the system is necessary for two important reasons: voluntary treatment appears to be ineffective—treatment must be mandated as part of criminal action,¹⁶⁵ and it is necessary for the child to hear from someone in a position of authority who is outside the family that the incest was not her fault, that she was correct in disclosing the problem, and that help is available.¹⁶⁶

Use of the criminal justice system is necessary, but modification of the system for the incest situation is essential. Several suggestions have been made to achieve the objective of a system which deters criminal behavior without unnecessarily harming the child victim. For example, one of the primary causes of stress in the child after discovery of incest is repetition of her

161. To get federal funds under the 1974 Federal Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5106 (1976 & Supp. V 1981), state statutes must comply with certain requirements. One such provision mandates appointment of a guardian ad litem in every case involving an abused or neglected child which results in a judicial proceeding. *Id.* § 5103(b)(2)(G).

162. MacFarlane, *supra* note 39, at 98; *see, e.g.*, J. BULKLEY & H. DAVISON, *supra* note 4, at 4 (child examined and questioned for more than 14 hours, forcing psychiatric hospitalization). In a study of 250 cases of child sexual abuse in which police made 173 arrests, more than a thousand court appearances were required. "This resulted in much stress and tension for the child, an inordinate dislocation of normal activities for the parents, or parent, who appeared each time with the child, and created, in parents, strong resentments against the process and the people responsible for it." V. DE FRANCIS, *PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS* xi (Children's Div., Am. Humane Ass'n Pub. No. 41, 1969).

163. Parker, *supra* note 153, at 408.

164. H. STOENNER, *supra* note 53, at 14.

165. Criminal sanctions may increase the trauma experienced by the incestuous family. The often disastrous effect on the children and other family members has caused some professionals to argue that the solution for intrafamily sexual abuse should not be sought within the criminal justice system. J. BULKLEY & H. DAVISON, *supra* note 4, at 1. Of 96 doctors who responded to an anonymous letter survey of general practitioners and pediatricians, two-thirds said they believed it would be harmful to families if incidents were reported. The reason is that the criminal justice system is not set up to deal with the sexual abuse of children without inflicting additional harm on all involved. C. LINDECKER, *supra* note 135, at 93.

166. J. BULKLEY & H. DAVISON, *supra* note 4, at 5.

story.¹⁶⁷ Although it is quite clear she must disclose the details of the incident to someone, there appears to be no need for the repetition presently required. Ideally, a police department should have a special child abuse professional who could make the initial contact with the child.¹⁶⁸ This interview should be in a nonthreatening environment.¹⁶⁹ The professional, trained to cope with incest problems, would be able to question the child while developing a rapport and creating a supportive relationship which could help the child throughout the long, arduous, and stressful legal proceeding. The interview could be taped and the tapes viewed by others who might have need to know the child's story, saving the child the necessity of having to repeat the details several times.¹⁷⁰

Testifying at trial is probably the most difficult aspect of the criminal process for the incest victim. She is forced to publicly reveal intimate details of a sexual relationship with her father. The victim, often badgered by the defense attorney in an attempt to discredit her story, must struggle with her own often ambivalent feelings. The incestuous relationship with her father might have been the only "loving" the child has ever known.¹⁷¹ This may make it extremely difficult for her to testify against him, as she may think her testimony was the reason he was sent to jail.¹⁷² Thus, the probable adverse effect on the child of testifying at trial may be a consideration when deciding whether to prosecute.

Several proposals have been advanced for making the child victim's testimony unnecessary or at least attempting to reduce the potential harm generally associated with testifying.¹⁷³ For example, it has been suggested that the incest victim need not testify personally at trial. Instead, pretrial examination of the victim by an expert, supplemented by in-court testimony of the expert,

167. *Id.* at 10.

168. J. DAVIS, *supra* note 127, at 124, 127-31.

169. See Schultz, *Psychotherapeutic and Legal Approaches to the Sexually Victimized Child*, INT'L J. CHILD PSYCHOTHERAPY, Oct., 1972, at 115, 125 (article emphasizes child sexual abuse by nonfamily members). Techniques for interviewing the victim of familial and nonfamilial abuse are the same. J. DAVIS, *supra* note 127, at 127-31.

170. J. BULKLEY & H. DAVISON, *supra* note 4, at 12. In some states, it is necessary for the incest victim to testify at the grand jury proceeding for the prosecutor to establish a prima facie case. In others, it is possible for the state to utilize hearsay evidence (otherwise incompetent at trial). See Annot., 37 A.L.R.3d 612 (1971). An argument could be made that hearsay statements given by the child to her parent or a qualified social worker should be sufficient to establish a prima facie case. This would save the child the necessity of having to repeat the story to the grand jury. Another alternative would be the joint detective/prosecutor interviews employed in Seattle, Washington. J. BULKLEY & H. DAVISON, *supra* note 4, at 12.

171. S. FORWARD & C. BUCK, *supra* note 36, at 148. The guilt may be exacerbated if the child enjoyed the sexual contact. J. HERMAN & L. HIRSCHMAN, *supra* note 38, at 86-87.

