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DEFINING INCEST

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I have to learn alone
to turn my body without force
in the deep element.
And now: it is easy to forget
what I came for
among so many who have always lived here . . .
I came to explore the wreck.
The words are purposes.
The words are maps.
I came to see the damage that was done
and the treasures that prevail . . . .
the thing I came for:
the wreck and not the story of the wreck
the thing itself and not the myth
the drowned face always staring
toward the sun
the evidence of damage . . .[1]

I. INTRODUCTION

The law defines Incest, but the law is not alone in defining Incest. Among others, anthropologists, psychologists, social workers, priests and

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[1] Adrienne Rich, *Diving Into the Wreck*, *in* ADRIENNE RICH, THE FACT OF A DOOR FRAME: POEMS SELECTED AND NEW, 1950-1984 (1994).

ministers, and people who live in or consider themselves as part of a family define incest, if by incest we mean prohibited or socially sanctioned sexual behavior within the family. What is known about incest? We know the pattern of behavior exists and has existed in every society, however it is defined. We know it is punishable behavior in most societies, although punishments vary and cultures define the boundaries of prohibited behavior differently, both in terms of the forbidden relationship and the acts constituting the offense.

The laws regarding sex offenses are a tangled web, as old as writing, clear for short bursts, or segments of time and place, ragged and contradictory elsewhere, and changing, ever changing in meaning, in interpretation, and formulation. This Article examines the statutory formulations and interpretations of Incest in American jurisdictions against the backdrop of my experience first as an advocate and reporter on rape reform legislation in the late 1970s and later, as a public defender representing sex offenders sentenced to treatment at the Adult Diagnostic and Treatment Center in Avenel, New Jersey.

Reports of the incidence of incest outside of the law come from samples that are admittedly incomplete and usually unscientific. These samples include self selected responses to surveys, from confessional literature, from the caseloads of individual psychologists, psychiatrists, or other professionals offering counseling or treatment, from hospital records, and from social services agencies and residential institutions. A history or allegation of prior acts of incest may emerge when a person is arrested for prostitution or another offense, being treated for substance abuse or depression, or engaging in aberrant or disruptive sexual behavior. In other societies or prior times, reports of incest have come from historical anecdote, from literature and mythology, or from the work of anthropologists.

Incest turns up rarely in American decisional law. Reported cases of incest are an indeterminate proportion but, it is suspected, a small fraction of actual incidents that occur. The national crime reports do not separate out Incest from other sex offenses. The data on incarcerated sex offenders is one of the few sources of information on incidence. Comparing cases across states or local jurisdictions is hazardous at best. Incest typically takes place over years rather than being a single criminal episode. When cases come to the attention of law enforcement, they place enormous strains upon the criminal justice system. Everyone hates them, and it is easy to understand why; the acts are repellent. Neither the victims nor the defendants evoke much sympathy. The accusing witnesses and the defendants contradict themselves and each other, retract charges, or engage in behavior that makes their testimony subject to impeachment, thereby creating problems for prosecutors and defense attorneys alike. Furthermore, the outcome is unpredictable because these conflicted family relationships have a different configuration in every case.

Cases in the juvenile or family court pose another set of conundrums: Should the family members be separated or stay together? Should the accusing child be removed from the home, which may cause her to feel that she has committed the crime? Who should be treated and for what? As in the criminal system, there are credibility problems everywhere: issues of proof for acts reported long after the fact, unavailable and uncooperative witnesses, and the appropriateness of the state's intervention is questionable at every stage.

The offense, the crime, the prohibited behavior, in its multiple statutory formulations, was and is not a matter of social or political consensus. That acts occur which meet the definition of Incest under the old or new formulations is unquestionable. How this behavior is to be judged and whether criminal punishment is appropriate is controversial. Incest cases are in the middle of the battlefield of sexual politics. The most common case pattern involves adult men engaging in sexual acts, often sexual intercourse, with very young women, or children, often daughters or step daughters. Incest cases or incestuous behavior may first come to light during a divorce or other family crisis. Some allege a threat of divorce precipitates false reports. The report of incest may itself accelerate family dissolution. The threat of externally imposed sanctions is a direct and frequently resisted challenge to individual and generalized patriarchal authority. How and when should the State intervene, and what control can or should the State have over the lives and behavior of the family?

Not only the war between men and women, but also conflicts between the generations are present and troublesome. A generation gap exists between decisionmakers and those affected by the decision. The volatile and defiant behavior described in the cases and media reports resonates with legal decisionmakers who are put in the uncomfortable position of acting for the State when no one knows the boundaries of that power or how it should be exercised. These ambiguities unsettle all discussions of the "law."

It is just these confusions, however, that force the fundamental questions: What is the purpose and effect of statutory definitions? How is the statute used in practice, if at all? How should the legal system resolve contradictions? What happens when the criminal justice system ignores or seems to condone admitted violations of criminal statutes? Should enforcement be relegated to another section of the society, for example civil or religious authorities? Does any social institution respond effectively? Should Incest be in the criminal statutes at all? And if Incest is appropriately included within crimes, how should the offense be defined and titled? Where should it be placed within the criminal statutes? Is it an offense against the person, a crime against morality, a family offense, or all of the above? What is the gravamen or essence of the offense? How do we perceive the harm? Why are some offenders selected for criminal penalties when others are sent for treatment or receive probation?

From the earliest colonial times until the present, Incest has been codified as an offense in every United States jurisdiction. All states forbid marriage between certain specified relatives, and the majority of states still define a crime called Incest. In 1793, Incest was a crime grounded in principles of morality, property, and the laws governing inheritance. By the end of this century, the crime had been transformed into a crime against the person: a very personal kind of sexual assault against the body, usually of a child. What do these statutory changes tell us about how society perceives this sexual behavior and the harm deserving of criminal punishment, in the past and present?

> *The problem with such a no-nonsense approach to things, one which extracts the general from the particular and then sets the particular aside as detail, illustration, background, or qualification, is it leaves us helpless in the face of the very difference we need to explore. Either we assimilate it to a system of abstract subtypes, for which there threatens to be no end . . . or we regard it as superficial local coloring of deeper generic form . . . or we merely ignore it as ambient noise—external interference with a readable signal. That does indeed simplify matters. It is less certain that it clarifies them.*
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> *Whatever price, and there is one, one pays in directness, surety or the look of science by refusing to sequester politics from the specificities of the life in which it is embodied is more than made up for by the breadth of analysis that then becomes possible . . . .*[2]

II. LOOKING BACKWARD: THE POLITICAL CLIMATE SURROUNDING RAPE REFORM LEGISLATION

My first professional job in 1976 was as a Research Attorney for a clinical study of all reporting rape victims in Philadelphia over an eighteen month period.[3] The study consisted of a data set of more than fourteen-hundred persons who were brought to Philadelphia General Hospital by the police. This was the first comprehensive, scientific study of victims of sexual assault in the United States. The research I began in Philadelphia on

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[2] CLIFFORD GEERTZ, AFTER THE FACT: TWO COUNTRIES, FOUR DECADES, ONE ANTHROPOLOGIST 40 (1995).

[3] The Director was a distinguished Freudian psychiatrist, Joseph J. Peters, who had been treating 'nonviolent' sex offenders, most of whom were child molesters, in group therapy for several years. His interest in the etiology of sexual violence had led him to design a clinically based scientific study of rape victims. *See* J.J. Peters & H.A. Roether, American Ass'n for the Advancement of Science, *Success and Failure of Sex Offenders* (1971). Unfortunately, Dr. Peters died before the research on rape victims was completed. The scientific results of the Philadelphia Assault Victim Study are published as THOMAS W. MCCAHILL ET AL., THE AFTERMATH OF RAPE (1979). The research project spawned a clinical program, the Center for Rape Concern, to provide crisis intervention and services to victims and their families. For a description of the study design, see Leigh Bienen, *Rape II*, 3 WOMEN'S RTS. L. REP. 90 (1977). I was hired because the National Institutes of Mental Health ("NIMH") required a legal component to the Study whose principal investigators were psychiatrists and criminologists from the University of Pennsylvania.

Rape and Incest turned into an independent study of legislative changes in the laws defining sex offenses that lasted for a decade.[4]

One-third of the victims in Philadelphia were under twelve, and approximately thirty percent of that number were incest cases. These cases included sexual assaults upon boys and girls by grandfathers, brothers, mothers, fathers, and step parents. All the victims who were under the age of twelve were more likely to be assaulted by someone they knew rather than by a stranger, and for children the most likely candidate was a member of the child's immediate family.

When courts had jurisdiction over these incest cases, the actions of legal authorities seemed to have little relationship to what the clinicians and research staff were trying to accomplish. Although the doctors and social workers threatened to refer cases to the state prosecutor, few of the victims who were under the age of twelve in Philadelphia General Hospital ended up in a judicial proceeding. Those classifying the cases at intake did not worry about the legal requirements for Incest under Pennsylvania law.

The professional staff at Philadelphia General Hospital had no desire to take incest cases to court or even to refer them to the state prosecutor. The medical staff, the social workers, and the families all regarded the court system as a disaster, a place to be avoided at all costs. Being involved in a court case in the state criminal courts meant waiting hours for calendar calls and being asked to testify about matters such as the presence of semen, which the clinicians considered unimportant. Going to court wasted everyone's time and for the individuals involved added anxiety and trauma. Guilt was usually obvious and acknowledged by all, thus, the guilt determination function of a court proceeding was not needed.

As a practical matter the technicalities of the criminal definition of Incest were usually irrelevant to the medical staff at Philadelphia General Hospital, because guilt sufficient to convict under several alternative stat-

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[4] Publications from that research include: HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE (1980); Leigh Bienen, *Rape I*, 3 WOMEN'S RTS. L. REP. 45 (1976); Leigh Bienen, *Rape II*, 3 WOMEN'S RTS. L. REP. 90 (1977); Leigh Bienen, *Rape III: National Developments in Rape Reform*, 6 WOMEN'S RTS. L. REP. 170 (1980); Leigh Bienen, *Rape IV*, 6 WOMEN'S RTS. L. REP. (1980) (separately published supplement); Leigh Bienen, *Mistakes*, 7 PHIL. & PUB. AFF. 224 (1978); Leigh Bienen, *Rape Reform Legislation in the United States*, 8 VICTIMOLOGY 139 (1983). Research took on a component of advocacy as I consulted with groups drafting and lobbying for rape reform legislation across the country while conducting research. For an excellent and recent examination of rape reform legislation, with an exhaustive compilation of prior research and a comprehensive discussion of its legal and philosophical foundations, see David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194 (1997) [hereinafter Bryden & Lengnick, *Rape*]. Dr. Peters and I were both very interested in the set of child victims and in what could be learned from looking at both sides of the equation, victims and the offenders. Research on sex offenders continues under the auspices of The Joseph J. Peters Institute. *See* Robert A. Prentky et al., *Recidivism Rates Among Child Molester and Rapists: A Methodological Analysis*, 21 LAW & HUM. BEHAV. 635 (1997).

utes was conceded.[5] The threat of criminal prosecution was used to monitor or restructure family living arrangements and to change the pattern of behavior or power relations within the family. Occasionally the technicalities of Incest or Rape statutes, such as the prompt complaint requirement, made criminal prosecution problematic. For cases involving very young children or babies, the statutes used were the vaguely defined molestation provisions or lewdness statutes. A threat of prosecution under those statutes operated in much the same way. My curiosity about the formal law developed from seeing the discrepancy between the circumstances of the clinical cases and the legal requirements for Incest.

The late 1970s was a period when the laws regarding sex offenses were changing radically. There was a new interest in the rights of "victims" and their role and status in the criminal justice system. A standard package of rape reform legislation was being presented to legislatures across the country.[6] Typically some part of the package, in some states all of it, was enacted by the state legislature although there was and remains considerable variation in the substance and form of reform statutes and their articulated purpose.[7]

In my experience the interactions between advocates for rape reform legislation, those capable of implementing the proposed changes and the usual participants in any discussion of legislation affecting criminal justice issues—the state Attorneys General, the bar associations, occasionally the public defenders or the defense bar, and various special interest groups—were unpredictable and often surprising. The operative decisions were made at the level of the legislative judiciary committees, typically a joint committee of two legislative bodies. These tended to be small committees, usually dominated by the Chair and one or two others. The legislators were overwhelmingly white, older men. The members of these committees were typically seasoned politicians and they controlled what legislation reached the floor of the legislature. If they had any experience in criminal law, they were likely to have been prosecutors.[8] The standard reform package included a proposal to decriminalize consenting homosexual conduct, and in the late 1970s this carried its own set of political risks.

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[5] For a history of rape and incest statutes in Pennsylvania, see Leigh Bienen, *Legislative History of Rape Law in Pennsylvania, in Rape I*, supra note 4, at 48; *see also* Pennsylvania, Chart, *infra*.

[6] *See* JEANNE C. MARSH ET AL., RAPE AND THE LIMITS OF LAW REFORM (1982); CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT (1992); Leigh Bienen, *Rape III*, *supra* note 4; Patricia Seales and Ronald J. Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, 10 WOMEN'S RTS. L. REP. 25 (1987).

[7] *See, e.g.*, Chart, *infra*. There are a variety of statutory definitions in rape reform statutes in Michigan, Florida, Kentucky, Iowa and Washington.

[8] *See* Bryden & Lengnick, *Rape*, *supra* note 2. The package of legislation may have been tied to a grant of funds for the training of police and judges under the now defunct Law Enforcement Assistance Administration ("LEAA"), and the support of these groups could be determinative.

The changes in the definitions of sex crimes were substantial, if not revolutionary. Many of the advocates for reform had worked in rape crisis centers or battered women's shelters, and they brought an unusual moral authority to the table.[9] Individual advocates and legislators played unique and time bounded roles. Though every state was a different story, generally the changes enacted showed a distinct pattern. The redefinition of sex offenses involving children, and especially incest, was a central tenet of these reforms.[10] The goals for the redefinition of incest were specific and came with greater consensus than other aspects of rape reform legislation. The political constellation was different in every state. In some states social service workers and child welfare advocates led the reform. In other states it was lawyers and law professors. Each group brought a different perspective to the offense.

The twenty-year hiatus since I began research on Incest offers an occasion to reflect. Of course, the times have changed dramatically. The era has passed when it was thought that changes in the statutory law of sex offenses would have revolutionary effects upon the status of women, and perhaps the behavior of men, and finally the practice of law. Some changes comparable to the boldness of the conception of the laws themselves did occur.

The redefinition of incest under rape reform legislation was one of the most dramatic reformulations. This redefinition was a philosophical leap, restating the gravamen of the offense and its cultural and social meaning. The reformers saw little merit to the traditional incest statutes. Those statutes typically had many special provisions and were limited in terms of the conduct prohibited.[11] Reformers saw little reason why they should not be eliminated or relegated to an obscure civil provision. A prohibition against marriage between blood relations belonged in the civil code, not in the category of the most serious sex offenses. Whether or not a civil statute prohibited marriage between relatives had little relevance to punishing or preventing sexual assaults upon children, or the sexual abuse of young girls.

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[9] *See* Bienen, *Rape I, supra* note 4. As I contacted the state legislatures and advocacy groups around the country to find out what was pending or enacted in all of the states to produce the first Chart of the Rape Statutes in *Rape II, supra* note 3, it was clear this was a national political movement with its own momentum and esprit de corps. People in one state wanted to know what was being enacted elsewhere. National centers and coalitions, some funded and some ad hoc, sprung up to lobby for legislative changes, building a collective political experience and a national agenda.

[10] The package of rape reform legislation usually included the replacement of the crime of rape by a sex neutral definition of a new offense with an expanded definition of the acts constituting the offense; the replacement of the terminology of rape and carnal abuse with sexual assault; the separation of offenses into sexual penetration offenses and sexual contact offenses; the stair casing or grading of offenses to promote plea bargaining; and provisions to limit the introduction of evidence regarding the prior sexual history of the victim. Such evidence was regarded as turning rape trials into trials of victims. *See* Bryden & Lengnick, *Rape, supra* note 2 (citing Vivian Berger, *Man's Trial, Women's Tribulation: Rape Cases in the Courtroom,* 77 COLUM. L. REV. 1 (1977)).

[11] *See, e.g.,* Texas incest statute, Chart, *infra.*

The title of the offense itself introduced an archaic and distorted diction, influencing the mind set of legal actors addressing the circumstances of the cases. In the opinion of reformers, the language and syntax describing the traditional offense was confusing and contradictory. The offenses being reported, even when they involved father and daughter, had little to do with marriage or cohabitation.[12] The language of the traditional definition of incest showed little recognition of the abusive character of the offense, even though these statutes occasionally provided a vehicle for punishing "deviant" sexual behavior. The Biblical "carnal knowledge" and abuse language in the traditional rape statutes had proved itself to be awkward and convoluted in the area of rape. This terminology did not function any better or differently in the statutory definition of Incest.

Proposing the repeal of the traditional Incest offense did, however, have the potential to distract legislators.[13] Gender neutrality, coupled with the new age limits and the redefinition of sexual penetration and sexual conduct, was the mechanism for decriminalizing consenting homosexual conduct and consenting conduct among older teenagers and unmarried persons. In addition, the repeal of the traditional sex offenses, such as Rape, Fornication, Sodomy, and Incest, in some jurisdictions, became the focal point for protests.[14] These controversial provisions were central to the proposed redefintion of Incest. The reformulation of Incest could not be uncoupled from the repeal of other traditional offenses against morality. And in many states those advocating for rape reform legislation had made a pact among themselves not to agree to splitting off parts of the reform package during negotiations with legislators and other advocacy groups.[15]

The fundamental goal of the redefinition of offenses involving children, including Incest, and this was difficult to for legislators to oppose, was to provide greater protection for children who were victims of sexual assault within the family, irrespective of gender. An additional purpose of the reform was to facilitate and encourage reporting and to streamline the prosecutorial process by clarifying or removing overlapping legal jurisdiction, which delayed and complicated prosecutions. In Washington state, re-

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[12] *See, e.g.*, California and West Virginia incest statutes, Chart, *infra*.

[13] *See, e.g.*, Elizabeth Sandowski, *Trenton's Policy on Sexuality is Laissez-Faire*, N.Y. TIMES, Dec. 30, 1979, at B16; Martin Waldron, *Age of Consent in Jersey Expected to Revert to 16*, N.Y. TIMES, May 2, 1979, at B1 [hereinafter Waldron, *Age*]; Martin Waldron, *Jersey State Assembly Votes 71 to 2 to Keep 16 as Age of Consent*, N.Y. TIMES, May 4, 1979, at B4 [hereinafter Waldron, *Assembly*]; Martin Waldron, *New Jersey Journal*, N.Y. TIMES, Apr. 29, 1979 at B3 [hereinafter Waldron, *Journal*].

[14] In New Jersey, the most vocal opposition to the enactment of the Code of Criminal Justice in 1978 was to the repeal of Sodomy and Incest as part of the package of rape reform legislation. Demonstrators in front of the State House carried placards protesting that New Jersey was becoming Sodom and Gomorrah. The political opposition to the bill focused upon the "lowering of the age of consent" as encouraging or licensing teenage sexual conduct. *See Sandowski, supra* note 11; Waldron, *Age, supra* note 11; Waldron, *Assembly, supra* note 11; Waldron, *Journal, supra* note 11.

[15] *See, e.g., Sandowski, supra* note 11; Waldron, *Age, supra* note 11; Waldron, *Assembly, supra* note 11; Waldron, *Journal, supra* note 11.

form provisions stated that prosecutions should not be in the juvenile court.[16]

The criminal cases of Incest had one set of problems; the cases in the family court had another set. The child welfare agencies could, but rarely did, refer cases to state prosecutors.[17] In family court, the attorneys and judges delayed proceedings for months or years while waiting for expert reports or simply because of crowded dockets. If the family was receiving social services, and the offending behavior had stopped, there was little impetus to proceed in the criminal justice system. In the 1970s and 1980s there was little of the present pressure to transfer juveniles out of the family court. Jurisdiction of the court was triggered when the victim or the offender was a juvenile. Adult offenders in incest cases welcomed being in a family court where the proceedings were confidential and the prospect of incarceration was small.

For offenses involving children, a principal goal was the expansion of the acts constituting the offense, to include oral/genital acts and acts defined by sexual contact or touching, in addition to or instead of sexual intercourse.[18] The traditional statutes referred to marriage and carnal copulation or sexual intercourse as the acts constituting the offense. When the offenses involved younger children, the sexual acts were typically not sexual intercourse, although the pattern was for the acts to escalate to intercourse as the child became older.[19] One goal of reformers was to remove the social stigma from reporting and to alleviate what was perceived by reformers to be a bias and prejudice against children and especially adolescent girls, who were victims of sexual assault.[20]

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[16] *See* Washington statute, Chart, *infra*.

[17] The lobbying for legal changes occurred at a time when revolutionary changes in attitudes towards the composition of the family, and the status of children generally, were taking place. For an historical perspective and an overview of some of these changes, see Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345 (1997).

[18] *See, e.g.*, New Mexico statute, Ohio statute, Chart, *infra*.

[19] *See* Leslie Feiner, *The Whole Truth: Restoring Reality to Children's Narrative in Long-Term Incest Cases*, 87 J. CRIM. L. & CRIMINOLOGY 1385 (1997) [hereinafter Feiner, *The Whole Truth*]. The case patterns described in this article are seen repeatedly in the earlier academic research on Incest, although their interpretation may not be the same. *See also* Linda Meyer Williams & David Finkelhor, *The Characteristics of Incestuous Fathers: A Review of Recent Studies*, *in* HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER *passim* (W.L. Marshall et al. eds., 1990) [hereinafter Williams & Finkelhor, *Incestuous Fathers*] (annotating studies).

[20] The law's unwillingness to give credence to reports of sexual assaults upon young girls was reinforced and perpetuated by a new recommendation in John Henry Wigmore's TREATISE ON EVIDENCE, introduced in the 1934 Supplement to the 1920 Edition, arguing for special tests to challenge the credibility of the complaining witness in cases in which young girls accuse adult men of sexual assault. *See* Leigh B. Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence*, 19 CAL. W. L. REV. 235 (1983). Partly because of the prominence of the Treatise and the prestige of its author, legal authorities accepted this recommendation and were unwilling to recognize that sexual assaults upon female children were real, and not fantasies of the victim. Wigmore's untimely death in 1943 prevented him from reconsidering this categorical position.

For offenses involving children, those lobbying for the reform package argued that graded offenses, coupled with mandatory minimums for a second offense, would make the threat of criminal prosecution more viable in the hands of social service workers and government welfare agencies.[21] One goal regarding the penalty structure was to facilitate plea bargaining to a lesser non-penetration offense that was clearly identified as a sex offense involving children. If the offender was found guilty of a subsequent sex offense there would be a record and a significant penalty for recidivism.[22] Another purpose was to prevent the judge from dismissing all sex offense charges as part of a plea bargain. These were ambitious goals indeed. Some thought the criminal justice system had been descended upon by the Furies, or the witches in Macbeth.

Subtle questions are raised by asking what the possible effect of these legal changes could have been, and how much of an effect can ever be attributed to the legislative redefinitions themselves, in comparison to other social or institutional adjustments or to sea changes in public attitudes. What were the legislative changes after all but changes in language? Words defining offenses, and words attempting to say what the crime was. Researchers measuring incidence can only hope that the methods of data collection or reporting have not changed radically over the time and place for the study period.[23] Some legislative changes proved to have little effect upon a well-entrenched legal culture and criminal justice bureaucracy.[24]

The laws were changed as part of a larger social and political movement. Separating the "legal" effects—centrifuging them out—is difficult. An important social effect of rape reform legislation was that it brought

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These very strong statements, later discredited, were simply reincorporated in subsequent editions of the Treatise.

As was noted later,

> [B]oth cultural and personal factors combined to cause everyone, including Freud himself at times, to welcome the idea that reports of childhood sexual victimization could be regarded as fantasies. This position relieved the guilt of adults .... [B]oth Freud and his followers oversubscribed to the theory of childhood fantasy and overlooked incidents of actual sexual victimization in childhood.

Joseph J. Peters, *Children Who are Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. PSYCHOTHERAPY 398, 401 (1976) [hereinafter, Peters, *Children Who are Victims*].

[21] *See, e.g.*, Ohio, Oregon penalty provisions, Chart, *infra*.

[22] *See, e.g.*, MICH. COMP. LAWS ANN. § 750.520 (West 1996); N.J. STAT. ANN. § 14 (West 1989). *See generally* MARSH ET AL., *supra* note 6; Bryden & Lengnick, *Rape*, *supra* note 4.

[23] In the Philadelphia Assault Victim Study there was no comparable prior data set, but at least all of the 1,400 cases entering the study came from the same source and followed the same data collection protocol. Twenty years later, because of the quality of that data collection and case identification, we have the benefit of a systematic follow up study with its surprising results. *See* Linda M. Williams, *Recovered Memories of Abuse in Women with Documented Child Sexual Victimization Histories*, 8 J. TRAUMATIC STRESS 649 (1995).

[24] The rape evidence provisions were designed to influence trials. Cases involving children were and are typically disposed of by plea bargains. Evidence provisions had little effect unless they made the threat of criminal prosecution more realistic. The changes in the sentencing structure on the other hand did influence plea bargains, especially the mandatory minimum terms for a second offense.

many women, and some men, who had never been involved in politics into the committee rooms of state legislatures. Many of these women later ran for elective office, went to law school, and remained in the public sector. In the intervening time period, the law has become burdened with more, not less, of the culture's frustrations and ambivalence.[25] On the other hand, we have also seen a rollback of some reforms and a backlash.[26] At the same time, the level of public sophistication about criminal law and legal decision making increased dramatically in the 1990s. The law, however it is defined—as the statutes or rules, the court proceedings, who gets convicted and what the sentences are, who plea bargains, or all of the above—is prominent in discussions of public policy in a way it was not twenty years ago. Interestingly, the reforms of the 1970s had been put forward at other times and even been partially enacted in some places.[27]

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[25] For example, the debate over the legitimacy of recovered memories and suits by adult survivors has been one of the most bitter fights, involving the law, clinicians, and doctors, as well as victims and their families. *See* Cynthia Grant Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy,* 109 HARV. L. REV. 549 (1996); Cynthia Grant Bowman, *The Manipulation of Legal Remedies to Deter Suits by Survivors of Childhood Sexual Abuse*, 92 NW. U. L. REV. (1998). For the research on recall of childhood sexual assault by one of the clinicians who was an original researcher in the Philadelphia Assault Victim Project, see Linda Meyer Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 J. CONSULTING & CLINICAL PSYCHOL. 1167 (1994); Williams, *supra* note 23, at 649. Some 129 women with documented histories of sexual victimization in childhood (the participants in the original NIMH study in Philadelphia) were interviewed and asked about abuse history. A large proportion of the women (38%) did not recall the abuse that had been reported and documented by medical personnel seventeen years earlier. Seventeen years following the initial report, 80 of the women recalled the victimization; however, one in 10 reported that at some time in the past they had forgotten the abuse. Those with a prior record of forgetting were younger at the time of the abuse and were less likely to have received support from their mothers. Williams concludes that long periods with no memory of abuse should not be regarded as evidence that the abuse did not occur. Statutes of limitations can affect the criminal prosecution of cases. *See, e.g.,* Connecticut and Missouri, Chart, *infra.*

[26] The changes in attitudes and the official treatment of domestic violence, for example, is one of the movement's great successes. Domestic violence has not been eradicated, but the issue is out of the closet. Similarly, the decriminalization of consenting homosexual conduct was part of a profound cultural change in public attitudes strongly influenced, but not controlled by, changes in the law. *See* SUSAN FALUDI, BACKLASH (1991); *see also* Mary Becker, *The Abuse Excuse and Patriarchal Narratives*, 92 NW. U. L. REV.1459 (1998).

[27] After a clear and concise summary of previous studies and the law in Britain and the United States, with reference to several empirical reports and the law in other European jurisdictions, in 1964 Graham Hughes concludes

> the typical state of incest laws in common-law systems can be seen to be clumsy and imprecise in their impact on the evils produced by such behavior. It is clear that the primary need is for protection of the younger female members of the family circle. No protection afforded by the law can be very effective in the nature of incest behavior, but it is submitted that the miseries produced here can be so acute that the law must add what weight it can to the general social condemnation.

Graham Hughes, *The Crime of Incest*, 55 J. CRIM. L. & CRIMINOLOGY 322, 329-30 (1964) [hereinafter Hughes, *The Crime of Incest*]. Hughes recommended a special criminal offense protecting females until age 21 and including step children, extending the acts constituting the offense to include more than sexual intercourse, limiting the prohibited relationships to the direct line nuclear family (i.e. excluding aunts and uncles, including grandparents) and removing marriage from consideration, and including brother

In New Jersey, the effective decisionmaking body for rape reform legislation was the five-man Senate Judiciary Committee and the five-man Assembly Judiciary Committee.[28] The most powerful legislator moving this package forward was a former law partner of the then Governor. The Chair of the Senate Judiciary Committee, State Senator Martin L. Greenberg, was himself a long standing member of the National Organization for Women ("NOW"). Both the Chair of the Senate Judiciary Committee and the Chair of the Assembly Judiciary Committee were strong supporters of the feminist reform package in the Code of Criminal Justice, which included the redefinition of Incest. Without the support of these unlikely allies, rape reform legislation never would have passed in New Jersey. The reform statute would not have been formulated or brought forward without the women's movement, but it never would have passed in New Jersey without the specific politics surrounding the enactment of the Code of Criminal Justice in 1978 and 1979.

In 1978, neither of these Committees had a female member. Some members of the Judiciary Committee were puzzled by the provisions introduced in rape reform legislation. They were mostly embarrassed by the testimony and presence of the women and men lobbying for the package. They were especially uncomfortable with the people who came to lobby for the decriminalization of consenting homosexual conduct. One self-appointed advocate submitted statements from a variety of private organizations supporting decriminalization of all sexual activity between adults and children.

The reclassifications of sex offenses were very difficult for several committee members to understand in 1977 and 1978. Sometimes the objections were religious and sometimes they were simply that the behaviors described were claimed to be outside the knowledge or experience of the legislators. Some of their hesitancies and objections seemed to this observer to be sincere matters of conscience, while others did not. Generally, the legislators favored policies that facilitated prosecutions. They were also highly suspicious of any change to the status quo or any change that might

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and sister and half sister, when the female is between the ages of 16 and 18, on the assumption that acts with females under 16 will be covered by the statutory rape laws. *See id.* at 329-30.

> The thesis advocated here is, then, that the incest situation is one which causes harm of an identifiable kind which is a proper subject for criminal prohibition, but that existing criminal statutes obscure this by displaying unreflecting vestiges of primitive taboo attitudes and in not directing their prohibitions with sufficient precision at the evils that ought to be suppressed.

Id.

[28] There were very specific politics associated with the passage of the Code of Criminal Justice in New Jersey. The proposed Code had been pending before the legislature since the early 1970s. The sticking point was the death penalty. The legislature wanted a death penalty. The lame duck governor had declared that he would not sign the Code if it included the reenactment of capital punishment. The governor and his effective and powerful political allies on the Assembly and Senate Judiciary Committees were successful in getting the Code of Criminal Justice passed without a provision reenacting capital punishment.

have an unintended effect. The intended effect was difficult enough. The legislators rightly anticipated that issues such as the decriminalization of consenting heterosexual conduct among teenagers would catch the attention of voters and be politically troublesome.

The sex neutral aspect of the offense was appealing to legislators because it protected boys from homosexual assaults by adults. That was a policy change that male legislators understood and endorsed, especially when presented with examples of abusive scout masters or camp counselors.[29] These examples were highly persuasive in other jurisdictions as well. The members of the two powerful judiciary committees understood the legislative politics behind passage of the Code in New Jersey. When the Code reached the floor under a deadline, there would be no opportunity for substantive discussion or debate on the sex offense provisions. Basically the formulation of offenses that emerged from the Committees would be what was enacted. And this was what happened.

III. THE SPECIAL STATUS OF DIAGNOSED SEX OFFENDERS BEFORE AND AFTER THE ENACTMENT OF THE REFORM STATUTE

New Jersey adopted rape reform legislation in 1978, which became effective in 1979. The New Jersey experience with legislative reform is both typical and unique. The existence of the Adult Diagnostic and Treatment Center ("ADTC"), a special prison for "diagnosed" sex offenders, makes the New Jersey statutory configuration particularly relevant here.[30] This statute was typical of the sex offender treatment statutes enacted in the 1940s and 1950s.[31] It incarcerated sex offenders for indeterminate terms, on the theory that when or if they progressed in treatment, they could be released. The New Jersey rape reform statute, like the Michigan and Minnesota statutes among others, incorporated a redefinition of the offense, including a radical redefinition of all sex offenses including Incest and all offenses involving children.

None of the new or reform definitions of sex offenses that went into effect in 1979 applied to the sex offenders already incarcerated in the ADTC

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[29] Some states included specialized categories of persons with supervision over children within their revised statutes. *See, e.g.*, Connecticut, Maryland, Tennessee, Chart, *infra*.

[30] For a history of this statute and other sex offender treatment statutes, see Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. 1317 (1998).

[31] The program at Avenel is described in detail by Lawrence Wright in *A Rapist's Homecoming*, THE NEW YORKER, Sept. 4, 1995, at 56. In December of 1996 the American Psychiatric Association issued a Task Force Report on Sexually Dangerous Offenders chaired by Dr. Howard Zonana [hereinafter Task Force Report]. This Report was created in response to the passage of statutes designed to civilly commit sex offenders who have served their criminal sentences. It includes a review of the literature and experimental studies of sex offender recidivism and an extensive cross disciplinary bibliography. The Task Force criticizes the current research and notes that sound epidemiological data on causes or effective treatment do not exist, although more than 10% of the national prison population is made up of sex offenders. *See* Task Force Report at 102, 104.

in 1979. Nor was their status part of the debate before the Committees. In the final hours before the passage of the Code, a provision reincorporating the sex offender treatment statute without change was adopted. They now stood convicted of crimes whose definition had been radically altered.

Practically all of the one hundred ninety sex offenders incarcerated at the ADTC when the new Code went into effect were technically eligible to be considered for a reduction of sentence under a special resentencing provision of the Code.[32] The purpose of the resentencing provision was to allow someone who was incarcerated for consenting homosexual conduct, for example, to be resentenced or released, if that conduct was decriminalized or downgraded by the Code.[33]

The "special" sex offender sentences under the prior New Jersey law were all indeterminate terms to the maximum for the offense, a sentence that was abolished under the sentencing provisions of the 1979 Code.[34] Technically all were eligible for resentencing, and the principles of ex post facto laws prevented them from having their sentences increased by provisions enacted after the date of their offense. A number of diagnosed sex offenders, mostly child molesters, did have their sentences changed.[35]

The first task was to find out who was incarcerated for what offense.[36] A very small fraction of the one hundred ninety sex offenders incarcerated at the ADTC were incest offenders; a large fraction were child molesters.

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[32] The Code of Criminal Justice included a provision, taken from the Model Penal Code, that allowed persons who carried a longer sentence than was provided for under the current law to petition for resentencing under the Code. *See* N.J. STAT. ANN. § 2C:1-1(d)(2) (West 1997).

[33] When the Code went into effect I took on the job of evaluating the records of the 190 sex offenders incarcerated at the ADTC to see who was eligible for resentencing. This required looking at the factual basis for the sentence and comparing the sentence under the former law with what the offender could get for the same behavior or offense under the new rape reform provision in the Code. These records were typically presentence reports prepared by the probation office. Sometimes the descriptions of the offenses were complete; sometimes they were fragmentary. Many of the offenders had a long history of sex offenses.

[34] There was no political agreement or discussion of what was appropriate in terms of amending or modifying the Sex Offender Treatment provisions of the prior law during the pendency of the Code. The Sex Offender provisions were just incorporated without change into the Code of Criminal Justice. Indeterminate sentencing, however, had been abolished by the Code. The Sex Offender Treatment Provisons made little sense in conjunction with the new sentencing scheme. *See* N.J. STAT. ANN. § 2C: 45, 47 (West 1997).

[35] For a description of these resentencing proceedings, see State v. Smith, 426 A.2d 38 (N.J. 1981); Savad v. Dep't of Corrections, 429 A.2d 381 (N.J. Super. Ct. App. Div. 1981); State v. Cavanaugh, 415 A.2d 390 (N.J. Super. Ct. Law Div. 1979).

[36] A printout listing the residents of the ADTC on July 6, 1979 lists a total of 195 residents. Six are sentenced for Incest; 24 are sentenced for carnal abuse or attempted carnal abuse (statutory rape); 16 had sentences for Sodomy, which was the only offense which encompassed oral genital acts; 46 were convicted of Indecency or Exposure or Impairing the Morals of a Minor; the remaining 103 were convicted of rape or attempted rape or a crime labeled "attempt to commit sex offense." One person was convicted of "B &E" (Breaking and Entering). *See* Bureau of Correctional Information Sys., New Jersey Dep't Of Corrections, Review List of Resident and In Custody Inmates with Selected Characteristics, (July 6, 1979) (on file with the author).

The criteria for admission to the institution, and the issues raised by these terms of imprisonment, raised a host of other legal issues, some of which were addressed in the resentencing cases.[37] Whether or not an inmate was diagnosed as a sex offender affected the length of sentence, the conditions of confinement, and his parole status after release. To oversimplify a complex situation, the criteria for admission were that the offender be found, after a diagnostic examination by a psychiatrist, to be a "compulsive and repetitive" sex offender—a standard subject to manipulation by attorneys and defendants, and subject to wide swings in interpretation by admitting staff at the ADTC.

In practice, the diagnostic examination for admission was pro forma. The simple pencil and paper tests were administered by secretaries or inmates working as office assistants. Some defense attorneys were knowledgeable about what defendants needed to tell the psychiatrist in the brief interview that resulted in being "diagnosed" as a compulsive and repetitive sex offender.[38] Being sentenced to "treatment" carried with it advantages and disadvantages, leaving aside the difficult questions of whether the so called treatment was effective, scientific, or delivered at all.[39]

The sex offenders incarcerated in the ADTC for Incest in 1979 were adult men who had sexual relations with their daughters or stepdaughters. Perhaps it was "easier" to be classified as a sex offender for the purposes of the statute under a charge of Incest than it was for statutory rape because the title of the offense itself implied sexual deviance. There were also incest offenders at the ADTC sentenced for "Carnal Abuse" or "Attempted Carnal Abuse" under the statutory rape statute. The sample is small, and to the best of my recollection there seemed to be no consistent pattern as to why one incest offender would be sentenced for Incest and another sentenced for Carnal Abuse. There was no case law in New Jersey at the time indicating that one form of prosecution was preferred.

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[37] *See* Denno, *supra* note 30; Eric Janus, *Foreshadowing the Future of* Kansas v. Hendricks, 92 NW. U. L. REV. 1279 (1998); Michael Perlin, *There's No Success Like Failure, and Failure's No Success at All: Exposing the Pretextuality of* Kansas v. Hendricks, 92 NW. U. L. REV. 1247 (1998).

[38] With the sizable increase in the number of persons incarcerated in New Jersey in the 1980s and 1990s, the character and legal standards governing the ADTC changed radically. This description is based upon a Department of Corrections Record of who was in the institution in 1979 and upon my memory interviews and case records from the early 1980s. It is not an accurate description of the present situation involving sex offenders in New Jersey.

[39] Dr. Peters and the psychiatrists at the Philadelphia Center for Rape Concern would not have endorsed what passed for treatment at the ADTC, at a large expense to the taxpayer. Some offenders refused treatment and argued this should be a legal justification for their transfer out of the ADTC and for resentencing under the Code. The litigation involving resentencing of sex offenders resulted in a series of opinions and some discussion of the terms of incarceration at the ADTC. *See* State v. Bowen, 540 A.2d 218 (N.J. Super. Ct. App. Div. 1988); Gerald v. Commissioner, 493 A.2d 556 (N.J. Super. Ct. App. Div. 1985); Savad v. Dep't of Corrections, 429 A.2d 381 (N.J. Super. Ct. App. Div. 1981); State v. Cavanaugh, 415 A.2d 390 (N.J. Super. Ct. Law Div. 1979).

Once the offender was classified as a sex offender and sentenced to treatment, the practical distinction between a sentence for Carnal Abuse and Incest was nonexistent. Both carried the same sentence, an indeterminate maximum of fifteen years.[40] All received the same treatment, unless the label incest triggered a different treatment modality from the therapist. Such treatment was group therapy with some individual therapy. According to the offenders, there was little individualization of treatment. Some offenders claimed they received no individual treatment.

The "child molesters" were typically sentenced for Indecency or "Lewdness," or Impairing the Morals of a Minor ("IMM"), even if the acts constituting the offense were sexual contact offenses, not simply exposure.[41] Some of the offenders sentenced for IMM or Lewdness were also incest offenders.[42] It was just this class of offender, the sex offender who could not be sentenced for Incest because the acts constituting the offense were not sexual intercourse, that the reform definition of the Code was designed to catch. There were some incest offenders and child molesters at the ADTC in 1979 who would have received longer and more precise convictions with mandatory minimums under the reform statute.