172. See MacFarlane, *supra* note 39, at 99.

173. See generally Parker, *The Rights of Child Witnesses: Is The Court A Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643 (1982).

could be used.¹⁷⁴ Such a proposal faces serious constitutional challenge as a violation of the defendant's sixth amendment right to confrontation. Nevertheless, one court rejected the argument that the defendant was denied his constitutional right to confrontation because his five-year-old daughter was not produced as a state's witness in his incest and rape prosecution.¹⁷⁵ "There is no constitutional requirement that the victim of any crime testify."¹⁷⁶ As the right of confrontation is a right to confront witnesses (not victims), it "certainly confers no rights to terrify five year old girls."¹⁷⁷

Certain statements of the child victim regarding the incident may be admissible under traditional exceptions to the hearsay rule even though the child is not present in court to testify. Sometimes referred to as *res gestae*, the excited utterance exception to the hearsay rule applies to statements relating to a startling act or event made spontaneously and without reflection while the declarant was under the stress of excitement and offered to prove the truth of the matter asserted.¹⁷⁸ The statement is considered "particularly trustworthy" as it is "made under the immediate and uncontrolled domination of the senses," and before considerations of self-interest could have influenced the declarant.¹⁷⁹ The Colorado Supreme Court held the hearsay statement of a child who was not quite three, offered to prove that defendant sexually assaulted her, was admissible.¹⁸⁰ The child's statement, made approximately one-half hour after the alleged assault, was admissible because the court determined "considerable latitude in temporal proximity is particularly evident in cases involving assertions by very young children after a stressful experience."¹⁸¹ The court also rejected the argument that defendant was denied his right to confrontation because of the application of the *res gestae* exception. When a hearsay declarant is not present for cross-examination, the sixth amendment

174. Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 J. L. REFORM 131, 139-52 (1981) (pretrial examination would protect victim from trauma while not impairing defendant's constitutional rights).

175. *State v. Boodry*, 96 Ariz. 259, 265, 394 P.2d 196, 200, *cert. denied*, 379 U.S. 949 (1964). The court vacated the incest conviction because the defendant received two concurrent sentences on two counts in the same trial based on one definite act. The remedy under the "double punishment" statute was to retain the convictions and remove the lesser sentence. *Id.* at _____, 394 P.2d at 198.

176. *Id.*

177. *Id.* Although arguably the correct result is reached in that the child victim is protected from being forced to testify, this distinction suffers from the same infirmities as the corroboration requirement: it ignores reality. In many incest cases the child victim is the only witness.

178. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 297, at 704 (E. Cleary 2d ed. 1972).

179. J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1747, at 195 (J. Chadbourn rev. 1981).

180. *Lancaster v. People*, 200 Colo. 448, 452, 615 P.2d 720, 722 (1980).

181. *Id.* at 453, 615 P.2d at 723; *see, e.g., Love v. State*, 64 Wis. 2d 432, 442, 219 N.W.2d 294, 299 (1974) (mother's testimony as to statement made by three-and-one-half-year-old child the morning after the offense was admissible as part of the *res gestae* or as an excited utterance).

confrontation clause requires a showing that he is "unavailable."¹⁸² Further, his statement is then admissible only if it bears adequate "indicia of reliability."¹⁸³ The declarant was considered unavailable as a witness because of her youth. The "requirement of spontaneity underlying the *res gestae* exception provides an adequate proxy for the truth-exacting sanction of an oath" so the admission of the hearsay assertion did not violate the confrontation rights of the defendant.¹⁸⁴

Some states have made court proceedings somewhat less grueling for the child victim by allowing the child's videotaped testimony where there is "substantial likelihood" of harm if (s)he is required to testify in court.¹⁸⁵ Other states allow the trial judge to "exclude from the trial any person whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."¹⁸⁶ Although such a rule may be facially valid, the Virginia Supreme Court held that an order which prohibited all spectators during the testimony of a child and twelve other witnesses was too broad.¹⁸⁷ "The mere fact that the prosecution was for the crime of incest was insufficient standing alone to justify the wholesale banishment of spectators which occurred. On these facts we hold that the act of clearing the courtroom violated defendant's constitutional right to a public trial."¹⁸⁸

Signs of change from punishment-oriented intervention¹⁸⁹ to intervention with the goal of rehabilitating the family have also begun to appear.¹⁹⁰ It is suggested that the majority of fathers can be rehabilitated with treatment.¹⁹¹

182. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

183. *Id.* at 65-66.

184. *Lancaster*, 200 Colo. at 453-54, 615 P.2d at 723-24.

185. *See, e.g.*, FLA. STAT. § 918.17 (1981); *cf.* Ghent, *Victim Testimony in Sex Crime Prosecutions: An Analysis of the Rape Shield Provision and the Use of Deposition Testimony Under the Criminal Sexual Conduct Statute*, 34 S.C.L. REV. 583, 588-93 (1982) (testifying by deposition raises constitutional questions).

186. VA. CODE § 19.2-266 (1950); *see, e.g.*, FLA. STAT. § 918.16 (1981) (in any civil or criminal trial where a person under 16 is testifying concerning any sex offense, "the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, and court reporters").

187. *Cumbee v. Commonwealth*, 219 Va. 1132, —, 254 S.E.2d 112, 115 (1979).

188. *Id.* at —, 254 S.E.2d at 115. There are other creative solutions. For example, the Baltimore State Attorney's Sexual Offense Task Force prepares children for trial by walking them through the courtroom. Task Force Chief Edwin Wenck makes the sort of "evil eyes" a defense lawyer might use to intimidate the child. *Beware of Child Molesters*, *Newsweek*, Aug. 9, 1982, at 45, 47.

189. In a study of 250 cases of child sexual abuse, following disclosure of the abuse, fewer than one-third of the parents repented in such a way as to indicate concern for the child. "Most responses (35%) were offender-oriented, i.e., punitively directed toward the offender, or protective of the offender." V. DE FRANCIS, *supra* note 162, at ix.

190. SEXUAL EXPLOITATION, *supra* note 4, at 7.

191. S. FORWARD & C. BUCK, *supra* note 36, at 149-50.

Unfortunately, due to the unavailability of a sufficient number of incest treatment programs¹⁹² the courts must either sentence the offender to prison or allow him to go free on probation.¹⁹³ Most incestuous fathers are not dangerous criminals and do not need to be locked up. Arguably some are not really mentally disturbed,¹⁹⁴ even though the general population associates incest with a demented mind.¹⁹⁵

Allowing the incestuous father to remain free without treatment places the child victim in an even worse position than before the incest was discovered. Generally, the mother is unable, or unwilling, to protect the child from the father. In the absence of maternal protection, or help from other adult family members, the child who has publicly accused her father of incestuous behavior may be in physical danger if the untreated father is allowed to return home without treatment.¹⁹⁶

To protect the child from the father, the daughter is often taken from her home and placed with a foster family. "This practice is analogous to locking up the victim of the crime and letting the offender go free."¹⁹⁷ Separating the child from her family increases her guilt feelings, adding fuel to her belief that she is being punished for her part in the incestuous affair. Placing the child in foster care may further damage the child psychologically. She may suffer identity problems and experience additional confusion.¹⁹⁸ Despite the fact that it is generally better for the child to remain in her home throughout the legal process, the prosecutor will often recommend removal. The prosecuting attorney may favor taking the child from her home because if she is left there family pressure will generally be exerted on her to retract her complaint. The

192. Specialized programs for treatment of sexual abuse are "the exception rather than the rule in most American communities." K. FALLER, *SEXUAL ABUSE, SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN* 157 (1981).

193. S. FORWARD & C. BUCK, *supra* note 36, at 148.

194. See generally Fontana, *Child Abuse: Tomorrow's Problems Begin Today*, 22 CATH. LAW. 297, 299 (1976).

195. *State v. LaFernier*, 37 Wis. 2d 365, 373, 155 N.W.2d 93, 97 (1967).

196. MacFarlane, *supra* note 39, at 101. Although a voluntary agreement that the father will live elsewhere can sometimes be reached, such an agreement is probably unstable. The mother is likely to have ambivalent feelings about choosing the child over the father. Moreover, the mother may decide to allow the father to return because of financial and emotional dependence. K. FALLER, *supra* note 192, at 155.

197. Note, *supra* note 135, at 688 n.86.

Looking at the child who has been separated, we see a grieving child, grieving not only for his lost parents, but for the whole familiar environment and family structure that is all he has known; grieving for a part of himself. . . . He does not perceive that he is safer away from this situation, not neglected or abused in this new home.

Id. (quoting Arvanian, *Dynamics of Separation and Placement*, in *CHILD ABUSE: INTERVENTION AND TREATMENT* 117, 119 (1975)).

198. Many times the child is not safer in the foster home. Cases of incest victims being sexually abused in foster homes are common. Once the daughter is seen as seductive and tainted, she may be approached sexually by men who view her as "fair game." B. JUSTICE & R. JUSTICE, *supra* note 5, at 177.

judge may support this recommendation because it would probably protect the child from physical harm if the father remains in the home. Threat of removal of the child is also used as a judicial weapon to force a father's compliance with juvenile court orders.¹⁹⁹ The fact that these responses are most often contrary to the best interests of the victim²⁰⁰ belies any notion that incest laws are essentially for the protection of the child.

Judges should be extremely reluctant to remove the child from her home unless that is the only way the incestuous behavior can be stopped. There is a strong presumption that the natural parents are the best able to raise their children.²⁰¹ There are cases in which this presumption is rebutted by evidence of abuse or failure to protect against abuse. For example, a Kansas court recently terminated the parental rights of a natural mother despite the fact that she was a "good and loving mother."²⁰² She was found to be unfit because she had not taken steps to keep the natural father from abusing the child and probably would not do so in the future.²⁰³

Courts are far more likely to preserve the parent-child relationship where it appears incest has ceased and will not recur. Notwithstanding evidence of past incest, a Washington court, finding the mother unfit, granted her husband

199. Note, *supra* note 135, at 689. Juvenile courts otherwise have no direct authority over parents.

200. "In most instances of incest, excluding those where continued danger to the minor children exists, separation of family members is to be avoided. Separation may doubly traumatize." L. SCHULTZ, *INCEST POLICY RECOMMENDATIONS, THE SEXUAL VICTIMOLOGY OF YOUTH* 163 (1980).