What distinguished the group of child molesters who were sentenced to three-year indeterminate terms from the offenders sentenced to fifteen-year terms? The most consistent explanation was that offenses involving children under the age of ten of both sexes almost always carried a sentence for Lewdness or IMM, even if the acts included sexual contact or intercourse. On the other hand, offenses involving teenage girls were likely to be classified as Carnal Abuse, and offenses involving older boys were classified as Sodomy, which also had a fifteen-year maximum. Sentences for all offenses could be consecutive for multiple incidents. Part of the difference was, as it is in so many situations of imprisonment, that some offenders had "better lawyers." Their lawyers understood the system well enough to negotiate lower sentences for their clients. Irrespective of that unpredictable variable, however, there were other distinctions between the crimes and offenders.

The child molesters tended to be physically weak and psychologically manipulative. Their prior offenses were typically "nonviolent" sex offenses, even when they involved sexual contact. To the best of my recollection, there was no one incarcerated at the ADTC in 1979 for a first offense involving children. Those convicted of Incest and Carnal Abuse tended to have more violent records and to have committed the acts over a

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[40] *See* N.J. STAT. ANN. § 2A: 114 (West 1978) (Incest); N.J. STAT. ANN.§ 2A: 138-1 (West 1978) (rape and carnal abuse), both *repealed by* N.J. STAT. ANN. § 2C: 98-2 (West 1989).

[41] Some states retain these offenses. *See, e.g.*, Oklahoma, Tennessee, Chart, *infra*.

[42] The important statutory distinction was that Lewdness and IMM carried penalties with a three year maximum instead of a 15 year maximum. However, sentences could be stacked consecutively. *See* penalties under the former N.J. STAT. ANN. § 2A (West 1978).

longer period of time. As crude and unscientific as the diagnostic definition "compulsive and repetitive" was (and it was often garbled by embarrassed judges and lawyers into "repulsive and competitive") it had an intuitive truth. However we understood the term, a person who committed dozens, or in some cases hundreds of illegal sexual acts in circumstances in which he was bound to get caught, was certainly compulsive and repetitive in the common sense meaning of the term.[43]

The judges on the specially constituted resentencing panel knew little about what went on at the ADTC, nor were they interested in how the offender before them for resentencing fit into some larger medical or jurisprudential classification scheme. They were in the position judges often find themselves, being asked to reconcile legal contradictions. And like the rest of us, they would rather not hear about these offenses. Nor were those lobbying for rape reform legislation imagining these offenders or the issues raised by their resentencing. The feminists lobbying for rape reform legislation were focused on getting the newly defined sex offenses through the legislature. Besides, the activities at the ADTC had been shrouded in secrecy and bureaucratic obfuscation.

Although their sentences were to treatment, the population at the ADTC was nonetheless an institutional population. This was a prison. Many inmates were repeat offenders who had been incarcerated for years or institutionalized for most of their lives.

The studies of victims of Incest identify victims from all sections of society. At most there were one or two offenders who were middle class or white collar, although there were disproportionately more white offenders and more middle-class offenders at the ADTC than in the general prison population. This was one complaint from outsiders about the institution's procedures. Some alleged that white, middle-class offenders paid high fees to similarly situated lawyers who persuaded white, middle-class prosecutors and judges that probation with outpatient counseling was the appropriate disposition for them. Others said that non-English speaking, ethnic minorities or illiterates could not complete the simple paper and pencil psychological tests that were part of the admission process. The institution's response was that violent sex offenders, or offenders with convictions for non-sex offenses, did not meet the diagnostic criteria because their offenses were not caused by a compulsive sexual disorder.

A few of the offenders I interviewed were very sophisticated about the law.[44] These offenders would have been capable of moving themselves and

[43] Prior to 1979, the ADTC never had female inmates. One immediate issue raised by the enactment of rape reform legislation with its sex neutral definitions of the offense was that female sex offenders were now eligible to be incarcerated at the ADTC. It was several years before a woman was incarcerated at the ADTC. By the time a female offender was sentenced there, the character of the institution had changed dramatically from what it was when the Code went into effect in 1979.

[44] A remarkably large proportion of the inmates at the institution claimed to have been molested themselves as children. Some believed this was because the brand of group therapy practiced at the

their victims to another state in order to avoid a punitive sanction such as the mandatory minimum term for repeat offenders introduced by rape reform legislation in New Jersey. They were, however, a very small minority. The child molesters typically had so few social skills it was difficult for them to understand how their behavior was regarded by others, that it caused harm, or what law had been violated. Some of the child molesters sentenced for Lewdness or IMM had committed offenses with dozens of children, others with a few children. Most committed offenses against acquaintances or family members; only a few with strangers. Those convicted of Incest or Carnal Abuse seemed to be more socialized to others' judgments of their actions and the consequences. A few claimed to have been "cured" by the treatment at the ADTC.

There is a variety of clinical research on child molesters, including incest offenders and others.[45] A survey of the clinical studies of incestuous fathers provides little scientific support for the proposition that incestuous fathers were themselves sexually abused as children. This finding is contrary to popular belief and to the views of clinicians.[46] The one group of sex offenders who seem to have a history of prior abuse as children are pedophiles who offend with male children.[47] Child offenders generally are

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ADTC encouraged inmates to simulate memories of sexual assault. *See* Wright, *supra* note 31; *see also* Williams & Finkelhor, *Incestuous Fathers, supra* note 19 (citing clinical literature).

[45] *See, e.g.*, Williams & Finkelhor, *Incestuous Fathers, supra* note 19, at 231-55. Studies of offenders prior to the 1970s were of small incarcerated populations. The studies of victims that began to be published in the 1970s rarely included data on offenders. This review of the literature examines 29 studies, 16 of them doctoral dissertations. This Article limits its consideration to those studies that quantified characteristics and included recognized controls, and hence could claim some scientific objectivity.

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> It is practically an article of faith among clinicians that "molesters molest because they themselves were molested as children," yet the connection appears far less universal than this claim would have it. Four out of six studies testing the hypothesis of higher sexual abuse among incestuous fathers have confirmed it, and one of the two remaining studies did find a nonsignificant trend. However, most interestingly, the absolute percentages of incestuous fathers with a history of being victimized is not very high . . . . [T]he highest percentage of these offenders who were sexually abused as children is 35%, and the mean is about 20%. These numbers are closer to estimates of the rate of sexual abuse in the community in general and are a far cry from the number that one often hears . . . . Some proponents of the hypothesis believe that many offenders deny or have repressed knowledge of their victimizations. However, it is also true that given the therapy many of the subjects of these studies have received post disclosure, they have had much more encouragement, motivation, and opportunity than the control subjects to remember or redefine experiences as victimizations . . . . Interestingly, the rates of physical abuse in the backgrounds of incestuous fathers ran consistently higher than rates of sexual abuse . . . . From the available evidence we conclude that physical maltreatment is more prevalent than sexual abuse and perhaps of more general etiological significance.

Williams & Finkelhor, *Incestuous Fathers, supra* note 19 at 231, 236-38 (citations omitted).

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> This particular group has a number of characteristics that distinguish them from other sex offenders. Their behavior is truly deviant; it is not socially condoned or excused. Their sexual interest in young boys often has an early onset, they may lack any significant interest in consenting sexual relations with adults. Their behavior is often extremely compulsive and resistant to change . . . . Taken together, these data suggest the possibility that childhood sexual trauma in boys may be a

likely to be recidivists.[48] If anything the studies of sex offenders are surprising in showing that most sex offenders are not mentally ill.[49]

Of the research reports from before 1960, most were compiled in response to a sensational crime, or to support proposed sex offender legislation, or they were the work of a professional who had access to a body of case reports.[50] These data sets do not conform to present standards of scientific sampling. On the other hand, any reports of actual cases provide some welcome information. The older case reports frequently document what has been alleged, perhaps stridently, by feminists advocating for reform of the law: a distrust of victims who report; an inability or unwillingness of the legal or social service community to stop or prevent the abusive behavior when it is acknowledged; and the avoidance of penalty.

One of the more thorough reports, in response to a sensational murder, the 1939 Report Commissioned by the Mayor of New York examined all sex offenses in New York City over a period of nine years. [51] The author of

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particularly significant risk factor for the development of sexually abusive behavior *toward other males.*

Judith Lewis Herman, *Sex Offenders—A Feminist Perpsective*, *in* HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 181-82 (W.L. Marshall et al. eds., 1990) [hereinafter Herman, *Feminist Perspective*] (citations omitted).

[48] *See* R. Karl Hanson et al., *Long-Term Recidivism of Child Molesters*, 61 J. CONSULTING & CLINICAL PSYCHOL. 646-52 (1993). This study examined the long-term recidivism rates of 197 child molesters released from prison between 1958 and 1974. Incest offenders were reconvicted at a slower rate than were child sex offenders who selected only boys, with offenders against girls showing a rate intermediate between these two groups. Other factors associated with increased recidivism were 1) never being married and 2) previous sexual offenses. On recidivism of sex offenders generally, see J. Michael Bailey & Aaron Greenberg, *The Science and Ethics of Castration: Lessons from the* Morse *Case*, 92 NW. U. L. REV. 1225 (1998); Lucy Berliner, *Sex Offenders: Policy and Practice,* 92 NW. U. L. REV. 1203 (1998).

[49] If the cycle of abuse theory were proven, it would be expected that women would offend at a rate of at least two or three to one because studies have replicated the skewed representation of women in studies of victims. The studies of sex offenders that do exist document their apparent normality. They fit the criteria for having "personality disorders," but not psychotic disorders that effect criminal responsibility. *See* Herman, *Feminist Perspective, supra* note 47, at 177.

[50] *See e.g.*, S. KIRSON WEINBERG, INCEST BEHAVIOR (1955). In a Preface dated 1955, the author describes this work as a study based upon 203 cases of Incest in Illinois. No dates are indicated for the cases, nor is an indication given of the source of the sample. The researcher did interview the families and the offenders. From the data available they appear to be records of all cases resulting in a conviction before a specific court, perhaps the Cook County Circuit Court, over a particular period whose limits are not specified. The cases are not identified by name or number. The basic data include: 159 of the 203 were father/daughter; 37 were brother/sister; 2 were mother/son; and 5 were combined father/daughter and brother/sister. For the fathers, 49.4% of the fathers were convicted. The case patterns described are similar to those reported in later studies. The patterns in incest cases change as large social trends affect the family: as compulsory education requires teenaged girls to stay in school; the availability of salaried jobs other than domestic service for women and girls outside of the home; changes in communication patterns; and other social and economic factors play an important role in the detection and handling of cases.

[51] The Mayor's Committee for the Study of Sex Offenses reported on the results of nine specific types of sex crimes that came to the attention of the New York City Police during the period 1930-1939.

this 1939 Report, Morris Ploscowe, later became a judge and the author of a book that was widely cited by courts in support of corroboration and resistance requirements in rape cases.[52] The book emphasized the need to protect adult men from false accusations by women and girls and for the proposition that an adult woman could not be raped if she resisted.[53] Some of the Committee's concerns are archaic: whether offenders were "native born" or "immigrants" and whether sex crimes occur more frequently in King's County. The classification of race distinguished between white males and non-white offenders including thirty-five of the yellow and red races!

Prior to the most recent political movement to redefine all sexual offenses, the view was that no data existed on Incest, and therefore the incidence must be low.[54] Research on incest cases involving boys appeared in

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See 1939 Report Commissioned by the Mayor of New York [William R. Bays, Chairman and Morris Ploscowe, Chief Clerk], [hereinafter New York City Mayor's 1939 Report] (copy on file with Northwestern University Library, Government Documents Section).

[52] *See* MORRIS PLOSCOWE, SEX AND THE LAW (1951).

[53] The factual basis for these recommendations was the New York City Mayor's Report. This Report was occasioned by the New York legislature's consideration of a sexual psychopath law. Members of the Committee included judges, parole board officials, corrections officials, the Chief of Police, doctors, and only two women out of 23! The Report recommends the passage of the sexual psychopath law. *See* New York City Mayor's 1939 Report, *supra* note 51, at 9. The study examines presentence reports for 3,295 convicted sex offenders, compiling retrospective statistics on the initial charge, conviction, and the like. For the cases from 1930 to 1939 Incest is relatively infrequent, a total of 98 cases or 3% of the total 3,295; 74% of those were convicted of a felony; 58 of the 98 Incest offenders were sent to state prison. All but 9 of the felonies were decided by pleas. A traditional Incest statute prohibiting marriage, adultery, and fornication was the statutory law. Incest and Rape or Statutory Rape were charged together in a small fraction of the cases. There was no corroboration requirement for Incest, and the Report suggests that the very strict statutory corroboration requirement for rape of adult women that was in effect at the time be instituted for crimes involving children.

[54] "Statistics on incest are not available, but its occurrence is extremely low." Hughes, *The Crime of Incest*, *supra* note 27, at 324 (quoting GERHARD MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT (1961)). Hughes comments in response: "If this is taken to refer to offenses known to the police or brought to prosecution the statement is no doubt true, but with incest the 'dark figure' of offenses that never come to the attention of the authorities is incalculable but probably extensive." *Id.* at 324-25. Hughes then goes on to cite figures from the 1930s to 1961 for England and Wales, including offenses known to the police, "persons for trial," annual averages with comparisons for rape. For example, the incest offenses known to the police from 1940 to 1944 is 101; and persons for trial is 62; whereas the offenses known to police for rape in the same period is 5,224. The offenses known to police would be the equivalent to our reports, the difference being that England and Wales would have a centralized reporting system, and in the United States each state would have its own reporting system. In England and Wales, as in some state jurisdictions, some of the rape cases would have included incest cases. *See id.*at 325. All studies note that a substantial fraction of cases that come to the attention of the police—reported offenses are not "prosecuted" or "proceeded against." *See id.* at 325 (citing *Sexual Offenses, A Report of the Cambridge Department of Criminal Science* 95). "Under this English statute a prosecution can be commenced only by the Director of Public Prosecutions or with the sanction of the Attorney General . . . ." *Id.* at 322.

response to the political atmosphere of the 1970s.[55] And there was a subsequent proliferation of commentary on Incest.[56]

IV. LOOKING FARTHER INTO THE PAST: TRADITIONAL DEFINITIONS OF INCEST IN STATE CRIMINAL CODES

State legislatures have defined all sex offenses, including Incest, in American codes. The American pattern, unlike the British tradition, was for legislatures to stipulate a crime and state the penalty within the state's penal code.[57] The legislature then declared that the definition of the offense was the common-law definition taken from Britain. Thus, Rape was a crime defined by statute in every United States jurisdiction prior to the introduction of rape reform legislation, but the statutory definition either reproduced the language of the British common-law offense or simply stated that it codified the British common-law offense. In the nineteenth and twentieth century, case law interpreted and annotated this statutory law, sometimes grafting on by statutory amendment what would be common-law defenses or interpretations under British law.

The common law of England would not have specified a criminal offense of Incest at the time when American colonial legislatures were formulating their earliest criminal statutes. Except for a brief period during

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[55] A respected study found that boys are victims if not as frequently as girls, frequently enough that their welfare should not be overlooked by those involved in public policy issues or the reform of the laws. *See* DAVID FINKELHOR, SEXUALLY VICTIMIZED CHILDREN (1979). This study reports findings from a sample of 530, of which 28% of the girls and 23% of the boys report incest. Within the nuclear family, it is 14% of the girls and 8% of the boys. *See id.* tbl.6-1 ("Sexual Experiences with Relatives or Near-Relatives"). This study prints its questionnaire and compares its findings with those of other samples. *See id.* app. A; app. B. A useful compendium is a detailed clinical history of a father daughter incest case involving repeated sexual acts beginning when the daughter is eight and then involving other male and female siblings. Although the daughter left home, and there was ample corroborative evidence, including admissions from the other siblings, the incest was never reported to the authorities or prosecuted. *See id.* app. C. The feminist literature has concentrated upon repressed memories for offenses against women. *See, e.g.*, Bowman & Mertz, *supra* note 25. Perhaps more incidents involving boys will be reported as recovered memories in the future.

[56] Incest once again became a phenomenon in the popular literature. One of the earliest and often cited reports on incidence is DIANA E.H. RUSSELL, THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN (1986). It is, however, based upon a self-selected response to a solicitation in a magazine. The sample is unreliable for statements about the incidence of incest in the general population. The report is nonetheless valuable because it details the circumstances of a large number of cases. The numerator seems reliable, even if the denominator is imprecise. There is a large, popular confessional literature, a literature of popular psychology, and a literature of self reports. *See, e.g.*, LOUISE ARMSTRONG, KISS DADDY GOODNIGHT (1978). Recently, a memoir/novel was published in which the author describes her continuing obsession with her sexual relationship with her father into adulthood. *See* KATHRYN HARRISON, THE KISS (1997).

[57] There were many inconsistencies in these codifications. The earliest criminal codification of laws in the Massachusetts Colony, for example, does not include Incest among its capital laws, which list the offenses of Idolatry, Witchcraft, Blasphemy, Murder, Poisoning, Brutality, Sodomy, and Adultery. *See* COLONIAL LAWS OF MASSACHUSETTS 128 (reprint 1889) (1660) [hereinafter 1660 COLONIAL LAWS OF MASSACHUSETTS].

Cromwell's reign in Great Britain, there was no criminal offense of Incest until 1908.[58] From its earliest colonial beginnings, American law diverged from the British tradition in defining crimes by statute, even if the definition of the offense was based upon "the common law of Great Britain."[59]

Prior to the late 1970s and the introduction of sweeping changes in the definition of all sex offenses, Incest was a statutory offense in every jurisdiction in the United States.[60] Federal jurisdiction over sex crimes and family matters generally was, until recently, very limited.[61] The relevant legal history in America is the enactment and amendment of incest statutes

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[58] *See* Victor Bailey & Sheila Blackburn, *The Punishment of Incest Act 1908: A Case Study of Law Creation*, 1979 CRIM. L. REV. 708, 708-18. The authors detail the social and political events which culminated in the passage of the Punishment of Incest Act in 1908. The Incest Act in England was passed in 1908 in response to reports of prevalence of incest among 'the poor' rather than in response to considerations of eugenics. *See id.* at 713. This dynamic between a government report followed by the enactment of 'model' legislation can be seen at several points in the century. A crime, or a government commission or report, will recommend legislation regarding the redefinition of sex offenses. In the United States there has usually been the copycat phenomenon of other states following a leading state, such as California or New York. Every state in America had defined a crime called incest before 1908.

[59] In 1798, for example, New Jersey enacted a Crimes Act that stated that it was codifying, without defining them, the "common" law offenses of Rape, Sodomy, and Incest. *See, e.g.*, Bienen, *Rape I, supra* note 4. These 1798 statutes were "penalty statutes;" they simply stipulated a penalty for an undefined offense. The common law, or case law, defined the elements of the crime. The function of these penalty statutes was radically different from the function of rape reform statutes. The statute did not define the offense. Judges and prosecutors decided whether the alleged acts constituted a sex offense, through the exercise of prosecutorial discretion and by interpreting the common law. A primary goal behind the enactment of rape reform statutes was the mandated legislative redefinition of the offense, removing discretion from prosecutors and judges. Rape reform statutes were intended to overrule and replace the common law. *See* MARSH ET AL., *supra* note 6; Bryden & Lengnick, *Rape*, *supra* note 4 (citing other sources).

[60] In 1980 after the enactment of rape reform legislation in some states, there were seven states that did not define a crime called Incest. *See* JUDITH HERMAN & LISA HIRSCHMAN, FATHER-DAUGHTER INCEST 219-59 (1981) (chart of state incest statutes); *see also* Josephine Bulkley, *Analysis of State Legislation Providing Criminal Penalties for Sexual Abuse of Children* (1992); *Child Sexual Abuse and the Law, A Report of the American Bar Association National Legal Resource Center for Child Advocacy and Protection* 21-49, 67-80 (Josephine Bulkley ed., 1981); M. Daughtery, *The Crime of Incest Against the Minor Child and the States' Statutory Responses*, 17 J. FAM. L. 93 (1979-80).

[61] The federal criminal code defined Incest as an offense for Indians. *See* 18 U.S.C.A. § 1153 (1966 & Supp. 1981); 18 U.S.C.A. § 3242 (1969). Prior to 1966 the federal criminal code specifically stated that rape shall be defined in accordance with the laws of the state in which the offense is committed, but no such explicit reference was made to the corresponding state incest laws. A prosecution for father-daughter incest in an Indian jurisdiction was dismissed because the statutory section prohibiting incest lacked definition and a proscribed penalty, and was therefore unenforceable. *See* Acunia v. United States, 404 F.2d 140 (9th Cir. 1968). A 1966 federal amendment thereafter stated that "incest shall be defined and punished in accordance with the laws of the state in which such offense was committed as are in force at the time of such offense . . . ." 18 U.S.C.A. § 115.3 (Supp. 1981). Courts did not consider it their duty to define crimes. The duty of the appellate court was to interpret or clarify an already existing standard, for consent, or a defense of excuse or mistake. Only recently with the enactment of child pornography statutes and national laws regarding sex offender reporting has the U.S. Congress enacted laws defining or regulating sex offenses. *See* discussion in Janus, *supra* note 37; Perlin, *supra* note 37.

in state criminal codes and the related civil statutes prohibiting marriage between designated relatives.[62]

The law in the individual states was like the British common-law system, however, in so far as case law defined the elements of the offense, for example the defense of consent.[63] However, the American tradition was unlike the British law in that statutory changes crept into the law, ostensibly codifying the common law, but soon taking on a life of their own. Then the case law became an interpretation not of the common law, but of the statutory language of these ad hoc amendments. This is important to understanding incest cases under traditional statutes and the jurisprudence that grew up around them.

Because there was no common-law British offense of Incest to adopt, state legislatures either codified what they believed was the British canon law offense of Incest or codified the Biblical incest prohibition from Leviticus.[64] American legislatures created a hybrid civil-criminal statute that simultaneously prohibited sexual intercourse in all of its variations and nomenclatures—fornication, adultery, carnal knowledge—and marriage between relatives.[65] Once having passed such a statute, it was not clear what could or should be done with it as a vehicle for criminal prosecution. Crimes that address sexual behavior have ambiguities and contradictions. The jurisprudence that grew up around state incest statutes however was bizarre.

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[62] In the majority of states a single statute will prohibit and penalize sexual intercourse and marriage between designated relatives. These are the statutes I refer to as "traditional incest statutes." Some states will separate the two offenses, or have a duplicate marriage provision in the civil code. But the typical incest offense that was written into state criminal codes in the eighteenth or nineteenth century is a statute simultaneously prohibiting marriage and sexual intercourse between relatives. *See, e.g.*, PA. STAT. ANN. tit. 18, § 4304 (West 1997) (prohibiting marriage and sexual relations). *Cf.* TEX. PENAL CODE ANN. § 25.02 (West 1994) (prohibiting sexual relations); TEX. FAMILY CODE ANN. § 2.21 (West 1994) (prohibiting marriages).

[63] For a history of the consent standard in rape cases, see Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919 (1973); *see also* Carol Pateman, *Women and Consent*, 2 POL. THEORY 149 (1980).

[64] In England incest was originally exclusively in the jurisdiction of the ecclesiastical courts. It was given a statutory form in the Punishment of Incest Act of 1908, and is now to be found in the consolidating enactment, the Sexual Offences Act, 1956. *See* 4 & 5 Eliz. 2, ch. 69. For a history of the law in Great Britain, see Hughes, *The Crime of Incest*, *supra* note 27.

[65] There were codifications of incest under ancient and non western codifications. *See, e.g.*, Laws of Hammurabi § 154, at 110, *in* MARTHA T. ROTH, LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR (1995) ("If a man shall carnally know his daughter, they shall banish that man from the city.") [hereinafter LH]; LH, *supra*, § 157, at 111 ("If a man, after his father's death, should lie with his mother, they shall burn them both."); *see id.* §§ 155, 156 (governing a man who selects a bride for his son and then lies with her [in other words regulations prohibiting a kind of droit to seigneur for your son's wife]); Calum Carmichael, *Incest in the Bible*, 71 CHI.-KENT L. REV. 123 (1995).

A. The Diction of Traditional Incest Statutes

An expressive example of early American statutory law is a statute enacted in 1779 in Vermont.[66] The 1779 Vermont statute defines incest as marriage and carnal copulation between persons of prohibited degrees of relationship and is titled: "An act for the punishment of incest, and for preventing incestuous marriages." The Vermont statute does not define the offense; it simply declares Incest is an offense.[67]

There is a noteworthy syntactic disjunction in the linguistic structure of the Vermont statute. The statute addresses itself primarily to criminalizing the behavior of men. The penalties of corporal punishment and stigmatization, however, apply to both women and men.[68] The statute mixes civil and criminal provisions. The statute proscribes criminal punishment, declares marriages void and regulates descent and distribution. The statute is more comprehensive than most traditional statutes not only in its stipulation of a corporal and a symbolic penalty but also in addressing descent and distribution. Subsequent incest statutes confined themselves to stipulating, without defining, an offense, and announcing the penalty.

The punishment is striking. Not only shall offenders be set upon the gallows and whipped, but "also, every persons so offending, shall, forever after, wear a capital letter, 'I,' of two inches long, and proportionable bigness, cut out in cloth of a contrary color to their cloths [sic] and sewed upon their garments, on the outside of their arm, or on their back, in open view. . . ." Inferences about legislative intent can be drawn from both the prohibited behavior and the consequences imposed by the State.[69]

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[66] *See* Vermont State Papers: Being a Collection of Records and Documents, compiled and published by (William Slade, Middlebury, Vt. 1823) (Laws of Vermont, Laws passed February, 1779) [hereinafter Vermont State Papers (1779-1786)]. The legislature which passed the Incest statute accomplished a complete revision of the statutory law in 16 days, including the banishment from the state of 100 named persons. *See* HENRY STEELE WARDNER, THE BIRTHPLACE OF VERMONT: A HISTORY OF WINDSOR TO 1781 (1927). The legislature was made up of one or more members of each of the towns, elected by the freemen of the towns. "The session of the General Assembly established the common law, as 'generally practised and understood in the New England states,' as the common law of Vermont." 2 WALTER HILL CROCKETT, VERMONT-THE GREEN MOUNTAIN STATE 227 (1921). Statutes ranged from all crimes, the basic laws of inheritance, taxes, gaols (prisons), regulation of boundaries, and special statutes regarding farming and boats and forests. *See* 12 LAWS OF VERMONT (Allen Soule ed., 1964). The incest statute was taken from a Connecticut formulation of 1715. *See* Acts and Laws of Connecticut, Laws of 1715. Its adoption in Vermont was apparently a side effect of a political compromise over territorial boundaries. The 1715 Connecticut statute may be the first colonial law defining Incest.

[67] What the society is willing to name or speak of in different periods is as telling as the penalties imposed. Historically, the offense of sodomy was not even referred to by name. *See* Act of May 31, 1718, ch. 236 [1896] III PA. STAT. AT LARGE, from 1682-1801 (discussed in Bienen, *Rape I*, *supra* note 4, at 49 nn.51-58. The commentator to this statute refers to sodomy as "S ____y" or "B____y," also referred to as the "unspeakable" crime against nature. *See* Bienen, *Rape I*, *supra* note 2, at 49.

[68] Women in colonial society would have had limited liability for criminal offenses.

[69] The 1779 Vermont laws were enacted "as they stood on the Connecticut law book" and are described as the first "essay" at legislation by the government of Vermont. The 1779 compilation was

The 1779 Vermont statute prohibited "acts" of marriage and "Carnal Copulation" between family members. The penalty for engaging in such marriages or carnal copulations was in part forbidding the children of such unions to inherit. This punished both the offending parents and the children who had committed no criminal act nor engaged in offending sexual behavior themselves.[70] Perhaps in 1779, as later, Incest was discovered when a pregnancy occurred. The penalties of restraint (being placed in the stocks) applied to both parties, although the statute only spoke in terms of prohibiting sexual behavior of men.[71]

The fact that both parties were punished publicly implies that both were considered responsible and both were pronounced guilty. The penalty was in part a penalty of shaming. Incest was not seen as an offense in which adults sexually abused children. The corporal penalties were not unusual in that period and there was an important symbolic penalty: the wearing of the letter "I."

Incest was not punished with permanent stigmatization. The crime of Adultery in the same 1779 Vermont compilation called not only for the wearing of the letter "A" but also that "both of them" shall be "stigmatized, or burnt on the forehead with letter 'A', on a hot iron."[72] Presumably Adultery was considered a more serious offense, more reprehensible than Incest, because the penalties specified are more severe and the stigmatization, the branding, is permanent. As in the present period, the passage of statutes may have been driven by immediate social and political concerns, the urgency of which is later forgotten, while the statutes remain as a record of a symbolic position taken by some people at some time and place.[73]

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based upon the "temporary" laws of 1778 for which no record remains. *See* Vermont State Papers (1779-1786), *supra* note 66, at 1.

[70] Presumably without this statutory prohibition, the children of incestuous unions would not have been necessarily prevented from inheritance, because some bastards were permitted to inherit in some circumstances.

[71] The language is very specific:

> ". . . that no man shall marry . . . . And if any man shall hereafter marry. . ." but "that every man and woman. . . shall be set upon the gallows . . . . Also, every person so offending, shall forever after, wear a capital letter I. . . and if any person or persons, . . . shall, at any time, be found without their letter so worn . . . ."

Vermont State Papers (1779-1786). The suggestion is that repentance was a principal objective of the punishment.

[72] *See* Vermont State Papers (1779 to 1786), *supra* note 66, at 290:

> "An act against, and for the punishment of adultery. . . .*both of them* shall be severely punished by whipping on the naked body, not exceeding thirty nine stripes, and stigmatized, or burnt on the forehead with the letter A, on a hot iron; and *each of them* shall wear the capital letter A, on the back of their outside garment, of a different colour [sic], in fair view, during their abode in their State. . ."

Id. (emphasis added). The next gradation of seriousness in punishment was banishment.

[73] Linda Kealey studied indictments in the Superior Courts of Massachusetts between 1750 and 1796, the period surrounding this statute, and found only 4.3% of all indictments were for "moral and sexual offenses," including fornication, adultery, incest, blasphemy, swearing and sabbath violation.

Although the 1779 Vermont statute provided a seemingly harsh penalty for incest, it did not stipulate the death penalty, that was the penalty for common law felonies in England at the time and for many crimes in America in the colonial period.[74] Even if hanging for such offenses was rare, the symbol of the most serious sanction is expressive.[75] Stipulating an offense announces what lawmakers officially prohibit. The specification of penalties is a telling indication of how the crime is regarded. A crime may be defined in language replete with moralistic indignation, but if the penalty is low or slight relative to other crimes, the moral indignation of the language is merely rhetorical. An emphasis on morality may be accompanied by a lack of specificity in the delineation of the offenses, a characteristic noted in later statutory formulations.[76] In this set of criminal statutes, Incest required punishment but apparently Adultery was considered to be a more serious crime.[77]

Linda Kealey, *Patterns of Punishment: Massachusetts in the Eighteenth Century*, 30 AM. J. LEGAL HIST. 163, 169 (1986). Lawrence Friedman argues that enforcement of crimes of 'morality' was always minimal. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 42, 128 (1993).

[74] Death was and is the most severe criminal penalty, although a death sentence was not always carried out. *See* J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 450 (1986); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources*, 50 U. CHI. L. REV. 1, 36-37 (1983) (while in theory, all felonies in England in the mid-1750s were punishable by death, in reality criminals were commonly transported to America as punishment).

[75] The 1779 Vermont codification specified death as the punishment for rape. *See* Vermont State Papers (1779 to 1786), *supra* note 66, at 292. There was no alternative or lesser penalty proscribed. Similarly the 1660 compilation of Massachusetts laws specifies as the penalty for rape: "death, or some other grievous punishment, according to circumstances, as the judges, or general court shall determine." 1660 COLONIAL LAWS OF MASSACHUSETTS, *supra* note 57, at 129. This rape statute was passed in 1649. The 1660 Colonial Laws of Massachusetts also list death as the penalty for adultery: Both adulterer and adulteress "shall surely be put to death . . . ." *Id.* at 128. (citing Leviticus as the source of law). Sex offenses were not the only crimes whose source of law was attributed to the Bible. The same 1660 Massachusetts compilation defines an offense of being a "stubborne or Rebellious Son," and fixes the penalty for such an offense at death. *Id.* at 129 (citing Deuteronomy 20, 21, 22 as the source of law).

[76] For a discussion of the offenses of Impairing the Morals of a Minor and Lewdness, see *supra* note 42 and *infra* note 250. These offenses tended to specify no specific prohibited acts. Consequently Impairing the Morals of a Minor was added as a count to any offense committed by an adult with an accomplice under the age of 21.

[77] *See* Act of December 7, 1682, ch. 9 (1682), *in* Charter to Wm. Penn & Laws of the Province of Pennsylvania 110 (1879) (sodomy statute, repealed 1693):

> That if any person shall be Legally Convicted of the unnatural sin of Sodomy or joining with beasts, Such person shall be whipt, and forfeit one third of his or her estate, and work six months in the house of Correction, at hard labour, and for the Second Offense, imprisonment, as aforesaid, during life.

Id., *cited in* Bienen, *Rape I*, *supra* note 4, at 48 n.33. This was an all-fronts punishment: corporal punishment to the body; forfeiture of property; a sentence to work at hard labor; for a second offense imprisonment. Banishment, however, was a more serious penalty. *See* Friedman, *supra* note 73, at 40.

> A statute enacted in 1700 in the province of Pennsylvania punished 'rape' or 'ravishment' with a public whipping (31 lashes on his bare back, well laid on) and seven years imprisonment at hard labor, and if unmarried he shall forfeit his estate . . . . For a second offense, he shall suffer castration and be branded with the letter R on his forehead.

The public character of the whipping, the wearing of the "I," and putting offenders in the stocks served a social purpose beyond punishing the individuals. Not only are the offenders to suffer personal corporal punishment, pain, and scarring of the body, but this punishment and humiliation is to be witnessed by the community and acknowledged publicly by the offender. Confessions and recantations were part of the ritual.

Designating as punishment the wearing of the letter "I" implies that stigmatization and notification were as important as the infliction of personal bodily pain or the deprivation of property rights. For these lawmakers, punishment was not something to be suffered alone in a hidden cell. Punishment was public. The community was harmed by the offense, and the social fabric must be repaired by a public, theatrical event in which the community participated.[78] Executions were public, and usually held in the town square where everyone, including children, were called to witness them.[79]

This type of public punishment contrasts strongly with the traditions surrounding sex crimes that developed subsequently: that sex offenses were to be prosecuted behind closed doors, that family court proceedings were not open to the public, that the names of rape victims were not to be disclosed or published, and that the treatment and terms of incarceration for sex offenders were not subject to public review or discussion.[80] The law has now come full circle, with the current statutes requiring the "publication" of the names of released sex offenders that results in demonstrations outside of the houses of released offenders.[81]

The Vermont 1779 statute is not the earliest Incest statute in an American colonial jurisdiction. The Connecticut General Court, which functioned as a colonial legislature, compiled a body of laws that included a crime

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Bienen, *Rape I, supra* note 4, at n.39 (citing An Act Against Rape of Ravishment, Nov. 27, 1700). This 1700 enactment in Pennsylvania also prohibited Incest. *See id.* In 1700 in Pennsylvania different penalties were specified for Negroes, and that offense could only be committed upon a "white woman or maid." *Id.*

[78] *See* Natalie Davis, *The Return of Martin Guerre* (1983), and commentary on the role of the law as archivist in Leigh Buchanan Bienen, *The Law as Storyteller*, 98 HARV. L. REV.494 (1984) (book review). The records of the time describe Martin Guerre being paraded through the street prior to his execution, confessing and repenting.

[79] New Jersey had public executions until 1906. "[The] revolting spectacle of a man slowly strangling to death at the end of a rope should be relegated to the Dark Ages as fast as possible . . . ." Editorial, N.J. L.J. (supporting legislation introducing electrocution and centralizing executions), *cited in* Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey*, 41 RUTGERS L. REV. 27, 58, n.96 (1988).

[80] As with the death penalty, traditions of secrecy surrounding the prosecution and punishment of sex offenders differs from generation to generation and decade to decade. There were periods when sex offenses were not reported in the newspapers and the names of rape victims were not published. During other times enormous public outcry accompanied the prosecution of a sex offender, particularly if the victim was a child. *See* Report of Mayor's Task Force, *supra* note49. *See* Denno, *supra* note 30; Janus, *supra* note 37.

[81] *See, e.g.*, Wright, *supra* note 31 (describing the public outcry at the release of Donald Chapman).

called Incest in 1650.[82] The act constituting the offense was "Carnal Copulation," presumably heterosexual intercourse. The prohibited degrees of relationship were relatively limited. Death was the stipulated penalty for Incest.[83] The penalty of death was for both parties. The same statute prescribed the death penalty for the crimes of Idolatry, Blasphemy, Witchcraft, Murder, Bestiality, Sodomy, Rape, Manstealing (slave stealing); False Witness; Conspiracy (Treason); Willful Firing of a dwelling house (Arson); Children who curse or smite their parents; and being a Rebellious son. All capital statutes in this codification cite to biblical sources.[84]

As to legislative purpose, the preface to the 1650 Connecticut compilation makes explicit reference only to the necessity for establishing wholesome laws, mentioning obedience to Jehovah the great lawgiver, invoking the authority of the Bible and the General Court of Connecticut.[85] Leviticus is cited as the source of the Connecticut incest statute, although the formulation of the offense differs from the formulation found in the Old Testament.[86]

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[82] The Code is called Ludlow's Code, probably because Mr. Ludlow drafted the entire code. The formulation of the offense in the Ludlow Code of 1650 is as follows:

> Incest. ss.8. If any Man shall lye with his Mother, or Fathers Wife, or Wives Mother, his Daughter or Daughter in Law, having Carnal Copulation with them, both of them have committed abomination, they both shall be put to death, except it appear that the Woman was forced, or under *fourteen years* of age, Levit. 20.11, 12, 14, and 18, 7.8, etc.

The Laws of Connecticut, and exact reprint of the Original edition of 1673 Hartford, Conn. 1865, *Capital Laws of the Connecticut Colony*, at 9(emphasis added) [hereinafter Ludlow's Code of 1650, Capital Laws].

[83] Avoidance of the death penalty through provisions such as "the benefit of clergy" saved from death anyone who could read and later even larger categories of offenders sentenced to death. *See* Friedman, *supra* note 73, at 41-43.

[84] The definitions of sodomy and rape in Ludlow's Code of 1650 also mention force. The sodomy statute includes a statutory age of 15; the rape statute mentions no statutory age. *See* Ludlow's Code of 1650, Capital Laws, *supra* note 82, at 9.

[85] *See* "Laws of Connecticut, an exact Reprint of the Original Edition of 1673, Prefatory Note, vvii, pa. 2 [hereinafter Prefatory Note]. An edition of 500 copies of the laws were printed and distributed in 1654, and this edition was referred to as Ludlow's Code of 1650. In 1672 a printed and revised edition was offered by Samuel Green at Cambridge, then the only place in North America where a printing shop was established. A facsimile of this edition is reproduced in the 1865 republication.

[86] The prohibition in Leviticus did not refer to acts of sexual intercourse. The Biblical terminology is usually translated as "uncover the nakedness." 18 *Leviticus*. Many of the surrounding prohibitions in Leviticus address diet and forbidden types of clothing. These provisions resemble rituals of purification and expiation more than a prohibition on sexual behavior, or a concern with inbreeding or genetic purity. *See* MARY DOUGLAS, PURITY AND DANGER 42-58 (1966). Leviticus makes no reference to 'sexual relations' between father and daughter. That relationship is not included within the list of prohibited relationships in Leviticus. The Hittite Laws, on the other hand, define father-daughter incest as a capital offense:

> If a man violates his own mother, it is a capital crime. If a man violates his daughter, it is a capital crime. If a man violates his son, it is a capital crime . . . . If a man violates his stepmother, there shall be no punishment. [But] if his father is living, it is a capital crime.

"The Hittite Laws," *in* ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT 196, §§ 189-190 (James B. Pritchard ed. & Albrecht Goetze trans., 1950) sections 189, 190 at p. 196.

The statutory language has another feature rarely seen in twentieth-century statutes. It was intended to be understood. The Preface to Ludlow's Code in colonial Connecticut in 1650 says that the practice was for the statutes to be read out in public town meetings.[87] It is not surprising that these statutes sound like sermons. That is how they were delivered to the citizens, the majority of whom could not read. The hortatory character of these statutes is noteworthy. The language of fire and brimstone served a purpose before a single offense was committed, reported, or punished.

The nature of the punishment specified in the 1779 Vermont statute and in the Connecticut colonial statutes must be seen in context. Corporal punishment was commonplace. Prison terms were a rarity in the colonies.[88] Branding and burning with a hot iron, now regarded as barbaric and tortuous, were relatively lenient penalties in a society that stipulated death for Adultery and other sex offenses and for minor property crimes. The variety of penalties raises the question of who inflicted the penalties? Could "citizens" impose beatings or exact the hard labor? If there were few or no prisons, who had the power to carry out the penalties? Comparing criminal penalties among offenses and across states is relevant to the analysis of the present formulations of incest as well.[89] The multiplicity of laws governing incestuous behavior impose punishments which vary markedly from one set of laws to another. Choice of law and the legal definition of the offense within the statutory law is not only an ideological or philosophical question, it may determine the length and character of the penalty, or whether the offense is prosecuted at all.