201. *Santosky v. Kramer*, 455 U.S. 745 (1982).

202. *In re Dodge*, 8 Kan. App. 2d 259, ____, 655 P.2d 135, 136 (1982).

203. *Id.* at ____, 655 P.2d at 137. At a minimum, unfitness must be founded on "clear and convincing evidence" to justify termination of parental rights. *Santosky*, 455 U.S. at 769. In *In re Armentrout*, 207 Kan. 366, 485 P.2d 183 (1971), the Kansas Supreme Court affirmed a holding that a natural mother was unfit. Even after the stepfather of her child was convicted and sentenced for statutory rape of her child, the mother insisted on his innocence, wanted him back after his release from prison, and was willing to risk further injury to her child. Based on this, the court terminated her parental rights. *Id.* at 372-73, 485 P.2d at 188; *see also Baker v. Vidal*, 363 S.W.2d 158, 159-60 (Tex. Civ. App. 1962) (evidence of sexual abuse requires awarding custody to other spouse).

A child was placed in foster care based on evidence of several incidents of sexual molestation which began when she was between nine and eleven and continued until she left home. *In re T.J.A.*, 407 S.W.2d 573, 575 (Mo. Ct. App. 1966). The mother had knowledge of her husband's conduct. The court refused to remove the child's three younger sisters because of a lack of "substantial evidence tending to prove that the father was guilty of such misconduct" with them. However, the court did say the younger children should be kept under "close supervision of competent juvenile officers so that their future welfare will be protected." *Id.* at 575.

A California court refused to remove a child from parental custody based only on the fact that the child alleged her father had sexually molested her, especially where the father was acquitted of the crime. *In re Lockwood*, 260 Cal. App. 2d 725, 726, 67 Cal. Rptr. 497, 498 (1968).

custody of the three children.²⁰⁴ The 16-year-old daughter testified about sexual intercourse between her and her father from the time she was six until he stopped, at her insistence, when she was 12. Nevertheless, she stated she wished to live with him because he had changed. Reports from professionals supported the fact that past incestuous conduct had no impact on the present.²⁰⁵

A trend to make incest penalties more severe for those who commit incestuous acts with young children reinforces the idea that the child is not the focus of the protection. Although it is true that one is more viscerally distressed by the thought of an incestuous assault on a child below the age of 10, psychologically the child is more likely to suffer long lasting damage if incestuous behavior occurs after she has passed puberty.²⁰⁶ Recognizing that much of the harm flows from guilt the child experiences due to negative reactions of her family and the community,²⁰⁷ it is not surprising that the child suffers more as she understands the mores of society. Current incest legislation fails to protect child victims in one additional respect. Many incest statutes prohibit only heterosexual activity.²⁰⁸ While the overwhelming majority of offenders are adult males²⁰⁹ and the majority of victims are female children,²¹⁰ at least

204. *In re Marriage of Woffinden*, 33 Wash. App. 326, 654 P.2d 1219 (1982). Two of the children were born to his wife prior to their marriage and were adopted by him. The third child, a boy, was his natural child.

205. *Id.* at 328-29, 654 P.2d at 1220-21; *see, e.g., In re Involuntary Termination of Parental Rights*, 449 Pa. 543, 547, 297 A.2d 117, 119 (1972) (“[A]ppellant’s guilty plea to the charge of accessory to rape of one of her own daughters . . . does not, in itself, meet the statutory standard of *continued abuse* necessary to support involuntary termination.”).

206. Incest appears to cause the least psychological damage to the younger child, if (s)he is not physically assaulted and traumatized. As the child nears adolescence, the psychological risks increase. This is due to the fact that the younger child generally will not realize the significance of the sexual behavior and therefore will not suffer as much guilt. R. Justice & B. Justice, *supra* note 5, at 181. The very young child may not feel the disruptive effects of the inappropriate family dynamics as deeply. *Id.*

In a survey of cases of the victims of pedophilia, including incest, minimal anxiety was found in pre-adolescent children. Barry, *Incest*, in *SEXUAL BEHAVIOR AND THE LAW* 521, 536 (S. Kling, ed. 1965). The difference in response may relate to the “increased strength of inhibiting forces in the postpubertal years, so that while younger children react to incest no differently than to other forms of sexual activity, adolescents consider it to be socially reprehensible.” When the incest occurs early in childhood, the incident is usually repressed, perhaps to reappear later in life. Henderson, *supra* note 5, at 310.

Some statutes base the seriousness of the offense on the age differential between victim and offender. *See, e.g., TEX. PENAL CODE ANN. § 21-10(c)* (Vernon 1979). While age is an important factor, it is the abuse of power which causes the harm and seriously disrupts family harmony.

207. Many children seem to experience no remorse until they sense the disapproval of family and friends. Summit & Kryso, *supra* note 48, at 248.

208. *See, e.g., FLA. STAT. § 826.04* (1976) (defines “sexual intercourse” to be penetration of the *female* sex organ by the *male* sex organ).