The definition of Incest in Ludlow's Code of 1650 is atypical of later traditional statutes.[90] Marriage is not prohibited, only carnal copulation.

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[87] Although the "Body of Laws" was compiled in 1650, they were not printed until 1655: "the General court ordering to them to be 'published' by the Constables of the several towns, which was done by reading manuscript copies to the people assembled in Town-meetings." Prefatory Note, *supra* note 85, at vi. The legislative history reprinted with the Connecticut laws of 1865 contains a sparse note from the original edition of 1673, indicating that the Planters of Connecticut, who may have passed the first Incest statute in America, were principally concerned with writing a constitution and establishing hegemony over the New Haven Colony. The estimated colonial population for Connecticut in 1640 was 2,000. *See* U.S. CENSUS BUREAU, A CENTURY OF POPULATION GROWTH FROM THE FIRST CENSUS OF THE UNITED STATES TO THE TWELFTH, 1790-1900, at 9 (1909).

[88] Atypically, in the 1779 Vermont codification the punishment for Lascivious Carriage and Behavior provided for "a fine on them, or by committing them to the house of correction, or by inflicting corporal punishment on them, according to the nature and aggravation of the offense . . . ." Vermont State Papers (1779 to 1786), *supra* note 66, at 290.

[89] Many states define crimes for sexual abuse of children that were replete with moralistic language, but the penalties are minimal. And whatever the penalty specified, if there are no prosecutions under the statute, then the stipulation of a serious penalty must be interpreted differently. *See* Chart, *infra* (comparing penalties across states).

[90] Peter Bardaglio notes that in Southern states the ecclesiastical law of the Church of England was the source of the degrees of prohibited relationships, drawn up in the Table of Degrees by Archbishop Parker in 1563. *See* Peter Bardaglio, *An Outrage Upon Nature: Incest and the Law in the Nineteenth-Century South*, *in* JOY AND SORROW: WOMEN, FAMILY AND MARRIAGE IN THE VICTORIAN SOUTH 35

Second, the Connecticut statute specifies a very limited number of relationships. Third, it mentions force and a statutory age for the woman. This definition of Incest resembles formulations of rape in nineteenth-century codes.

The Connecticut Acts and Laws of 1715 include a very different definition of Incest than Ludlow's Code of 1650.[91] The 1715 Connecticut statute is essentially identical to the 1779 Vermont statute, and both differ significantly from the 1650 formulation in Connecticut. These are "marriage" statutes. Their primary thrust appears to be the preservation of the lineal purity of the marriage relationship, although the prohibited relationships are not all consanguineal.[92]

At the end of the twentieth century, state statutes retain definitions of incest that incorporate many features of these colonial statutes. The traditional definition of incest in state criminal codes typically includes a prohibition against marriage, sexual relationships and/or cohabitation between persons within a specified familial relationships, and the announcement of a penalty for these offenses. The prohibited familial associations include relationships by marriage or adoption, as well as blood ties. The prohibition

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(Carol Blaser ed., 1991) (discussing incest cases reaching the high courts of southern states). "In the Anglican South colonial statutes required that every parish display Parker's Table." *Id.* The Anglican tradition was also the source of the rule that only the church could annul a marriage; thus the American colonies wrote in the rule saying these unions were void. Bardaglio argues that appellate opinions provide a window on the ambivalence and anxiety generated by incest. This research identifies 49 incest cases that reached the southern high courts between 1800 to 1900, of which 80% involved older men and young girls and 30 were fathers and daughters or stepdaughters. The information gathered on all appellate cases decided by southern high courts from 1865-1899 indicate that appellate courts decided 37 incest cases and 20 miscegenation cases. The similarity in the numbers of incest cases and miscegenation cases is intriguing. As elsewhere "technical" defenses, such as the recognition of accomplice liability, excused patriarchal offenders. The essay includes a useful analysis of the marriage provisions in southern statutes, pointing out that southern traditions permitted the marriage of first cousins and some other relations.

[91] *See* Connecticut Acts and Laws of 1715, "An Act to Prevent Incestuous Marriages . . . ", at 74.

[92] The 1715 Connecticut statute, or a later version of a similar offense, was probably the source of the 1779 Vermont statute. *See* Introduction, Laws of 1779 ("[T]he same laws were passed that were in the Connecticut law book (1769 edition) with few exceptions;"); Laws of Vermont [12 State Papers of Vermont] at 35 (Allen Soule ed., 1964). There are minor discrepancies between the two statutes. The Connecticut statute specifies 28 prohibited relationships; the Vermont statute specifies only 21. Vermont omits and Connecticut includes the following eight prohibited relationships: mother's brother's wife; wife's father's sister; wife's mother's sister, sister; brother's wife; wife's sister; wife's brother's daughter; wife's sister's daughter. The Vermont statute has only one category of relationship omitted by Connecticut: sister's son's daughter. The Vermont statute provides for 39 stripes at the gallows; the Connecticut statute stipulates 40. This detailed enumeration of the prohibited relationships argues that the nature of the relationship, not the sexual behavior, or its possibly exploitative or abusive character, was the harm to be punished or prevented. The incestuous relationship resulted in a threat to the social order and thus it was necessary to specify exactly the prohibited relationships. Each state defined its own set of prohibited categories. The Connecticut statute states that the letter "I" shall be "sewed" upon their upper Garments, on the outside of their Arm, or on their Back in open view. The Connecticut statute has an additional provision stating that Incest shall not only receive the special penalties enumerated, but they shall be punished as Adulterers.

against Incest is rooted in part in prohibitions against inbreeding. The very detailed and specific definitions of the relationships stipulated reflect that social goal. The fear of inbreeding does not explain, however, the inclusion of step relationships or distant in-laws.

B. The Implications of the Language and Structure of Traditional Statutes

These traditional Incest statutes resemble pollution rules that strictly set out punishment and the social consequences for prohibited behavior, and then specify what needs to be done to purify the community and maintain the social order.[93] Interestingly Leviticus, which incorporates the incest prohibition, is concerned with food taboos and setting out elaborate prohibitions and restrictions on everyday functions, such as eating, drinking, and the wearing of wool and other clothes, rules that have nothing to do with sexuality. Purification rituals expiate the sin, guard against the wrath of the gods, and prevent the gods from taking revenge when they discover the forbidden has occurred.[94] Punishment is not to reform or educate the offender. It is to appease the gods.

The inclusion of in-laws and distant relations in the Connecticut and Vermont Codes can be understood by seeing the colonial family as a patriarchal, property-based clan system. Affinity is not only a blood relationship, but includes kinship based upon marriage. Marriage was the mainstay of this social system, defining all other relationships. Marrying your wife's cousin by marriage is prohibited not because it would be inbreeding, but because it would confuse an existing, rigidly structured, kinship relationship with your wife's family. Marriage and the legitimacy of children had and continue to have significant consequences for the ownership of property and title to land. Wealth and stature in the community was based upon ownership of land. The marriage of in-laws would confuse the lines of inheritance and ownership of land and had to be prohibited.

Considered as a set of rules maintaining a social structure based upon marriage, rather than as laws regarding the sexual abuse of children, including descent and distribution and the ownership of land within the incest prohibition makes sense. In the eighteenth century, divorce was rare or nonexistent. People who owned property stayed in one place for their entire lives. Maintaining clarity in the ownership of land and family relationships

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[93] *See* MARY DOUGLAS, PURITY AND DANGER (1966).

[94] Mary Douglas' discussion of the interplay between pollution rules and the application of principles to the individual case with regard to adultery and incest is especially relevant here:

> Pollution rules, by contrast with moral rules are unequivocal. They do not depend on intention or a nice balancing of rights and duties. The other material question is whether a forbidden contact has taken place or not . . . . However as we look more closely at the relation between pollution and moral attitudes we shall discern something very like attempts to buttress a simplified moral code in this . . .

DOUGLAS, *supra* note 93, at 130-31.

was the primary goal. In traditional statutes, the prohibited relationships focus upon close ties of affinity, marriage, or consanguinity.[95]

Traditional statutes in late eighteenth- and early nineteenth-century codes turn into different kinds of statutes, although they remain concerned with the regulation of marriage and the prevention of inbreeding.[96] In the later nineteenth century, the provisions for stigmatization and corporal punishment, with their suggestion of purification and expiation, disappear. Incest as an offense against marriage, a threat to the civil and social order, remains although the provisions governing descent and distribution fall away.[97] Vestiges of the provisions regarding property can be seen in references to marriages being void in the traditional statutes. In the twentieth century, patterns of prosecution changed.

Traditional incest statutes rarely specify an intent requirement.[98] The absence of an intent requirement, the lack of a distinction between crimes involving children and those involving adults, and lack of any reference to force and non consent, all suggest that traditional statutes were not designed to address "sex crimes," assaultive offenses against the person, as that category would be understood in the late twentieth century. The intent requirement, when it is specified, is a "knowledge of the relationship," being informed of the "fact" of the relationship, emphasizing the quasi-criminal character of the statute.[99]

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[95] The colonial statutes do not make the distinction between "criminal" behavior and other forms of prohibited behavior. Mary Douglas gives examples of how the Nuer treat incest and adultery, and how the culture punishes or excuses these relationships. They distinguish between "serious" acts of incest and "mistakes" that are basically harmless, although they require expiation. *See* DOUGLAS, *supra* note 93, at 130. The anthropological literature on incest encompasses kinship, sexual relations, and many aspects other than the "criminal," which is the subject of this paper. *See, e.g.*, CLAUDE LEVI-STRAUSS, ELEMENTARY STRUCTURES OF KINSHIP (1969); *see also* G. Lindzey, *Some Remarks Concerning Incest, the Incest Taboo, and Psychoanalytic Theory*, 22 AM. PSYCHOLOGIST 1051, 1051-59 (1967). A whole other dimension is raised by theories founded on animal behavior. *See, e.g.*, D. Schneider & J. Spahler, *The Incest Taboo and the Mating Patterns of Animals*, 65 AM. ANTHROPOLIGIST 253, 253-65 (1963).

[96] The prohibition against miscegenation is similarly motivated. *See, e.g.*, Peter Bardaglio, *supra* note 90 (the prosecution of incest is at about the same level as miscegenation in southern states, if the measure of which cases reach the highest courts is an indication of the relative level of prosecutions).

[97] Many criminal statutes continue to cross reference the civil prohibitions regarding marriage. Some incest statutes include the alternative of a civil fine.

[98] *See* California, Chart, *infra*.

[99] Because of the *mens rea* requirement for crimes, 21 states with traditional statutes require proof of knowledge of the prohibited relationship. *See, e.g.*, IND. CODE ANN. § 35-46-1-3 (Michie Cum. Supp. 1977) (Incest; "A person over 18 who engages in sexual intercourse who *knows* the other person is a parent . . . ."). For what might be termed the Tom Jones loophole, see IOWA CODE ANN. § 726.2 (West 1979 Pamph) (Incest; "A person who has sexual intercourse with a person whom he or she *knows* to be related, either legitimately or illegitimately . . . ."); *see also* ALA. CODE § 13A-13-3 (1977) (Incest); ARK. CODE ANN. § 41-2403 (Michie 1977) (Incest); COLO. REV. STAT. ANN. § 18-6-301 (West 1978 Rpl.) (Incest); CONN. GEN. STAT. ANN. § 53a-191 (West 1972) (Incest: Class D Felony); D.C. CODE ANN. § 22-1901 (1973) (Definition and Penalty [Incest]); KAN. STAT. ANN. §§ 21-3602, 21-3603 (1974) (Incest and Aggravated Incest); KY. REV. STAT. ANN. § 530.020 (1975 Repl.) (Incest); ME. REV. STAT. ANN. tit. 17A, § 556 (West 1979 Pamph) (Incest); MD. ANN. CODE art. 27, § 335 (1976 Repl.)

If the intent requirement is a knowledge of the relationship requirement, then is there a defense of mistake of fact? A mistake of fact defense makes sense in terms of doctrine if the "crime" is unknowingly marrying or having sexual relations with a person unknown to be within a prohibited degree of relationship.[100] The person must only have knowledge of the prohibited relationship. What you must know to have the requisite intent—the nature of the relationship—is the essence, or gravamen, of the offense. An intent to commit a criminal assault, Rape, or the sexual abuse of a child is not required if protection of the social order through the institution of marriage is the purpose of the statute. If traditional incest statutes are designed to uphold a property-based kinship system based upon marriage, then the individual's actual knowledge of the prohibited relationship is irrelevant.[101] The nature of the defenses recognized or created by statute express the social purpose behind criminalizing the behavior.

In the nineteenth century, the intent requirement for incest became mixed up with the intent requirements for statutory rape and rape itself. Incest cases came to be prosecuted under the statutory rape laws. In statutory rape statutes it was knowledge of the prohibited age that was part of the intent requirement, as knowledge of the prohibited relationship was the knowledge requirement for incest.

Incest was usually placed with fornication, adultery, and bigamy under a section of the criminal code titled "crimes against morality."[102] These

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(Carnal knowledge of another within degrees of consanguinity within which marriages prohibited); MO. REV. STAT. § 568.020 (1979) (Incest); MONT. REV. CODE ANN. § 45-56-13 (Smith 1979) (Incest); N.H. REV. STAT. ANN. § 639.2 (West 1997); N.Y. PENAL § 255.25 (1977) (Incest); OR. REV. STAT. § 163.525 (1977) (Incest); PA. STAT. ANN. tit. 18 § 4302 (West 1973) (Incest); UTAH CODE ANN. § 76-7-102 (1978 Repl.) (Incest); WASH. REV. CODE ANN. § 94.64.020 (West 1977) (Incest); WIS. STAT. ANN. § 944.06 (West Supp. 1979-80) (Incest); WYO. STAT. ANN. § 6-5-102 (Michie 1977) (Incest).

[100] Mary Douglas gives examples of how the Nuer have a purification ritual for when someone commits "incest;" that is, marrying within the prohibited degrees of relationship, "by mistake." And indeed it is easy for such mistakes to occur within a complicated lineage system where ethnic groups live in close proximity and have overlapping family relationships. Such mistakes are easily excused and not taken seriously. *See* DOUGLAS, *supra* note 93, at 131.

> Nuer attitudes to the contact which they consider dangerous are not necessarily disapproving. They would be horrified at a case of incest between mother and son, but many of the relationships which are prohibited to them arouse no such condemnation. A little "incest" is something which could happen between the best of families at any time . . . . The integrity of the social structure is very much at issue when breaches of the adultery and incest rules are [violated,] for the local structure consists entirely of categories of persons defined by incest relations, marriage payments and marital status.

Id. at 131. Perhaps the situation was not very different in colonial Connecticut.

[101] When a mistake of fact defense is recognized as a mistake of fact as to consent, for example, in a rape case, a very different conceptual framework is operating. *See, e.g.*, Leigh Bienen, *Mistakes*, supra note 4, at 224 (1978) (discussing the court's recognition of mistake of fact as to consent in People v. Mayberry, 542 P. 2d 1337 (Cal. 1975) and Director of Pub. Prosecutions v. Morgan, 2 All E.R. 347 (1975)). Minnesota keeps mistake as to age as an affirmative defense. *See* Minnesota, Chart, *infra*.

[102] *See e.g.*, The Penal code of New York 129 §§ 341-344 (Albany 1865). When incest is grouped with "Offenses Against Chastity" or "Offenses Against Morality" the offenses typically include

were criminal statutes in so far as they specified the criminal penalty of imprisonment, but the harm to be prevented was not harm to the person. The titles given to these groups of offenses, and the penalties or sanctions, is expressive of how the offenses were regarded. This just is as true today as it was in 1779.

Placing the redefined crime of incest within the rape reform statute, as a subcategory of the most serious sex offense, was a symbolic declaration that Incest was an abusive crime against the person deserving a harsh penalty not a statute regulating marriage.[103] When Incest was placed in a chapter or section with laws prohibiting miscegenation, the implication was that legislators regarded these offenses as similar.[104]

Rarely is legislative intent stated as directly as when Alabama, in 1977, revised its definition of Incest. Interestingly, the purpose behind this recodification was stated to be a mix of the traditional prohibitions against "impure" marriages, and a prohibition of abusive relationships within the family.[105] One marker of the traditional statutes, and one indicator of how the offense is conceived, is who is held responsible under the statute. Under the eighteenth- and early-nineteenth-century traditional statutes both

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Adultery, Bigamy and Fornication, and sometimes Seduction or False Promise of Marriage. For example, Arizona includes incest with "Family Offenses," such as "marrying the spouse of another." ARIZ. REV. STAT. ANN § 13-3608 (West 1978). The Vermont Incest statute of 18 February 1779 is preceded by "An Act for the Punishment of Lascivious Carriage and Behavior" (19 Feb. 1779); "An Act Against Polygamy" (19 February 1779); and "An Act Against, and for the Punishment of Adultery" (18 February 1779). It is followed, though, by "An Act for the Punishment of Rape," (19 Feb. 1779) (a traditional carnal knowledge rape statute, with death as the penalty). The General Assembly met three times, and the session from February 11-26 included the Incest statute.

[103] *See* Connecticut, Delaware, Michigan, North Dakota, Chart, *infra*.

[104] The eugenics movement in the nineteenth century spurred the passage of miscegenation statutes as well as sterilization laws. These were not traditional criminal statutes, insofar as they did not derive from the common law felonies, although they carried a criminal penalty. They were laws designed to prevent inbreeding, accompanied by a 'moral' stricture. For example, Arkansas provided the same penalty for incest and miscegenation. *Compare* ARK. CODE ANN. § 55-105 (Michie Supp. 1977) *with* ARK. CODE ANN. § 41-2403 (Michie 1977). For a summary of the present law and the history of laws governing marriage and sterilization of the mentally retarded, see Elizabeth J. Reed, *Criminal Law and the Capacity of Mentally Retarded Persons to Consent to Sexual Activity*, 83 VA. L. REV. 799 (1997); *see also* Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315. For a detailed history of the eugenics movement in the United States, see DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY (1985) and its comprehensive "Essay on Sources," at 384-405.

[105] The Commentary to the revised 1977 incest statute in Alabama lists four separate justifications for defining the crime: "1) the religious tenet . . . . 2) the science of genetics: there is a higher probability of unfortunate recessive gene combinations in the first generation offspring of closely related parents [citing to a single 1953 source] . . . . 3) a sociological and psychological justification is that the prohibition of incest tends to promote solidarity of the family by preventing sex rivalries and jealousies within the family unit . . . . 4) a fourth justification is based upon the utility of forbidding abuse by heads of household, especially male, of their authority and financial power over younger children, especially female . . . ." A proposal to include acts of deviate sexual intercourse was not adopted because such conduct is not supported by the genetic justification. *See* Commentary to ALA. CODE § 13A-13-3 (1977) (Incest); *see also* Alabama, Chart, *infra*.

parties are assumed to be guilty. This implies both parties are assumed to be consenting adults.[106]

Under traditional formulations of the offense, Incest is a "status" offense. The offending status is conferred by the familial relationship, just as the prohibition under miscegenation statutes is conferred by the racial status of the parties. The status is something no one can do anything about. It is not the sexual acts themselves that are criminal, except insofar as all sexual acts outside of marriage are prohibited or unlawful. The sexual relationship is not seen as inherently abusive. The social purpose, or definition of proscribed harm, centers upon the state's interest in the regulation of marriage, not upon protection of the sexual autonomy or bodily integrity of any person. These statutes do not have as their intention the punishment or prevention of assaults or batteries or rape. In the most fundamental sense of that concept, they are not "offenses against the person."

Under traditional statutes it is the relationship between the parties itself that makes the sexual acts harmful.[107] The harm is that the parties have sinned against God's order and against the social structure upheld by marriage and kinship relationships governing the ownership of property. The harm is that the parties committing the sexual acts are not married and could not be married. Incest is unlike fornication and adultery, however, in that the parties will not ever be in the position to form a legitimate marriage.[108]

Prior to the introduction of rape reform statutes, a few traditional statutes specified harsher provisions for offenses involving children or for offenses involving a parent and child. Illinois was exceptional.[109] When incest statutes made such distinctions they moved in the direction of becoming statutes prohibiting sexual abuse and sexual assault while continu-

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[106] *See, e.g.*, CAL. PENAL CODE § 285 (1970) (Incest; "*Persons* being within the degree of consanguinity within which marriages [are prohibited] . . . *who* intermarry . . . or . . . commit fornication or adultery with each other, *are* punishable by imprisonment . . . ."); *see also* ARIZ. REV. STAT. ANN. § 13-3608 (West 1978) (Incest, Classification). Some statutes are ambiguous; their phrasing implies that only the older male will be punished. *See, e.g.* N.C. GEN. STAT. § 14-178 (1969) (Incest between certain near relatives). The 1779 Vermont Statute punished both the man and the woman. Although the definition of the offense spoke in terms of "no man shall marry," the penalty provisions clearly were to be applied to both parties: "That *every* man *and woman* who shall marry . . . shall . . ." (emphasis added). Ludlow's Code of 1650 similarly specifies: "*both* of them have committed abomination, they *both* shall be put to death . . . ." *See supra* notes 72, 82 for a discussion of the Vermont and Connecticut statutes. Similarly, the former Texas penal code prohibiting adultery and fornication has a specific proviso: "Both guilty." TEX. PENAL CODE ANN. ch. 3, art. 501 (West 1974).

[107] *See* Delaware, Nevada, Chart, *infra*.

[108] The exception is those relationships that are forbidden because of ties through a present marriage. Some incest statutes prohibit sexual relations between step parent and child "while the marriage exists." *See, e.g.*, TEX. PENAL CODE ANN. § 25.02 (West 1974) (Incest).

[109] *See* Chart, *infra*.

ing to regulate marriage.[110] The same statute then prohibited two very different kinds of behavior and incorporated in a single statute two very different perceptions of the social harm caused by that behavior. A single statute prohibited both consenting conduct between adults and forcible or abusive sexual acts committed upon children.[111] In some of these statutes the penalty structure reflects this difference, as does the apportionment of responsibility.

If the legislative purpose of traditional statutes was primarily the regulation of marriage, then the intent requirement should be no more than knowledge of the prohibited relationship, and the penalty should be similar to that for Bigamy. If the acts declared criminal are between consenting adults, then there is no threat to personal or bodily integrity. The religious or moral tenet was also part of the gravamen of the crime, just as it was for criminal prohibitions against consenting homosexual conduct between adults. An important difference between Incest statutes and Sodomy statutes in the later twentieth century is the dramatic change in the way in which the conduct itself came to be regarded. Heterosexual conduct between consenting adults has been decriminalized in fact and as a matter of practice in the majority of states.[112] The prohibition against marriage and sexual relations between close relatives, even if both parties are consenting adults, remains basically in effect.

The goals incorporated within traditional Incest statutes include: the orderly regulation of marriage, the prevention of biologically harmful inbreeding, the rhetorical affirmation of moral and religious precepts derived from Judaic-Christian traditions generally and from the specific Biblical prohibition of Leviticus, and the setting out of punishment for sexual behavior perceived as deviant or exploitative.[113] Prior to the rape reform

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[110] Nebraska defines a separate crime for a father cohabiting with a daughter. *See* NEB. REV. STAT. § 28-906 (1975). Illinois defines Aggravated Incest as sexual intercourse or deviate sexual conduct with a daughter or son, including illegitimates, stepchildren, and adopted children. *See* Ill. Comp. Stat. Ann. 38/11-10 (West 1979). Only the adult is held responsible for acts with children under 18.

[111] Colorado defines a traditional offense, prohibiting marriage and sexual relations between ancestors and descendants, and then separately defines aggravated incest as sexual intercourse with one's own natural child, stepchild, or child by adoption. *Compare* Colo. Rev. Stat. Ann. § 18-6-301 (Incest) *with* § 18-6-302 (1978) (Aggravated Incest). Aggravated incest carries a harsher penalty. The first codification of the offense in New Jersey was in the revised code of 1798. The statute separately defined incest and incestuous conduct between parent and child. *See* N.J. STAT. ANN. § 2A:114-1, 2, *repealed by* N.J. STAT. ANN. 2C: 98-2 (West 1989); *see also* Chart, *infra*.

[112] As early as the 1950s the American Law Institute's Model Penal Code recommended that Bigamy, Adultery and Fornication be removed from criminal codes and that consenting homosexual conduct and Incest be treated as misdemeanors. *See* Comments to the AMERICAN LAW INST., MODEL PENAL CODE (1955). The implication of this recommendation is that incest was not seen by these commentators as a form of sexual abuse, particularly as a form of sexual abuse of children. The Model Code in the same provisions recommended prompt complaint requirements and corroboration requirements for rape. But criminal laws against Sodomy remain. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986).

[113] *See, e.g.*, California, Mississippi, New Hampshire, Chart, *infra*.

movement of the late 1970s, the great majority of states still defined Incest as marriage, or an act of sexual intercourse, or cohabitation, between persons within prohibited degrees of kinship and relationship. This traditional formulation carried relatively low penalties in comparison to criminal penalties for rape of a child within the criminal statutes or rape of an adult woman within the same criminal code.

If the purpose of traditional incest statutes was regulating marriage and preventing inbreeding, then it might be expected that the cases annotated would involve prosecutions for incestuous marriages.[114] However, the annotations under traditional statutes show a different pattern. The cases under traditional statutes typically involve incest between fathers and minor daughters.[115] There is little systematic information about how these statutes were applied or the role of prosecutorial discretion. The record suggests that even the traditional laws were rarely applied to consenting behavior between adults.[116]

C. Consent and Corroboration Requirements under Traditional Incest Statutes: Patterns and Examples from the Cases

Under traditional definitions of Incest, consent should not have been an issue. If the prohibited acts were consenting behavior among adults who were prohibited from marrying for reasons that they could do nothing about, personal or individual consent to acts of sexual intercourse is irrelevant. Both parties are assumed to be consenting sinners. In a number of states, the case law specifically provided either that the absence of consent was not an element of the offense, or that "consent," *as that term came to be defined by the common law in rape cases*, was not a defense to a charge of incest.[117]

In some cases and in some jurisdictions, however, when the issue of consent in incest cases was raised, a tortured doctrine developed. The de-

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[114] And there were some prosecutions for violations of the marriage provisions. *See, e.g.*, Henderson v. State, 157 So. 884 (Ala. Ct. App. 1934). The *Henderson* court held that where there is no issue of a marriage to continue the relationship, the affinity ceases upon the death of the one by and through which the affinity arose. Thus, stepmother and stepson were not guilty of incest in marrying. There must be a novel waiting to be written about this case.

[115] A significant fraction of the annotations to traditional statutes involve offenders who are fathers, stepfathers, or men in a position of patriarchal authority and female children under the age of consent. *See, e.g.*, annotations to the former N.J. STAT. ANN. 2A:114 (West 1978).

[116] The census of 1880 provided data on some 58,000 prisoners. Of that total, 4,768 were incarcerated for offenses against public morals, including 121 for Incest, 63 for the crime against nature (Sodomy) and 257 for Bigamy and Polygamy; 161 for Adultery [more than for Incest], 26 for Seduction . . . 85 for Fornication. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 140 (1993). These figures suggest that the offenses against morality were prosecuted infrequently. The majority of those incarcerated under these offenses had been arrested for being "drunk and disorderly" (3,331). *See id.*; *see also* Williams & Finkelhor, *Incestuous Fathers*, *supra* note 19 (compiling studies).

[117] *See, e.g.*, State v. Jarvis, 26 P. 302 (Or. 1891) and cases collected in Annotation, *Consent as an Element of Incest*, 36 A.L.R. 2d 1299 (1954).

fense argued that because the absence of consent was not an element of the offense, the presence of consent was an element of the offense. Therefore, proof of non-consent was put forward as a defense to incest.[118] It was as if a defendant charged with vehicular homicide, or reckless manslaughter, claimed he should be acquitted because he committed first degree murder.

Many incest cases that resulted in reported opinions involved circumstances of sexual intercourse between fathers or stepfathers and minor females. The question of consent in these cases might have been simply resolved by reference to the statutory rape law in the jurisdiction. The theory of statutory rape is that a female under the "age of consent" is incapable of consenting to an act of sexual intercourse with anyone, including her father or stepfather.[119] Instead, a number of state appellate courts completely ignored the fact that the female child in incest cases was under the statutory age of consent as defined by the statutory rape laws. These opinions resulted in a wholly judge created exception to the statutory rape laws for sexual acts between fathers and daughters. These were not a few isolated instances from a distant and archaic past.

In a line of cases beginning in 1881 and culminating in 1974, the highest court of criminal appeals in Texas held that females under the statutory age of consent could nonetheless be consenting accomplices to sexual acts with their fathers or stepfathers. The notion that incest was committed by consenting adults was transformed into the idea that an underage daughter was an accomplice to the "crime."[120] Therefore, the father should be acquitted. Although the daughters in these cases were under the statutory age of consent, the court never considered or addressed the question of the daughter's inability or incapacity to consent to sexual intercourse with anyone, including her father or stepfather, even though the age and gender of the participants put the offense squarely in the category of statutory rape.

In Texas in 1974, the statutory age of consent for rape was seventeen, as it had been since 1970. Between 1918 and 1970 the statutory age was

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[118] *See* State v. Hittson, 254 P.2d 1063 (N.M. 1933). The defense did not succeed in this case, but it was seriously considered.

[119] *See, e.g.*, CAL. PENAL CODE § 261.5 (1998) (Unlawful sexual intercourse with a female under 18).

[120] Through the mechanism of accomplice theory the Texas Court of Criminal Appeals added on the requirement that force, resistance, and prompt complaint be proved in incest cases involving fathers and minor daughters. *See* Freeman v. State, 11 Tex. Ct. App. 92 (Tex. Crim. App. 1881). In *Freeman*, a 12-year-old girl spent the night in the outhouse with her stepfather and testified that he had intercourse with her twice. She said she did not want him to do this and it hurt her very much. The conviction was reversed for lack of proper charge on accomplice theory. In Mercer v. State, 17 Tex. Ct. App. 452, the same court held that although the daughter said she did not consent to sexual intercourse the evidence showed she made neither outcry nor resistance, and therefore she was a consenting accomplice. These cases were cited approvingly by the same court in Bolin v. State, 505 S.W. 2d 912 (Tex. Crim. App. 1974) The court in *Bolin* held that a 13 year old daughter was a consenting accomplice to acts of sexual intercourse as a matter of law because the prosecutrix did not show she was the victim of force, threats, or fraud.

eighteen. Rape of a child was defined as sexual intercourse with a female under seventeen when the actor was more than two years older, whether or not the female consented.[121] The Texas incest statute had no statutory requirement that force, resistance, or prompt complaint be proved. The highest court of criminal appeals in the state found that the daughter was a consenting accomplice to incest. The court grafted on a set of common law presumptions and defenses. There was now a corroboration requirement for Incest with a female under the age for statutory rape.[122]

If the underage daughter is treated as an accomplice to the crime of incest, the law regards her as a co-conspirator—a party to the crime. This harkens back to the "both guilty" proviso of the 1750 Connecticut statute.[123] Accomplice theory provided that corroboration was required in the form of totally independent evidence of the offense. The Texas rule of criminal procedure governing accomplice liability states: "corroboration is not sufficient if it *merely shows commission of the offense.*"[124]

If commission of the offense *itself* is insufficient to prove the commission of the offense, it probably would be impossible ever to prove commission of the offense to these judges. In other words, commission of the offense is insufficient to prove the offense was committed. This is legal doublespeak. It is difficult to understand this "technical" ruling as anything other than a mechanism for excusing offenders, or a denial of the offense. Nor is this an absolute rule applied to a hypothetical set of facts. In *Bolin*, the Texas Court of Criminal Appeals reversed a jury verdict against a father in the face of what was apparently *uncontradicted* evidence of repeated acts of sexual intercourse beginning when the daughter was ten, a pattern documented by social service workers and clinicians.[125] Not only did this court go out of its way to write a corroboration requirement into the incest laws, but the theory of conspiracy and accomplice liability were also grossly distorted by holding that a daughter between the ages of ten and thirteen could

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[121] *See* Tex. Penal Code Ann. § 21.09. In 1866 Texas defined Rape as carnal knowledge of a female under 10 with or without consent. In 1895 the statutory age was raised to 15 and in 1918 it was raised to 18. In 1970 the statute defining Rape of a child as sexual intercourse with a female under 17 was introduced. Texas split off statutory rape from the law defining Rape of a child. The court in 1881 could have taken judicial notice of the fact that the age of consent was 17. The court chose to ignore that entire body of law.

[122] Corroboration requirements were flexible. Some judges recognized slight evidence as sufficient corroboration. In some jurisdictions, however, such as New York during the turn of the century and later, the corroboration requirement for Rape was interpreted to require independent corroboration of every element of the offense, making the offense of rape extremely difficult to prove. In rape cases, however, there are many other factors influencing whether a report will result in a conviction, including the prosecutor's decision to go forward and the police decision to "unfound" or not proceed with a complaint. *See* Bryden & Lengnick, *Rape, supra* note 4, at 1201-55, and sources cited therein.

[123] *See supra* note 82.

[124] TEX. CODE CRIM. P. ANN. art. 38.14 (West 1979) (emphasis added).

[125] *See* Feiner, *The Whole Truth, supra* note 19.

be an accomplice to acts of incest.[126] Nor is this a pattern found only in Texas or in a few isolated cases.

Bolin was decided by the highest court of criminal appeals in Texas in 1974 with the Court citing a string of earlier decisions consistent with this ruling. Ironically, in the same jurisdiction during that period, corroboration was not required if a case of sexual abuse was brought against a person who was not a relative, as long as the victim told *anyone* within six months of the offense.[127] Sexual abuse of a child was easier to prove in Texas if the offender was not a family member. Female victims of incest in Texas were held to an extraordinarily high standard of "reliability" imposed by the common law.[128] Or, to put the matter differently, the Texas incest statute was rendered useless for the prosecution of incest cases as crimes. This may have resulted in incest cases being referred to family courts, being prosecuted under the statutory rape statute, or simply not being prosecuted at all.

At the time of *Bolin*, the clinical literature was beginning to document that sexual abuse of children, especially female children, was likely to be committed by a family member.[129] The *Bolin* court's reliance on theories of accomplice liability does not explain the court's willingness to completely ignore the age of consent for sexual intercourse. The result in *Bolin* was not mandated by an entrenched or universally accepted principle of law. Perhaps the ringing righteousness of the opinion in *Bolin* can be understood by

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[126] The Texas rule did not mandate accomplice theory. *See* 1971 Commentary to proposed 2C:2-6(e) (Exceptions to Accessory Liability), N.J. Criminal Law Revision Commission (1972): "The victim of a crime is excluded from liability for an offense, although his conduct in a sense assists in the commission of the crime, because to view the victim as involved in the commission of the crime 'confounds the policy embodied in the prohibition; it is laid down, wholly or in part, for their protection.'" [citing] MPC T.D. 1, p. 35 (1953) (offering as examples female in statutory rape is not an accomplice; woman is not guilty under the Mann act of conspiracy to transport herself). "New Jersey recognizes that a victim of a crime should not be capable of being convicted of the crime. Classifying a woman upon whom an abortion has been committed as a victim, the cases hold her incapable of being convicted of that crime or aiding or abetting it. . . . The Code also provided that when the offense is so defined that the person's conduct is 'inevitably incident to its commission' then he is not an accomplice . . ." 1971 Commentary to Final Report of the N.J. Criminal Law Revision Commission, Commentary to N.J. Code of Criminal Justice, Title 2C:2-6 General Principles of Liability, at 101 (reprinted in 1989 ed. of New Jersey Code of Criminal Justice) (1989) (citation to cases omitted). Also, "a person who is legally incapable of committing an offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity." 1971 Commentary (e.g. statutory rape by a woman); Comment to 2C:2-6(d) (Legal Incapacity).

[127] *See* TEX. CODE CRIM. P. ANN. § 38.07. *But cf.* TEX. CODE CRIM. P. ANN. §§ 38.07, 38.14.

[128] By comparison, see State v. Lonney, 274 P.2d 838 (Ariz. 1955) (a female under 18 is incapable of consenting to incest and cannot be an accomplice); *see also* State v. Warner, 291 P. 307 (Utah 1930). The *Warner* court held that a 13-year-old daughter was not above the age of consent and therefore not an accomplice to incest. The opinion implies she would be an accomplice if she were over the age of consent.

[129] *See* FINKELHOR, *supra* note 55; Peters, *Children who are Victims, supra* note 20.

reference to norms external to the law.[130] These opinions may be express cultural denial that manifests itself when criminal prosecutions are brought against fathers.[131]

In a later case, another state high court reached the same result on similar grounds and in similar circumstances. In *State v. Foust*, the Utah Supreme Court reversed a jury verdict and overturned a conviction for Incest as a matter of law, when it held that the defendant's sixteen year-old adopted stepdaughter was an accomplice to the incest offense and had consented to sexual intercourse.[132] This was an extraordinary outcome in a case with many ironic turns.

In the criminal case, the court redefined incest as a forcible offense, analogous to rape, and held that "consent" of the stepdaughter who was under the "age of consent" when the incestuous acts began, was a complete defense.[133] After the Utah Supreme Court set aside the jury verdict and in-

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[130] In the opinion of one commentator, the judicial ruling in such cases is politically motivated.

> This article has set out to explore whether, and if so to what extent, the judgments of the Court of Appeal in incest cases are influenced by the dominant ideologies of power and sexuality . . . . The results show that the Court readily accepted in mitigation behavior which was said to be "promiscuous", or "seductive" and therefore constituted "provocation". Where a daughter was a non-virgin, the Court all but held her responsible for the incest. A direct consequence of this judicial attitude was to exonerate the father; its indirect effect is to control female sexuality . . . . Finally, we found that the Court frequently disregards its own established precedents in accepting as a mitigating factors the hardship and unhappiness caused to the family in consequence of conviction and sentence . . .

Charlotte L. Mitra, *Judicial Discourse in Father-Daughter Incest Appeal Cases*, 15 INT'L J. SOC. L. 121, 144-45 (1987) (reporting the results of an analysis of 63 appeals against sentence in incest cases heard by the Court of Criminal Appeal (Criminal Division) during the period 1970-1980).

[131] Judith Herman describes what seems to be the typical social response to the official report of incest. First, there are expressions of outrage and anger, then denial.

> Most often, the community's response initially is one of extreme anger with frequent comments to the effect that "they should castrate the bastards" . . . . These initial intense emotions eventually evolve to either conditional acceptance or avoidance. We have seen spouses, lawyers, judges, and doctors assertively question the possibility of such distasteful acts having occurred when more than a preponderance of the evidence supports the legitimacy of the allegation . . . . *The same avoidance mechanism which disallows the mother/spouse from conscious awareness is also operational in the community at large.*

R. Moe and M. Moe, Incest in a Rural Community 13-14 (1977) (unpublished manuscript, on file with Child Protective Service, Bonner County Idaho), *quoted in* HERMAN & HIRSCHMAN, *supra* note 60, at 130.

> This common reaction [of the community] of initial shock and outrage followed by denial disrupts and threatens the family, provoking the father's wrath, without offering any adequate protection to the child. Thus the child is left even more at the mercy of her father than she was before she dared to disobey him.

HERMAN & HIRSCHMAN, *supra* note 60, at 129-30.

[132] State v. Foust, 588 P.2d 170 (Utah 1978).

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> The real purpose behind the law requiring corroboration of the testimony of an accomplice is to afford protection to one *falsely* accused. Absent such a law, 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. Such would offend our whole system of justice. . . . Purely and simply stated, no conviction of the defendant can be had in the absence of competent, admissible evidence con-

stituted a corroboration requirement under accomplice theory, the defendant was acquitted at the retrial. There was overwhelming evidence that sexual intercourse had been taking place over a period of years. The grandparents of the stepdaughter filed a civil action.[134] This became the first reported case in which general and punitive damages were awarded for acts of incest.[135] In the civil action, evidence of the history of sexual abuse by the stepfather was uncontroverted and was the basis for an award of damages.[136]

Opinions such as *Bolin* and *Foust* persuaded those lobbying for rape reform legislation that limiting the discretion of judges should be a major policy objective.[137] The misogynist attitudes expressed by some judges seem to be the explanation for the outcome in cases such as *Bolin* and *Foust*.[138] Courts were not the only institutions expressing attitudes of distrust and suspicion towards young girls who asserted they were being sexually abused by their fathers or other adult males in positions of authority.[139]

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stituting proof beyond a reasonable doubt that (1) the crime of incest was committed, *and (2) that it was committed without the consent of the prosecutrix.*

Id. at 173 (emphasis added).

[134] *See* Appellant's Brief at 16, Elkington v. Foust, 618 P.2d 37 (Utah 1980) (No. 16298). The stepfather in *Foust* was first charged with rape of his stepdaughter. That charge was dismissed by the judge at the preliminary hearing because the stepdaughter testified she had "consented" and "agreed to" any sexual allegations that occurred after age 14. The defendant was then charged with incest. The crime of incest required proof of sexual intercourse. There were never any charges filed on the crime of sexual abuse that did not require proof of sexual intercourse. *See* UTAH CODE ANN. § 76-5-404.

[135] *See* Elkington v. Foust, 618 P.2d at 39.