209. J. HERMANN & L. HIRSCHMAN, *supra* note 38, at 3.

some men²¹¹ engage in sexual contact with male children.²¹² This deficiency in the statutes is particularly distressing because, whereas girls seem able, with competent professional help, to learn to cope with many of the psychological problems caused by incestuous behavior, boys may experience psychotic breaks.²¹³

C. *Protection of the Family*

Legislation protecting children against incestuous abuse can be expected to ultimately protect the family unit as a whole.²¹⁴ The family is a primary social institution which is deeply rooted in history and tradition. The United States Supreme Court has recognized that it is "through the family that we inculcate and pass down many of our most cherished values, moral and cultural."²¹⁵

Families in which incest occurs over long periods of time²¹⁶ are usually families with other severe psychological disturbances.²¹⁷ Experts have claimed that the presence of family strife figures prominently in the occurrence of incest.²¹⁸ Actually, the predisposition to incestuous behavior probably existed long before the marriage. While it is impossible to predict exactly who will become an incestuous parent, a certain profile does emerge. Studies show the father's family background frequently includes "sexual or physical abuse; desertion or deprivation of a father figure; general lack of warmth and under-

210. Note, *supra* note 174, at 133.

211. Mother-daughter incest is the least understood type of child sexual abuse because it is so rare. S. FORWARD & C. BUCK, *supra* note 36, at 117.

212. Finkelhor, *The Sexual Abuse of Boys*, 6 VICTIMOLOGY 76 (1983). Although many more girl victims have been reported in the past, treatment programs are beginning to see an increasing number of boy victims. *Id.*; see also R. JUSTICE & B. JUSTICE, *supra* note 5, at 196-97.

213. Most female children who are incestuously assaulted do not develop major psychotic breaks. "In the male child, there is greater likelihood that psychotic defenses will be utilized, whereas in the female minor, psychophysiological reactions, sociopathic behaviors, characterological disturbances, anxiety states, and some depressive neurosis are much more likely." Schecter & Roberge, *supra* note 146, at 140. When the incestuous parent is the mother, the boy may have a very difficult time relating to women in the future. Women are taught the nurturing, mothering role, which many perform with a lover or spouse. This may bring back negative incestuous feelings. S. FORWARD & C. BUCK, *supra* note 36, at 75.

214. See generally 41 AM. JUR. 2D *Incest* §§ 1-27 (1968).

215. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977).

216. Incest begins with touching and fondling, mutual masturbation, and oral-genital contact, and then progresses to more sexual behavior, sometimes leading to sexual intercourse after a long history of other sex play. Stories of only one act of incestuous contact are extremely rare. S. BUTLER, *supra* note 39, at 31-32.

217. Poznanski & Blos, *supra* note 48, at 54.

218. Canepa & Bandini, *Incest and Family Dynamics: A Clinical Study*, 3 INT'L J.L. & PSYCHIATRY 453, 453 (1980).

standing; broken home and leaving home at a young age."²¹⁹ The man wants to marry and provide his family with stability he never had. Unfortunately, he generally has no idea how to accomplish this. He attempts to hide feelings of inadequacy with outward displays of masculine prowess. He must be the center of his family's world.²²⁰ The mother, on the other hand, is often a passive woman²²¹ and has been led to believe that to be complete she must be married to a "superior" male. The woman may have been an incest victim herself and has internalized all the self-doubts and fears attendant to victimization.²²² Often the wife in an incestuous family did not receive the mothering she needed when she was a child. She too lacks the skill or experience necessary to provide love and protection for her children. Some women may simply be sexually naive or uninformed. Perhaps vaguely sensing her inadequacy, the wife seeks to avoid conflict by withdrawal rather than by confronting the problem.²²³

These two people, each with a poor self concept, initially cling to each other for reassurance.²²⁴ When the parents are unable to satisfy the unrealistic needs of each other, and because their insecurities make it difficult for them to relate to other adults, they may seek to transform their children into peers.²²⁵

219. L. SANFORD, *supra* note 112, at 153.

220. *Id.* at 152. *But see* Peters, *supra* note 55, at 411:

Outside of the rare psychotic, who is re-enacting his brutalized childhood on children, most seem to have started their marriages as passive, emotionally dependent husbands. They tend to please as providers and seemed eager for the approval of an active, dominant spouse. Only when the wife, under increased psychologic and physical pressures, began to seek emotional support from the husband did regression occur. . . .

In terms of a pattern, it is the same: the emotionally dependent man, the domineering or managing wife; withdrawal of the wife from an increasingly frustrating relationship, usually including the refusal to continue sexual relations. The husband then begins drinking and sexually molests an accessible little girl, usually someone over whom he exercises authority and who is not likely to reject him.

221. S. BUTLER, *supra* note 39, at 114-15.

222. Many sexually abused children grown up to be sexually abusive parents. In studies of male sexual offenders, "well over half, and in some cases nearly three quarters, of the men studied who are serving time in prison were found to have been sexually abused as young boys." *Id.* at 67.