[136] In the civil action, the plaintiffs introduced medical evidence regarding the plaintiff's hospitalizations and the emotional damage caused by sexual abuse which began when the stepdaughter was nine. Ironically, the court which upheld the award of general, special and punitive damages (in the amount of $30,000) was the same court, the Utah Supreme Court, which had reversed the same defendant's conviction for incest on the grounds that the stepdaughter was a consenting accomplice. The dissenters, however, now became the majority. In the civil action, the grandparents introduced a variety of evidence, including evidence that the mother had at one point filed for a divorce on the grounds that the stepfather was causing severe emotional distress to her daughter. *See* Respondents Brief at 115, Elkington v. Foust, 619 P.2d 37 (Utah 1980) (No. 16298)..

[137] There is little systematic research on the judicial attitudes towards rape victims. What research has been done suggests judges have often been unsympathetic. *See* C. Bohmer, *Judicial Attitudes Towards Rape Victims*, 37 JUDICATURE 303 (1976).

[138] Women still hold a small fraction of judicial appointments. As of 1980 women were 5.1% of all state appellate judges, 2.0% of state trial judges and 2.1% of all state judges. *See* CYNTHIA EPSTEIN, WOMEN IN LAW 234-46 tbl.13.1 (1983). The situation has not greatly improved in the 1990s. The National Center for State Courts data for 1990 indicate that while no state has no women at the trial court level, seventeen states had less than 5% women on the trial courts. All but 13 states have less than 10% women on the trial courts. As of 1990, the most recent figures available, 26 states had no women on their high courts. *See* Feminist Leadership in the Law, "The Success of Women and Minorities in Achieving Judicial Office: The Judicial Process," Fund for Modern Courts, Inc. (1985) (statistics updated to 1990 by Feminist Majority Survey of State Court Administrative Offices, 1990).

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> Both cultural and personal factors caused everyone, including Freud himself at times, to welcome the idea that reports of child sexual victimization could be regarded as fantasies. . . . Both Freud

Those advocating for rape reform legislation in the 1970s were not the first or only commentators to remark upon the inadequacy of the response of the legal system.[140] It took a national political movement, however, to bring about changes that reached beyond more than one jurisdiction.

Courts in incest cases have often offered the explicandum of female fantasy in order to dismiss complaints and exonerate offenders. If the daughter did not fantasize the sexual acts, she might have, and therefore the court should require corroboration on that ground.[141] If complaints of sexual abuse by adult males are fantasies of the female child, then no act of sexual abuse occurred. No harm occurred because nothing happened. The father is the innocent victim of a "false" accusation.[142]

The emphasis upon consent and corroboration requirements in incest cases brought under traditional statutes had an additional important effect. The issues of consent and corroboration allowed the court and the jury to focus upon the behavior, character, and "mental state" of the female victim, rather than the acts of the father.[143] When the legal question becomes whether the minor daughter was an accomplice to incest, *her sexual behavior* becomes the relevant fact. The implication of an accomplice theory being put before the jury is that the underage daughter is at least as blameworthy as the defendant. When the "accomplices" were minor children, the fact that sexual acts took place over a long period of time was seen by these

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and his followers oversubscribed to the theory of childhood fantasy and overlooked incidents of actual sexual victimization in childhood.

Peters, *Children Who are Victims*, *supra* note 20, at 401; *see also* HERMAN & HIRSCHMAN, *supra* note 60, JANET MALCOLM, IN THE FREUD ARCHIVES (1984); JEFFREY MOUSSAIEFF MASSON, THE ASSAULT UPON THE TRUTH—FREUD'S SUPPRESSION OF THE SEDUCTION THEORY (1984).

[140] *See* Hughes, *The Crime of Incest*, *supra* note 27.

[141] *See, e.g.*, Note, United States v. Bear Runner: *The Need for Corroboration in Incest Cases*, 23 ST. LOUIS U. L.J. 747, 764 (1979) (arguing that corroboration should be required in incest cases because of the "dangers of distortion, misrepresentations, [and] bias" (on the part of the victim).

> Another important factor in the concern for misrepresentation or distortion is the fact that people naturally feel physical attraction towards one another in spite of their familial relationships. Studies have specifically shown that young children's flirtations and imagined romantic involvement with members of the opposite sex in the safety [sic] of their own home are an important and normal part of their social development. Young girls are known to flirt with and woo their fathers . . . . Situations exist in which the compulsory and repeated daily contacts between family members promote the development of anger, spite, misunderstanding or confusion *which can lead to false or erroneous accusation of incest.*

Id. at 759 (emphasis added) (internal footnote omitted to a single "scientific" source: Messer, *The Phaedra Complex*, 21 ARCHIVES GEN. PSYCHOL. 213 (1969)).

[142] For a critical analysis of Freud's construction and rejection of his patients' reports of actual incest, see MASSON, *supra* note 139. Masson himself and his role in the revelation of previous unpublished documents authenticating his theory is analyzed in MALCOLM, *supra* note 139. The accuracy of Malcolm's reporting and transcription in this work became the subject of an important libel case litigated to the United States Supreme Court. *See* Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350 (N.D. Cal. 1993) and the subsequent opinions in the case challenging Janet Malcolm's attribution of quotations to Jeffrey Masson, 501 U.S. 496 (1991); 895 F.2d 1535 (1989).

[143] The Utah Supreme Court's concern to "afford protection to one falsely accused" is not atypical. State v. Foust, 588 P.2d 170, 173 (Utah 1978).

courts as further evidence of complicity and consent rather than exploitation by the father. Evidence that should have supported the victims of incest because it was typical of the pattern in incest cases was turned against victims.[144]

In rape cases, evidence of the victim's prior sexual history with third parties was, and is, introduced both to suggest that the defendant's conduct was not forcible and to imply that no harm has been done because the "victim" is not a virgin.[145] In incest cases, evidence that sexual acts took place over a period of years between an adult male and a minor female within the family is introduced ostensibly to prove "accomplice" liability but more importantly to ascribe blame, to suggest fault, complicity, and the absence of harm.[146] Yet if a child had been regularly beaten or starved by a family member in a dominant position of authority, a court would never suggest that silence, fear, and the fact that the child did not report was a sign of consent or that the child was an accomplice to being beaten or starved.

As in statutory rape cases, the daughter in incest cases is frequently referred to as the "complainant" or the "prosecutrix," rather than the victim. This terminology suggests that no offense occurred because the acts were not accompanied by force or injury. The person prosecuting is not the victim of a crime, although the statute is criminal.[147] The terminology of

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[144] *See* Feiner, *The Whole Truth, supra* note 19.

[145] "Where a daughter was a non-virgin, the Court all but held her responsible for the incest. A direct consequence of this judicial attitude was to exonerate the father . . . ." Mitra, *supra* note 130, at 144-45.

[146] In a 1978 opinion, the North Carolina Supreme Court made the following comment: "Obviously there are types of sex offenses, notably incest, in which by the very nature of the charge, there is grave danger of completely false accusations by young girls of innocent appearance but unsound minds, susceptible to sexual fantasies and possessed of malicious, vengeful spirits . . . ." State v. Looney, 240 S.E. 2d 612 (N.C. 1978). These views accord with Wigmore's vigorously expressed opinion that "the real victim, however, too often in such cases is the innocent man . . ." JOHN HENRY WIGMORE, TREATISE ON EVIDENCE, § 924a, at 736. In his citation of collaborative sources for the proposition that young girls fantasized sexual assaults Wigmore deleted, without indicating an ellipsis, statements to the effect that the sexual acts in the cases reported actually occurred and were not fantasies. The authors Wigmore quoted in support of the view that sexual assaults reported by young girls were fantasies themselves believed that the sexual assaults took place and were not fantasies. *See* Bienen, supra note 20. Young girls' complaints of sexual abuse by adult males were typically ascribed to fantasy by psychiatrists. *See* HERMAN & HIRSCHMAN, *supra* note 60.

[147] Consider the following comments by a judge in 1981 who objected to the use of the word "victim" to refer to the complaining witness in an incest case:

> Given the inherent meaning of the word "victim" and the context in which it was used, leave no doubt that, although unintentionally, the court intimated to the jury panel its opinion that the prosecuting witness had been wronged in some way. Because of public abhorrence to the type of offense [incest] with which [the] defendant was charged and the natural sympathy given to a young girl in the setting involved, the slightest intimation by the presiding judge that her testimony merits belief carries a great influence with the members of the jury . . . especially when one takes into account that he word "victim" describes one who has been legally or morally wronged. The danger of the reference is that it might instill sympathy in the hearts and minds of the jury in favor of the prosecuting witness while in the same instance harden their senses against the accused.

prosecutrix and complainant suggests that no harm occurred. In a homicide prosecution or an assault, the person upon whom the criminal acts were committed would be referred to as a victim, even if the defendant were a relative or spouse. The status of "victim"—the status of a person harmed—would attach even though there was no assailant identified or the assailant was known to be a family member.[148]

Few cases are annotated under the traditional incest statutes. Perhaps few cases have been prosecuted because few report, or because courts may have been reluctant to publish opinions in incest cases because of a concern for propriety or family privacy. Alternatively, cases may have been referred to the family courts, where opinions are not reported. That could not have been the explanation for the total absence of cases during the nineteenth and early twentieth century in many states, because few jurisdictions had family courts before the middle of this century. Well into the middle of this century some states have *not one reported* case annotated under their traditional incest statutes.

It is impossible to reconstruct causation or an accurate history on the basis of a few cases. It would be necessary to have complete information on cases that were and were not reported or prosecuted. That information does not exist now for any jurisdiction. Traditional incest statutes may never have been successful vehicles for prosecution in reported cases of father-daughter incest because common-law developments such as those concerning corroboration and accomplice theory made conviction virtually impossible. Perhaps cases were never prosecuted, or dismissed, because there was no social support for allegations of incest. The absence of cases annotated may reflect the culture's tolerance for the offense. The opinions in *Bolin* and *Foust* show no concern for the mental or physical well-being of the underage child. These opinions go further than ambivalence. They are punitive towards women who report perhaps because becoming a "complainant" challenges the sexual dominance of a father.

These opinions ignore, or are unaware of, the fact that sexual acting out by the daughter is a common consequence of sexual abuse of a child by an adult. The very behavior used to impeach and discredit the testimony of the "prosecutrix" or "complainant" could be interpreted as supporting the

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Bateman v. State, 621 S.W.2d, slip op. at 34 (Ark. Ct. App. September 16, 1981) (Corbin, J., dissenting). This judge argued that the court's reference to the complaining witness as a "victim" warranted reversal.

[148] The use of the terminology "complainant" or "prosecutrix" in incest cases may indicate the judge's attitude towards the offense. The judge's choice of terminology and his characterizations of the sexual acts and persons involved are highly expressive of how the offense is viewed and predictive of the outcome. This is particularly striking in the two *Foust* cases. The judge who reversed the criminal conviction by a jury for incest mentioned few details. His tone was distant, and the attribution of quotations to the stepdaughter was dismissive and disparaging. By contrast, when the same court upheld the award of punitive damages the court did so after dwelling at length upon the physical and emotional harm suffered by the stepdaughter, the young age of the child at the time of the first assault, and the abusive character of the acts. *See supra* notes 132-36.

charges. As part of the movement to reform the rape laws, a number of commentators put forward specific proposals to introduce expert testimony in support of incest victims, especially child victims.[149] An expanding literature from psychiatrists, psychologists, and clinicians laid the theoretical foundation for proposed technical changes in the rules of evidence.[150]

Cases such as *Bolin* teach all participants and observers a lesson: Not only will reports to the authorities not result in punishment, but the complainant and her supporters will be worse off after the prosecution. The paucity of reported cases, as well, suggests that this seems to have been a lesson well learned. Few criminal cases under traditional incest statutes report the prosecution of fathers for sexual abuse of young male children and fewer still involve mothers' sexual abuse of their sons. Both circumstances are reported in the clinical literature.[151] If the explanation for the legal system's rejection of the cases involving father-daughter incest is the maintenance of patriarchal authority by a patriarchal legal system, then a different version of that explanation may be needed when male children are alleged to be victims or adult females are the offenders.[152]

V. INCEST AS A SUBCATEGORY OF STATUTORY RAPE: SOME PATTERNS AND A FRAGMENTARY HISTORY

Statutory Rape in the United States was an offense carved out of the codification of common law rape. When state legislatures first enacted criminal codes, they took the definition of rape from the British common law that included two crimes: 1) carnal knowledge of an adult woman by force or against her will and 2) carnal knowledge or abuse of a female child

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[149] *See* Josephine Bulkley, *Psychological Expert Testimony in Child Sexual Abuse Cases*, *in* SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES 191-213 (E.B. Nicholson ed., 1988); Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523 (1988); David McCord, *Expert Psychological Testimony about Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1 (1986); John E.B. Meyers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1 (1986); Rebecca J. Roe, *Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97 (1985); *see also* CHILD SEXUAL ABUSE AND THE LAW (Josephine Bulkley ed., 1981); DEBRA WHITCOMB, WHEN THE VICTIM IS A CHILD (2d ed. 1992).

[150] *See* Judith Lewis Herman & Emily Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, PSYCHOANALYTIC PSYCHOL. 1 (1987); *see also* J. BRIERE, THERAPY FOR ADULTS MOLESTED AS CHILDREN: BEYOND SURVIVAL (1989); J.A. COURTOIS, HEALING THE INCEST WOUND: ADULT SURVIVORS IN THERAPY (1988); JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY (1992); INCEST-RELATED SYNDROMES OF ADULT PSYCHOPATHOLOGY (Richard Kluft ed., 1990); K. MEISELMAN, RESOLVING THE TRAUMA OF INCEST (1990); LEONARD SHENGOLD, SOUL MURDER: THE EFFECTS OF CHILDHOOD ABUSE AND DEPRAVATION (1989).

[151] *See* T. MCCAHILL ET AL., THE AFTERMATH OF RAPE, *supra* note 1. The Philadelphia Assault Victim Study includes data on a sizable number of male victims, especially among the victims under 12. David Finkelhor's book was one of the first to call attention to male children, as well as females. *See* FINKELHOR, *supra* note 55.

[152] *See* Becker, *supra* note 26, at 1479 (arguing that men support other men in patriarchal actions).

under ten years of age.[153] The development of statutory law and decisional law in the states created a uniquely American jurisprudence surrounding the crime of statutory rape that differed from the traditional British common law offense.[154]

American statutory rape laws prohibited sexual intercourse with a female under the designated statutory age or between two specified ages. The second offense, sexual intercourse with a female between two designated ages, did not exist under British common law. After the 1920s, sixteen was the age most commonly specified as the upper boundary, and twelve was the most common lower boundary.[155] The statutory age came to be termed "the age of consent" because proof of force, or the absence of consent, was in theory not an element of the crime of statutory rape if the female was under the stated age.[156] This is the origin of the term "statutory" rape. The

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> And for plain declaration of law, be it enacted, That if any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, every such unlawful and carnal knowledge shall be felony, and the offender thereof being duly convicted shall suffer as a felon without allowance of clergy.

18 Eliz. I, ch.7, § 4 (1576). The statutory age set by the Elizabethan statute was ten. Few American jurisdictions kept the statutory age at ten, even in the nineteenth century, although no jurisdiction set it lower than 10. For a history of the development of statutory rape law in the United States, see Michael M. v. Superior Court, 450 U.S. 464 (1981); *see also* Bienen, *Rape III*, *supra* note 4, and other more recent academic sources cited in Bryden and Lengnick, *Rape*, *supra* note 4.

[154] The history of the statutory rape laws raises many similar issues. Issues of sexual exploitation and the society's interest in marriage are mixed together and confused in the statutes and the case law. The law of statutory rape was at different periods a catalyst for political and social reform. The effect of the statutory reform is difficult to assess because the behavior was typically not brought to the attention of legal authorities. When illegal behavior was brought to the attention of legislators, both lobbyists and legislators had several agendas. The development of statutory rape law in the United States and the political campaigns to reduce the age of consent were influenced by social campaigns against child prostitution, immigration issues, campaigns to improve living and working conditions for the poor, and many many other factors. The prevalence of and lack of a cure for serious degenerative diseases, such as syphilis, the fact that illegal abortions and childbirth often resulted in death or life long medical problems were aspects of the "legal" issue that cannot be ignored. Questions of "morality" and the history of social policy have these medical realities in the background.

[155] *See, e.g.*, the history of enactment of statutory rape law in North Carolina. A law in 1818 declared the Elizabethan rape statute, 18 Eliz., ch. 7 (1576), to be in force in North Carolina. In 1868-69 the statute specified an age of 10 years. In 1917 the statutory age was raised to 12 and a new offense is added: carnal knowledge of "any female child who has never had sexual intercourse with any person." In 1923 the age provisions were amended to include females over 12 and under 16. A Proviso added: if the offenders shall be married, such marriage shall be a total bar to prosecution; if male is under 18, offense shall be a misdemeanor. This statutory rape provision remained in effect until 1979. *See* FEILD & BIENEN, JURORS AND RAPE, *supra* note 4, at 366. By contrast, in California the Penal Code of 1872 included a category of rape involving females under 10, with a presumption of inability for males under 14. An amendment in 1889 raised the statutory age for females to 14 and an amendment in 1897 raised the age of the female to 16. The Code of 1901 raised the age of the female to 18. In 1970 statutory rape was defined as "unlawful sexual intercourse with a female under 18" and moved to a separate section. *See id.* at 225. For the legislative history in New York, see *id.* at 360.

[156] For a history of the statutory rape statutes and the political campaign to raise the age of consent, see Jane E. Larson, *"Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century Amer-*

crime is designated rape because of the age of the female. Setting the lower boundary of the statutory age at ten or twelve implied that sexual acts with a female below that age were inherently deviant or abusive and criminal under all circumstances.

Father-daughter incest cases appear in the annotations and case records for statutory rape in jurisdiction after jurisdiction. In the nineteenth century, attitudes towards girls and their sexual behavior were inextricably bound up with attitudes towards immigrants, their working and living conditions, and poverty in addition to religion and family.[157] A new historical literature provides a social and political context for an understanding of the application of these statutes in practice.[158] If the daughter is under the statutory age set by the jurisdiction, father-daughter incest technically meets the criteria for statutory rape. Choice of law is one aspect of prosecutorial

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ica, 9 YALE J.L. & HUMAN. 1 (1997) [hereinafter Larson, *Rape Reform in Late Nineteenth-Century America*]. The movement for reform was spurred by those who saw the behavior to be prohibited as the abuse and exploitation of young girls. This reform movement was a precursor to the rape reform movement of the 1970s. The resemblances and differences between this movement and the rape reform movement of the 1970s merit further serious attention. Both were campaigns taken to the state legislatures. That itself is noteworthy. Those seeking to change the age of "consent" intended to protect vulnerable women from abuse. Many who were opposed to any change pointed to the statute's function to regulate the age of legal marriage.

[157] A number of feminist scholars have examined court and case records that include some incest cases. This research often documents the refusal of officials to prosecute offenders within the family, even in the face of corroborated evidence. *See, e.g.*, MARY E. ODEM, DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT AND FEMALE SEXUALITY IN THE UNITED STATES, 1885-1920 (1995). This study includes an analysis of two sets of court records: all prosecutions for statutory rape in the Alameda County Superior Court for the decade 1910-20 (112 cases) and all prosecutions for statutory rape in the Los Angeles Juvenile Court for the years 1910 (8 cases) and 1920 (23 cases). *See id.* app. at 190. The author notes, as do others who study a segment or universe of cases:

> It is difficult to know just how widespread the sexual abuse of young women within the home was. Most cases were not reported to law enforcement officials, and even fewer were prosecuted in court . . . . A number of the victims of familial sexual abuse did not physically resist the sexual advances of their male relatives. When questioned by judges and attorneys about their passivity, the girls said they were afraid or that the man had threatened to harm them if they reported the assaults. Taught at an early age to obey the orders of fathers and other male adults, these girls hesitated to challenge male authority even in cases of sexual abuse . . . .

Id. at 60 (citations omitted); *see also* CHRISTINE STANSELL, CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1860 (1987); Linda Gordon, *Incest and Resistance: Patterns of Father-Daughter Incest, 1880-1930*, 33 SOC. PROBS. 253-67 (1986); Linda Gordon & Paul O'Keefe, *Incest as a form of Family Violence: Evidence from Historical Case Records*, 46 J. MARRIAGE & FAM. 27-34 (1984).

[158] For a detailed historical study of statutory rape and other sex crimes in New York City from 1880 to 1950, see Stephen Robertson, Sexuality Through the Prism of Age: Modern Culture and Sexual Violence in New York City, 1880-1950 (January 1998) (unpublished Ph. D. Dissertation in History, Rutgers-The State University, New Jersey) [hereinafter Robertson, Sexuality Through the Prism of Age]. The data set is: "every rape case I could identify in every fifth year beginning in 1886 and ending in 1921, a total of 610 cases." *Id.* at 373. The source of information was the affidavits from the magistrate's court and the indictment, and additional information, including some trial transcripts on a subset of cases. *See id.* Robertson documents that New York City grand and petit jurors were unwilling to indict and convict for statutory rape of girls even when faced with overwhelming evidence that the sexual intercourse occurred and there was a clearly written statutory rape statute criminalizing the behavior.

discretion. If the acts constituting an offense meet the criteria for Statutory Rape and Incest, in theory the prosecutor can choose to prosecute for either statute.[159] Prosecution in the alternative or simultaneously for Incest and Statutory Rape varied from jurisdiction to jurisdiction.[160] The reasons for differing practices in different jurisdictions are and were idiosyncratic. The practice in the big cities bore little resemblance to the practice in rural areas. Each jurisdiction has its own set of precedents and traditions.[161] In each state there is a unique dialogue between statutory defenses and the case law.[162] Prosecutors, historically and at present, are elected officials and the manner in which cases are chosen for prosecution have always and will continue to reflect the concerns and values of the community. The in-depth studies of single jurisdictions during a historical period greatly enrich our misunderstanding of the law

In nineteenth-century New York City, Robertson argues, it was juries who would not indict or convict for statutory rape. So prosecutors stopped bringing the cases. The history of women and the records of social service agencies and courts document cases of statutory rape and incest.[163] In New

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[159] *See, e.g.*, McGee v. People, 413 P.2d 901 (Colo. 1966) (holding that where both the crime of statutory rape and incest have been committed in the same transaction, the state may charge the male participant with either or both crimes).

[160] Robertson's research documents that prosecutors simultaneously charged second degree rape (statutory rape) and Incest from the turn of the century until the 1940s. There was a corroboration requirement for statutory rape but not for Incest during this period. Accomplice theory introduced a corroboration requirement for Incest. The corroboration requirement for statutory rape was an extension of the corroboration requirement for Seduction and Abduction. In 1852 the New York state high court held that Incest could only be charged if sexual intercourse was by mutual consent. *See* People v. Harriden, 1 Parker, Cr. R, 344 (1852); D.R.N. Blackburn, *Incest*, 4 CRIM. L. MAG. & REP. XVII, at 389-99 (July 1895), *cited in* Stephen Robertson, *Signs, Marks, and Private Parts: Doctors, Legal Discourses, and Evidence of Rape in the United States, 1823-1930*, 8 J. HIST. SEXUALITY (No. 3) 345-73 (1998) [hereinafter Robertson, *Signs, Marks, and Private Parts*].

[161] No New York cases addressed the question of incest and the statutory age of consent. However, because the practice until 1940 was to charge both Incest and statutory rape, there is an implicit reference to the age of consent. When both offenses were charged defendants tended to pled guilty to statutory rape in incest cases. The sentences were typically longer in cases involving a family member. Robertson sees this as the one exception to the trend towards reducing sentences and dismissing charges of statutory rape over the period studied. Robertson's discussion of the development of law of carnal abuse in New York, in comparison to the law of New Jersey, is relevant. In 1933, the legislature in New York amended the carnal abuse statute to apply to boys. This was never the law in New Jersey. *See* Robertson, Sexuality Through the Prism of Age, *supra* note 158, at 237 ch. 7; *see also* discussion of the definition of carnal abuse in New Jersey, *infra* note 176.

[162] In 1886, for example, the legislature in New York extended the corroboration requirement from Rape to Statutory Rape. Between 1887 and 1895, the legislature raised the statutory age to 18 and split the crime into degrees, with second degree rape being statutory rape that carried a maximum sentence of 10 years. The concern of the social welfare agency that essentially made the decision to prosecute was with virginity, and doctors testified as to "virginity." Doctors and medical expert testimony played an important role in determining whether to go forward with a prosecution for a statutory rape prosecution. *See* Robertson, *Signs, Marks, and Private Parts*, *supra* note 160 and sources cited therein.

[163] Cases from social service agencies, whether in the nineteenth or twentieth century, report on an atypical population. The population tends to be less educated and lower on social and economic indi-

York City during this period the social service agencies selected cases for prosecution. These studies offer a larger description of the two offenses and the legal distinctions between them.[164] Incest cases involving older men and young girls or children raise all of the contradictions of statutory rape. In addition, they carry an overlay of attitudes concerning children as property, in which the obedience of children is a symbol of patriarchal authority and daughters are the sexual property of their fathers; tenets strongly supported by the seduction and marriage statutes.

The shifting institutional relationships between social service agencies and courts is rarely addressed by legal scholars.[165] Lawyers look at what can be found in our law libraries. The informal relationships between prosecutors, judges, and social service agencies are overlaid with politics and the many social and economic interactions that maintain a complex social organization. The character of these relationships may be more influential than a precedential case or statute in determining what the law means. In New York City and Boston, in the nineteenth and early twentieth century, the prosecutors abrogated the duty and responsibility for the prosecution of child abuse cases to private child welfare agencies. These agencies, not the legal authorities, made the decision as to which cases would be

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cators than the general population. Early studies commented that patterns of "poverty" contributed to sexual abuse of children. This stereotype has recently been challenged: "Epidemiological studies of unreported cases and surveys of adult victims have consistently failed to find higher rates of sexual abuse among those raised in families of lower socioeconomic status." Linda Meyer Williams & David Finkelhor, *The Characteristics of Incestuous Fathers: A Review of Recent Studies, in* HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 231, 234 (W.L. Marshall et al. eds., 1990) (internal citation omitted). The many victim studies of the 1970s and 1980 suggest that the prevalence of low-income families in the early studies is an artifact of reporting. These were the families whose behavior was subject to public scrutiny. Consequently, incest came to the attention of authorities.

[164] *See* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, BOSTON 1880-1960 (1988) [hereinafter GORDON, HEROES OF THEIR OWN LIVES] (includes a chapter (chapter 7, pp. 205-249) on incest cases found in the case histories in the files of the Massachusetts Society for the Prevention of Cruelty to Children). The study discusses both patterns and individual cases, looking at approximately 100 incest cases, 50 were among the random sample of cases. In other words, 10% of the randomly selected family violence cases included incest. Fifty more cases were added by including every incest case in the order in which they occurred in the sample. *See id.* at 354-55 n.16. The cases were predominantly heterosexual; of the children involved, 93 out of 97 were girls. Almost 80% of the abusers were biological fathers or "social fathers" (stepfathers, adoptive fathers, mothers' boyfriends). The victims were children, not adolescents. The average age was 10.

[165] Coordination between the criminal and civil courts seems to be a large bureaucratic problem everywhere and at all periods. For example, in a recent incest case in Seattle the offender pled guilty and was sentenced to 10 years for sexually abusing his twelve year old stepdaughter over a seven year period, in spite of the recommendation of the prosecutor, the defense, and the probation officer that he receive a deferred prison sentence and undergo counseling. The discussion of this case is particularly informative because it includes the opinions of individual family members, the lawyers, other professionals who were involved in the case, and the role played by extensive publicity in the press. *See* Cynthia A. Ahlgren, *Maintaining Incest Victims' Support Relationships*, 22 J. FAM. L. 483, 522-27 (1983-84); *see also* Tennessee, Washington, Chart, *infra*.

prosecuted.[166] Virginity was a primary concern. The agencies, where women held leadership roles, decided what values would be upheld, what evidence would be brought forward, and what cases would be brought to trial.[167]

The studies of nineteenth and early twentieth century cases suggest the technical definition of the statutory offense was not a critical factor. If a particular statute or appellate case made prosecution difficult or impossible, prosecutors can and will seek out other vehicles for prosecution, if they wish to bring that particular case or kind of case. Prosecutors are highly motivated to bring cases successfully to conviction, by trial or plea. If a particular kind of case, for example incest cases, are difficult to prosecute, or if juries are unwilling to indict or convict, or if prosecutors believe they are, then prosecutors will be reluctant to bring those cases. Prosecutors also can persuade legislators to amend statutes to make prosecution easier. And that dialogue is continuous.

Information on actual cases from the nineteenth-and twentieth-century studies, however, shows the vectors pointing in the same direction: a small number of cases are reported and those that are reported rarely result in prosecutions or convictions. Even when evidence of guilt is admitted or overwhelmingly corroborated cases do not become legal cases. [168]

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[166] As in New York, the child welfare agency in Boston was skeptical of reports of abuse by girls, insisting upon a medical examination for virginity. Familiar patterns emerge from these case reports: girls who turn to prostitution; girls protecting younger siblings; denial and disbelief in the face of reports and physical evidence. Gordon comments:

> Incest changes less than any other form of family violence over the last century. This does not mean that incest is a pathology uninfluenced by historical change, but that the social arrangements that give rise to it have been tenacious. There is no way to know whether its incidence remained the same. The proportion of incest cases found in family-violence agencies may tell us more about what social workers were noticing than about actual occurrence.

GORDON, HEROES OF THEIR OWN LIVES, *supra* note 164, at 210.

[167] For a discussion of the role of individual women leaders in the political movement at the end of the nineteenth century, see Larson, *Rape Reform in Late Nineteenth-Century America*, *supra* note 156.

[168] Regarding the way cases were prosecuted in one relatively progressive jurisdiction, consider the following:

> "When a situation is severe enough, if reported, and the Child Protection Agency believes the incident has happened, they'll investigate the case . . . . [I]n this county's procedure, which is common to most, the social worker assumes the role of policeman, judge and attorney. She becomes everything. All the decisions are made by her and no treatment is recommended . . . ." Anderson worked in the Child Protection Agency, where there was no outlined procedure for dealing with incest, for seven months. No real criteria were used to determine what constituted a believable case. "Social workers would go to the homes where the complaints have been made, wearing their many hats. They had no arrest or law-enforcement power, even though a felony had been committed. They would say, 'We're here to investigate the case.' Between the arranged visit and the actual encounter, all evidence may have been destroyed . . . . Decision about what happens to the families are at present made by the welfare department and the cases are brought to juvenile court," Anderson explained. "This is wrong. Adults should be taken to adult courts. In this county, the children are usually whisked from the home immediately, are put into a boarding school, in a temporary foster home, or kept in the juvenile center for a while. Both the father and the mother go before the juvenile court, where they just get their wrists slapped; the children pay the price for what has happened. The children are eventually sent back to live in the home with the persons who sexually abused them . . . . Families are considered too scary to touch. Children of-

In some instances, the reluctance is from doctors, or social workers, or prosecutors; sometimes it is the family, including the victim, which does not wish to bring the cases for adjudication to the criminal justice system. The reported behavior is unquestionably against the law and universally condemned as "immoral" or wrong. Nonetheless, there is little impetus to bring these cases to court and there are few successful prosecutions.[169] The interplay between the social and cultural factors and the law may be easier to see in the studies from the early part of the century.

It might be expected that if there were two applicable statutes, one tailored to the specifics of the offense and the other a more general description, the specific statute would have advantages for the prosecution. Developments in the traditional law made criminal prosecutions under the traditional Incest statutes problematic. Some of these disabilities were present in the statutory rape laws, which carried their own misogynist traditions. Where complaints were acted upon, it was because the young women were perceived as belonging to other men.[170]

Statutory rape in American codes is a sex specific offense: an adult man is subject to prosecution for having sexual intercourse with a female under the statutory age, even though the acts may have been voluntary or

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ten 'act out' by running away, and therefore have records of delinquency; it is this charge that children are treated for. Few people want to admit that all the behavior stemmed from the incest."

BART DELIN, THE SEX OFFENDER, 133-35 (1978) (quoting Debbie Anderson, Dir. of Sexual Assault Servs., Minneapolis, Minnesota). Anderson suggests a team approach and says that incest is basically rape. *See id.* at 121-43.

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> The primary obstacle to creating a legal world in which the harms women suffer are taken as seriously as the harms suffered by men is political, not jurisprudential. If women were taken as seriously as men, by citizen-voters, by legislators, and by judges, law would not so frequently, consistently, and predictably trivialize, ignore, legitimate, protect, or celebrate, rather than minimize, the harms that women and only women suffer . . . . Politics, in this sense, must precede law. If, [as a society], we *care* about violence against women, then we will do something about it, and what we do about it will perforce involve the law. Law, however, will not take gendered harms seriously until "society" does, and society won't until women's interests are weighted equally with men's.

ROBIN WEST, CARING FOR JUSTICE 164-65 (1997).

[170] For a comprehensive history of the civil action of seduction and its relation to rape and the criminal laws, as the law developed and changed over the nineteenth and into the twentieth century, see Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817 (1996). The author is persuasive on the point that whatever else it was, the laws of seduction did little to offer redress to women for seduction and abandonment. The cause of action belonged to fathers, and in theory to employers. The Field Code in New York in 1850 introduced a procedural change that allowed women to sue on their own behalf. *See id.* at 891 n.356. This reform was adopted, apparently inadvertently, as eleven other states adopted the Field Codes in their entirety. *See id.* at 893 n.369. The seduction cases discussed in this article resemble the traditional incest cases in their reports of female misery and the unwillingness of the legal system to recognize a legal wrong or offer amelioration in a situation in which the law technically created a remedy. In the nineteenth-century seduction cases, the principles of equity were ignored as well as the letter of the statutory law.

consensual on both sides.[171] Under traditional statutory rape laws, a woman could not be prosecuted for committing statutory rape of a male under the statutory age of consent.[172] The complaint of statutory rape was dismissed if the "offender" married the underage girl.[173] In this respect, statutory rape laws took on some of the characteristics of "seduction" statutes and other quasi-criminal statutes proscribing fines for criminal conversation; marriage of the offender to the underage girl was a defense.[174]

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[171] Fornication statutes, on the other hand, always punished both parties. The presumption was that the behavior was consensual. Seduction statutes and statutes prohibiting criminal conversation were gender specific. The shading together of these offenses was one source of confusion in the law. Those enacting the statute, or seeking enforcement, may have been envisioning one type of behavior; those subject to enforcement, or to the lack of enforcement, may have seen the offense in very different terms. Prior to the enactment of its revised criminal code in 1979, New Jersey was typical in having a miscellaneous compilation of criminal statutes governing consensual sexual behavior left over from the nineteenth century. *See* 1971 Commentary, Introductory Note to Chapter 14 on Adultery and Fornication. Title 2C: New Jersey Code of Criminal Justice (1987).

[172] *See, e.g.*, MISS. CODE ANN. § 97-3-67 (1972) ("Rape - Carnal knowledge of chaste females over twelve and under eighteen years of age"). This offense was created in 1942. The statutory age in Mississippi had been 10 from 1839 until 1917, when the statutory age was raised to 12. The law prohibits carnal knowledge of unmarried females of a chaste character "younger than himself." In addition to this definition of statutory rape, the principal rape statute prohibits carnal knowledge of a female under 12. *See* MISS CODE ANN. § 97-3-65 (1972). Thus in Mississippi there were two statutory rape offenses: one offense for females under 12, another for "consenting" sexual acts with "chaste" females over 12 and under 18. *See* FEILD & BIENEN, JURORS AND RAPE *supra* note 4, at 318-22.

[173] In North Carolina a law of 1818 declared the 1576 Elizabethan rape statute, which defined the "statutory age" as 10, to be in force in North Carolina. An amendment in 1917 raised the stipulated age to 12 and added an entirely new offense: "obtaining carnal knowledge of *virtuous* girls between 12 and 14." The 1917 North Carolina statute defines the offense as carnal knowledge of any female child *who has never had sexual intercourse with any person*. The compilation of 1943 notes that in 1923 the age provisions were amended to encompass females over 12 and under 16 and a proviso was added: "If the offenders shall be married, such marriage shall be a total bar to prosecution." This is basically a seduction statute. *See* FEILD & BIENEN, JURORS AND RAPE *supra* note 4, at 366-70. Utah has removed the spousal exception for rape, but kept the spousal exception for statutory rape. *See* Chart, *infra*.

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> The chief criminal prosecution affected by marriage is that for seduction (usually defined as "seduction under promise of marriage"). Seduction was not a crime at common law, but is quite generally made so by statutes in the United States. The nature of the offense is such that the fact of marriage becomes very material in determining the policy that shall be pursued in prosecuting offenders. The essence of the crime consisting primarily in an inducement to sexual intercourse under promise of marriage, if the marriage in fact takes place, there would seem to be a very substantial mitigation of the offense. It is therefore not surprising to note that twenty-five American jurisdictions have provisions, in varying form, to the effect that marriage, or in some states a bona fide offer of marriage, constitutes a bar to prosecution or otherwise serves as a defense. [detailing statutory provisions in nineteen of the twenty five states]

1 CHESTER G. VERNIER, AMERICAN FAMILY LAWS: A COMPARATIVE STUDY OF THE FAMILY LAW OF THE FORTY-EIGHT AMERICAN STATES, ALASKA, AND DISTRICT OF COLUMBIA, AND HAWAII (TO JAN. 1, 1931) 288 (1931). The social purity movement lobbied in state legislatures to raise the statutory age while simultaneously campaigning for women's right to vote and pushing for a broader social agenda than simply changing the statutory age as it related to the capacity to consent to sexual intercourse and marriage. *See* Larson, *Rape Reform in Nineteenth-Century America, supra* note 156, at 11-15, 49-50; VanderVelde, *supra* note 170.

In some states, the age specified for statutory rape had a lower boundary as well as an upper limit. In some states, the statutory rape laws used the terminology of carnal abuse. Carnal abuse in some states included acts less than sexual intercourse, in addition to heterosexual intercourse.[175] The carnal abuse statute in New Jersey applied to vastly different circumstances involving sexual relations and behavior of and with a female under the statutory age, including: cases of consenting heterosexual intercourse among teenage peers; circumstances involving adult men and young girls, in which the sexual acts were not intercourse; and circumstances of forcible rape of an underage female.[176] These carnal abuse statutes were very different from both rape reform statutes, with their specific descriptions of acts and persons and statutory rape laws that simply prohibited sexual intercourse with a female under a certain age.

The legislative history of statutory rape in many jurisdictions shows the blurring of the boundary between statutory rape laws and seduction statutes.[177] At the time of initial codification, the statutory age was initially set at ten or twelve, following the British traditional offense of rape.[178] During the nineteenth century, the states raised the statutory age to fourteen, sixteen, or eighteen.[179] As the statutory age was raised, however, the perception of the character of the offense and the harm changed. As the age

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[175] "The rape cases in New Jersey and in other states require proof of some actual penetration into the female sex organ, 'however slight,' in order for the crime to exist. Such is not true for carnal abuse in New Jersey. Contact without penetration is sufficient . . . ." 1971 Commentary, reprinted as Appendix to Ch. 14, Sexual Offenses, Title 2C: New Jersey Code of Criminal Justice 308 (1989). (citation to cases omitted). *See* History of New Jersey: in 1887 statutory age for females was raised to 16. In 1905 a new offense was created, carnal abuse of females over 12 and under 16. *See* FEILD & BIENEN, JURORS AND RAPE, *supra* note 4, at 347. There were a significant fraction of offenders incarcerated at the ADTC for Carnal Abuse in 1980. *See* D.C. CODE ANN. § 22-2801 (1973) (Carnal Knowledge and Abuse of a Female Child Under 16). This statutory rape statute simultaneously prohibited "consenting" and forcible behavior. The penalty ranges from any term of years to life, and the acts constituting the offense are both sexual intercourse and sexual acts less than intercourse. For a discussion of the history of carnal abuse legislation in New York in the nineteenth century, see Robertson, Sexuality Through the Prism of Age, *supra* note 158, at 139-60.

[176] Excluded from the statute were possibly abusive behavior in heterosexual acts involving adult women and young boys, acts involving adult men and young boys, and homosexual acts between women. Some, but not all, of those behaviors would have been punishable under the traditional sodomy statute. *See* N.J. STAT. ANN. § 2A: 143-2, *repealed by* N.J. STAT. ANN. 2C:98-2 (1989).

[177] *See* VanderVelde, supra note 170, at 862. The law of seduction was as contradictory as the law in incest cases. The confusion was compounded by the fact that seduction was a civil action and the doctrine of merger and presumptions of the hierarchy between civil and criminal jurisdiction entered into the mix. *See id.* at 848. The results were distressingly similar to those in incest cases, however: an unwillingness to offer redress to women and an unwillingness to punish offending men.

[178] In 1885, an expose of child prostitution in Britain caused such public outcry that the age of consent was raised from 13 to 16. *See* Larson, *Rape Reform in Nineteenth-Century America, supra* note 156, at 25, and sources cited therein.

[179] The Mississippi and North Carolina statutory rape laws emphasized virginity and the unmarried status of the female in the statutes themselves. *See* FEILD & BIENEN, JURORS AND RAPE, *supra* note 4.

was raised, the penalties were typically lowered.[180] Special proof requirements were incorporated as the age of consent was raised and attitudes changed towards heterosexual behavior prior to marriage.[181] The fact that the terminology "consent" was used for the "age of consent" and actual consent by a specific female in a particular circumstance added further confusion. However, consent and its meaning and interpretation continued to be troublesome.[182]

As the age of consent was raised, statutory rape in some states was split off from the offense defining rape of adult women.[183] In other jurisdictions, statutory rape remained as a subcategory of the principal sex offense statute defining the forcible rape of adult women.[184] By the 1940s

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[180] Typically the development of the law was as follows. When the statutory age was raised, a chaste character provision was added and the "statutory rape" offense was separated out from the forcible rape statute. The legislative history of the California statutory rape law is typical. The California Penal Code of 1872 included within the definition of rape acts with a female under 10. An amendment in 1889 changed the statutory age of the female to 14; an amendment in 1897 raised the statutory age to 16. The California Code of 1913 raised the statutory age of the female to 18. In 1923, the punishment for statutory rape was reduced to a maximum of one year. In 1970, statutory rape, now defined as "unlawful"—between unmarried persons—sexual intercourse with a female under 18, was moved out of the principal rape statute. This is the statute that was challenged in Michael M. v. Superior Court, 450 U.S. 464 (1981). CAL. PENAL CODE § 261.5 (West Supp. 1980)

[181] These special provisions were chaste character provisions and corroboration requirements. For example, the Mississippi statutory rape law was introduced in 1942. Punishment was to be fixed by the jury. There was a chaste character requirement and a statutory corroboration requirement. The penalty remains a fine not exceeding $500 or imprisonment for six months, or for imprisonment up to five years, if punishment is set by the jury. *See* MISS. CODE ANN. § 97-3-67 (1994). By comparison, rape of a female under 14 by an offender over 18 carries a stipulated penalty of death or life imprisonment. *See* MISS. CODE ANN. § 97-3-65. *But see* Coker v. Georgia, 433 U.S. 584 (1977) (regarding the constitutionality of the death penalty for rape).

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> Not only did the issue of consent stymie actions for simple battery, in its crystalline form it also precluded women from obtaining standing in actions for their own seduction . . . . In many cases, women were thrown to the floor or the ground, said the word "no," resisted physically, and sometimes begged to be killed instead of raped. Nonetheless, in none of these cases is there any indication that the courts would have allowed the resisting and battered woman to sue in her own right [for seduction].

VanderVelde, supra note 170, at 860-61 (internal citations omitted). *See, e.g.*, Comment, *Forcible and Statutory Rape—An Explanation of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 65 (1952); *see also* Bienen, *Rape III*, *supra* note 4, at 190; Pateman, *supra* note 63.

[183] Iowa, prior to the enactment of a reform statute in 1979, kept increasing the statutory age within its traditional rape statute. The statutory age for females was 10 in 1850. It was raised to 13 in 1888, increased to 15 in 1897, and increased to 16 in 1923. The 1923 amendment also distinguished between males over 25 and under 25 for purposes of penalty. *See* FEILD & BIENEN, JURORS AND RAPE, *supra* note 4.

[184] For example, an 1823 compilation of laws of the Arkansas territory simply defined rape or carnal knowledge, forcibly and without consent. An act of 1838 added the offense of carnal knowledge of a female child "under the age of puberty." The compilation of 1894 specified 16 as the age of consent for "carnal abuse" and reduced the minimum penalty from 5 years to 1 year. The age provisions were unchanged until 1975 when the "age of consent" was defined as 11 and the formulation of the offense was entirely changed. *See* FEILD & BIENEN, *supra* note 4, at 220-24.

and 1950s the American definition of statutory rape had diverged significantly from the British common-law tradition.[185] Statutory and common law corroboration requirements and prompt complaint rules were American developments. The purpose behind such provisions was to excuse or exonerate defendants who engaged in sexual behavior that the society condoned or was unwilling to punish.[186] The legislative history of statutory rape in some jurisdictions supports the view that statutory rape laws were intended to function as seduction statutes.[187] The stipulation of a fine as penalty is a strong indicator. In maintaining a legal penalty for consenting conduct, legislatures seemed to be principally concerned with announcing a moral prohibition and preserving the threat of occasional criminal prosecution for parents and others.[188] And if parents or social service workers were choosing whom to prosecute, the statute had a quasi-civil status.

The mistake as to age defense for statutory rape developed to excuse otherwise culpable men for sexual behavior that was criminalized, but in fact tolerated.[189] The rule created a "technical" exception, or a legal fiction,

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[185] For a detailed and thoughtful study of the analogous laws in Britain, see L. RADZINOWICZ, SEXUAL OFFENSES: A REPORT OF THE CAMBRIDGE DEPARTMENT OF CRIMINAL SCIENCE (1957). This useful study includes comparative essays and some statistics on victims and offenders under the law prior to the major revision of English law under the Sexual Offences Act, 1956.

[186] For a current variation on this theme, see the policy described by Kelly C. Connerton. Kelly C. Connerton, Comment, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists*, 61 ALB. L. REV. 237, 256-62 (1997).

[187] In South Carolina in 1902, a new offense was defined: abducting and deflowering of a woman under 16 without the knowledge of her father. The penalty was a fine or a maximum term of 5 years. The age of consent at the time was 14, and the maximum penalty for rape or sexual intercourse with a child over 10 and under 14 was 14 years. A 1919 Virginia provision allowed marriage *with the consent of a parent* to be a bar to prosecution for rape of a female over 12 and under 16. In Montana, the 1895 Code contained a seduction statute with a chaste character provision. In Nebraska an amendment to the statutory rape law in 1895 increased the statutory age for females and added a statutory chaste character provision for carnal knowledge of a female child under 18 and over 15 with her consent. In South Carolina in 1921 the following provisions were added to the rape statute: If the defendant is under 18 and the female is over 14, the previous chastity of the female may be defensively shown. The punishment then is not to exceed one year or a fine of $500. In 1942, this offense was designated "statutory rape." From 1886 until 1971 Vermont had an offense defined as carnal knowledge of a female under 14 by a male under 16 with consent. The penalty was for both parties to be sent to "reform" school.

[188] *See, e.g.*, the discussion of the infrequency of prosecution under American statutory rape laws in Michael M. v. Superior Court, 450 U.S. 464, 474 (1981). The court recognized that the prevention of pregnancy among unwed female teenagers was a valid legislative purpose for the gender specific statute. *See* TEENAGE PREGNANCY: THE PROBLEM THAT HASN'T GONE AWAY 16-17 (1981). Teenagers represent only 18% of all sexually active women capable of becoming pregnant, but they account for 46% of all out of wedlock births and 31% of all abortions. The United States teenage pregnancy rate is the highest in the world. *See* Deborah L. Rhode, *Adolescent Pregnancy and Public Policy*, *in* THE POLITICS OF PREGNANCY 301, 311 (1993); *see also* Dave Lesher, *State Faces Tough Battle Against Teen Pregnancy*, L.A. TIMES, Jan. 30, 1996, at A1 (reporting that two-thirds of the pregnant teens in the group examined were prior victims of child abuse and rape).

[189] If a man "mistakenly" thought the female was older than the stipulated statutory age, that was a defense to statutory rape in many jurisdictions. *See* Larry W. Myers, *Reasonable Mistake of Age: A*

which was a complete defense. The defense was a mechanism for privileging the man's testimony over the woman's. If the man said he "believed" the woman was over the statutory age, the offense was not statutory rape. The confusion between consent and the age of consent was at the heart of these cases, whether a young woman under the statutory age could or should consent to sexual relations. The statutory rape statutes were comprehensive, categorical, and clear. They prohibited all sexual intercourse with females under the stipulated age. Their application was never straightforward. The defense of mistake as to age was a largely judge-created exception to this categorical rule. Recognizing the mistake as to age defense served another function: it created a legal basis for admitting evidence of consent or "knowledge" of the promiscuity of the female, or evidence about her "appearance," when such evidence was irrelevant to the elements of statutory rape. The mistake as to age defense suggested that no offense occurred because no harm occurred. The statutory age was a "technicality."

Chaste character requirements and corroboration rules, whether introduced by statute or case law, similarly created exceptions to a literal interpretation of the statutory rape laws and allowed for the admission of evidence regarding the appearance, behavior, and life circumstances of the young woman. In some jurisdictions these exceptions and special proof requirements resulted in a situation in which it was virtually impossible to obtain a conviction for statutory rape unless it could be proved the female under the age of consent was a virgin.[190] Marriage to the underage female was often and still is in some places a defense to statutory rape. As the seduction statutes were repealed or fell into disuse, statutory rape laws took over some of their functions.[191] Criminal prosecution was often intended to

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Needed Defense to Statutory Rape, 64 MICH. L. REV. 105 (1966). The justification for the defense was that older men want to have sexual relations with underage females without fear of criminal prosecution: "However, there are even more girls from twelve to fifteen whose appearance and behavior place them within, or on the vague border of, the overage males' category of desirable females." *Id.* at 121.

[190] *See* Robertson, Sexuality Through the Prism of Age, *supra* note 158. In New York, a seduction statute was introduced in 1848. The offense had a chaste character provision and a statutory corroboration requirement and was a misdemeanor with a maximum penalty of five years or one year. Indictment was required to be found within two years (a prompt complaint requirement) and subsequent marriage of the parties was a bar to prosecution (the marriage defense). None of these requirements applied to a prosecution for statutory rape. In New York, the corroboration requirement for statutory rape was added in 1886 when the seduction statute was repealed. However, Robertson argued that men did modify their behavior based upon whether they knew or thought the girls were under the statutory age. *See* Robertson, Sexuality Through the Prism of Age, supra note 158, at ch. 4 (discussing cases where men claimed they made a point of inquiring whether the girl was above the statutory age).

[191] Not all seduction statutes have been repealed. *See, e.g.*, MISS. CODE ANN. § 11-7-11 (1994):

> Action for seduction of a daughter: a father or mother may bring an action for the seduction of a daughter, although such daughter be not living with nor in the service of the plaintiff, and although there be no loss of service; but a recovery by the father, mother, or daughter shall bar any other action for the same cause.

Id. For a discussion of the notion of sexual rights in women as a form of property rights, owned by and inherited by male heads of family, under African traditional law, see T.O. Beidelman, *Kaguru Justice*

bring about a civil result: marriage of the parties.[192] The amendments to statutory rape laws reflect rapidly changing social rules and circumstances.[193] Criminal prosecutions have always been tied closely to politics in large cities, and each city had a unique culture.[194]

The role of the criminal justice system in upholding social norms, as opposed to its function of "punishing" persons for prohibited behavior is not a relic of the distant past.[195] Some interesting comparisons emerge from looking at the rules regarding "marriage" in statutory rape laws and incest

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and the Concept of Legal Fictions, 5 J. AFR. LAWS 5, 5-20 (1961). The author describes how the traditional sanction for rape is payment to the father or brother or husband. Such offenses, the author argues, are properly considered as trespasses to sexual property. The social harm is not to the female but to the men who possess property rights in her body. The fines paid are not for procreation, but for use. The status of "consent" is unclear. On the one hand, Beidelman speaks in terms of "rape." On the other hand he refers to consenting behavior in cases of adultery. In the Kaguru context, consent presumably would refer to the consent of the male property owner to the use of his women. The personal consent of the individual woman presumably is irrelevant to the legal determination that a male's property rights have been violated. For discussion of the father's right to bring an action for seduction, see VanderVelde, *supra* note 170.

[192] In Oregon, a law of 1905 added a new offense, carnal knowledge of a female over 16 and under 18 by a male over 18; *if there was no rape and the person of previously chaste character, then the offense was fornication* with a penalty of a fine or one month in county jail; if rape, then the penalty was a minimum of one to five years in prison. *See* FEILD & BIENEN, *supra* note 4, at 387-91. In Pennsylvania in 1887, the sex offense provisions of the code were amended to set the statutory age for the female and offenders at 16. At the same time chaste character provisions were introduced and a special consent defense was added: if acts with a female under 16 were with consent, the offense was fornication. This statute was repealed in 1972. In Mississippi, a 1942 law added the following new offense to the category of sex offenses: carnal knowledge of an unmarried female of previously chaste character younger than himself and between 12 and 18. Punishment was to be fixed by the jury. This provision remains in effect today, with the chaste character provision and a corroboration requirement intact. *See* MISS. CODE ANN. § 97-3-67 (1972). *See also* FEILD & BIENEN, *supra* note 4, at 318-22. In 1934 Tennessee added a provision prohibiting unlawful carnal knowledge of a female over 12 and under 21. Punishment was a minimum of 3 years and a maximum of 10 years. Evidence of prior unchastity was admissible only if the female was over 14, but "nothing shall authorize a conviction when the female is over 12 and is a bawd, lewd, or kept female." In 1956, a statutory corroboration requirement was added. *See* FEILD & BIENEN, JURORS AND RAPE, *supra* note 4.

[193] In 1970, California redefined statutory rape as unlawful sexual intercourse with a female under 18 and moved the offense into a separate section. Unlawful sexual intercourse is an act accomplished with a female not the wife of the perpetrator. *See* CAL. PENAL CODE § 261.5 (West. Supp. 1980). In 1950, New York defined a new offense, titled Statutory Rape, which was rape other than first or second degree, and the offense was a misdemeanor.

[194] *See* STANSELL, *supra* note 157.

[195] A controversial use of the marriage defense to statutory rape has surfaced recently in a California jurisdiction. Orange County has dropped statutory rape and child abuse charges against persons who agreed to marry underage females. This set of cases and the criticism directed at the county social service agency for this policy tells us that our own day has not seen a solution to the conflicts and contradictions raised by these cases. *See* Comment, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by their Statutory Rapists*, 61 ALB. L. REV. 237 (1997). Those criticizing the policy argued that it excused abusers by allowing them to marry their victims. Those upholding the policy said that it represented the choice of the girls and the best outcome for these teenagers, some of whom were marrying the parent of their child. Some of the population of underaged girls had been victims of sexual abuse within the family.

statutes. In traditional rape statutes with a spousal exception, a man cannot be guilty of raping his wife because it is an impossible crime, insofar as forcible sexual intercourse with *your wife* is a crime with no meaning. The "not the wife" phrase has a different meaning in statutory rape laws.[196] For Statutory rape, the reference to "unmarried" means chaste or virginal.[197] And marriage to the female is a defense to statutory rape.

When incest cases were prosecuted under American statutory rape laws, the statutory barriers to conviction that existed for statutory rape were applied to incest cases. In Britain prior to the Punishment of Incest Act of 1908, cases of father-daughter incest were necessarily prosecuted under the statutory rape law because there was no crime of Incest.[198] American prosecutors chose to bring incest cases under statutory rape laws in spite of the statutory and common-law barriers to conviction.[199] Differences in penalty may have been a consideration.[200] Ambiguities were present in both

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[196] In 1918, Georgia rewrote its statutory rape law, separating out the offense of statutory rape and defining 14 as the statutory age. A statutory corroboration requirement was introduced, and marriage was a statutory defense to a charge of rape under the section. The code of 1919 in Virginia added a new offense of carnal knowledge with consent of a female over 12 and under 16. If the carnal knowledge was with consent of the female, then subsequent marriage with the consent of the parents was a bar to prosecution. In Illinois, an amendment to the rape laws passed in 1905 added the language "not his wife" to the statutory rape offense and added a specific provision stating that marriage to the victim precluded conviction for statutory rape. A North Carolina statute of 1895 included in the compilation of laws of 1917 defined a new offense: obtaining carnal knowledge of *virtuous* girls between 12 and 14. In 1923 the age limits were amended to over 12 and under 16 and a provision was added: if the offenders shall be married, such a marriage shall be a total bar to prosecution. *See* FEILD & BIENEN, JURORS AND RAPE, *supra* note 4.

[197] The reference to unmarried girls in statutory rape laws means unmarried to anyone, hence virginal. A spousal exception is not the same as saying subsequent marriage between the parties bars prosecution. In practice, these provisions shade into one another, blurred colors on the huge canvas of the law. For example, a 1913 statute in Michigan allowed for the prosecution of a man who married the woman he raped and then deserted her without good cause. This statute seems to be a version of a seduction statute applied to a situation of forcible rape followed by forced marriage, a circumstance usually only seen in statutory rape cases.

[198] Prior to the passage of the Punishment of Incest Act in 1908, a Home Office study of prosecutions for carnal knowledge of girls under 16 (statutory rape) revealed that over one-quarter (51) were cases of incest, and most involved father-daughter incest. *See* Victor Bailey & Sheila Blackburn, *The Punishment of Incest Act 1908: A Case Study of Law Creation*, 1979 CRIM. L. REV. 708, 713.

[199] *See, e.g.*, State v. Columbus, 154 A. 605 (N.J. 1931) (holding that acts of father-daughter incest could be prosecuted either under the statutory rape law or under the incest laws). In State v. Hittson, 254 P.2d 1063 (N.M. 1953), the defendant asked the court to reverse his conviction for incest because the facts showed he was guilty of forcible rape upon his daughter. The defense did not succeed in this case; however, several jurisdictions did follow a leading case that reversed a conviction for incest on this basis. *See* State v. Jarvis, 26 P. 302 (Or. 1891); L.S. Tellier, Annotation, *Consent as an Element of Incest*, 36 A.L.R. 2d 1299 (1954).

[200] *See, e.g.*, the former law of Pennsylvania. PA. STAT. ANN. tit. 18 § 4302 (West 1973) (Incest; carried a maximum of 5 years); PA. STAT. ANN. tit. 18 § 3122 (West 1973) (Statutory Rape; carried a maximum term of 10 years). In contrast, New Jersey, prior to the passage of rape reform legislation, had a penalty of 15 years for both incest and carnal abuse. *See* FEILD & BIENEN, *supra* note 4, at 347-52.

sets of statutes.[201] A few incest statutes recognized as acts constituting the offense sexual conduct other than heterosexual intercourse.[202] Prosecuting incest cases under the statutory rape law in most jurisdictions required proof of sexual intercourse.

When incest was prosecuted under statutory rape laws, the relevance of the victim's character and reputation for chastity allowed the defense to focus the fact finder's attention on the sexual behavior of the complaining witness because the defenses developed for statutory rape applied.[203] Sexual acting out is a frequent psychological consequence of father-daughter incest.[204] A father-daughter case which was prosecuted under a statutory rape law in a state with a chaste character provision could be defeated by a showing of promiscuous behavior of the daughter.[205]

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[201] *See, e.g.*, N.J. STAT. ANN. § 2A:138-1 (1978), *repealed by* N.J. STAT. ANN. § 2C:98-2 (1995), prohibiting carnal abuse of a female under 16. The offense is in the same section as the forcible rape statute. It is ambiguous whether or not forcible rape of a person under 16 carried a penalty of 30 years (the penalty for rape of an adult woman) or a penalty of 15 years (the penalty for "statutory" rape). As a matter of practicality cases involving females under 16 were prosecuted under the statutory rape law, and the maximum penalty was 15 years. This meant forcible rape of a female under 16 carried a lesser penalty than forcible rape of an adult woman in New Jersey.

[202] New Jersey was unusual in including under the definition of "incestuous conduct" acts which were not intercourse. *See* N.J. STAT. ANN. § 2A:114-2 (West 1978), *repealed by* N.J. STAT. ANN. § 2C:98-2 (West 1995).

[203] In McKinney v. State, 505 S.W. 2d 536 (Tex. Crim. App. 1974), the defendant had been convicted of statutory rape for acts of sexual intercourse with his adopted daughter. The court was concerned that all the traditional defenses to statutory rape had been given an adequate airing. There was no corroboration requirement or issue of consent under statutory rape law in Texas. *See id.* at 538-39. The Texas Incest Statute, in effect in 1974, prohibited sexual intercourse with an adopted daughter. In *McKinney* there was evidence that the defendant had sexual relations with other adopted daughters as well. No explanation is offered as to why this prosecution proceeded under the statutory rape law instead of the incest statute. In Uhl v. State, 479 S.W. 2d 55 (Tex. Crim. App. 1972), the defendant was charged with rape of his 12 year old cousin. The traditional defense to statutory rape, lack of corroboration and failure to make outcry, were raised. *See id.* at 56. Neither of these defenses would have been available if the prosecution had been under the incest statute.

[204] Research indicates that a very high percentage of juvenile prostitutes are teenage runaways who leave home because they are being sexually abused within the family, usually by a father or stepfathers. *See* Jennifer James & Jane Meyerdin, *Early Sexual Experience and Prostitution*, 134 AM. J. PSYCHIATRY 1381 (1977). There is a great deal of anecdotal evidence and a small number of controlled studies involving the prevalence of prior sexual abuse among women when they are young. "Clinical reports and empirical studies have consistently found that sexual abuse, as well as other forms of maltreatment, may affect children in all areas of development, and that delays in cognitive, social, emotional and psychological development brought on by such abuse may interfere with overall adaptive functioning." Debra Boyer & David Fine, *Sexual Abuse as a Factor in Adolescent Pregnancy and Child Maltreatment*, 24 FAM. PLAN. PERSP. 4 (1992). Two-thirds of a sample of 535 young women from the state of Washington who became pregnant as adolescents had been sexually abused. The abused adolescents were also more likely to have been hit, slapped, or beaten by a partner and to have exchanged sex for money, drugs, or a place to stay. Young women in the abused group were also more likely to report that their own children had been abused or had been taken from them by Child Protective Services. *See id.*

[205] For a case history in which a girl who is subjected to incest from her father runs away from home and becomes a prostitute, see DELIN, *supra* note 168, at 121-43.

The prompt complaint requirement hampered the prosecution when cases of father-daughter incest were brought under the statutory rape law.[206] If a juror believed she or he might have acted differently than the victim under similar circumstances and there is a statute suggesting the norm is prompt complaint, doubt about the victim's response could perhaps lead to an acquittal.[207]

If there was any difficulty in proving the existence of a formal marriage, if the adult was a common-law partner rather than a biological father or step parent, or if the validity of the marriage itself could not be established, that could be a reason to prosecute an incest case under the statutory rape laws. The existence of the family relationship is irrelevant to statutory rape, but it is a critical element of Incest. On some occasions, prosecution was brought in the alternative for both Incest and statutory rape. In a few jurisdictions, the common law prohibited prosecution for both offenses or in the alternative. [208]

The traditionally defined offenses of Incest and statutory rape are similar in several important respects. Both crimes connect to the society's interest in regulating marriage. Both offenses in some circumstances may be considered status offenses: that is, the prohibited conduct would not be criminal if it were done by persons who were not related or within the prohibited age grades. The definitions of prohibited conduct in both Incest and statutory rape encompass prohibitions against forcible acts, and in some in-

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[206] The prompt complaint rule was similar in function to corroboration requirements since it stated that unless a female, especially a young female, made "prompt outcry" the prosecution would be dismissed. *See, e.g.*, MODEL PENAL CODE § 213.6(4) and Comments (1980). The Model Penal Code generally adopted the attitude that in the case of sex offenses, the principal danger was to protect men from "false complaints." The repeal of prompt complaint rules in the late 1970s reflected a significant change in cultural attitudes. *See* former PA. STAT. ANN. tit. 18, § 3105 (West 1974) (Prompt Complaint, repealed in 1975 and replaced with a provision saying no prompt complaint required).

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> The pattern of child incestuous abuse is strikingly consistent. In the typical situation, the incestuous child abuser uses the atmosphere of silence and denial surrounding incest to gain and maintain sexual access to his victim, . . . [t]he typical victim, who may be exploited repeatedly from early childhood into adolescence, initially submits passively to the assaults; she is completely dominated because of the extreme power imbalance inherent in the relationship. As she grows older and discovers with tremendous shame that her relationship with the perpetrator is taboo, the incest perpetrator typically threatens her with a chain of evil consequences if she refuses to submit or reveals the secret . . . . As a result, most children keep the fact that they are being incestuously abused a secret.

Jocelyn Lamm, *Easing Access to the Courts for Incest Victims: Towards an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189, 2192-93 (1991) (internal notes omitted); *see also* Carolyn B. Handler, *Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle*, 15 FORDHAM URB. L.J. 709 (1987), and sources cited therein; Herman & Schatzow, *supra* note 150.

[208] *See* State v. Haston, 166 P. 2d 141 (Ariz. 1946) (information charging eight different offenses of statutory rape, incest and assault with intent to commit statutory rape and incest on three different daughters did violate defendant's constitutional right to have the charge against him defined with clarity).

stances sexual acts with very young children. These are not status offenses. Very different kinds of sexual behavior are included within the purview of a single statute in both instances. The cases coming to the courts overwhelmingly involve circumstances of coercion or females under the age of consent. Incest cases continue to be brought under statutory rape laws in some jurisdictions; differences in penalties between the two offenses remain.[209]

The purpose and operation of statutory rape laws were called into question when feminists and others challenged traditional rape statutes and the practice surrounding them. Reformers argued the rape laws reflected a misogynistic and repressive political attitude towards women and imposed a restrictive view of acceptable sexual behavior. It was a small, logical step to apply the same analysis to the legal system's response to sexual abuse within the family, especially when clinical reports suggested the majority of prosecutions involved fathers and underage daughters and few resulted in conviction. What better symbolized the patriarchal values of the legal system?[210] The development of statutory definitions of incest under reform statutes was a frontal assault upon both the view of women expressed in the statutory language of these traditional statutes and upon the legal system's unwillingness to punish adult male offenders.

VI. THE REDEFINITION OF INCEST UNDER RAPE REFORM STATUTES: CHANGING THE CHARACTERIZATION OF THE OFFENSE

The national women's movement of the 1970s and 1980s focused public attention upon women as victims of sex crimes generally and spearheaded the enactment of laws redefining all sex crimes in a significant number of states. The political movement addressed the status of women generally, including civil and political rights and employment issues, and considering the status of women in the criminal law as central to the goals of reformers. For the purposes of providing redress through the law, de-

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[209] In Delaware, Incest is a Class A misdemeanor with a maximum penalty of two years, and sexual intercourse with a female under 16 is a Class B felony, with a minimum of 3 years and a maximum of 30 years. *See* DEL. CODE ANN. tit. 11 §§ 771, 763, 4206, 4205. In Idaho, Incest is punishable with a maximum penalty of 10 years, and statutory rape carries a minimum term of one year and a maximum of life. *See* IDAHO CODE §§ 18-6602, 18-6101(1) (1998). In contrast, Kentucky and Georgia specify the same penalty for statutory rape and Incest. *See* GA. CODE ANN. §§ 26-2006, 26-2018; KY. REV. STAT. ANN. §§ 530.020, 510.060(1) (Michie 1998)..

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> Early feminist theory about incest suggested that, because such behavior seemed to involve a sexual objectification of daughters, the treating of children as property, and the abuse of patriarchal authority, incestuous fathers would be men with rigidly traditional masculine outlooks. Three very thoughtful dissertations which set out with this hypothesis, however, failed to confirm it . . . . All studies, however, did find suggestions of other sex-role disturbances . . . . In short , incestuous fathers seem to be inadequate in their masculine identification rather than being over identified with stereotypical masculinity.

Williams & Finkelhor, *Incestuous Fathers*, *supra* note 19, at 231, 245-46 (citations to studies omitted).

fining and measuring the harm to the victims of incest was and remains difficult when that harm may be lifelong psychological disability. Incest may not be reported until years after the act and the extent of the psychological harm may not be directly proportionate to the nature of the sexual acts. Many incestuous assaults involve sexual intercourse, pregnancy, or extremely deviant acts with very young children, but many do not. According to the clinical literature, the extent of the psychological harm is not necessarily correlated to the sexual acts committed.[211] The arguments against the legal system and the criminal justice system being the forum for redressing all wrongs were and are not trivial. History teaches us that the legal system rarely corrects longstanding injustices, especially when they are firmly embedded in the social fabric. The reformers of the 1970s were, however, determined to do something about the future. Drafting statutes applicable to a range of incestuous circumstances, which were also a practical vehicle for prosecutors, and persuading state legislatures to adopt such laws was a formidable undertaking.

Prior to the passage of rape reform legislation, few states defined sexual intercourse with a daughter or sister as a subcategory of the most serious sex offense.[212] In most states the prototypical incest case, sexual acts between a father and an underage daughter, would be cognizable under three very different statutes: the traditional incest statute, the traditional statutory rape statute, and some variety of child abuse. These provisions had overlapping jurisdiction, and the prosecutor could choose how and where to bring the case. Reformers argued for replacing vaguely worded, duplicative offenses, and for removing overlapping jurisdiction, emphasizing that the proposed rape reform statute rationalized a hodgepodge of criminal laws.[213]

When feminists began to lobby for changes in the rape laws in the 1970s, recharacterizing sex offenses involving children became a powerful

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[211] Debbie Anderson, the Director of the Sexual Assault Services in Minneapolis, Minnesota has commented:

> Incestuous families stunt the growth of the children, but society doesn't want to recognize what is happening. The whole subject is too painful. We shove the truth under the rug and ignore its presence. The very inner core of the child is meddled with and used. It turns upside down-down who is taking care of whom . . . . We pretty well know that mentally ill people come from situations where they're hearing conflicting messages at one time. This happens with incest . . .

DELIN, *supra* note 168, at 131 (quoting Anderson).

[212] *See, e.g.*, ALASKA STAT. § 11.41.410 (Michie 1978) (First Degree Sexual Assault includes sexual penetration with a son or daughter); OR. REV. STAT. § 163.375 (1977) (defining as Rape in the First Degree sexual intercourse when the female is under 16 and the male's sister, of the whole or half blood, his daughter, or his wife's daughter).

[213] The Mayor's 1939 Committee on Sex Offenses had some concerns similar to the goals of the reformers of the 1970s: *e.g.* to remove and replace contradictions and multiplicities in the definitions of sex offenses. It is also worth noting that some of the practices which troubled advocates in the 1970s were noted and present in the 1930s: *e.g.* disposing of sex offense charges with pleas to minor misdemeanors, with no record of the offense being a sex offense, even when that offense was incest or sexual acts with a child. *See* New York City Mayor's 1939 Report 44-50. The Committee recommended that all "sexual misbehavior and tampering with children" under 10 be classified as a felony.

and persuasive component of both the practical and the political arguments for redefining all sex offenses and for changing the criminal justice system's response to sex crimes generally. The Michigan rape reform statute, the first rape reform statute and the prototype for many subsequent enactments, redefined incest as a subcategory of the most serious sex offense but only if the persons committing the offense were over the age of thirteen and under the age of sixteen.[214] The Michigan rape reform statute jettisoned the title "incest" and defined a totally new sex offense. Michigan simultaneously repealed its traditional incest statute.[215] Reform statutes like the Michigan statue do not characterize the statutory age as the age of consent, but reform statutes do set a "statutory" age and then define as criminal all sexual contact or sexual penetration with a person under that age.[216] The arguably radical step of repealing the traditional incest statute was not taken by the majority of states enacting rape reform legislation. Minnesota enacted rape reform legislation soon after the passage of the Michigan statute and modeled its reform statute closely upon the Michigan statute, but Minnesota did not repeal its traditional incest statute.[217] New Jersey was one of the few states to follow Michigan and repeal its traditional incest statute when rape reform legislation was passed.[218]

The new offense in Michigan, defined as a subcategory of criminal sexual conduct, prohibited acts of sexual penetration and sexual contact with persons over thirteen and under sixteen when the other person was an adult member of the household, a relative, or in a position of authority.

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> A person is guilty of criminal sexual conduct in the first degree [the most serious sex offense] if he engages in sexual penetration with another person and if any of the following circumstances exists: . . . (b) The other person is at least 13 but less than 16 years of age *and* the actor is a member of the same household as the victim, or the actor is related to the victim by blood or affinity to the fourth degree, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit . . . .

MICH. COMP. LAWS §§ 750.520(b), 750.520(2) (1998). A parallel provision defined a second degree offense for acts of sexual contact, that is, acts less than sexual intercourse, in the same circumstance. In 1980, seventeen jurisdictions still specifically defined statutory rape in terms of an age of consent, with the age of consent commonly set at 16. *See* Bienen, *Rape III*, *supra* note 4, at 190.

[215] *See* MICH. STAT. ANN. § 28.565 (Law. Co-op. 1972), *repealed by* Michigan Pub. Act. 1974, No. 266, effective April 1, 1975.

[216] In Florida, the reform statute set statutory age at 11, but the jurisdiction retained the traditional statutory rape statute with its chaste character provision and set the age at 18. *See* FLA. STAT. ANN. § 794.011(2) (West 1998). The majority of states enacting reform statutes did not adopt 12 or 13 as the statutory age, perhaps largely because it was politically unacceptable to decriminalize even consenting sexual conduct among teenagers.

[217] *See* MINN. STAT. ANN. §§ 609.342, 609.343 (Criminal Sexual Conduct in the first degree; Criminal Sexual Conduct in the second degree) (1980). A typical, traditional incest statute, MINN. STAT. ANN. § 609.365 (1980), was not repealed.

[218] *See* N.J. STAT. ANN. § 2A:114-1, 2 (West 1978), *repealed by* N.J. STAT. ANN. § 2C:98-2 (West 1989). The states which have repealed the traditional criminal offense of incest typically retain a civil offense prohibiting marriage between certain relatives. *See, e.g.*, N.J. STAT. ANN. § 37:1-1 (West 1998) (Certain Marriages Prohibited).

This offense was one of several categories of first degree criminal sexual conduct, the most serious sex offense. Sexual penetration with a person under thirteen was encompassed within the most serious sex offenses, irrespective of the status or age of the actor.

The incest statutes defined under rape reform legislation depart from the concept of the crime under traditional statutes in several important ways. A number of states started with the Michigan formulation of the offense. Few states followed the nomenclature of the Michigan statute. The name of the new offenses differed from state to state, with many reform states adopting the categorization of sexual assault. The concept of the offense was taken from the Michigan statute, however.

It was unusual for a criminal statute to have been drafted on the basis of an entirely new conceptual framework, and doubly unusual that the definition of the offense came out of 1970s feminist political theory. The crimes that were set out in the Michigan rape reform statute were constructed anew from basic premises, with each element being redefined. Law professors and women lawyers played a crucial role, and their training and experience made an enormous difference. In each state, adjustments and changes were made in drafting and during the course of negotiation. These women lawyers participated at every stage. What was this new conception of Incest? And was it as revolutionary as its proponents and critics argued?

There were a number of wholly new provisions. First, under the New Jersey and Michigan models, if the child is under the age of thirteen, no distinction is made between sexual acts committed by a relative or family member and acts committed by any other person. Relationship of the parties, or the existence of a marriage, is irrelevant to the definition of the offense if the child is under thirteen years old. For acts with children under age thirteen, there is no distinction in penalty, or in the categorization of the harm, between sexual acts between father and daughter, for example, and sexual acts with an acquaintance or a stranger. Second, in those states that repealed the traditional offense of incest when enacting rape reform legislation, there would no longer be a crime titled Incest. Consenting sexual relations between close relatives, when both parties are over sixteen years of age, is no longer a crime. Sexual intercourse between cousins or siblings or parents and children is not subject to criminal penalties if the parties are both over age sixteen. That iteration of the traditional offense has been eliminated entirely. Third, the reform statutes make no distinction between homosexual and heterosexual acts. Sexual behavior between members of the same sex is as criminal as male-female or female-male relations. Fourth, the definition of prohibited conduct is significantly expanded. Acts of sexual penetration are redefined and expanded to include more than het-

erosexual intercourse.[219] In addition, lesser offenses are defined and the acts constituting those offenses are based upon the newly defined sexual contact provisions under the reform definition. These include acts of touching and other sexual acts that do not involve penetration.[220] Finally, the definition of the relationship that triggers eligibility for criminal prosecution is changed conceptually and in scope.

The purpose behind the recharacterization of child sexual abuse within the family was to replace traditional incest statutes with an offense whose formulation was closer to the circumstances seen by therapists or reported to hospitals and social service agencies.[221] The reformers of the 1970s had a very different perception of the harm committed, and this can be seen in

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[219] Sexual penetration under the reform statutes includes cunnilingus, fellatio, anal intercourse, digital penetration, and penetration with an object. The last category particularly has been criticized as overly inclusive, incorporating dentistry and legitimate medical examinations. *See* MODEL PENAL CODE, comments to Art. 213 Sexual Offenses (1980 Rev. ed.); *see also* reform definitions of sexual penetration and sexual contact: MICH. COMP. LAWS § 28.788 (1998); N.J .STAT. ANN. § 2C:14-1(c), (d) (West 1995). Some states adopted a medical exception for this reason. *See* COLO. REV. STAT. § 18-3-410 (1998).

[220] *See, e.g.*, N.J. STAT. ANN. § 2C:14-1(d):

> "Sexual Contact" means an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present.

And just to show that obscurantist commentary is not an art lost in the nineteenth century, consider the following "official commentary" to this provision:

> In the legislative process the source definition was also reworked to clarify it and to combine the touching of the victim by the actor and the touching of the actor by the victim. That gave rise to an ambiguity as to whether touching of the actor by the actor was included [i.e. exposure or masturbation by a male]. The distinction may lie in the relation of the actor to the victim. Sexual contact is an essentially assaultive crime. The victim in lewdness, while subject o affront or alarm, is not really made part of the act itself, which is only observed by the victim . . . .

Comment to Ch. 14, Sexual Offenses, Title 2C: New Jersey Code of Criminal Justice 288-89 (1989 edition).

[221] In some states, reform efforts were focused upon the passage of child abuse legislation, at the same time or as an alternative to the passage of rape reform legislation. *See* COLO. REV. STAT. § 18-6-401 *et seq.* (1978) (defining sexual abuse). The Colorado rape reform statute defines three degrees of sexual assault, including sexual assault upon a child. *See* COLO. REV. STAT. § 18-3-405 (1978). Second degree sexual assault includes sexual penetration with a victim under 18 by an actor who is the victim's guardian or responsible for the victim's supervision. *See* COLO. REV. STAT. § 18-3-403 (1987). Third degree sexual assault is defined as sexual contact with a victim less than 18 by an actor who is the victim's guardian or responsible for the victim's supervision. *See* COLO. REV. STAT. § 18-3-404(e) (1978). Colorado also has a separate offense of incest and aggravated incest. *See* COLO. REV. STAT. § 18-6-301 (1978). In 1983 the Colorado legislature amended the definition section of this statute to clarify that:

> One in a 'position of trust' includes, but is not limited to, any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties, or responsibilities concerning a child, or a person who is charged with any duty or responsibility for child care, or family care, either independently or through another, no matter how brief, at the time of an unlawful act.

COLO. REV. STAT. § 18-3-401(3.5) (1978).

the terminology chosen to define the new sex offenses.[222] Terms such as "lewd and lascivious" or "infamous" or "unchaste" were removed and replaced with precise, clinical terminology taken from the medical lexicon. This change in diction is more than a technicality. The medical vocabulary replaced language of morality. The medical terminology used clinical terms for sexual acts and made no reference to marriage. Biblical terms, such as adultery and carnal knowledge, were replaced with detailed anatomical descriptions of sexual penetration and sexual contact.

Reformers argued that both medical and clinical research from social service agencies supported the redefinition of the offense.[223] Clinical personnel in a hospital setting were reporting cases that provided empirical support.[224] Reformers hoped that transposing the characterization of the offense into the language of medicine, or the clinical terminology of social service agencies, would render irrelevant debates on morality and fault, and lend the authority of science and objectivity to their position.[225]

The adoption of this terminology and the presence and support of social service case workers and medical clinicians changed the tenor of the political debate before the legislative committees. It was a far reaching choice made early by those lobbying for the reform legislation. The parameters of the argument altered drastically and many legislators were caught off guard. No longer were the "dirty" details of sex offenses off limits in the public legislative debate, something male legislators could perhaps make jokes about behind closed doors with no women present. Women were taking the initiative and coming into the committee rooms of the state legislature with a fully drafted, complicated proposed statute in hand. They were talking about penises, anal intercourse, oral genital acts, breasts, vaginas, and sexual penetration. The male legislators were the ones who were embarrassed. This was a brilliant preemptive strike in the battle for control of the discourse.

Arguing that young victims fantasized assaults and thus the law should have strict corroboration requirements, a prompt complaint rule, or a mistake as to age defense was difficult in the face of the detailed, specific clinical reports, often backed up by empirical research, which were thrust before the legislators. The feminists stole a march on their opposition when they talked about sexual acts in explicit terms. No longer could the response be: Women do not know about this and should not talk about it. Insisting upon the anatomical diction of medicine precluded the debate from being derailed

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[222] *See, e.g.*, Wyoming reference to mental injury; Wisconsin reference to liability of third parties, Chart, *infra*.

[223] Hawaii refers to continuous sexual assault of a victim. *See* Chart, *infra*.

[224] South Dakota enacted a crime titled "Criminal Pedophilia." *See* Chart, *infra*.

[225] Of course having doctors testify as to sexual offenses was not new in the 1970s. Doctors in the nineteenth century testified in rape cases and statutory rape cases, but they testified as to whether or not the woman was a virgin. *See* Robertson, *Signs, Marks, and Private Parts*, *supra* note 160.

into issues of whether or not teenaged girls were immoral, seductive, consenting or blameworthy.[226] And those lobbying for the changed definitions always included examples of the sexual abuse of young boys. With the adoption of medical and psychological terminology, Incest was persuasively characterized as an assault upon the person, capable of being verified by case reports and systematic data collection and defined in precise medical diction. When this language was written into the statute, it was emblematic of the philosophical and doctrinal changes embodied in the redefinition of the offense. What were these important changes in language?