Many psychiatrists emphasize the importance of imitation. "Where there is an unhealthy sex pattern in the lives of parents, there is great danger of sexual maladjustment in the lives of children." Rubin, *How Parents "Seduce" Their Children*, in *SEX IN THE CHILDHOOD YEARS* 111, 114-15 (J. Rubin & L. Kirkendall ed. 1970). Women sexually abused as children often marry men who will sexually abuse their children. Although it is unlikely that a female victim will abuse her child, she may select a mate who has a personality similar to her father's. She may add to her own confusion as to what is right and wrong and, possibly subconsciously, set her own child up to be sexually molested. C. LINEDECKER, *supra* note 135, at 94.

223. S. BUTLER, *supra* note 39, at 114-15.

224. L. SANFORD, *supra* note 112, at 151-52.

225. *Id.* at 153-54. A general family breakdown prior to the act of incest contrib-

This blurs the generational lines and eventually leads to the role confusion which contributes to the incestuous environment.

The child ultimately achieves an inordinate degree of power over the family because she is privy to an important family secret by virtue of her special relationship with her father. This creates role confusion in the family. The child never knows if father will act as parent or lover at any given time and therefore she is not sure whether she should act as child or equal. The mother is both parent and rival to her daughter. The siblings, who see a sister with powers and privileges appropriate to a parent, are confused about who is actually in charge.²²⁶

Incestuous parents have failed to carry out two of the primary functions of parenting. First, incestuous parents have failed in their responsibility to socialize their children.²²⁷ They are unable to teach their children the parameters of "normal" familial relationships. Second, parents are responsible for providing nurture, care, and warmth to their children. Incestuous parents substitute sexual contact for nurturing physical contact.²²⁸ The home is supposed to be a safe place where a child can explore her awakening sexuality without fear. She should be able to test her flirting with father, subconsciously confident that he will not allow the situation to escalate beyond that. The parent is the adult and the one who bears responsibility for drawing the line at the point between appropriate and inappropriate physical contact.²²⁹ Unfortunately, the

utes to the sexual abuse. Thus, more adequate parental role training is required through a formal educational system. "Despite the incredibly serious nature of parenthood in a family centered society, there is little preparation for it." L. SCHULTZ, *supra* note 200, at 164.

226. B. JUSTICE & R. JUSTICE, *supra* note 5, at 168-69.

227. Mrazek & Bentovim, *Incest and the Dysfunctional Family System*, in P. MRAZEK & C. KEMPE, *supra* note 13, at 167-70.

228. The daughter is learning to "transmit the magical vibrations our society requires of the emergent woman." Summit & Kryso, *supra* note 48, at 243. The child needs support and she should get it primarily from her mother and father. Her mother should be a model of female behavior and she should be able to test that new model on her father.

A father should be harmless to flirt with. He should be approving, admiring and responsive to her growing sexual attraction, and he should provide a controlled, self-limited prototype of the sensual experiences she will develop with other men as an adult. Both father and mother should have a shared sense of the appropriateness of this prototype romance, and both should be comfortable in recognizing and defining the appropriate limits. Incestuous activity begins when the father needs to bend those limits and the mother chooses to ignore them.

Id.

229. Mrazek & Bentovim, *supra* note 227, at 167-70. One important characteristic of the incestuous father is a lack of impulse control. "All parents have sensuous feelings toward their children. The abusing parent acts on these feelings in a less controlled way and expects of the child an adult level of performance and a quality of devotion and gratification that no child can fulfill." Summit & Kryso, *supra* note 48, at 239-40.

incestuous father is unable to do this.

The state is not responsible for telling parents how to raise their children. There is a well-established constitutionally protected right to raise a family²³⁰ and a related fundamental right to marital privacy.²³¹ The state does have a sufficiently compelling interest²³² in the family, however, to support legislation to regulate domestic abuse which threatens the existence of the family.

A trend to deny defendants the protection of the evidentiary marital privilege²³³ is a reflection of legal recognition of the effect the crime of incest can have on the family. A logical extension of the common law exception that a wife is competent to testify against her husband for a crime of personal violence against her²³⁴ is that a spouse may testify as to criminal acts committed on the children by the other spouse. For instance, the Mississippi Supreme Court interpreted a state statute which allowed testimony by one spouse against the other in a criminal prosecution for "contributing to the neglect or delinquency of a child"²³⁵ as allowing the mother of an incest victim to testify against her husband.²³⁶ The court stated it "cannot be successfully argued that incest with appellant's minor daughters was not a crime contributing to the delinquency of said child."²³⁷ The court was influenced by a Wyoming case involving the statutory rape of a daughter by her father. There the court held that the rape was a crime against his wife within the meaning of a statute which provided that a wife is a competent witness in "criminal proceedings for a crime committed by one against the other. . . ."²³⁸ Consequently, while the approach to limiting the marital privilege differs depending on the language of the specific state statutes, the same result is reached "based on the recognition that once a child has been subjected to personal violence from the hands of the father, no good reason remains for prohibiting the mother from testifying."²³⁹

230. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

231. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

232. A state may regulate a fundamental right only to further a compelling interest. *E.g., id.*

233. Two distinct privileges exist. One is the testimonial privilege which prohibits the examination of a spouse for or against the other in a legal proceeding. The other is a communications privilege, which prohibits examination into confidential communications between spouses. *State v. Suttles*, 287 Or. 15, 19, 597 P.2d 786, 788 (1979); C. McCORMICK, *supra* note 178, §§ 66, 78. Generally in incest prosecutions the testimonial privilege would be at issue; the defendant would attempt to preclude his spouse from taking the stand.