Reform statutes typically adopted sex neutral terms for the persons involved.[227] This language change had several ramifications: Legislators and judges were moved away from terms such as prosecutrix and complainant that reformers regarded as sexist, biased by negative and derogatory connotations. The reformers wanted to cut any connection with the line of cases incorporating that language and the attitudes they symbolized. The adoption of sex neutral language for offenders and victims was part of a strategy to reformulate sex crimes in more objective, serious, and clinical terms.[228] It was difficult to call up characterizations of seductive and lascivious young females, whom men needed protection from, when those lobbying for the change were speaking with specificity and precision about oral genital acts with very young boys and girls or circumstances of psychological helplessness. For reformers this meant seeing the offense realistically.

Many reform states adopted position of familial authority, or family relationship as a subcategory of the most serious sex offense, renamed as sexual assault or criminal sexual conduct. Offenses involving adults and minors when the adult was in a position of familial authority became a spe-

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[226] There was some resistance to what was correctly perceived to be a national plot. In some states the attempt to maintain the status quo were successful. The allegations of false reports and suspicion of young women's sexual conduct were not confined to the law. *See, e.g.*, Jean Goodwin et al., *Incest Hoax—False Accusations, False Denials, in* SEXUAL ABUSE OF CHILDREN - IMPLICATIONS FOR TREATMENT 37-45 (Wayne M. Holder ed., 1980). *But see* Ahlgren, *supra* note 165, at 492 n.61 ("Research indicates that children rarely fabricate these stories. Conversely, as many as 30% of the victims will falsely retract incest allegations following pressure from the abuser. [citing] Goodwin et al., *False Accusations and False Denials of Incest: Clinical Myths and Clinical Realities, in* SEXUAL ABUSE 17 (J. Goodwin ed., 1982)."). This article includes extensive discussion on feminist theory.

[227] In some states, the terms adopted were those customarily used to describe the participants in the crimes of homicide or other assaults against the person—perpetrator-victim or offender-victim. Other state statutes picked up the terminology actor/victim. Others used the more neutral actor-actor or person-person. *See, e.g.*, Chart, *infra*.

[228] The titles of the redefined sex offenses expressed that goal: Offenses were no longer to be titled "rape," "statutory rape," "carnal abuse," sodomy or incest. The new offenses were titled Criminal Sexual Conduct (Michigan); Sexual assault (New Jersey); or Sexual Battery (Florida).

cial case of the redefined and retitled sex offenses.[229] The transformation of family, with its emphasis upon blood relations, into a concept of "position of authority" was one of the most profound philosophical changes.

These statutes introduced an entirely new concept of Incest in their description of the behavior to be prohibited, the proof requirements, the penalties, and the perceived harm. Under the Michigan, New Jersey, and Minnesota reform statutes acts of sexual penetration, as set out under the expanded reform definition, and acts of sexual contact, again using the broadly worded reform definition, are criminalized when the actor is in a position of familial authority. States define the persons included in the category differently.[230] Most reform statutes only define an offense for persons over thirteen years of age and under sixteen years of age. For offenses involving older children, the definition of the prohibited familial relationship is significantly expanded in comparison to the categories in a traditional incest statute.[231]

If the victim is under thirteen, acts of sexual penetration, as defined, merit the same treatment and punishment whether or not the actor is a family member and whether or not the acts are homosexual or heterosexual intercourse or oral genital acts. This comes about from the sex neutral definition of actor and victim and from the redefinition of the actus reus, sexual penetration.[232] The penalty structure has been radically altered.[233] In

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[229] In many states, the legislature took the opportunity to regroup all sex offenses in a new chapter with a new title, adopting the new sex neutral language, and that was a significant change. *See, e.g.*, Wyoming, Chart, *infra*. The redefined section on sex offenses, which usually included at least some part of the former incest, and were put together under a new chapter. The special provisions redefining proof requirements then clearly applied to all offenses in the entire chapter. *See, e.g.*, N.J. STAT. ANN. § 2C:14-1 et seq. (West 1995) ("The following . . . apply to this chapter").

[230] In some states, the concept of position of authority was expanded to include teachers, institutional workers and paid child care providers. Notice the differences between the definition of "position of authority" in MINN. STAT. ANN. § 609.341(10) (1980) and MICH. COMP. LAWS § 750.520b(l)(b) (1980). The Michigan provision states a relationship of blood or affinity of the fourth degree or a position of authority. *See* MICH. COMP. LAWS § 750.520(b) (1980). Michigan kept some of the terminology of the former incest statutes. The Minnesota provision defines position of authority to include any parent and any person acting in the place of a parent and charged with any of a parent's rights, duties, or responsibilities for a child. *See* MINN. STAT. ANN. § 609.341(10) (West 1980). The Minnesota Statute also allows for a mistake as to age defense for third and fourth degree offenses. *See* MINN. STAT. ANN. §§ .609.344(b), 609.345(b).

[231] The traditional incest statutes defined family relationships in terms of blood relationship or affinity. The reform statutes introduce a different concept: position of familial authority. The harm to society under traditional statutes was inbreeding or tainted blood lines, or a violation of a prohibition against sex outside of marriage, or a crossing of prohibited marital relations. Under reform statutes the articulated harm is abusive or exploitative use of authority within the family. The language of the reform statutes incorporates nontraditional fathers, stepfathers, "unmarried" fathers, uncles, grandparents and other adults in the household. An important, difficult to define category is the occasionally resident sexual partner, who is not the father.

[232] Acts of sexual penetration with a person under 13 are now cognizable as First Degree Criminal Sexual Conduct in Michigan and as Aggravated Sexual Assault in New Jersey.

New Jersey and Michigan, the penalty for a first-degree sex offense can be life or any term of years, with a mandatory five year period of incarceration for a second conviction in both jurisdictions.[234]

The reform statutes were radical in decriminalizing consenting sexual activity involving older teenagers.[235] Under many reform definitions, sexual acts, if both parties are under sixteen but over thirteen, are not crimes, unless there is a relationship of authority, including familial authority. Brother-sister incest, under the reform statute, would require proof of coercion or a presumed relationship of authority due to a discrepancy in age or size, and the relationship of authority would presumptively be gender neutral.

There are two new aspects to the reform-age gap provisions: One aspect is the implication that if the parties are the same age then the offense is presumed not to be abusive. An age disparity, typically set at three or four

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[233] In Michigan, the traditional incest offense carried a maximum penalty of ten years. *See* MICH. STAT. ANN. § 28.565 (West 1996), *repealed by* Pub. Acts 1974, No. 266, eff. April 1, 1975. The maximum penalty for first degree criminal sexual conduct is life or any term of years. *See* MICH. COMP. LAWS § 750.520b(2) (1998). In South Carolina, the traditional incest statute carries a penalty of a fine of $500 or a minimum of one year in prison or both. *See* S.C. CODE ANN. § 16-15-20 (Law Co-op. 1976) (Incest). The most serious sex offense, defined in part as sexual penetration with a victim under 11 when the actor is three years older, carries a maximum penalty of 30 years. *See* S.C. CODE ANN. § 16-3-562, 563 (Law Co-op. 1976). Similarly, in Rhode Island, the traditional offense of incest carries a penalty with a maximum of ten years. *See* R.I. GEN. LAWS § 11-6-4 (1970) (Incest). The most serious sex offense under the reform statute, first degree sexual assault, defined in part as sexual penetration when a victim is under 13, carries a minimum term of 10 years and a maximum term of life. R.I. GEN. LAWS § 11-37-2, 3 (1990).

Under the traditional offense in New Jersey, the maximum penalty for incest was 15 years, and this was almost always imposed as an indeterminate term under the New Jersey sex offender statute. *See* N.J. STAT. ANN. § 2A:114-1, 164-1 *et seq.* (West 1978), *both repealed by* N.J. STAT. ANN. § 2C:98-2 (West 1989). Even if the female child was under 16 and the acts consisted of repeated acts of sexual intercourse with a daughter, the maximum penalty was 15 years, if prosecution was under the incest statute. If prosecution was brought under the statutory rape statute, the maximum penalty was also 15 years. If prosecution was brought under the forcible rape statute, and the victim was under 12, then the penalty was a maximum of 30 years. Under the rape reform statute of 1979, the penalty for aggravated sexual assault, which includes some categories of the former incest, is 20 years. *See* N.J. STAT. ANN. § 2C:43-6(a) (West 1995) Under the prior law the following offenses all carried the same 15 year penalty: consenting sexual intercourse with a female over 12 and under 16; acts of sexual intercourse between a father and daughter of any age; acts of homosexual incest; marriage between first cousins; forcible intercourse with a female over 12 and under 16; and in some cases acts less than intercourse with a female over 12 and under 16.

[234] *See* N.J. STAT. ANN. § 2C:14-6 (1981) (modeled upon MICH. COMP. LAWS § 750.520f (1979)).

[235] The rape reform provisions redefining prohibited behavior among older teenagers have been a source of considerable controversy. "Conservatives" object to the "lowering of the age of consent" or to "legalizing sex between teenagers." On the other hand, some advocates of rape reform legislation feel very strongly that females under 16 do need additional protection, that the traditional statutory rape prosecutions were for situations that were coercive or forcible in fact. *See supra* note 195. Reform statutes diverge widely on the recharacterization of the statutory age. *See, e.g.*, WASH. REV. CODE § 9A.44.73, 6, 9 defining second-degree rape of a child as sexual intercourse with one 12 or 13 years old when the perpetrator is at least 3 years older. *See* Chart, *infra*.

years, implies the element of coercion.[236] In this respect, the reform provision is not very different from the former statutory rape: The purpose of the age limitation was and is to protect a younger person from an older person. Statutory rape laws, however, were structured around virginity. The age gap in the rape reform statutes has a different resonance. The rape reform provisions are designed to protect against sexual exploitation and abuse. What constitutes the harm to be prevented is not the sexual activity itself, but sexual activity in which one party is too young, or in which an older person may be in a position to coerce a younger person, simply because of the age differential. And that relationship might include siblings.

The second aspect of the gap provision opens up the offense for persons within the specified ages. Under the reform statutes, entirely new offenses are created defined in part by the age of one of the participants.[237] A wide variety of sexual conduct among family members, both homosexual and heterosexual, under reform statutes carries a more serious penalty than under traditional incest statutes. A large category of sexual acts involving persons below a certain age, and adults in a position of authority or within the household, are made criminal for the first time.

Reform statutes with gap provisions, for example, criminalize consenting sexual contact that is not intercourse between a fifteen year old and a twenty-one year old in some circumstances. The specific gap differs from state to state. Some states retain the traditional offense of statutory rape. Many states exempt consenting heterosexual conduct among peers.[238]

As part of a package of rape reform legislation, some of the special disabilities and defenses associated with statutory rape and Incest were re-

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[236] Most states specify a three or four year age differential. The difference of three or four years may not be sufficient if the legislature wants to decriminalize consenting conduct. On the other hand if acts between adults and teenagers are to be condemned, perhaps a 6 or 7 year age gap is too long. *See* Bienen, *Rape III & IV*, *supra* note 4, at 189-96 & n.144, for an annotation of which states adopted specific age gaps as of 1979. Whenever statutory rape is defined as consenting acts among older teenagers, the penalties are usually light. *See, e.g.*, UTAH CODE ANN. § 76-5-401 (1978) (sexual intercourse with persons under 16 a third degree felony unless the actor less than three years older, then a misdemeanor).

[237] The majority of reform statutes prohibit sexual penetration and sexual contact with all persons under 13, irrespective of sex or relationship of the parties. Sexual acts with persons over 13 and under 16, are declared criminal under specifically restricted circumstances. Other states followed this policy, with some modifications. *See, e.g.*, OHIO REV. CODE ANN. § 2907.01, 2907.12 (1975 & 1979 Supp.).

[238] North Carolina's sex offense statute includes an expanded definition of the act constituting the offense, a clear cut distinction between rape, which requires an act of male-female, penile-vaginal penetration, and what is termed a first degree and second degree sex offense. Age is an aspect of the definition of prohibited conduct if the "victim" is under 13 years and the defendant is four or more years older. That implies that acts between two 13 year olds are not punishable. *See* N.C. GEN. STAT. § 14-27.1-27.10 (1979). In 1979, the North Carolina legislature also created a new offense prohibiting sexual conduct between minors and parents or persons in a position of authority. *See* N.C. GEN. STAT. § 14-27.7 (1997). *See also* new Hampshire, Oklahoma, Chart, *infra*.

moved by statute in a number of jurisdictions.[239] Removing special corroboration requirements was one of the targets of reformers.[240] Many rape reform evidence statutes presumptively declare inadmissible evidence as to the victim's prior "unchastity."[241] These provisions apply to the redefined sex offenses and to the reform definition of Incest, if it is a subcategory of these offenses. The repeal of corroboration requirements under a reform statute would not apply to a prosecution under the traditional incest statute, even after the enactment of rape reform legislation.[242]

Because the repeal of corroboration requirements and prompt complaint rules only apply to prosecutions under the new sex offense statutes, prosecutorial discretion in choice of law remains important.[243] For prosecutors, the rape reform statutes would be preferable in most instances. But some features of rape reform legislation whose purpose was to protect rape victims from chaste character provisions could boomerang and operate to

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[239] These would include the repeal of the prompt complaint requirement and the repeal of chaste character provisions. *See, e.g.*, N.J. STAT. ANN. § 2C:14-5(a) (1981) (proof of resistance not required); WASH. REV. CODE § 9A.040.020(2)-(4) (1980-1981).

[240] For Statutory Rape and Incest probably the most important single reform is the repeal of prompt complaint rules and corroboration requirements for sex offenses under reform statutes. *See* MICH. COMP. LAWS § 750.520h (1998). The repeal of corroboration requirements for sex offenses involving children, and especially incest, has also been vigorously opposed. The most recent trends show a swing back towards asking for corroboration for the testimony of children, perhaps a recognition of the suggestibility of children. *See* Bowman & Mertz, *supra* note 25.

[241] Rape evidence provisions were the easiest to get through the legislature. If a state legislature did nothing else, it usually passed a minimal rape evidence statute. As of 1979, over 40 states had passed some version of a rape evidence bill. *See* J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980), and other sources cited in Bienen, *Rape III*, *supra* note 4. Most rape evidence statutes simply require a hearing prior to the introduction of evidence concerning the prior sexual history of the victim. The effectiveness of such statutes is debatable. *See* Note, *Florida's Sexual Battery Statute: Significant Reform But Bias Against the Victim Still Prevails*, 30 U. FLA. L. REV. 419 (1978); Christopher Nicoll, *Idaho Code sec.18-6105: A Limitation on the Use of Evidence Relating to the Prior Sexual Conduct of the Prosecutrix in Idaho Rape Trials*, 15 IDAHO L. REV. 323 (1979).

[242] Typically, the repeal of corroboration requirements and the abolition of chaste character rules are part of a reform package and the new rules apply only to prosecutions under the newly defined sex offenses, stating "for offenses under this chapter" or "in this section." *See, e.g.*, COLO. REV. STAT. ANN. § 18-3-407, 408 (West 1998), which refer specifically to any criminal prosecution "under the preceding sections."

[243] As a vehicle for obtaining a conviction in Colorado, the general reform statute defining unlawful sexual behavior seems clearly preferable to the traditional incest statute if the victim is less than 15 and the actor is more than four years older, in the typical father-daughter case, for example. The definition of prohibited acts and circumstances are broader: the penalty is higher for second degree sexual assault than for the traditionally defined incest; the reform evidence provisions apply; and the statutory prohibition against Lord Hale's cautionary instruction applies. *Cf.* COLO. REV. STAT. § 18-5-403(1)(e) (1978); COLO. REV. STAT. § 18-6-301, 302 (1973). Incest could also be prosecuted under the Colorado Child Abuse statute that defines the offense as causing or permitting a child to be placed in a situation that may endanger the child's life or health. *See* Colo. Rev. Stat. § 18-6-401 (West 1991). Prosecuting under the child abuse statutes, however, involves moving into an entirely different institutional structure.

the detriment of incest victims.[244] Irrefutable presumptions keeping out all evidence of the victim's prior sexual activity, for example, could keep out a history of incestuous activity with the defendant or evidence of sexual acting out by the daughter.[245]

While the repeal of corroboration requirements and chaste character provisions is generally helpful to the prosecution in incest cases, the redefinition of the acts constituting the offense is far more important to the prosecution in cases of incest and the sexual abuse of children. This change has two aspects. The first is the expanded definition of sexual penetration, and the second is the addition of sexual contact or sexual touching, as an *actus reus*. The traditional law's emphasis upon penetration was seen by feminists as an example of men defining the harm committed as the spoiling of female virginity for other men, rather than sexual abuse or exploitation of a relatively powerless female by a male. Penetration was what was important to men, but it was not necessarily the most important aspect of the offense for women. The majority of rape reform statutes nonetheless retain a distinction between penetration offenses and non-penetration, but the included acts are more than heterosexual intercourse.[246]

When cases involving children are brought under the rape reform statutes, the penetration requirement for the most serious sex offense remains but oral genital acts and penetration with an object are included. Clinical reports indicated that sex offenses involving children often involved such behavior. The admittedly skewed data from incarcerated sex offenders also confirmed this pattern. Redefining the prohibited conduct to include such acts was a principal goal of reformers. Expanding the statutory definition of sexual penetration beyond heterosexual intercourse was a significant victory for those seeking to change the legal system's definition and per-

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[244] For example, a gender neutral rape reform statute which banned the admissibility of prior sexual conduct of either the victim or defendant could preclude the admissibility of evidence of prior sexual acts with siblings or assaults upon other family members, a pattern common in incestuous families. Michigan's rape evidence provision has a total bar.

[245] *See* NEB. REV. STAT. § 28-321 (1978) (prohibiting the introduction of evidence concerning the prior sexual history of the victim or the defendant). Some states allow for an exception for evidence of prior sexual acts between the parties in the case. *See, e.g., Rape IV, supra* note 4.

[246] The emphasis upon penetration comes from the traditional British common law offense of rape, and it was incorporated both by case law and occasionally by statute into the definition of rape in American state statutes. By stating that "the essence of the crime of rape is penetration," or as it is sometimes phrased, "any penetration is sufficient to complete the crime," the law is announcing a policy that no crime has occurred unless heterosexual intercourse, or "penetration" of the female by the male has occurred. *See* CAL. PENAL CODE § 263 (West 1970). The emphasis upon penetration is another expression of the traditional law's concern to protect virginity. Absent penetration, there can be no loss of virginity. The traditional definition of rape usually provides that ejaculation is not an element of the crime. Traditional rape formulations repeatedly state that "emission of semen" is not required. Yet, in rape cases the most common physical evidence offered is the presence of sperm. Prosecutors will often not go forward with a prosecution in the absence of a finding of a positive presence of sperm, although research on sex offenders has repeatedly documented that rapists are frequently impotent. *See, e.g.*, NICHOLAS GROTH, MEN WHO RAPE (1980).

ception of the offense. The purpose of this change was to have courts reassess the harm and some courts have understood the change in legislative intent.[247]

Including homosexual acts of child sexual abuse while simultaneously decriminalizing consenting homosexual acts between adults was another major policy change. The statutory definition of prohibited conduct involving young persons was expanded to include homosexual acts, both sexual contact and sexual penetration, with persons of both sexes. For sex offenses involving children under age twelve, the idea that homosexual and heterosexual acts should be punished identically was another sharp demarcation between traditional definitions and the reform proposals. It codifed the principle that homosexual acts were potentially no more or less reprehensible or abhorrent than heterosexual acts: the gravamen of the offense was any sexual abuse of a child by any person.

The decriminalization of consenting homosexual conduct and the refusal to distinguish between homosexual assaults and heterosexual assaults grew out of the political coalitions that were formed during lobbying for rape reform legislation and other legislative changes. The women's movement occurred simultaneously with the gay rights movement, and the two lobbying groups were allied on many key issues. The decriminalization of consenting homosexual conduct between adults was a fundamental goal for gay rights advocates and supported by most women lobbying for rape reform legislation.

For children under twelve there was little political opposition to the idea that the acts defining the most serious sex offense should be expanded to include homosexual acts and oral-genital acts or penetration with an object. There were objections to the broad definition of sexual contact that included touching of parts of the child's body by a parent or legitimate touching by a professional. In theory, the addition of sexual contact offenses significantly expanded the definition of criminal sexual conduct, especially within the family. In fact, however, the sexual contact provisions have not been widely applied.[248] The fear of legislators and others that

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[247] *See* State v. Jiminez, 556 P.2d 60, 63-64 (N.M. Ct. App. 1976) (noting that legislature eliminated absence of consent as an element of rape statute).

[248] In New Jersey, for example, the rape reform statute significantly increased the range of offenses involving children. Not only were acts other than sexual intercourse cognizable as the most serious sex offense, aggravated sexual assault, but sexual contact offenses with a family member under 16 carried a very serious penalty as well. The 1979 reform statute prohibits sexual penetration when the actor is related to the victim by blood or affinity to the third degree and redefines family relationships to include an actor who is "a foster parent, a guardian, or stands in *loco parentis*." N.J. STAT. ANN. § 2C:14-2a(2)(a), (c) (1981). The definition of sexual assault, a lesser offense, includes a slightly different provision prohibiting sexual penetration "when the victim is at least 16 but less than 18 years old and the actor is a member of the victim's household with supervisory or disciplinary power over the victim." N.J. STAT. ANN. § 2C:14-2c(4) (1981). There is a question as to whether this excludes parents, guardians, and persons in *loco parentis* by implication, because that group is covered specifically in another section. In addition, the following circumstances are defined as Aggravated Criminal Sexual contact:

harmless or trivial behavior would now become criminal has not been realized.

The reform definitions of position of authority and family relationship significantly expanded the definition of the offense. In many states, positions of authority now includes step parents, guardians, foster parents, prison guards, daycare workers, institutional care takers, and others.[249] The gravamen of the offense is not inherently familial. Abuse of authority is no longer strictly patriarchal or even necessarily male to female.

The present definition of offenses involving sexual contact in reform statutes is perhaps overly inclusive. It is difficult to formulate substitute definitions that would cover the abusive acts chronicled in the medical and clinical literature and simultaneously exclude normal physical contact and closeness between family members. The choice was usually made to err on the side of over inclusion. Thus the new statutes suffer from some of the defects of the former laws against lewdness or indecency. They are overly inclusive and some definitions of prohibited behavior may be vague to the point of constitutional infirmity.

Another area of difficulty is the language defining the intent requirement, especially for the criminal sexual contact offenses. The definitions are elusive or nonexistent.[250] Some of the confusion and contradiction in the former law remains under the reform definitions. One definition of prohibited sexual conduct, no matter how subtle, revolutionary, or philosophically grounded, could not possibly address the range of distinctions between socially acceptable sexual behavior, as these standards change with time and among different groups and circumstances.

The recharacterization of Incest under reform legislation redefining sex offenses did, however, accomplish several objectives. First, including sex-

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The victim is at least 13 but less than 16 years old and a) the actor is related to the victim by blood or affinity to the third degree, or b) the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status, or c) the actor is a foster parent, a guardian or stands in *loco parentis*.

An amendment in 1983 removed the term "within the household" from after "in *loco parentis*."

[249] New Mexico defines criminal sexual penetration with a child over 13 and under 16 when the perpetrator is in a position of authority. *See* N.M. STAT. ANN. § 30-9-11B (Michie 1978). Position of authority is defined as that position occupied by a parent, relative, household member, teacher, employer or other person who, by reason of said position, is able to exercise undue influence over a child. *See* N.M. STAT. ANN. § 30-9-10D (Michie 1978). Arguably, that includes scoutleader, choir master, child psychologist, school principal or guidance counselor, and a variety of other persons. This is the most inclusive definition of position of authority presently in effect. In Wyoming, position of authority means that position occupied by a parent, guardian, relative, household member, *teacher, employer, custodian, and any other person* who, by reason of his position, is able to *exercise significant influence over a person*. WYO. STAT. ANN. § 6-4-301(a)(iv) (Michie 1979). Positions of authority provisions are now included in over 18 states. *See* Child Sexual Abuse and the Law, ABA Report, at 16 n.55 (1981).

[250] New Jersey introduced the following phrase to limit the definition of lewdness: "for the purposes of degrading or humiliating the victim or sexually arousing or gratifying the actor." N.J. STAT. ANN. § 2C:14-2 (1980). This phrase may create more problems than it solves. What about the defendant who states his purpose was to punish, or that he acted under compulsion, or with no conscious intent.

ual abuse of children within rape reform legislation officially announced that such acts were to be considered as assaultive crimes against the person. Incest and the sexual abuse of children and girls were no longer to be regarded as an offense against chastity or morality, or as part of the law regulating marriage and legitimacy.[251] The traditional offense's emphasis upon a blood relationship has been replaced by a conceptualization that focuses upon the abuse of familial or other authority and harm to the person abused.[252] The idea of exploitation and abuse of children replaces the idea of unchecked parental authority and parental ownership of children.

According to the reform definition of the offense, what is important is whether or not a position of authority within the household or family has been used to intimidate or coerce children to commit sexual acts. The gravamen of the offense is a violation of the sanctity of the home and the family, but in an entirely different way. A child is harmed when the place where she is supposed to be safe is the place where she is harmed by the people whom she is supposed to be able to trust, her protectors.[253] The harm is to the person, to the psychological well being, and to the autonomy and integrity of an individual. The reform statutes assume that the concept of consent is irrelevant when the law is evaluating sexual acts between wholly dependent children and adults who are not only physically larger, but who can limit the child's access to food, shelter, and to the outside world. A child is not assumed to have the power to resist a parent.

Rape reform statutes are a long step away from the traditional formulation of Incest with its emphasis upon genetic purity, prohibited marriage,

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[251] With regard to whether to repeal traditional statutes such as fornication laws, which may be picked up later and used for another purpose, see Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL'Y REV. 169 (1997). The article discusses the use of statutes criminalizing fornication and adultery in Utah to enforce social policy goals.

[252] North Carolina creates a special offense:

> Intercourse and sexual offenses with certain victims; consent no defense: If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age, engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a felony.

N.C. GEN. STAT. § 14-27.7 (1979). The reference to institutions presumably covers a broad range of juvenile homes, hospitals, schools, and prisons.

[253] Consider the following:

> We defined "tempting" as the offender trying to arouse the victim's interest *or gain her consent* [sic] by verbal or non-verbal means . . . coercion, defined as threatening the victim with bodily harm or other verbal threats, was described in 31% of the cases . . . . Threats to assault younger siblings were also frequently encountered. Nonetheless, all forms of physical force *were used less frequently against child victims than against victims in other age groups* . . . . Physical force was not used at all in 54% of the incidents involving children . . . . In only four cases [of over 300 cases involving children under 12] did our staff conclude that no sexual assault occurred.

Peters, *Children Who are Victims*, *supra* note 20, at 415-16 (emphasis added).

and its punishments of branding and whipping.[254] The reform definitions of the offense reflect a concern for the rights of powerless persons and are part of a more general movement to protect children from sexual exploitation and victimization. In this respect, the 1970s reform has a social and political agenda not dissimilar to that of earlier movements. The issues involving sex offenders, their etiology and treatment, and the prevention of sex offenses are among the most intractable.[255] Sexual intercourse is not the worst or only criminal act, although it remains the act constituting the offense for most offenses involving young adults. The psychological consequences may be more harmful from other aspects of the offense than from the fact that the act was intercourse.

Legislating to redress psychological harm raises an entirely different set of concerns. By placing Incest squarely within the statute defining the most serious sex offenses in the jurisdiction, however, legislatures announce that the social harm caused by sexual assaults within the family are to be considered as serious as forcible and violent sexual assaults by strangers upon children and adults of either sex.

VII. CONCLUSION

Yet how to manage this relation between the large and the little, scene-framing, background matters, which seem momentous, general and historically fixed, and local goings on, which do not, is far from clear . . . . there has been

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[254] Reforms addressing institutional biases include

> educational seminars aimed at changing the beliefs of law enforcement officers, judges, and lawyers that incest complaints originate in the child's imagination. Procedural reforms to reduce the psychological trauma of testifying in court include limiting or removing courtroom spectators, appointing one *guardian ad litem* for juvenile as well as criminal court, and arranging for the child not to confront the abuser. Evidentiary changes in the criminal prosecution include abolishment of the marital testimony privilege, alteration of the corroboration requirements, admission of medical records as business records under the hearsay exceptions, and admission of the child's out of court statements as excited utterances or proof that the child previously accused the abuser even though she later denies it on the stand. The courts are also considering the evidentiary validity of a "sexually abused child syndrome" which is analogous to the "battered child syndrome."

Cynthia A. Ahlgren, *Maintaining Incest victims' Support Relationships*, 22 J. FAM. L. 483, 518-19 (1983-84) (internal citations omitted); *see also* Josephine Bulkley, [reporter] National Legal Resource Center for Child Advocacy and Protection, Recommendations for Improving Legal Intervention in Intra Family Child Sexual Abuse Cases (October, 1982).

[255]

> One advance that seems fairly obvious and important is the evidence against a simple single-factor hypothesis. There is no characteristic that appears universal or near universal. For example, the idea that *all* incestuous fathers were themselves molested as children was not supported. Even the characteristics that received the strongest empirical support (e.g. maltreatment by parents or social isolation) were not descriptive of more than half of the offenders. By the same token, while it is not possible to sketch a single profile of the incestuous father, there are characteristics that seem relatively common. Many incestuous fathers appear to be passive, dependent, isolated, somewhat paranoid and lacking a core masculine identification. Many have been maltreated in their families of origin and report rejection, particularly by their fathers . . . . The wide number of characteristics confirmed by various studies, and the lack of universality suggest multiple causes and multiple pathways.

Williams & Finkelhor, *Incestuous Fathers, supra* note 19, at 231, 249.

much hesitation and more than a little evasion. Focused pictures have been hard to come by, and when come by crude and schematic . . . . Understanding a form of life, and convincing others that you have indeed done so, involves more than the assembly of telling particulars or the imposition of general narratives. It involves bringing figure and ground, the passion, occasion and the long story, into coincident view . . . .[256]

Incestuous behavior, however it is defined, has been and will continue to be a crime in American jurisdictions. Sexual acts between parents and children, between the young and adults or older family members, whether they are heterosexual intercourse or other behaviors, will continue to offend and outrage those with the authority to set criminal standards and punish those who transgress them. Some will define the acts as abuse or exploitation of the young, others will use the terminology of pathology, or deviance, or mental abnormality. Some will continue to see Incest as a question of morality; and others will see Incest as an example of the subjugation of women and young girls by men. People will continue to debate whether these acts or behaviors are abusive, wrong, sick, or exploitative, and what criminal penalties are appropriate.

In the continually shifting environment of the relations between and among the sexes in our multitudinous society, it is useful to return periodically to fundamental questions in law that can never be answered once and forever. I take it as a beginning principle that children should not be used by adults sexually and that "consent" or "complicity" by the children is no excuse. Is it not a basic tenet that one of the law's functions is to protect the young and vulnerable, the helpless? When the legal system fails to provide this protection, it is an important failure.

I take as axiomatic that another of the law's purposes is to articulate a standard for principled government action. If the law prohibits sexual relations between parents and children, even if the law cannot enforce that prohibition, that is a value in and of itself.

Incest presents an interesting social projection of gender equities and power relations between the sexes. That incestuous acts occur with boys, primarily but not exclusively committed by adult men, mostly fathers, is undisputed. One of the gruesome side effects of the reenactment of capital punishment is the recounting in penalty phase hearings of horrific circumstances of physical and sexual abuse of boys, usually by their fathers. In most of these cases, the violence perpetrated upon these children, now being offered up for punishment themselves, are not disputed or contradicted. Indeed those lobbying for rape reform legislation, when faced with a suspicious all male judiciary committee, had only to talk in terms of the sexual abuse of young boys to find a sympathetic audience. One striking aspect of

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[256] GEERTZ, *supra* note 2, at 50-51.

the literature before 1970 is the paucity of references to male victims or to the aftereffects of incest and sexual abuse upon young boys.

How the law is defined and how it is enforced will continue to be the subject of political, social, and cultural dispute. At the very least, changes in the statutory definitions of Incest and their myriad interpretations, as reported and studied at different points, allow us to glimpse some part of the great web of the law, as it stretches and tears, across time and place, and then connects itself again to the living body of the society. The law defining Incest will never be static. The parameters of acceptable sexual behavior within the family institution, writ large, are fundamental and constantly shifting for the individual, the group, and the polity. This Article is perhaps best seen as a series of snapshots of what the law of Incest looked like at some particular times and places, with this view of the past also subject to change and redefinition.

ALABAMA

INCEST

TYPE: Offenses Against the Family

TITLE: Rape

CITE: ALA. CODE § 13A-13-3 (Michie 1996)

PROHIBITED CONDUCT:

Marrying or engaging in sexual intercourse with a person he knows to be, either legitimately or illegitimately, his ancestor or descendant by blood or adoption; or his brother or sister of the whole or half blood; or his stepchild or stepparent, while the marriage creating the relationship exists; or his aunt, uncle, nephew or niece of the whole or half blood.

PENALTIES: Class C felony 1-10 years

HISTORY:

Enacted 1977, effective 1979; replaced similar laws, 1975 ALA. CODE §§ 30-1-1, 30-1-2, 13-8-3 (repealed 1977)

CROSS REFERENCES:

TITLE: Solemnization of marriage of parties of prohibited degrees

CITE: ALA. CODE § 30-1-6 (Michie 1996)

RAPE / STATUTORY RAPE

TYPE: Offenses Involving Danger to the Person

TITLE: Rape

CITE: ALA. CODE §§ 13A-6-61, 62 (Michie 1996)

PROHIBITED CONDUCT:

Male engaging in sexual intercourse with a female by forcible compulsion; with a female incapable of consent due to physical or mental incapacity; or, being 16 years or older, with a female less than 12 years old.

PENALTIES: 1st degree rape: 10-99 years
2d degree rape: 2-20 years

HISTORY:

Original statute enacted 1852; revised 1896 codified common law. Current statute enacted 1977, effective 1979; replaced similar laws, 1975 ALA. CODE §§ 13-1-131, 13-1-133

OTHER

TITLE: Sexual Misconduct

CITE: ALA. CODE § 13A-6-65 (Michie 1996)

PROHIBITED CONDUCT:

A male engages in sexual intercourse with a female without her consent under circumstances other than those covered by §§ 13A-6-61 or 13A-6-62; or with consent where obtained by fraud or artifice; a female engages in sexual intercourse with a man without his consent; either sex engages in deviate sexual conduct with another person.

PENALTIES: Class A misdemeanor

TITLE: Sexual Abuse

CITE: ALA. CODE § 13-A-6-66 (Michie 1996)

TITLE: Child Abuse
CITE: ALA. CODE § 26-15-2, 3 (Michie 1977)

ALASKA

INCEST

TYPE: Sexual Offenses
TITLE: Incest
CITE: ALASKA STAT. § 11.41.450 (Michie 1997)
PROHIBITED CONDUCT:
A person 18 years or older, engages in sexual penetration with another who is related, either legitimately or illegitimately, with an ancestor or descendant of the whole or half blood; a brother or sister of the whole or half blood; or an uncle, aunt, nephew, or niece by blood.
PENALTIES: Maximum 5 years.
HISTORY:
Original statute enacted 1899 as rape statute, with life sentence if victim was daughter or sister. Current statute enacted 1978.

RAPE / STATUTORY RAPE

TYPE: Sexual Offenses
TITLE: Sexual Assault
CITE: ALASKA STAT. § 11.41.410, 11.41.420 (Michie 1997)
PROHIBITED CONDUCT:
1st degree: Offender engages in sexual penetration with another person without consent of that person; or with another person who the offender knows is mentally incapable and who is in the offender's care by authority of law or in a facility or program that is required by law to be licensed by the state.
2d degree: Offender engages in sexual contact with another person under circumstances outlined above.
PENALTIES:
1st degree: 8-30 years
2d degree: Maximum 10 years
HISTORY:
Original statute enacted 1899, traditional rape statute. Current statute enacted 1978; amended 1990, eliminated age language regarding offenders; 1992, substituted "offender" for "person;" 1996.

OTHER

TITLE: Sexual Abuse of a Minor
CITE: ALASKA STAT. § 11.41.434 (Michie 1997)

PROHIBITED CONDUCT:

Offender, being 18 years or older: engages in sexual penetration with a person under 18, and the offender is the victim's natural parent, stepparent, adopted parent or legal guardian; or engages in sexual penetration with a person under 16 and the victim at the time of the offense is living in the same household as the offender and the offender has authority over the victim or the offender occupies a position of authority in relation to the victim.
PENALTIES: 8-30 years

TITLE: Child Abuse
CITE: ALASKA STAT. § 11.41.220 (Michie 1993)

ARIZONA

INCEST

TYPE: Family Offenses
TITLE: Incest
CITE: ARIZ. REV. STAT. ANN. § 13-3608 (West 1998)
PROHIBITED CONDUCT:
Persons who are 18 or more years of age and are within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who kowingly intermarry with each other or who knowingly commit fornication or adultery with each other.
PENALTIES: 2.5 –10 years.
HISTORY:
Original statute enacted 1901; marriage statute. Amended 1978; 1985, made applicable to persons 15 and over.
CROSS REFERENCES:
TITLE: Termination of parent-child relationship-abuse
CITE: ARIZ. REV. STAT. ANN. § 8-351 (West 1998)

TITLE: Duty to report
CITE: ARIZ. REV. STAT. ANN. § 13-3620 (West 1998)

RAPE / STATUTORY RAPE

TYPE: Sexual Offenses
TITLE: Sexual Conduct with a Minor
CITE: ARIZ. REV. STAT. ANN. § 13-1405; § 13-1406 (West 1996)
PROHIBITED CONDUCT:
A person intentionally or knowingly engages in sexual intercourse or oral sexual contact with any person under 18 years.

TITLE: Sexual Assault
CITE: ARIZ. REV. STAT. ANN. § 13-1406 (West 1996)

PROHIBITED CONDUCT:

A person intentionally or knowingly engages in sexual intercourse or contact with any person without consent of such person

PENALTIES:

Sexual Conduct with a Minor: Minimum 5 years

Sexual Assault: Minimum 5 years; life imprisonment for second offenses achieved by use of force

HISTORY:

Original statute enacted 1901, based on 1872 California Code. Current statute enacted 1978, based on Model Penal Code.

CROSS REFERENCES:

TITLE: Duty to report

CITE: ARIZ. REV. STAT. ANN. § 13-3620 (West 1996)

TITLE: Revocation of teacher's certificate

CITE: ARIZ. REV. STAT. ANN. § 15-550 (West 1996)

OTHER

TITLE: Child Abuse

CITE: ARIZ. REV. STAT. ANN. § 13-1204 (West 1991)

ARIZ. REV. STAT. ANN. § 13-3623 (West 1992)

ARIZ. REV. STAT. ANN. § 8-546(A) (West 1983)

ARKANSAS

INCEST

TYPE: Offenses Involving the Family

TITLE: Incest

CITE: ARK. CODE ANN. § 5-26-202 (Michie 1997)

PROHIBITED CONDUCT:

A person commits incest if, being 16 or older, he purports to marry, has sexual intercourse with, or engages in deviate sexual activity with a person he knows to be an ancestor or descendant, a stepchild or adopted child, or brother or sister of the whole or half blood or an uncle, aunt, nephew or niece or a stepgrandchild or adopted grandchild, based on blood relationships regardless of legitimacy.

PENALTIES: 6-30 years if victim is under 16 and offender is over 21

3-10 years otherwise

HISTORY:

Enacted in current form 1975; amended in 1977 to enhance sentence for majority offenders against victims under 16

RAPE / STATUTORY RAPE

TYPE: Sexual Offenses

TITLE: Rape

CITE: ARK. CODE ANN. § 5-14-103 (Michie 1997)

PROHIBITED CONDUCT:

A person commits rape if he engages in sexual intercourse or deviate sexual activity with another by forcible compulsion or with one other than his spouse who is by reason of need for medical treatment unable to consent or who is physically helpless. It shall also be rape if the person is less than 14 years of age or less than 16 years of age and unable to consent because of mental defect. It shall be an affirmative defense if charged with raping one under 14 that the defendant is no more than two years older than the victim.

PENALTIES: 10-40 years, or life imprisonment

HISTORY:

Current version enacted in 1975; amended in 1993 to provide defense for youthful offenders. Amended in 1997 to protect those under medical supervision.

OTHER

TITLE: Carnal abuse in first degree

CITE: ARK. CODE ANN. § 5-14-104 (Michie 1997)

PROHIBITED CONDUCT:

Intercourse between a minor and a person under 14

TITLE: Carnal abuse in second degree

CITE: ARK. CODE ANN. § 5-14-105 (Michie 1997)

PROHIBITED CONDUCT:

Intercourse with mentally deficient victim unable to consent

TITLE: Carnal abuse in third degree

CITE: ARK. CODE ANN. § 5-14-106 (Michie 1997)

PROHIBITED CONDUCT:

Intercourse between one 20 or older and one 16 or younger

TITLE: Child Abuse

CITE: ARK. CODE ANN. § 5-13-202 (Michie 1983)

CALIFORNIA

INCEST

TYPE: Bigamy, Incest, and the Crime Against Nature

TITLE: Incest

CITE: CAL. PENAL CODE § 285 (West 1998)

PROHIBITED CONDUCT:

Persons within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other.

PENALTIES: 16 months-3 years

HISTORY:

Enacted 1872; amended 1921, changed period of imprisonment from not exceeding 10 years to not less than 1 year nor more than 50 years; amended 1976, deleted "not less than one year nor more than 50 years" from the end of the section.

CROSS REFERENCES:

TITLE: Incestuous and void marriages

CITE: CAL. FAMILY CODE §§ 2200-2201 (West 1998)

RAPE / STATUTORY RAPE

TYPE: Sexual Assault, Decency, Morals

TITLE: Rape

CITE: CAL. PENAL CODE § 261 (West 1998)

PROHIBITED CONDUCT:

Offender engages in sexual intercourse with a person who is not the spouse of the offender under any of the following circumstances: the person is incapable, because of mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act; sexual intercourse is committed against the person's will by means of force, violence, or fear of immediate and unlawful bodily injury on the person . . . the act is accomplished against the victim's will by threatening to retaliate in the future against the victim; or threatening to exact retaliation via a public official.

PENALTIES: 3-8 years

HISTORY:

Enacted 1872. Amended 1889 to increase age from 10 to 14 years; amended 1897 to increase age from 14 to 16 years; amended 1913 to increase age from 16 to 18 years; amended in 1979 to be gender neutral.

CROSS REFERENCES:

TITLE: Unlawful Sexual Intercourse with Person 18

CITE: CAL. PENAL CODE § 261.5 (West 1998)

PROHIBITED CONDUCT:

Unlawful sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is under the age of 18.

PENALTIES: 1-4 years, civil fines

OTHER

TITLE: Child Abuse

CITE: CAL. PENAL CODE § 273a (West 1994)

CITE: CAL. PENAL CODE § 273d (West 1993)

COLORADO

INCEST

TYPE: Offenses Involving the Family Relations

TITLE: Incest, Aggravated Incest

CITE: COLO. REV. STAT. ANN. §§ 18-6-301, 302 (West 1997)

PROHIBITED CONDUCT:

A person knowingly marries, inflicts sexual penetration or sexual intrusion on, or subjects to sexual contact, an ancestor or descendant or stepchild 21 years or older, brother or sister of the whole or half blood, or an uncle, aunt, nephew or niece of the whole blood.

PENALTIES: Incest:2-8 years

Aggravated incest: 4-16 years

HISTORY:

Current statute enacted in 1975. In 1983, aggravated incest raised to class 3 felony and coverage added for aggravated incest with a child under 10 years old.

RAPE / STATUTORY RAPE

TYPE: Offenses Against a Person

TITLE: Sexual Assault

CITE: COLO. REV. STAT. ANN. §§ 18-3-402, 403, 404, 405, 405.3 (West 1997)

PROHIBITED CONDUCT:

1st degree: knowingly inflicting sexual penetration or intrusion through physical force or violence; threat of death, injury, or kidnapping; impairment by drugs; or if the victim is physically helpless and has not consented.

2d degree: knowingly inflict sexual penetration or intrusion through means other than 1st degree, but using means of sufficient consequence to cause submission against victim's will; or if the victim is incapable of appraising their conduct, or believes that the actor is the victims spouse; or if the victim is less than 15 years old and the actor is four years older than the victim.

3d degree: knowingly subjecting a victim to any sexual conduct if the victim does not consent, is incapable of appraisal, physically helpless, or is drugged by the actor; or, with or without sexual contact, induces or coerces a child, person under 18 years old, to expose intimate parts or to engage in any sexual contact, intrusion, or penetration with another person.

Sexual assault upon a child: knowingly subject another non-spouse to any sexual contact if the victim is less than 15 years old and the actor is at least four years older than the victim.

Sexual assault upon a child by one in a position of trust: knowingly subjecting a victim less than 18 years old if the actor committing the offense is one in a position of trust with respect to the victim.

PENALTIES:

1st degree: 4-16 years with enhancements for injury or use of force

2d degree: 2-8 years

3d degree: misdemeanor with enhancements if victim is a child

Sexual assault of a child: 2-8 years; enhanced for pattern of abuse or use of force

Sexual assault by one in a position of trust: 2-8 years; enhanced for victim under 15

OTHER

TITLE: Child Testimony

CITE: COLO. REV. STAT. § 13-90-106 (West 1997)

PROHIBITED CONDUCT:

Children under 10 allowed to testify only in cases of sexual abuse or incest

TITLE: Enticement of a Child
CITE: COLO. REV. STAT. § 18-3-305 (West 1997)
PROHIBITED CONDUCT:
Invite or persuade any child under 15 years old to enter any secluded place with the intent to commit sexual assault in any degree.
PENALTIES: 2-8 years, with enhancement for repeat offenders

TITLE: Pattern of Sexual Abuse
CITE: COLO. REV. STAT. § 18-3-401 (West 1997)

TITLE: Sexually Violent Predator
CITE: COLO. REV. STAT. § 18-3-414.5 (West 1997)

TITLE: Child Abuse
CITE: COLO. REV. STAT. § 18-6-401 (West 1991)

CONNECTICUT

INCEST

TYPE: Sex Offenses
TITLE: Bigamy and Incest
CITE: CONN. GEN. STAT. § 53a-191 (West 1997)
PROHIBITED CONDUCT:
A person is guilty of incest when he marries a person whom he knows to be related to him within any of the degrees of kindred specified in § 46b-21.
PENALTIES: 1-5 years
HISTORY:
Enacted 1902, replaced prior § 53-223. The only change was to substitute "engages in sexual intercourse" for "carnally know each other."

RAPE / STATUTORY RAPE

TYPE: Sex Offenses
TITLE: Sexual Assault
CITE: CONN. GEN. STAT. § 53a-70 (West 1997)
PROHIBITED CONDUCT:
A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person, or engages in sexual intercourse with another person who is under 13 years of age and the actor is more than two years older than such person.
PENALTIES:

1st degree aggravated sexual assault: 5-20 years
1st degree sexual assault:1-20 years
2d degree sexual assault:1-10 years
3d degree sexual assault:1-5 years

HISTORY:

Original statute enacted 1879 to codify common law; revised 1902 to change age provisions and added the offense of assault with intent to rape; revised 1969, modeled after New York statute and Model Penal Code; revised 1975 to redefine all sex offenses; revised 1995 to provide that if the victim was under 10 years of age, 10 years of the sentence imposed may not be suspended or reduced by the court.

OTHER

TITLE: Impairing the Morals of Children
CITE: CONN. GEN. STAT. § 53-21 (West 1997)

TITLE: Sexual Assault in the Third Degree
CITE: CONN. GEN. STAT. § 53a-72a (West 1997)
PROHIBITED CONDUCT:
Sexual intercourse with persons known by actor to be kindred.

TITLE: Child Abuse
CITE: CONN. GEN. STAT. § 53-20 (West 1949)

DELAWARE

INCEST

TYPE: Sexual Offenses
TITLE: ncest
CITE: DEL. CODE ANN. tit. 11 § 766 (Michie 1995)
PROHIBITED CONDUCT:
A person is guilty of incest if the person engages in sexual intercourse with another person within certain degrees of relation specified in § 766(a) and (b).
PENALTIES: 1 year maximum
HISTORY:
1953 law amended original statute.
CROSS REFERENCES:
TITLE: Void and Voidable Marriages
CITE: DEL. CODE ANN. tit. 13 § 101 (Michie 1995)

RAPE / STATUTORY RAPE

TYPE: Sexual Offenses
TITLE: Unlawful sexual penetration and unlawful sexual intercourse
CITE: DEL. CODE ANN. tit. 11 § 767-75 (Michie 1995)

PROHIBITED CONDUCT:

1st and 2d degree:sexual intercourse during a crime without consent; sexual intercourse without consent during commission of a felony or misdemeanor specified in statute or accompanied by use of a deadly weapon, or between one under 12 and one under 18, or between one under 16 and one in a position of trust relative to the victim.

3d degree:intentional intercourse with one 16 or younger if offender is ten or more years older; intentional intercourse with one under 14

th degree:intentional intercourse with one under 16; intentional intercourse between one 30 years or older and one 18 years or younger

PENALTIES:

1st degree:15 years to life imprisonment

2d degree:2 to 20 years

3d degree:2 to 20 years

4th degree:8 year maximum

HISTORY:

1719 law made rape by assault or putting another in fear a felony; 1829 law penalized rape with death; 1852 law increased maximum term for carnal abuse to 10 years; 1874 law lowered child's age to under 7 for carnal abuse offense; Model Penal Code revision enacted in 1972; 1976 amendment raised the age of consent from 12 to 16.

OTHER

TITLE: Continuous Sexual Abuse of a Child

CITE: DEL. CODE ANN. tit. 11 § 778 (Michie 1995)

PROHIBITED CONDUCT:

A person residing in home, or having recurring access to the child, intentionally engages in 3 or more acts of sexual conduct with a child under 14 years of age over a period of time, not less than 3 months in duration.

PENALTIES: 2-20 years

TITLE: Dangerous Crime Against a Child

CITE: DEL. CODE ANN. tit. 11 § 779 (Michie 1995)

PROHIBITED CONDUCT:

A person who engages in any criminal sexual conduct, as defined in §§ 770-773 of this title, against a minor under the age of 14 years old.

PENALTIES:2-20 years

FLORIDA

INCEST

TYPE: Offenses Against Family Relations

TITLE: Incest

CITE: FLA. STAT. ANN. § 826.04 (West 1994, Supp. 1998)

PROHIBITED CONDUCT:

A person knowingly marries or has sexual intercourse with a person whom he or she is related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece

PENALTIES: 5 year maximum

HISTORY:

Current statute enacted 1975; removed gender specific references 1997.

RAPE / STATUTORY RAPE

TYPE: Sexual Battery

TITLE: Unlawful sexual activity

CITE: FLA. STAT. ANN. §§ 794.011, .023, .05 (West 1992, Supp. 1998)

PROHIBITED CONDUCT:

"Sexual battery" is defined as oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any object. Prohibited conduct includes committing sexual battery upon a victim helpless to resist, using coercion or threat of force, drugging or incapacitating the victim, or if victim is incapacitated, committing sexual battery by one in a position of familial or custodial authority, soliciting sexual battery from a person less than 18 years old, or engaging in sexual battery with a person 12 to 18 years old. Also prohibited is sexual activity between a person 24 years or older with a person 16 or 17.

PENALTIES:

Sexual battery by one 18 or older on one 12 or younger:capital felony

Sexual battery by one under 18 on a person 12 years:life imprisonment

Sexual battery of a person 12 or older without consent:life imprisonment

Coercion or threat of force:30 years maximum

Familial and custodial solicitation:5 years maximum

HISTORY:

Current statute enacted 1974. Familial and custodial authority provisions added in 1992. Age for statutory rape changed from 11 to 12 in 1984.

CROSS REFERENCES

TITLE: Interview Restrictions for Victims under 16

CITE: FLA. STAT. ANN. § 914.16 (West 1994, Supp. 1998)

TERMS:

Judge may impose reasonable limits on number of interviews of victims under 16 or victims mentally incapacitated.

TITLE: Sexual assault counselor victim privilege

CITE: FLA. STAT. ANN. § 90.5035 (West 1994, Supp. 1998)

TITLE: Visitation Rights of Grandparents Having Violated this Statute

CITE: FLA. STAT. ANN. § 39.4105 (West 1994, Supp. 1998)

OTHER

TITLE: Luring or Enticing a Child

CITE: FLA. STAT. ANN. § 787.025 (West 1994, Supp. 1998)

PROHIBITED CONDUCT:

A person over 18 with a previous sexual battery conviction may not lure or entice a child into a structure, dwelling, or conveyance for an unlawful purpose.

TITLE: Common-law presumption relating to age abolished
CITE: FLA. STAT. ANN. § 794.02 (West 1994, Supp. 1998)
TERMS: boys under 14 no longer presumed incapable of rape

TITLE: Administration of medroxyprogesterone acetate to persons convicted of sexual battery
CITE: FLA. STAT. ANN. § 794.0235 (West 1994, Supp. 1998)
TERMS: The court may sentence sexual battery offenders to chemical castration.

TITLE: Lewd, lascivious, or indecent assault or act upon or in presence of a child
CITE: FLA. STAT. ANN. § 800.04 (West 1994, Supp. 1998)
TERMS:
A person who handles, fondles, or assaults any child under 16 in a lewd, lascivious, or indecent manner, commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is being or will be committed upon any child under 16 or forces or entices the child to commit such act or commits sexual battery or knowingly commits any lewd or lascivious act in presence of child under 16 commits a second degree felony.
PENALTIES:Maximum 15 years

TITLE: Child Abuse
CITE: FLA. STAT. ANN. § 827.01 (West 1977)
FLA. STAT. ANN. § 827.03 (West 1984)
FLA. STAT. ANN. § 827.04 (West 1990)

GEORGIA

INCEST

TYPE: Sexual Offenses
TITLE: Incest
CITE: GA. CODE ANN. § 26-2006 (1997)
PROHIBITED CONDUCT:
A person commits the offense of incest when he engages in sexual intercourse with a person to whom he knows he is related either by blood or by marriage as follows: father and daughter or stepdaughter; mother and son or stepson; brother and sister of the whole blood or half blood; grandparent and grandchild; aunt and nephew; uncle and niece
PENALTIES: 1-20 years

HISTORY:

Original statute enacted in 1833; replaced with similar law in 1933; current statute enacted in 1968.

CROSS REFERENCES:

TITLE: Degrees of relationship within which intermarriage prohibited

CITE: GA. CODE ANN. § 26-9905 (1997)

RAPE / STATUTORY RAPE

TYPE: Sexual Offenses

TITLE: Rape, Statutory Rape

CITE: GA. CODE ANN. §§ 26-2001, 26-2018 (1997)

PROHIBITED CONDUCT:

Rape: A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. The fact that he person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape.

Statutory rape: A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under 16 and not his or her spouse, provided that no conviction shall be had on the unsupported testimony of the victim.

PENALTIES:

Rape:20 years to life imprisonment or death penalty

Statutory Rape:10-20 years for offenders over 21

1-20 years for offenders under 21

OTHER

TITLE: Child Molestation

CITE: GA. CODE ANN. § 26-2019 (1997)

PROHIBITED CONDUCT:

A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desire of either the child or the person.

PENALTIES:5-20 years

TITLE: Enticing a child for indecent purposes

CITE: GA. CODE ANN. §§ 26-2020 (1997)

PROHIBITED CONDUCT:

A person commits the offense of enticing a child for indecent purposes when he or she solicits, entices, or takes any child under the age of 16 years to any place whatsoever for the purpose of child molestation or indecent acts.

PENALTIES: 1-20 years

TITLE: Actions for childhood sexual abuse

CITE: GA. CODE ANN. § 26-9905 (1997)

TITLE: Child abuse

CITE: GA. CODE ANN. § 16-5-70 (1981)

HAWAII

INCEST

TYPE: Offenses Against the Person

TITLE: Incest

CITE: HAW. REV. STAT. ANN. § 707.741 (Michie 1998)

PROHIBITED CONDUCT:

A person commits an act of sexual penetration with another who is within the degrees of consanguinity or affinity within which marriage is prohibited.

PENALTIES: Maximum 5 years

HISTORY: Current statute enacted 1972

CROSS REFERENCES:

TITLE: Standards for valid marriage contract

CITE: HAW. REV. STAT. ANN. § 572.1(1) (Michie 1998)

RAPE / STATUTORY RAPE

TYPE: Offenses Against the Person

TITLE: Sexual assault

CITE: HAW. REV. STAT. ANN. § 707-730 TO 707-750 (Michie 1998)

PROHIBITED CONDUCT:

1st degree: Knowingly inflicting sexual penetration using strong compulsion or with a person under 14

2d degree: Knowingly inflicting sexual penetration using compulsion, or upon a mentally defective person

3d degree: Recklessly subjecting another to an act of penetration by compulsion or knowingly subjecting a person to sexual contact or causing a person to have sexual contact with the actor under the following conditions: the person is under 14; the person is mentally defective or physically helpless; the actor uses strong compulsion.

4th degree: knowingly subjecting another to sexual contact by compulsion; knowingly exposing the person's genitals in a situation likely to alarm; knowing trespass to achieve sexual gratification via surveillance of another

PENALTIES:

1st degree: 20 years maximum

2d degree: 10 years maximum

3d degree: 5 years maximum

4th degree: 1 year maximum

HISTORY:

Current statute enacted 1972

CROSS REFERENCES:

TITLE: Sexual penetration, sexual contact, strong compulsion, and compulsion defined

CITE: HAW. REV. STAT. ANN. § 707-700 (Michie 1998)

OTHER

TITLE: Promoting Child Sexual Abuse
CITE: HAW. REV. STAT. ANN. § 707-750 (Michie 1998)
PROHIBITED CONDUCT:
Knowingly engaging in, producing, directing, participating in, or disseminating pornographic material or engaging in a pornographic performance with a minor
PENALTIES: Maximum 20 years
TITLE: Child abuse
CITE: HAW. REV. STAT. § 709-906 (Michie 1992)

IDAHO

INCEST

TYPE: Sex Crimes
TITLE: Incest
CITE: IDAHO CODE §§ 18-6602 (Michie 1997)
PROHIBITED CONDUCT:
Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other are punishable. Degrees of consanguinity include marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces, or aunts and nephews, are incestuous, and void from the beginning, whether the relationship is legitimate or illegitimate.
PENALTIES: Maximum 10 years
HISTORY:
Original statute enacted 1864; repealed 1971; reinstated in 1972.
CROSS REFERENCES:
TITLE: Incestuous Marriages
CITE: IDAHO CODE §§ 35-205 (Michie 1997)

RAPE / STATUTORY RAPE

TYPE: Sex Crimes
TITLE: Rape
CITE: IDAHO CODE §§ 18-1506, 18-1508A, 18-6101, 18-6104, (Michie 1997)
PROHIBITED CONDUCT:
Rape: the penetration, however slight, of the oral, anal, or vaginal opening with the perpetrator's penis accomplished with a female where the female is under 18 years, or is incapable of consenting because of unsound mind . . . .
Sexual abuse of a child under 16: Persons 18 or older, with intent to gratify the lust, passions, or sexual desires of the actor, minor child, or third party, solicit a minor child under the age of 16 to participate in a sexual act or cause or have sexual contact with such minor child or make a photograph or electronic recording of a minor child.
Sexual battery of minor child 16 or 17: Persons five years older than a minor aged 16 or 17, who, with the intent of arousing, appealing to, or gratifying the lust, passion, or sexual desires of such person, minor child, or third party, to commit any lewd or lascivious act or act

upon or with the body of such person, solicit a minor child to participate in a sexual act, cause to have sexual contact, or make a photo or electronic recording.

PENALTIES: 1 year to life imprisonment

HISTORY:

Original statute enacted 1874-75 contained carnal knowledge statute; revised 1887 and redefined rape; revised 1897 to return to original carnal knowledge formulation; revised 1901 and redefined rape; revised 1919 to specify minimum five year term; revised 1948 to reduce term to one year; revised 1972 into present form; revised 1977 to enact rape reform evidence provisions.

OTHER

TITLE: Injury to children

CITE: IDAHO CODE § 18-1501 (Michie 1997)

ILLINOIS

INCEST

TYPE: Sex Offenses

TITLE: Sexual relations within families

CITE: 720 ILL. COMP. STAT. ANN. 5/11-11 (Michie 1993 and 1998 Supp.)

PROHIBITED CONDUCT:

Commits an act of sexual penetration, and the person knows that he or she is related to the other person as follows: brother or sister, either of the whole blood or the half blood; or father or mother, when the child, regardless of legitimacy and regardless of whether the child was of the whole blood or the half blood or was adopted, was 18 years of age or over when the act was committed; or stepfather or stepmother, when the stepchild was 18 years of age or over when the act was committed.

PENALTIES: 2-5 years

HISTORY:

Formerly divided by aggravated incest (sexual intercourse or act of deviate sexual conduct with daughter or son, including illegitimates, stepchildren, and adopted children under 18; incest (sexual intercourse or act of deviate sexual conduct with brother or sister of the whole or half blood); and incestuous marriages.

CROSS REFERENCES:

TITLE: Blood tests for persons convicted of incest

CITE: 720 ILL. COMP. STAT. ANN. 5/5-4-3 (Michie 1993 and 1998 Supp.)

TITLE: Marriages prohibited

CITE: 720 ILL. COMP. STAT. ANN. 5/2-12 (Michie 1993 and 1998 Supp.)

RAPE / STATUTORY RAPE

TYPE: Criminal Offenses

TITLE: Criminal sexual assault

CITE: 720 ILL. COMP. STAT. ANN. 5/12-13, 5/12-14 (Michie 1993 and 1998 Supp.)

PROHIBITED CONDUCT:

Commits act of sexual penetration by the use of force or threat of force, or knew that the victim was unable to understand the nature of the act or was unable to give knowing consent, or the victim was under the age of 18 when the act was committed and the accused was a family member (not defined), or victim was at least 13 but under 18 when the act was committed and accused was 17 or over and held a position of trust, authority, or supervision in relation to the victim. For aggravated, if accused commits criminal sexual assault and any of the following, aggravating circumstances existed during the commission of the offense; use or display of threat of dangerous weapon; caused bodily harm; threatened or endangered life of victim or any other person; during course of felony; victim 69 or over when offense committed; victim was physically handicapped; accused was under 17 and victim was under 9, or victim was at least 9 but under 13 and accused used force or threat of force; victim was an institutionalized severely or profoundly mentally retarded person at time act committed.

PENALTIES:

Aggravated criminal sexual assault: 6-30 years; life imprisonment for repeat offender

Criminal sexual assault: 4-15 years; repeat offense 6-30 years

HISTORY:

Original statute enacted 1833; rape statute; for cases discussing rape and other offenses under the former law, see 720 ILL. COMP. STAT. ANN. 5/12-12 (Michie 1993 and 1998 Supp.)

OTHER

TITLE: Indecent Solicitation of a Child

CITE: 720 ILL. COMP. STAT. ANN. 5/12-13, 5/12-14 (Michie 1993 and 1998 Supp.)

PROHIBITED CONDUCT:

Any person 17 or older who solicits a child under 13 to do any act, which if done would be a variety of sexual offenses, commits indecent solicitation of a child.

PENALTIES: 0-3 years

TITLE: Predatory Criminal Sexual Assault of a Child

CITE: 720 ILL. COMP. STAT. ANN. 5/12-13, 5/12-14.1 (Michie 1993 and 1998 Supp.)

PROHIBITED CONDUCT:

One 17 or older commits act of sexual penetration with victim under 13

PENALTIES: 6-30 years; enhancement for grave injury

TITLE: Sexual Exploitation of a Child

CITE: 720 ILL. COMP. STAT. ANN. 5/11-9.1 (Michie 1993 and 1998 Supp.)

PROHIBITED CONDUCT:

In the presence of a child and with intent or knowledge that child would view his acts, engages in sexual act or exposes himself for purpose of sexual arousal.

PENALTIES:1 year maximum

TITLE: Child Abuse

CITE: 720 ILL. COMP. STAT. ANN. § 5/12-4.3 (Michie 1990)
720 ILL. COMP. STAT. ANN. § 5/12-4.4 (Michie 1986)

INDIANA

INCEST

TYPE: Offenses Against the Family

TITLE: Incest

CITE: IND. CODE ANN. § 35-46-1-3 (Michie 1996)

PROHIBITED CONDUCT:

A person over 18 who engages in sexual intercourse or deviate sexual conduct, with another person who is known to the person to be biologically related as a parent, child, grandparent, grandchild, sibling, aunt, uncle, niece, or nephew

PENALTIES: Maximum 4 years, with enhancement to 10 years if victim is under 16

HISTORY:

Statute in current form enacted in 1977; penalty raised in 1994

CROSS REFERENCES:

TITLE: Marriage between Relatives

CITE: IND. CODE ANN. §31-11-8-3 (Michie 1996)

RAPE / STATUTORY RAPE

TYPE: Sex Crimes

TITLE: Rape

CITE: IND. CODE ANN. §§ 35-42-4-1, 35-42-4-3, 35-42-4-9 (Michie 1996)

PROHIBITED CONDUCT:

Rape: A person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when the other person is compelled by force or imminent threat of force; the other person is unaware that sexual intercourse is occurring, or the other person is so mentally disabled that consent to the sexual intercourse cannot be given, commits rape.

Child Molesting: Sexual intercourse or deviate sexual conduct with child under 14

Sexual Misconduct with a Minor: Sexual intercourse with child 14-16 when actor is over 18, or sexual touching or fondling of child age 14-16 if actor is over 18

PENALTIES:

Rape: 10 years, enhanced to 30 years for deadly force or weapon

Child Molestation: 10 years, enhanced to 30 years if actor was over 21 or if force was used

Sexual Misconduct with a Minor: 1.5 to 30 years, depending on age and conduct of actors and use of force

HISTORY:

Statute enacted in current form in 1976; sentences raised in 1977; age of victim for child molestation raised from 12 to 14 in 1994; 1989 recognition of marital rape if divorce or separation pending.

OTHER

TITLE: Child Abuse
CITE: IND. CODE ANN. § 35-42-2-1 (Michie 1993)

IOWA

INCEST

TYPE: Protection of the Family and Dependent Persons
TITLE: Incest
CITE: IOWA CODE ANN. §726.2 (West 1993)
PROHIBITED CONDUCT:
A person performs a sex act with another whom the person knows to be related to the person, either legitimately or illegitimately, with degrees of relation prohibited in § 595.19.
PENALTIES: Maximum 5 years
HISTORY:
Enacted 1860, amended 1977, inserted "or her"; amended in 1986, substituted "performs a sex act" for "has sexual intercourse."
CROSS REFERENCES:
TITLE: Persons Between Whom Marriage is Prohibited
CITE: IOWA CODE ANN. §595.19 (West 1993)

RAPE / STATUTORY RAPE

TYPE: Crimes Against the Person
TITLE: Sexual Abuse
CITE: IOWA CODE ANN. §§ 709.1; 709.2; 709.3; 709.4 (West 1993)
PROHIBITED CONDUCT:
Sexual abuse defined: A person engages in a sexual act with another under any of the following circumstances: the act is committed by force or against the will of the other; the other participant suffers from a mental defect or incapacity; or the other participant is a child.

1st degree sexual abuse: Injuring another during sexual abuse

2d degree sexual abuse: Commission of sexual abuse accompanied by use of force or dangerous weapon or with a person under 12 or against the will of the victim.

3d degree sexual abuse: sexual abuse regardless of marriage or cohabitation or sexual abuse with a non-spouse if the victim is mentally incapacitated or 12 or 13, or 14 or 15 and the offender is a member of the same household (household not defined) or the victim and offender are related by blood or affinity to the fourth degree or the offender is in a position of authority, or the offender is six or more years older than the victim.

PENALTIES: 1st degree sexual abuse:
2d degree sexual abuse: Maximum 15 years
3d degree sexual abuse: Maximum 10 years
HISTORY:
Enacted 1851, amended 1984, added "or if the act is done while the other is under the influence of a drug inducing sleep or otherwise in a state of unconsciousness."
CROSS REFERENCES:

TITLE: Sex Act Defined
CITE: IOWA CODE ANN. § 702.17 (West 1993)

OTHER

TITLE: Lascivious Acts with a Child
CITE: IOWA CODE ANN. § 709.8 (West 1993)
PROHIBITED CONDUCT:
It is unlawful for any person 18 years of age or older to perform any of the following acts with or without the child's consent unless married to each other, for the purpose of arousing or satisfying the sexual desires of either of them; fondle or touch the genitals of a child; permit or cause a child to fondle or touch the person's genitals; solicit a child to engage in a sex act or solicit a person to arrange a sex act with a child; inflict pain or discomfort upon a child.
TITLE: Child Abuse
CITE: IOWA CODE ANN. § 726.6 (West 1985)

KANSAS

INCEST

TYPE: Crimes Affecting Family Relationships and Children
TITLE: Incest
CITE: KAN. STAT. ANN. § 21-362, 3 (1996)
PROHIBITED CONDUCT: Marriage to or engaging in otherwise lawful sexual intercourse or sodomy, as defined by KAN. STAT. ANN. § 21-3501 (1996), with a person who is 18 or more and who is known to the offender to be related to the offender as (certain types of) biological relatives. Aggravated incest is marriage to person under age 18 with certain degrees of relation or engaging in otherwise lawful sexual intercourse, sodomy; or lewd fondling with person who is 16 or more years of age but under 18 years of age, with certain degrees of relation.
PENALTIES: Incest: presumptive probation
Aggravated Incest:50 years minimum
HISTORY:
Enacted 1969

RAPE / STATUTORY RAPE

TYPE: Sex Offenses
TITLE: Rape
CITE: KAN STAT. ANN. § 21-3502 (1996)
PROHIBITED CONDUCT: Sexual intercourse with a person who does not consent, under the following circumstances: victim is overcome by force or fear; victim is obviously incapable of giving consent because of mental deficiency or disease, effect of any alcoholic liquor, narcotic, drug, or other substance; or sexual intercourse with a child under 14.
PENALTIES: Minimum 226 years
HISTORY:Amended 1969, 1978, 1983, 1993

CROSS REFERENCES:

TITLE: Sexual Battery
CITE: KAN. STAT. ANN. § 21-3517, 18 (1996)

OTHER

TITLE: Criminal Sodomy
CITE: KAN. STAT. ANN. § 21-3505, 3506 (1996)
PROHIBITED CONDUCT:
Sodomy with a child who is 14 or 15, to engage in sodomy with any person or animal. Aggravated sodomy when child is under 14.
PENALTIES: Minimum 74 years; minimum 226 years for aggravated sodomy.
CROSS REFERENCES:
TITLE: Definition of Sexual Intercourse and Sodomy
CITE: KAN. STAT. ANN. § 21-3501
TITLE: Indecent Liberties with a Child
CITE: KAN. STAT. ANN. § 21-3503
PROHIBITED CONDUCT:
When child is 14 or 15, any lewd fondling or touching for sexual desire or touching for sexual desire, or soliciting child to engage in such behavior.
PENALTIES: Minimum 50 years
TITLE: Child Abuse
CITE: KAN. STAT. ANN. § 21-3609 (1993)

KENTUCKY

INCEST

TYPE: Family Offenses
TITLE: Incest
CITE: KY. REV. STAT. ANN. § 530.020 (Michie 1990, Supp. 1996)
PROHIBITED CONDUCT:
Sexual intercourse or deviate sexual intercourse with a person whom offender knows to be an ancestor, descendant, brother, or sister
PENALTIES: 5-10 years
HISTORY:
Current statute enacted 1975
CROSS REFERENCES:
TITLE: Criminal liability of parties to incestuous marriage
CITE: KY. REV. STAT. ANN. § 402.990 (1990)

TITLE: Kentucky Multidisciplinary Commission on Child Sexual Abuse
CITE: KY. REV. STAT. ANN. § 431.650

RAPE / STATUTORY RAPE

TYPE: Sexual Offenses
TITLE: Rape
CITE: KY. REV. STAT. ANN. §§ 510.110-510.140 (Michie 1990, Supp. 1996)
PROHIBITED CONDUCT:

1st degree rape, sodomy, sexual abuse: sexual intercourse, deviate sexual intercourse, or sexual contact, respectively, by forcible compulsion or victim incapable of consent because physically helpless or under 12

2d degree rape, sodomy, sexual abuse: person 18 or older engages in sexual intercourse, deviate sexual intercourse, or sexual contact, respectively, with person under 14

3d degree rape, sodomy, sexual abuse: person 21 or older engages in sexual intercourse, deviate sexual intercourse, or sexual contact, respectively, with a person under 16 or person of any age who is mentally retarded or incapacitated

PENALTIES:

Rape: 1st degree:10-20 years
2d degree:5-10 years
3d degree:1-5 years
Sodomy: 1st degree:10-20 years
2d degree:5-10 years
3d degree:1-5 years
Sexual abuse: 1st degree:1-5 yeas
2d and 3d degrees: misdemeanor

HISTORY: Current statute enacted in 1974; amended 1988
CROSS REFERENCES:
TITLE: Child Sexual Abuse and Exploitation Defined
CITE: KY. REV. STAT ANN. § 15.900 (Michie 1990)

TITLE: Testimony of Child Allegedly Victim of Illegal Sexual Activity
CITE: KY. REV. STAT. ANN. § 421.350 (Michie 1990)

TITLE: Rights of Victim
CITE: KY. REV. STAT. ANN. § 421.500 (Michie 1990)

TITLE: Speedy Trial where Victim Under 16
CITE: KY. REV. STAT. ANN. § 421.510 (Michie 1990)

OTHER

TITLE: Persons Deemed Incapable of Consent when under 16
CITE: KY. REV. STAT. ANN. § 510.020 (Michie 1990)

TITLE: "He" means any natural person
CITE: KY. REV. STAT. ANN. § 500.080 (7) (Michie 1990)

TITLE: Definitions of "sexual intercourse," "deviate sexual intercourse," "sexual contact"
CITE: KY. REV. STAT. ANN. § 510.010 (Michie 1990)

TITLE: Child Abuse
CITE: KY. REV. STAT. ANN. § 508.090, .100, .110, .120 (Michie 1982)

LOUISIANA

INCEST

TYPE: Sex Offenses Affecting the Family
TITLE: Incest
CITE: LA. REV. STAT. ANN. §14:78 (West 1997)
PROHIBITED CONDUCT:
Marriage to or sexual intercourse within certain degrees of relation by blood defined in penalty section, with knowledge of their relationship. Aggravated incest: victim is under 18 and known to offender to be related. Acts covered include sexual intercourse or battery, carnal knowledge of a juvenile, pornography involving juveniles, molestation of a juvenile, crime against nature, cruelty to juveniles, parent enticing a child into prostitution; any lewd fondling or touching with sexual intent
PENALTIES:
Parent/grandparent-child or brother-sister, 15 years maximum
Uncle-niece or aunt-nephew, maximum 5 years
Aggravated incest: 20 years maximum
HISTORY:
Prior Laws 1884, 1906, 1930. Minor structural amendments in 1985.
CROSS REFERENCES:
TITLE: Duty of Coroner to Examine Incest Victims when Charge is investigated
CITE: LA. REV. STAT. ANN. § 33:1563 (West 1997)

RAPE / STATUTORY RAPE

TYPE: Offenses Against the Person
TITLE: Rape
CITE: LA. REV. STAT. ANN. § 14:41 et seq. (West 1997)
PROHIBITED CONDUCT:
Anal or vaginal sexual intercourse with a male or female person committed without the person's lawful consent. Aggravated rape: victim is under 12.
PENALTIES:
Aggravated rape: life imprisonment or death penalty
HISTORY:
1942 law amended in 1978; amendments in 1985 and 1990.
CROSS REFERENCES:
TITLE: Forcible Rape
CITE: LA. REV. STAT. ANN. § 14:42.1 (West 1997)

TITLE: Sexual Battery
CITE: LA. REV. STAT. ANN. § 14:43.1 (West 1997)

OTHER

TITLE: Carnal Knowledge of a Juvenile
CITE: LA. REV. STAT. ANN. § 14:80 (West 1997)
PROHIBITED CONDUCT:
Consensual sexual intercourse when offender is over 17 and more than 2 years older than the victim, and victim is at least 12 but under 17.
PENALTIES:
10 years maximum

TITLE: Indecent Behavior with Juveniles
CITE: LA. REV. STAT. ANN. § 14:81 (West 1997)
PROHIBITED CONDUCT:
Commission of any intentionally sexual lewd or lascivious act upon or in the presence of a child under 17 when there is an age difference of more than 2 years.
PENALTIES:
7 years maximum
TITLE: Molestation of a Juvenile
CITE: LA. REV. STAT. ANN. § 14.81.2 (West 1997)
PROHIBITED CONDUCT:
Commission of any intentionally sexual lewd or lascivious act upon or in the presence of child under 17, when there is an age difference of more than 2 years, by the use of force

MAINE

INCEST

TYPE: Offenses Against the Family
TITLE: Incest
CITE: ME. REV. STAT. ANN. tit. 17-A, § 556 (West 1983)
PROHIBITED CONDUCT:
A person at least 18 years old who has sexual intercourse with another person he knows is related within the second degree of consanguinity. It is a defense if the actor was legally married to the other person.
PENALTIES: 1-3 years
HISTORY:
Derived from 1954 statute; amended in 1975; 1977 amendment made marriage a defense; 1989 amendment made provision gender-neutral.
CROSS REFERENCES:
TITLE: Marriage Prohibited within Certain Degrees
CITE: ME. REV. STAT. ANN. tit. 19, § 31 (West 1983)

RAPE / STATUTORY RAPE

TYPE: Sex Offenses

TITLE: Rape

CITE: ME. REV. STAT. ANN. tit. 17-A, §§ 252, 253 (West 1983)

PROHIBITED CONDUCT:

Rape: A person engages in sexual intercourse with a person under 14 years old; or person submits as a result of compulsion. Marriage is a defense.

Gross Sexual Misconduct: Sexual act with a nonspouse where the victim submits on compulsion, or is under 14, or if offender has impaired his victim's control by drugs or intoxicants, or he threatens victim, or victim suffers from apparent mental disability, or the other person is unconscious or physically unable to resist, or the offender has supervisory authority over an institutionalized victim.

PENALTIES: 10 year minimum

OTHER

TITLE: Sexual Abuse of a Minor

CITE: ME. REV. STAT. ANN. tit. 17-A § 254 (West 1993)

PROHIBITED CONDUCT:

A person 19 years or older who engages in sexual intercourse or sexual acts with another person not his spouse who is 14-16 years old, provided the actor is at least 5 years older than the other person.

PENALTIES: 1-3 years

TITLE: Unlawful Sexual Contact

CITE: ME. REV. STAT. ANN. tit. 17-A § 255 (West 1993)

PROHIBITED CONDUCT:

A person intentionally subjects another person, not his spouse, to any sexual conduct without consent, or person is under 14

PENALTIES: 1-3 years, with enhancement for victim under 14

TITLE: Child Abuse

CITE: ME. REV. STAT. ANN. tit. 17-A, § 207 (West 1985)
ME. REV. STAT. ANN. tit. 18, § 218 (West 1954)

MARYLAND

INCEST

TYPE: Crimes and Punishments

TITLE: Carnal Knowledge of Another Within Degrees of Consanguinity within Which Marriage is Prohibited

CITE: MD. CODE ANN. § 335 (Michie 1997)

PROHIBITED CONDUCT:

Every person who shall knowingly have carnal knowledge of another person, being within the degrees of consanguinity within which marriages are prohibited by law, specified in MD. CODE ANN. § 2-202.

PENALTIES: 1-10 years

HISTORY:

Original statute enacted in 1884

RAPE / STATUTORY RAPE

TYPE: Sexual Offenses

TITLE Rape

CITE: MD. CODE ANN. § 461-464C (Michie 1997)

PROHIBITED CONDUCT:

1st degree: engaging in vaginal intercourse with another person by force or threat of force against the will and without the consent of the other person . . . .

2d degree: engaging in vaginal intercourse with another person by force or threat of force against the will and without the consent of the person, or if offender knows the victim is mentally defective, or if the victim is under 14 and the offender is at least four years older

PENALTIES:

1st degree:maximum life sentence

2d degree: maximum 20 years

HISTORY:

Original statute enacted 1809; recodified 1860 with no changes; amended 1914 to change statutory age to 14; replaced in 1976 by rape reform legislation including statute defining two degrees of rape; amended in 1977 to strengthen rape reform evidence statute.

CROSS REFERENCES:

TITLE: Defense that Victim is Spouse of Person Committing Act

CITE: MD. CODE ANN. § 464D (Michie 1997)

OTHER

TITLE: Causing Abuse to Children or Vulnerable Adults

CITE: MD. CODE ANN. § 35C (Michie 1997)

PROHIBITED CONDUCT:

Any act that involves sexual molestation or exploitation of a child by a parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member, including incest, rape, any degree of sexual offense, sodomy, unnatural or perverted sexual practices.

PENALTIES: Maximum 15 years

TITLE: Child Abuse

CITE: MD. CODE ANN. § 35A (Michie 1997)

MASSACHUSETTS

INCEST

TYPE: Crimes and Punishments

TITLE: Incest

CITE: MASS. GEN. LAWS ch. 265 § 13B, § 23; ch. 272 § 17, § 35A (West 1990)

PROHIBITED CONDUCT:

Incestuous marriage or intercourse between people whose marriages are null and void

PENALTIES: 2.5 to 20 years

HISTORY:

Current statute enacted in 1987

RAPE / STATUTORY RAPE

TYPE: Crimes Against the Person

TITLE: Rape

CITE: MASS. GEN. LAWS ch. 265 § 22, § 22A (West 1990)

PROHIBITED CONDUCT: sexual intercourse or unnatural sexual intercourse with a person, if such person compelled to submit by force and against his will, or compelled by threat of bodily injury; indecent assault or battery of child under 14; unlawful or unnatural intercourse with child under 16

PENALTIES: Maximum life sentence

HISTORY:

1974 amendment changed gender specific language

OTHER

TITLE: Indecent Assault and Battery on Mentally Retarded Person

CITE: MASS. GEN. LAWS ch. 265 § 13F (West 1990)

TITLE: Indecent Assault and Battery on Person over Age 14

CITE: MASS GEN. LAWS ch. 265 § 13H (West 1990)

TITLE: Child Abuse

CITE: MASS. GEN. LAWS ch. 265, § 13J (West 1993)

MICHIGAN

INCEST

TYPE: Rape

TITLE: Criminal Sexual Conduct

CITE: MICH. COMP. LAWS § 750.520(a)-(e) (West 1996)

PROHIBITED CONDUCT:

Sexual penetration with another person and the actor is related to the victim by blood or affinity to the fourth degree

PENALTIES:

1st degree: maximum life sentence

2d degree: maximum 15 years

3d degree: maximum 15 years

4th degree: maximum 2 years

HISTORY:

Former traditional incest statute repealed in 1974 when Michigan enacted rape reform legislation incorporating some categories of incest within sex neutral definitions of criminal sexual conduct.