234. *Merritt v. State*, 339 So. 2d 1366 (Miss. 1976). The exception is based on the necessity for such testimony and the recognition that once violence has occurred between spouses, "the sanctity of the marriage has been destroyed. Thus, the very reason for the privilege has been ravaged." *Id.* at 1369.

235. MISS. CODE ANN. § 13-1-5 (1972).

236. *Graham v. State*, 250 Miss. 816, 168 So. 2d 496 (1964).

237. *Id.* at 819, 168 So. 2d at 497.

238. *Chamberlain v. State*, 348 P.2d 280, 282 (Wyo. 1960).

239. *Merritt*, 339 So. 2d at 1370-71.

Insensitive legal intervention by the state can be as destructive as ignoring an incestuous situation. A difficult confrontation with the criminal justice system may take a family which is at least functioning on some levels and completely destroy it. Properly oriented legal intervention may not only prevent destruction of the family, but may reunite it by forcing all members to face the abuse, and through mandatory treatment, assisting the family in becoming a productive, functioning unit.

Incest, viewed as a family problem, requires a long-term solution which focuses on family rehabilitation as opposed to merely legal resolution.²⁴⁰ Treatment programs which emphasize family therapy have proven effective when used in conjunction with the criminal justice system. One program,²⁴¹ the Santa Clara Child Abuse Treatment Program in San Jose, California, has as one of its main objectives the rehabilitation of the incestuous family as quickly as possible.²⁴² Of the 600 families treated by the Santa Clara program between 1971 and 1977, most families were reunited. The children returned home within the first month of treatment, and no cases of recidivism were reported.²⁴³ Successful treatment of incestuous families is an important component of primary prevention in future generations because children of incestuous families tend to perpetuate incestuous behavior when they become parents.²⁴⁴ This tendency, which means that the incidence of incest may progress geometrically, leads to the final reason for the general prohibition of incest.

D. *Protection of Society*

To determine if protection of society is a valid purpose of the incest prohibition, it is necessary to establish the effect of incest on society. There are disturbing statistics on deviant adolescents: approximately 67% of prostitutes experienced some form of incestuous assault;²⁴⁵ at least 75% of runaways are

240. Cobey & Minzer, *Santa Clara County Child Sexual Abuse Treatment Program, Parents United, Daughters and Sons United, and Adults Molested as Children United, San Jose, California*, in J. BULKLEY, *supra* note 21, at 24.

241. For a description of other treatment programs, see J. BULKLEY, *supra* note 21, at 23-134.

242. See generally J. KROTH, *CHILD SEXUAL ABUSE, ANALYSIS OF A FAMILY THERAPY APPROACH* (1979).

243. However admirable the recidivism rate of incest offenders in the San Jose program seems to be, "with or without therapy, it appears that 98 percent of the incest offenders will not repeat the offense *once coming to the attention of the criminal justice system.*" *Id.* at 125. Further, proof of recidivism requires that someone report the offense again. The failure to report does not mean incest is not occurring. The San Jose program was designed to meet at least three goals. First, the child must understand she is not to blame. Both mother and father must tell her so. Second, the mother must absolve her daughter of all blame. Third, the father must be removed from the isolation and alienation from which he suffers and be made to understand that the family can be preserved and strengthened.

244. R. JUSTICE & B. JUSTICE, *supra* note 5, at 198-200.

245. The frequency of some form of childhood sexual molestation among prosti-

escaping incestuous abuse; and about 70% of adolescent drug addicts are victims of incest.²⁴⁶

The state, in its *parens patriae* role, has an interest in protecting children who cannot protect themselves.²⁴⁷ As the statistics reflect, these children become disruptive to society itself. Some become self-destructive. Many adolescent incest victims experience suicidal thoughts and frequently attempt to kill themselves.²⁴⁸ Others act out their anger and disappointment over the violation of family trust against other family members. The result may be homicide. For example, a teenage boy, a victim of a long-term stormy mother-son incestuous relationship, ultimately killed his mother.²⁴⁹ Adolescent prostitutes, run-aways, and drug addicts may create havoc in a community as they struggle to cope with the "frustration, rage and conflict" sexual abuse causes. "These feelings heighten the already significant loss of self-esteem and the unresolved grief and anger felt by the victim and precipitate, in adolescence, the urgent need to find relief from the burden of his or her secret, resulting in what professionals label 'anti-social' behavior."²⁵⁰

Public funds expended for incarceration and welfare for the family could more profitably be spent to establish treatment programs aimed at rehabilitation rather than punishment. Most importantly, because incest is a cyclical problem, merely jailing the offender is not sufficient. Although incarceration may punish the offender and stop the behavior for at least the period of imprisonment, it does not break the cycle of incest. Society has an important interest in effective rehabilitation of the entire family to insure that the cycle is broken. Notwithstanding society's stake in eliminating incest, current laws are not designed with protection of society as their goal because they do not emphasize rehabilitation.²⁵¹

IV. SUGGESTIONS FOR LEGISLATIVE CHANGE

Incest has tragic consequences for the victim, the family, and society. The incest taboo is so rooted in history and culture that the harm exists independent of any arguable inherent damage possibly stemming from the activity. The damage is done because of the violation of the trust relationship between parent and child. While the law cannot completely solve this problem, it can be far more responsive than current legislation.

Incest statutes should be drafted with protection of the child, family, and society in mind. While this goal is ambitious, statutes which include the following elements should prove helpful in developing a more holistic legal re-

tutes is 92%. S. JANUS, *supra* note 6, at 129.

246. *Id.*

247. *See, e.g.,* Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

248. S. JANUS, *supra* note 6, at 129-30.

249. BROWN, *Murder Rooted in Incest*, in R. MASTERS, *supra* note 2, at 302.

250. S. BUTLER, *supra* note 39, at 38.

251. *See* MANUAL, *supra* note 8, at 151.

sponse to a social problem that demands increasingly serious attention from state legislatures.

A definition of incest is needed which includes not only sexual intercourse but also fondling, caressing, or touching of a minor with the intent on the part of the adult to sexually arouse or gratify either the adult or the minor, or causing the minor to fondle, caress, or touch the adult with the intent on the part of the adult to sexually arouse or gratify either the adult or the minor. Harm to the child can result from many acts short of sexual intercourse.²⁵²

"Child" should be defined as a minor who is either the natural, adoptive, step, or surrogate²⁵³ child of the abusive adult. Harm to the child can result

252. Intent is not considered an element of the crime of incest. *State v. Alexander*, 216 La. 932, 939, 45 So. 2d 83, 85 (1950). The important question, however, should be whether the adult has the intent to arouse or gratify sexual feeling in himself or the child. Because the harm generally results from violation of the trust relationship normally existing between parent and child, the intent to abuse parental powers by sexualizing the parent-child relationship should be the focus of the statutory prohibition. See, e.g., ILL. ANN. STAT. ch. 38, § 11-11.1 (Smith-Hurd 1982). The statute should specifically exclude breast feeding because, conceivably, it would otherwise fall within this definition. Women have reported erotic or orgasmic response to breast feeding. Summit & Kryso, *supra* note 48, at 240. Requiring intent to arouse or gratify may create too high a standard. Thus, in Michigan specific intent is not an essential element of the crime, although the statute requires accused touch a genital area intentionally. "Rather, it suffices if 'that intentional touching *can reasonably be construed as being for the purpose of sexual arousal or gratification.*'" *People v. Fisher*, 77 Mich. App. 6, 13, 257 N.W.2d 250, 254 (1977). The court noted that the language of the statute was a "substantial lessening" of the prosecutor's burden of proof over a requirement of intent to arouse or gratify. *Id.* at 13 n.2, 257 N.W.2d at 254 n.2. Although this lesser standard has superficial appeal, it suffers from the same infirmity as many of the current incest laws—it ignores the reasons for the prohibition. Assuming that at least one purpose of the taboo is protection of the child, and understanding much of the trauma stems from the attitudes of the parents and significant others after the incest is discovered, the intent of the adult offender is the important issue.

253. Assuming that the harm to the child results from the violation of the trust inherent in a parent-child relationship, a similar harm would arguably follow from this type of activity with one in a parental role. So, for example, a child would suffer at least some of the same adverse consequences if sexually assaulted by a man who was living with her family for some time but to whom her mother was not married. A similar argument might be made in the case of long term foster parents. See, e.g., *State v. Hummel*, 132 N.J. Super. 412, 334 A.2d 52 (1975). *R* and *D* were about 12 when they arrived as foster children in defendant's home. *R*'s younger sister, *C*, was seven. Defendant was convicted of carnal abuse and of impairing the morals of the girls despite the fact that they did not complain of the abuse until they had moved out of defendant's home some three years after the incidents began. Each child testified she had acquiesced and not complained because defendant had threatened to have her put away if she reported the abuse. The court noted that *R* and *D* "were foster children under the control of defendant and his wife." Added to that, the jury obviously believed the testimony that defendant had threatened the girls that they would be sent to a children's shelter if they complained. "Under these circumstances their continued silence, except with respect to statements to each other, while resident in the Hummel home is not unreasonable." *Id.* at 423, 334 A.2d at 57. Many natural or stepfathers also obtain their daughter's silence by threats of separation from the family if the in-

from the violation of both the parental or quasi-parental trust relationship with the child.²⁵⁴

States should provide for mandatory rehabilitative treatment as an alternative to incarceration, thus offering constructive rather than interruptive or destructive intervention.²⁵⁵ Treatment is necessary for the whole family to enhance the likelihood that it will be able to reunite as a functioning unit.

cest is revealed.

254. Consideration of incestuous relationships between siblings, other family members outside the primary family unit, *e.g.*, uncle-niece, or related consenting adults, is beyond the scope of this Article.

255. One important hypothesis of the San Jose program is that the reporting of child sexual abuse cases and offender conviction rate will increase when treatment rather than a prison term is the most likely method. J. BULKLEY, *supra* note 21, at 25.