CROSS REFERENCES:

TITLE: Persons a Man or a Woman Cannot Marry

CITE: MICH. COMP. LAWS § 551.3 and 551.4 (West 1996)

RAPE / STATUTORY RAPE

TYPE: Rape

TITLE: Criminal Sexual Conduct

CITE: MICH. COMP. LAWS § 750.520 (a)-(e) (West 1996)

PROHIBITED CONDUCT:

1st and 2d degree:A person is guilty of criminal sexual conduct for engaging in sexual penetration with another person if any of the following circumstances exists: the victim is under 13; the victim is between 13 and 16 and is a member of the same household as the offender; is related by blood or fourth-degree affinity to the offender; the offender is in a position of authority over the victim; or sexual penetration occurs under circumstances involving the commission of any other felony; or the offender participates with others in the offense, and the victim is mentally deficient or physically helpless or the actor uses force or coercion.

3d degree: Sexual intercourse with one between 13 and 16 accomplished by use of force, or with a mentally incapacitated victim.

PENALTIES:

1st degree: maximum life sentence

2d degree: maximum 15 years

3d degree: maximum 15 years

4th degree: maximum 2 years

HISTORY:

Original statute enacted 1808; amended in 1816 to specify age of consent at 14 and age for statutory rape reduced to 10. Amended 1913 to allow prosecution of man who marries woman he rapes and then deserts her without good cause. Current rape reform statute enacted in 1974, effective 1975 included rape reform evidence statute and redefinition of the offense.

OTHER

TITLE: Accosting, enticing, or soliciting a child for immoral purposes

CITE: MICH. COMP. LAWS § 750.145(a) (West 1996)

PROHIBITED CONDUCT:

Accosting, enticing or soliciting a child under 16 with intent to induce or force said child to commit an immoral act, or to submit to an act of sexual intercourse, or an act of gross indecency, or any other act of depravity, or shall suggest to such child any of the aforementioned acts.

PENALTIES: Maximum 1 year

TITLE: Child Abuse

CITE: MICH. COMP. LAWS ANN. § 750.136b (West 1998)

MINNESOTA

INCEST

TYPE: Crimes Against the Family

TITLE: Incest

CITE: MINN. STAT. ANN. § 609.365 (West 1998)

PROHIBITED CONDUCT:

Sexual intercourse with another nearer of kin to the actor than first cousin, computed by rules of the civil law, whether of the half or the whole blood, with knowledge of the relationship

PENALTIES: Maximum 10 years

HISTORY: Original statute enacted 1963. Current statute enacted 1986, effective 1987

RAPE / STATUTORY RAPE

TYPE: Sex Crimes

TITLE: Criminal Sexual Conduct

CITE: MINN. STAT. ANN. §§ 609.342 to .344 (West 1998)

PROHIBITED CONDUCT:

1st degree: sexual penetration with another person, or sexual contact with a person under 13 if the complainant is under 13 years and the actor is more than 48 months older and in a position of authority over the complainant or circumstances cause the complainant to have a reasonable fear of imminent bodily harm.

2d degree: sexual contact with another person over age 13 under the same circumstances as 1st degree rape

PENALTIES:

1st degree:maximum 30 years

2d degree:maximum 25 years

HISTORY:

Original statute enacted in 1975; current version enacted in 1994 and 1995

CROSS REFERENCES:

TITLE: Restrictions on Evidence Used in Prosecution of these Statutes

CITE: MINN. STAT. ANN. § 609.347 (West 1998)

TITLE: Production and Possession of Child Pornography

CITE: MINN. STAT. ANN. § 617.246 and .247 (West 1998)

OTHER

TITLE: Fornication defined
CITE: MINN. STAT. ANN. § 609.34 (West 1998)

TITLE: Adultery defined
CITE: MINN. STAT. ANN. § 609.36 (West 1998)

TITLE: Child Abuse
CITE: MINN. STAT. ANN. § 609.255 (West 1993)
MINN. STAT. ANN. § 609.377 (West 1994)

MISSISSIPPI

INCEST

TYPE: Crimes Against Morals and Decency
TITLE: Incest
CITE: MISS. CODE ANN. §§ 97-29-27, 97-29-29 (West 1994)
PROHIBITED CONDUCT: Marriages between people of degrees of relation prohibited by law or cohabitation or sexual intercourse between those divorced for incest reasons.
PENALTIES: Maximum 10 years
HISTORY: Original statute enacted in 1848
CROSS REFERENCES:
TITLE: Unlawful Marriages
CITE: MISS. CODE ANN. §§ 93-1-1, 93-1-3 (West 1994)

TITLE: Divorced Persons not to Cohabitate
CITE: MISS. CODE ANN. §§ 93-5-29 (West 1994)

TITLE: Adultery and Fornication Between Kindred
CITE: MISS. CODE ANN. §§ 97-29-5 (West 1994)

RAPE / STATUTORY RAPE

TYPE: Crimes Against the Person
TITLE: Rape
CITE: MISS. CODE ANN. §§ 97-3-65, 97-3-71 (West 1994)
PROHIBITED CONDUCT:
Sexual intercourse with a child under 14, or with a child above 14 without consent and with the use of a substance that prevents resistance, or with any unmarried person 14-18 years old, or assault with intent to forcibly ravish any female of previous chaste character.
PENALTIES: 6 months to death penalty
HISTORY:
1816 compilation provided death penalty for rape; 1839 law prohibited carnal knowledge of a female under 10 or forcible ravishment of any woman 10 or older; 1917 changed statutory age of female to 12; 1942 added offense of carnal knowledge of an unmarried female of pre-

viously chaste character younger than himself and victim between 12-18; rape evidence reform statute passed in 1977.

CROSS REFERENCES:

TITLE: Sexual Battery

CITE: MISS. CODE ANN. §§ 97-3-95-97-3-103 (West 1994)

OTHER

TITLE: Seduction of Child under Age 18

CITE: MISS. CODE ANN. § 97-5-21 (West 1994)

PROHIBITED CONDUCT:

Illicit connection with any child under 18, and such child is of previously chaste character, or touching by any person over 18 of a person under 18 without the child's consent to satisfy actor's lust, or touching of a child under 18 by one in a position of authority relative to the child.

PENALTIES: 1-10 years

TITLE: Carnal knowledge of step or adopted child

CITE: MISS. CODE ANN. § 97-5-41 (West 1994)

PROHIBITED CONDCUT:

Carnal knowledge of unmarried stepchild or adopted child who is between the age of 14 and 18.

PENALTIES: 10 years maximum.

HISTORY: Added in 1984

TITLE: Child Abuse

CITE: MISS. CODE ANN. § 97-5-39 (West 1989)
MISS CODE ANN. § 43-21-105(m) (West 1993)

MISSOURI

INCEST

TYPE: Offenses Against the Family

TITLE: Incest

CITE: MO. REV. STAT. §§ 568.020, 568.045 (West 1979 & Supp. 1998)

PROHIBITED CONDUCT:

Marrying or engaging in sexual intercourse or deviate sexual intercourse with a person actor knows to be, without regard to legitimacy, within certain degrees of relationship, including stepchild, while the marriage creating the relationship exists. Endangering child's welfare by knowingly engaging in sexual conduct with a person under 17 over whom the person is a parent, guardian, or otherwise charged with care and custody.

PENALTIES: 1-7 years

HISTORY: Original statute enacted 1835; current version enacted 1977, effective 1979.

CROSS REFERENCES:

TITLE: Statute of limitations for prosecution of child sex offenses

CITE: MO. REV. STAT. § 556.037 (West 1979 & Supp. 1998)

RAPE / STATUTORY RAPE

TYPE: Sexual Offenses

TITLE: Sexual Assault

CITE: MO. REV. STAT. ANN. §§ 556.030, 556.040, 556.060, 556.070, 556.100 (West 1979 & Supp. 1998)

PROHIBITED CONDUCT:

1st degree rape: sexual intercourse with a person under 14 by forcible compulsion

2d degree rape: sexual intercourse between one 21 years or older with one under 17 by forcible compulsion

Sexual Assault: sexual intercourse with a person knowing the partner has not consented

Forcible Sodomy: deviate sexual intercourse with another person by forcible compulsion

Sexual Abuse: sexual contact by the use of forcible compulsion

PENALTIES:

Rape, forcible sodomy: minimum 5 years, with enhancement for use of a weapon

Statutory Rape:

1st degree: minimum 5 years, with enhancement for victims under 12

2d degree: 1-7 years

Sexual assault: 1-7 years

Sexual abuse: 1-7 years

HISTORY:

Original statute enacted 1825. Current statute enacted 1977, effective 1979. Reintroduced marriage as a defense for some sections in 1990; broadened definition of sexual assault, moved statutory rape and statutory sodomy definitions to separate sections; created child molestation sections and added deviate sexual assault in 1994. Added sexual misconduct involving a child in 1997.

OTHER

TITLE: Sexual intercourse, deviate sexual intercourse, sexual contact defined

CITE: MO. REV. STAT. § 566.010 (West 1979 & Supp. 1998)

TITLE: Penalties for Persistent Sexual Offender

CITE: MO. REV. STAT. §§ 558.016, 556.018, 556.021 (West 1979 & Supp. 1998)

TITLE: Statutory Sodomy

CITE: MO. REV. STAT. §§ 556.062, 556.064 (West 1979 & Supp. 1998)

TITLE: Sexual Misconduct Involving a Child
CITE: MO. REV. STAT. § 566.083 (West 1979 & Supp. 1998)

TITLE: Child Abuse
CITE: MO. REV. STAT. § 568.060 (West 1990)

MONTANA

INCEST

TYPE: Sexual Crimes
TITLE: Incest
CITE: MONT. CODE ANN. § 45-5-507 (1997)
PROHIBITED CONDUCT:
Knowingly marrying, cohabitating, or having sexual intercourse or sexual contact with an ancestor or descendant, a brother or sister of the whole or half blood, or any stepson or stepdaughter. The relationships include blood relationships without regard to legitimacy, relationships of parent and child by adoption, and relationships involving a stepson or stepdaughter.
PENALTIES: 100 years to life sentence
HISTORY:
Enacted 1973; amended 1981, 1983, 1985, 1989, 1991, 1995

RAPE/ STATUTORY RAPE

TYPE: Offenses Against the Person
TITLE: Rape
CITE: MONT. CODE ANN. § 45-5-502-50 (1997)
PROHIBITED CONDUCT:
Sexual Assault: knowingly subjecting another person to any sexual contact without consent
Sexual Intercourse without Consent:knowingly having sexual intercourse with another person without that person's consent, and victims under 16 are considered incapable of consent.
PENALTIES: 6 months- 100 years
HISTORY:
Enacted 1973; amended 1975, 1977, 1981, 1985, 1991, 1993, 1995

OTHER

TITLE: Childhood Sexual Abuse
CITE: MONT. CODE ANN. § 27-2-216 (1997)
TERMS: Provides tort remedy for victims of child sexual abuse

TITLE: Sexual Abuse of Children
CITE: MONT. CODE ANN. § 45-5-625 (1997)
PROHIBITED CONDUCT:
Knowingly employing a child in actual or simulated exhibition of sexual contact; regarding a child engaging in sexual conduct; duplicating materials depicting child sexual conduct, or financing or selling such materials
PENALTIES: Maximum 100 years

TITLE: Child Abuse
CITE: MONT. CODE ANN. § 45-5-201 (1991)
MONT. CODE ANN. § 45-5-206 (1993)
MONT. CODE ANN. § 45-5-627 (1993)

NEBRASKA

INCEST

TYPE: Crimes and Punishments
TITLE: Incest
CITE: NEB. REV. STAT. § 28-703 (1995)
PROHIBITED CONDUCT:
A person knowingly marries or engages in sexual penetration with any person who falls within certain degrees of consanguinity, or any person who engages in sexual penetration with his or her stepchild.
PENALTIES: 1-20 years
CROSS REFERENCES:
TITLE: Registration of Sex Offenders
CITE: NEB. REV. STAT. §§ 29-4001- §29-4013 (1995)

RAPE / STATUTORY RAPE

TYPE: Crimes and Punishments
TITLE: Sexual Assault
CITE: NEB. REV. STAT. § 28-319, 320 (1995)
PROHIBITED CONDUCT:
1st degree sexual assault: subjecting another person to sexual penetration without victim's consent or with reasonable knowledge that victim was mentally or physically incapable of resisting, or when the actor is 19 or older and the victim is under 16
d degree sexual assault: same as 1st degree, without age provisions, but requiring serious personal injury to victim
3d degree sexual assault: same as 1st degree, without age provisions
PENALTIES
1st degree:1-50 years
2d degree:1-20 years
3d degree:maximum 1 year

OTHER

TITLE: Sexual Assault of Child
CITE: NEB. REV. STAT. § 28-320.01 (1995)
PROHIBITED CONDUCT:
Subjecting another person 14 or younger to sexual contact if the actor is 19 or older
TITLE: Child Abuse
CITE: NEB. REV. STAT. § 28-707 (1994)

NEVADA

INCEST

TYPE: Crimes Against Public Decency and Good Morals
TITLE: Incest
CITE: NEV. REV. STAT. ANN. § 201.180 (Michie 1995)
PROHIBITED CONDUCT:
Persons being within the degree of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other or commit fornication or adultery with each other.
PENALTIES: 2-10 years
HISTORY: Originally enacted 1911; amended 1979, 1995
CROSS REFERENCES:
TITLE: Degree of Kinship, Void Marriages
CITE: NEV. REV. STAT. ANN. § 122.020 (Michie 1995)

RAPE / STATUTORY RAPE

TYPE: Crimes Against the Person
TITLE: Sexual Assault
CITE: NEV. REV. STAT. ANN. § 200.366 (Michie 1995)
PROHIBITED CONDUCT:

Sexual Assault: subjecting another to sexual penetration, or forcing another person to make a sexual penetration on himself or another, or on a beast, against the victim's will or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct.

Statutory Sexual Seduction: sexual intercourse committed by a person 18 or older with a person under 16, or sexual penetration committed by a person 18 or older with a person under 16.

PENALTIES:

Sexual Assault: Varies depending on whether substantial bodily harm was inflicted, and whether person is under the age of 16

Statutory Sexual Seduction: if actor is under 21, misdemeanor

Statutory Sexual Seduction: if actor is over 21, 1-5 years

HISTORY:
Enacted 1977; amended 1991, 1995

CROSS REFERENCES:

TITLE: Crimes Against Persons 65 or older, enhanced penalty

CITE: NEV. REV. STAT. ANN. §§ 193.167, 193.169 (Michie 1995)

OTHER

TITLE: Lewdness with a Child under 14

CITE: NEV. REV. STAT. ANN. § 201.230 (Michie 1995)

TITLE: Annoyance or Molestation of a Minor

CITE: NEV. REV. STAT. ANN. § 207.260 (Michie 1995)

TITLE: Child Abuse

CITE: NEV. REV. STAT. ANN. § 200.508 (1989)

NEW HAMPSHIRE

INCEST

TYPE: Offenses Against the Family

TITLE: Incest

CITE: N.H. REV. STAT. ANN. §§ 639:2 (West 1997)

PROHIBITED CONDUCT:

Marriage or intercourse or common-law marriage with a person one knows to be his ancestor, descendant, brother or sister of the half or whole blood, or an uncle, aunt, nephew or niece. Those under 18 are not liable if the other party is at least three years older at the time of the act.

PENALTIES: Maximum 7 years

HISTORY: Current statute enacted 1986

RAPE / STATUTORY RAPE

TYPE: Sexual Assault and Related Offenses

TITLE: Sexual Assault

CITE: N.H. REV. STAT. ANN. §§ 632-A:2, 632-A:3 (West 1997)

PROHIBITED CONDUCT:

Aggravated Sexual Assault:engaging in sexual penetration with another person accomplished by use of force, threats, position of authority, or drugs, or if victim is mentally incapacitated

Felonious Sexual Assault:causing serious personal injury during sexual contact, or engaging in sexual penetration with one under 16, or if victim is between 13 and 16, or a blood relation, or a pattern of sexual assault against one under 16.

PENALTIES:

Aggravated Sexual Assault:Maximum 7 years

Felonious Sexual Assault: 10-20 years, enhanced for repeat offense

HISTORY:

Original statute enacted in 1975; 1981 amendment changed age of victim from 16 to 13.

OTHER

TITLE: Statute of limitations for offenses against those under 18 starts when victim turns 18

CITE: N.H. REV. STAT. ANN. § 639:2(11) (West 1997)

TITLE: Misdemeanor for adult to subject person over the age of 13 to any conduct prohibited by § 632-A:2-A:3

CITE: N.H. REV. STAT. ANN. § 632-A:4 (West 1997)

TITLE: In camera testimony allowed for victims under 16

CITE: N.H. REV. STAT. ANN. § 632-A:8 (West 1997)

TITLE: Child Abuse

CITE: N.H. REV. STAT. ANN. § 631:1 (West 1993)
N.H. REV. STAT. ANN. § 631.2 (West 1992)

NEW JERSEY

INCEST

TYPE: Sexual Offenses

TITLE: Sexual Assault

CITE: N.J. STAT. ANN. § 2C:14-2 (1989)

PROHIBITED CONDUCT:

Act of sexual penetration with a victim related by blood or affinity to the third degree, or victim who is a foster child or ward.

PENALTIES: 5-20 years

CROSS REFERENCES:

TITLE: Marriage of Certain Persons Prohibited

CITE: N.J. STAT. ANN. §37:1-1 (1989)

RAPE / STATUTORY RAPE

TYPE: Sexual Offenses

TITLE: Sexual Assault

CITE: N.J. STAT. ANN. §§ 2C:14-2 (1989)

PROHIBITED CONDUCT:

Aggravated Sexual Assault:sexual penetration with another person if the victim is less than 13 years old, or the victim is at least 13 but less than 16, or the actor is related to the victim by blood or affinity to the third degree, or the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status, or the actor is a foster parent or guardian.

Sexual Assault: Sexual contact with one under 13 by one who is at least four years older than the victim, or sexual penetration where the victim is at least 16 but less than 18, or the actor is related to the victim by blood or affinity to the third degree, or the actor is

a foster parent or guardian, or the victim is at least 13 but less than 16 and the actor is at least four years older than the victim.

PENALTIES:

Aggravated Sexual Assault:10-20 years

Sexual Assault:5-10 years

CROSS REFERENCES:

TITLE: Sexual penetration, sexual contact, intimate parts defined

CITE: N.J. STAT. ANN. § 2C:14-1 (1989)

OTHER

TITLE: Endangering the Welfare of Children

CITE: N.J. STAT. ANN. § 2C: 24-4 (1992)

PROHIBITED CONDUCT:A person with legal duty for care of child engages in sexual conduct which would impair the morals of the child or induce or cause the child to become involved in pornography

TITLE: CHILD ABUSE

CITE: N.J. STAT. ANN. § 9:6-1 (1987)

N.J. STAT. ANN. § 9:6:3 (1990)

N.J. STAT. ANN. § 9:6-8.21 (1987)

NEW MEXICO

INCEST

TYPE: Marital and Familial Offenses

TITLE: Incest

CITE: N.M. STAT. ANN. § 30-10-3 (Michie 1997)

PROHIBITED CONDUCT:

Knowingly intermarrying or having sexual intercourse with persons within the following degrees of consanguinity: parents and children including grandparents and grandchildren of every degree, brothers and sisters of the half and whole blood, uncles and nieces, aunts and nephews

PENALTIES: 3 years

HISTORY: Statute enacted 1953

CROSS REFERENCES:

TITLE: 2d degree criminal penetration; bigamy

CITE: N.M. STAT. ANN. § 30-10-1 (Michie 1997)

RAPE / STATUTORY RAPE

TYPE: Sexual Offenses

TITLE: Criminal Sexual Penetration

CITE: N.M. STAT. ANN. § 30-9-11 (Michie 1997)

PROHIBITED CONDUCT:

Criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio, or anal intercourse, or the causing of penetration, to

any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

PENALTIES:

1st degree:18 years

2d degree:9 years

3d degree:3 years

4th degree:18 months

HISTORY:

Original statute enacted in 1865 was a variant of Elizabethan rape statute; revised in 1963 based on Model Penal Code, though definition of rape was essentially retained; current statue enacted in 1975 as rape reform statute

OTHER

TITLE: Criminal Sexual Contact on a Minor

CITE: N.M. STAT. ANN. § 30-9-13A (Michie 1997)

PROHIBITED CONDUCT:

All criminal sexual contact on a child under 13 or on a child from 13 to 18 when perpetrator is in a position of authority

PENALTIES: 3 years

TITLE: Criminal Sexual Contact

CITE: N.M. STAT. ANN. § 30-9-12 (Michie 1997)

PROHIBITED CONDUCT:

Criminal sexual contact is the unlawful and intentional touching of or application of force, without consent, to the unclothed intimate parts of another 18 or older, or intentionally causing another 18 or older to touch one's intimate parts.

NEW YORK

INCEST

TYPE: Offenses Against Marriage, the Family, and the Welfare of Children and Incompetents

TITLE: Incest

CITE: N.Y. PENAL CODE § 255.25 (McKinney 1989 & 1999 Supp.)

PROHIBITED CONDUCT:

Marrying or engaging in sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or out of wedlock, as an ancestor, descendant, brother or sister of either the half or whole blood, uncle, aunt, nephew or niece

PENALTIES: 4-year maximum

HISTORY: Established in 1881; amended in 1909; amended in 1984 to be gender neutral

CROSS REFERENCES:

TITLE: Incestuous Marriages Void

CITE: N.Y. DOM. REL. CODE § 5 (McKinney 1989 & 1999 Supp.)

RAPE / STATUTORY RAPE

TYPE: Sex Offenses

TITLE: Rape

CITE: N.Y. PENAL CODE § 130 et seq. (McKinney 1989)

PROHIBITED CONDUCT:

Persons under 17 or mentally incompetent are deemed incapable of consent

1st degree rape:Male engages in sexual intercourse with a female by forcible compulsion; or who is physically helpless, or who is under 11

2d degree rape:Sexual intercourse where offender is 18 or older and victim is under 13

3d degree rape:Sexual intercourse with non-spouse incapable of consent for a reason other than age, or sexual intercourse where offender is 21 or older, and victim is under 17

PENALTIES:

1st degree rape:25 years maximum

2d degree rape:7 years maximum

3d degree rape:4 years maximum

HISTORY:

Enacted in 1909; 1987 amendments applied 3d degree rape to women offenders

CROSS REFERENCES:

TITLE: Forcible Compulsion Defined

CITE: N.Y. PENAL CODE § 130.20 (McKinney 1989)

OTHER

TITLE: Child Abuse

CITE: N.Y. PENAL CODE §120.05 (McKinney 1990)

CITE: N.Y. PENAL CODE § 120.12 (McKinney 1990)

NORTH CAROLINA

INCEST

TYPE: Offenses Against Public Morality and Decency

TITLE: Incest

CITE: N.C. GEN. STAT. §§ 14-178, 14-179, 27.7A (Michie 1997)

PROHIBITED CONDUCT:

Carnal intercourse between grandparent and grandchild, parent and child or stepchild or adopted child, or brother and sister of the half or whole blood, between uncle and niece, or aunt and nephew.

PENALTIES: 13-168 months

HISTORY: First enacted 1879; technical revisions in 1994

RAPE / STATUTORY RAPE

TYPE: Offenses Against the Persons

TITLE: Rape

CITE: N.C. GEN. STAT. §§ 14-27.2, 14-27.5 (Michie 1997)

PROHIBITED CONDUCT:

1st degree rape: engaging in vaginal intercourse with a victim who is a child under the age of 13 and the defendant is at least 12 and is at least four years older than the victim; or with another person by force and against the will of the other person . . . .

2d degree rape:engaging in vaginal intercourse with another person by force and against the will for the other person; or with one who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless.

1st degree sexual offense:to engage in sexual act with a victim who is a child under the age of 13

PENALTIES:

1st degree rape:192-480 months

2d degree rape:58-168 months

1st degree sexual offense:192-480 months

2d degree sexual offense:58-168 months

HISTORY:

Original statute enacted in 1979

OTHER

TITLE: Mentally incapacitated, physically helpless, sexual act defined; provides for punishment of each individual act of incest

CITE: N.C. GEN. STAT. § 14-178 (Michie 1997)

TITLE: Consent is no defense to vaginal intercourse or sexual act with minor or child in custody if person has assumed the position of parent or custodian

CITE: N.C. GEN. STAT. § 14-27.7 (Michie 1997)

TITLE: Child Abuse

CITE: N.C. GEN. STAT. § 14-33 (Michie 1993)
N.C. GEN. STAT. § 14-318.2 (Michie 1971)
N.C. GEN. STAT. § 14-318.4 (Michie 1985)

NORTH DAKOTA

INCEST

TITLE: Incest

CITE: N.D. CENT. CODE § 12.1-20-11 (Michie 1995)

PROHIBITED CONDUCT:

Intermarriage, cohabitation, or sexual contact with another person related within the degree of consanguinity within which marriages are declared incestuous and void.

PENALTIES: 5 years maximum

CROSS REFERENCES:

TITLE: Marriages Incestuous and Void
CITE: N.D. CENT. CODE § 14-03-03 (Michie 1995)

RAPE / STATUTORY RAPE

TITLE: Gross Sexual Imposition
CITE: N.D. CENT. CODE §§ 12.1-20-03, 12.1-20-07 (Michie 1995)
PROHIBITED CONDUCT:
Gross Sexual Imposition: Sexual act accomplished by use of force or threat, or impairing victim's power of control, or sexual act or sexual contact with victim under 15.
Sexual Assault: Sexual contact with minor age 15 or over, where actor is parent, guardian, or otherwise responsible for minor's general supervision and welfare.
PENALTIES:
Gross Sexual Imposition:20 years maximum
Sexual Assault:1 year maximum

OTHER

TITLE: Corruption or Solicitation of Minors
CITE: N.D. CENT. CODE § 12.1-20-05 (Michie 1995)
PROHIBITED CONDUCT:
Engaging in sexual act with minor or causing another person to engage in a sexual act with the minor
PENALTIES: 1 year maximum

TITLE: Continual Sexual Abuse of a Child
CITE: N.D. CENT. CODE § 12.1-20-03.1 (Michie 1995)
PROHIBITED CONDUCT:
Three or more sexual acts or sexual contacts with a minor under 15 during a period of 3 months.

OHIO

INCEST

TYPE: Sexual Offenses
TITLE: Sexual Battery
CITE: OHIO REV. CODE ANN. § 2907.03(A)(5) (Banks-Baldwin 1997 & Supp. 1998)
PROHIBITED CONDUCT:
Sexual conduct with another when the offender is the victim's parent or guardian
PENALTIES: 1-5 years
HISTORY:
Incest repealed and merged into the definition of sexual battery in 1972, effective 1974

RAPE / STATUTORY RAPE

TYPE: Sexual Offenses
TITLE: Sexual Assaults
CITE: OHIO REV. CODE ANN. §§ 2907.02-§§ 2907.06 (Banks-Baldwin 1997 Supp. 1998)

PROHIBITED CONDUCT:

Rape: Sexual conduct with a non-spouse through force or threat of force, or if offender impairs the victim's judgment by administering drugs; or the victim is under 12 without regard to offender's knowledge of age; or the offender knows the victim is substantially impaired by a mental or physical condition.

Sexual Battery: Sexual conduct with a non-spouse when the offender knowingly coerces or knows that the victim is substantially impaired or unaware; or the offender is the victim's parent or guardian; or occupies a position of authority or trust

Corruption of a Minor: knowing or reckless sexual conduct by a person 18 years or older with a person 13 or older but less than 16 years old

Gross Sexual Imposition: Sexual contact through force or threat thereof, intoxicants, or with a victim under 13, or with a victim physically or mentally impaired

Sexual Imposition: Sexual contact offensive to other or when control impaired, or offender is 18 or older, four years older than victim, and victim is between 13 and 16.

PENALTIES:

Rape: 5-10 years with enhancement for victims under 13

Sexual Battery: 1-5 years

Corruption of a Minor: 6-18 months with enhancement for victims under 13

HISTORY:

Current statute enacted in 1972; higher minimum sentence for drug impairment, upgrade for all sexual battery offenses in 1997; felonious sexual penetration repealed in 1996; mental or physical impairment added as a condition in 1993.

CROSS REFERENCES:

TITLE: Criminal Child Enticement
CITE: OHIO REV. CODE ANN. § 2905.05 (Banks-Baldwin 1997 & Supp. 1998)

TITLE: Sexual Oriented Offense Defined
CITE: Ohio Rev. Code Ann. § 2950.01 (Banks-Baldwin 1997 & Supp. 1998)

TITLE: Violent Sex Offense Definitions
CITE: OHIO REV. CODE ANN. § 2971.01 (Banks-Baldwin 1997 & Supp. 1998)

OTHER

TITLE: Child Abuse
CITE: OHIO REV. CODE ANN. § 2919.22 (Banks-Baldwin 1989)
OHIO REV. CODE ANN. § 2919.25 (Banks-Baldwin 1994)

OKLAHOMA

INCEST

TYPE: Crimes Against Public Decency
TITLE: Incest
CITE: OKLA. STAT. ANN. Tit. 21 §885 (West 1983)

PROHIBITED CONDUCT:
Engaging in sexual intercourse with or marrying a person who is within certain degrees of relation specified in statute prohibiting incestuous marriages.
PENALTIES: 10 years maximum
HISTORY:
Original enacted in 1887; amended in 1997
CROSS REFERENCES:
TITLE: Prohibition Against Incestuous Marriage
CITE: OKLA. STAT. ANN. Tit. 43 §2 (West 1983)

RAPE / STATUTORY RAPE

TYPE: Crimes Against Public Decency and Morality
TITLE: Rape
CITE: OKLA. STAT. ANN. Tit. 21 §§ 1111-1116 (West 1983)
PROHIBITED CONDUCT:
Rape defined: Sexual intercourse with a non-spouse if victim is under 16, or victim cannot give consent because of mental illness, or force or violence is used, or victim is intoxicated by substance perpetrator administered.
1st degree: One over 18 engages in sexual intercourse with child under 14, or victim with a mental illness, or uses force, or causes bodily harm with an instrument
2d degree: All other cases of rape, except that anyone under 18 cannot be convicted of rape for sexual intercourse with anyone over 14
PENALTIES:
1st degree: 5 years –death penalty
2d degree: 1-15 years
HISTORY:
1890 source of statute; rape with female under 10 was 1st degree; 1895 amendment expands 1st degree rape to female under 14; 1901 amendment raises age to 16; 1910 adds that male must be over 18 and female under 14 for first degree rape; law of 1910 has essentially remained intact to present day.

OTHER

TITLE: Forcible Sodomy
CITE: OKLA. STAT. ANN. Tit. 21 §§ 888 (West 1983)
PROHIBITED CONDUCT:
Forcing another to engage in the detestable and abominable crime against nature and the person is 18 years or older and the victim is under 16; or the victim has a mental illness; or the perpetrator uses threat of force of violence

TITLE: Lewd or indecent proposals or acts involving child under 16
CITE: OKLA. STAT. ANN. Tit. 21 § 1123 (West 1983)
PROHIBITED CONDUCT:
Making an indecent proposal to a child under 16 for child to have unlawful sexual relations or intercourse, or looking at, touching or feeling any child under 16

TITLE: Child Abuse
CITE: OKLA. STAT. ANN. tit. 21, § 843 (West 1990)
OKLA. STAT. ANN. tit. 21, § 843.1 (West 1984)
OKLA. STAT. ANN. tit. 21, § 845 (West 1994)

OREGON

INCEST

TYPE: Offenses Against the Family
TITLE: Incest
CITE: OR. REV. STAT. § 163.525 (1997)
PROHIBITED CONDUCT:
Marrying or engaging in sexual intercourse or deviate sexual intercourse with a person whom the person knows to be related to the person, either legitimately or illegitimately, as an ancestor, descendant, or brother or sister of either the whole or half blood.
PENALTIES: 5 years maximum
HISTORY: Current statute enacted 1971

RAPE / STATUTORY RAPE

TYPE: Sexual Offenses
TITLE: Rape
CITE: OR. REV. STAT. §§ 163.355-357, 163.385-405, 163.408-411, 163.415-427, 163.435-445 (1997)
PROHIBITED CONDUCT:

1st degree rape: sexual intercourse with another person by forcible compulsion, or if victim is under 12, or if victim is under 16 and is the offender's sibling or child, or if victim is incapable of consent due to incapacitation or physical helplessness.

2d degree rape: sexual intercourse with person under 14

3d degree rape: sexual intercourse with person under 16

Sodomy: deviate sexual conduct prohibited by same scheme as rape

1st degree unlawful sexual penetration: penetration other than intercourse by forcible compulsion, or with victim under 12, or with victim incapable of consent

2d degree unlawful sexual penetration: penetration other than intercourse where victim is under 14

1st degree sexual abuse: subjecting a person to sexual contact by forcible compulsion, or where victim is under 14, or where victim is incapable of consent, or causing a person under 18 to engage in bestiality

2d degree sexual abuse: subjecting a person without consent to sexual intercourse, deviate sexual intercourse, or non-intercourse penetration

3d degree sexual abuse: sexual contact without consent or with a person incapable of consent because the person is under 18

PENALTIES:

1st degree rape:maximum 20 years

2d degree rape:maximum 10 years

3d degree rape:maximum 5 years

Sodomy:follows rape punishment scheme

Unlawful sexual penetration:follows rape punishment scheme

1st degree sexual abuse:maximum 10 years

2d degree sexual abuse:maximum 5 years

3d degree sexual abuse:misdemeanor

HISTORY:

Current statute enacted in 1971; unlawful sexual penetration added in 1981; sexual abuse in 1st degree added in 1991

OTHER

TITLE: Deviate Sexual Intercourse, Sexual Intercourse, Sexual Contact defined

CITE: OR REV. STAT. ANN. § 16.305 (1997)

TITLE: Person under 18 incapable of consent to sexual acts

CITE: OR. REV. STAT. ANN. § 16.315 (1997)

TITLE: Child Abuse

CITE: OR. REV. STAT. § 163.205 (1993)

PENNSYLVANIA

INCEST

TYPE: Offenses Against the Family

TITLE: Incest

CITE: 18 PA. CONS. STAT. ANN. §4302 (West 1997)

PROHIBITED CONDUCT:

A person knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood relationships, without regard to legitimacy and relationship of parent and child by adoption

PENALTIES: maximum 10 years

HISTORY:

Original law enacted in 1932; current version enacted 1972; amended 1989 and 1995.

CROSS REFERENCES:

TITLE: Marriage of First Cousins Unlawful

CITE: 18 PA. CONS. STAT. ANN. § 1304 (West 1997)

RAPE / STATUTORY RAPE

TYPE: Offenses Involving Danger to the Person

TITLE: Rape

CITE: 18 Pa. Cons. Stat. Ann. §§ 3121, 3122 (West 1997)

PROHIBITED CONDUCT:

Rape: Sexual intercourse by forcible compulsion; by threat of forcible compulsion; of a victim unconscious or unaware of the intercourse

Statutory Rape: One 18 or older commits statutory rape when he engages in sexual intercourse with another person not his spouse who is less than 14 years of age.

PENALTIES:

Rape:maximum 20 years

Statutory Rape: maximum 10 years

HISTORY:

1976 amendment to statutory rape increased age of offender from 16 to 18 and reduced the age of the victim from 16 to 14

OTHER

TITLE: Aggravated Indecent Assault

CITE: 18 PA. CONS. STAT. ANN. §3125 (West 1997)

TITLE: Child Abuse

CITE: 18 PA. CONS. STAT. § 2701 (West 1988)

RHODE ISLAND

INCEST

No specific criminal statute barring incestuous sexual relations within the family

CROSS REFERENCES:

TITLE: Men Forbidden to Marry Kindred

CITE: R.I. GEN. LAWS § 15-1-1 (Michie 1994)

TITLE: Women Forbidden to Marry Kindred

CITE: R.I. GEN. LAWS § 15-1-2 (Michie 1994)

TITLE: Incestuous Marriages Void

CITE: R.I. GEN. LAWS § 15-1-3 (Michie 1994)

RAPE / STATUTORY RAPE

TYPE: Sexual Assault

TITLE: Sexual Assault

CITE: R.I. GEN. LAWS § 11-37-2, 4, 6 (Michie 1994)

PROHIBITED CONDUCT:

1st degree sexual assault: Sexual penetration with another person and accused, being non-spouse, knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless, or the accused uses force or compulsion or the accused is able to overcome the victim by surprise.

2d degree sexual assault: Sexual contact with another person with knowledge that the person is mentally or physically helpless, or by forcible compulsion.

3d degree sexual assault: One over 18 engages in sexual penetration with one between 14 and 16

PENALTIES:

1st degree sexual assault: 10 years-life sentence

2d degree sexual assault: 3-15 years

3d degree sexual assault: maximum 5 years

HISTORY:

Current statute adopted in 1979; various provisions amended subsequently; reenacted 1994.

OTHER

TITLE: Child Abuse

CITE: R.I. GEN. LAWS § 11-9-5.3 (Michie 1990)

R.I. GEN. LAWS § 11-5-14 (Michie 1991)

R.I. GEN. LAWS § 11-5-14.1 (Michie 1991)

SOUTH CAROLINA

INCEST

TYPE: Offenses Against Morality and Decency

TITLE: Incest

CITE: S.C. CODE ANN. § 16-15-20 (Law Co-op. 1997)

PROHIBITED CONDUCT:

Carnal intercourse within any of the following degrees of relation: man with mother, grandmother, daughter, granddaughter, stepmother, sister, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister or mother's sister; or woman with her father, grandfather, son, grandson, stepfather, brother, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's son, husband's grandson, brother's son, sister's son, father's brother, or mother's brother.

PENALTIES: Minimum 1 year

HISTORY: Original statute enacted in 1884; current version enacted in 1962

CROSS REFERENCES:

TITLE: Prohibition of Marriage within Certain Degree of Relationship

CITE: S.C. CODE ANN. § 20-1-10 (Law Co-op 1997)

RAPE / STATUTORY RAPE

TYPE: Offenses Against the Person

TITLE: Criminal Sexual Conduct

CITE: S.C. CODE ANN. § 16-3-652, 653, 654, 655 (Law Co-op 1997)

PROHIBITED CONDUCT:

1st degree: Sexual battery with victim accomplished by aggravated force or during commission of separate offense

2d degree: Sexual battery accomplished by aggravated coercion

3d degree: Sexual battery accomplished by force or coercion or conducted with mentally incapacitated person

PENALTIES:

1st degree: maximum 30 years

2d degree: maximum 20 years

3d degree: maximum 10 years

HISTORY: Enacted 1977

OTHER

TITLE: Committing or Attempting Lewd Act upon Child under 16

CITE: S.C. CODE ANN. § 16-15-140 (Law Co-op 1997)

PROHIBITED CONDUCT:

One over 14 willfully and lewdly commits or attempts a lewd or lascivious act upon or with the body, or its parts, of a child under the age of 16, with the intent of arousing, appealing to, or gratifying the lust or sexual passion of the person or of the child

PENALTIES: Maximum 15 years

TITLE: Child Abuse

CITE: S.C. CODE ANN. § 16-25-10 (Law Co-op 1994)

S.C. CODE ANN. § 16-25-20 (Law Co-op 1994)

SOUTH DAKOTA

INCEST

TYPE: Sex Offenses

TITLE: Incest

CITE: S.D. CODIFIED LAWS § 22-22-19.1 (Michie 1988)

PROHIBITED CONDUCT:

Any person, 14 years or older, knowingly engages in sexual contact with another person, other than the person's spouse, if the other person is under the age of 21 and is within the degree of consanguinity or affinity within which marriages are by law void.

PENALTIES: Maximum 5 years

HISTORY: Amended 1989, added last sentence; amended 1994 to be gender neutral

CROSS REFERENCES:

TITLE: Admissibility of Statement of Victim Under 10 years

CITE: S.D. CODIFIED LAWS § 19-16-38 (Michie 1988)

TITLE: Sentence May Require Payment for Minor Victim's Treatment

CITE: S.D. CODIFIED LAWS § 23a-28-12 (Michie 1988)

RAPE / STATUTORY RAPE

TYPE: Sex Offenses

TITLE: Rape

CITE: S.D. CODIFIED LAWS § 22-22-1 (Michie 1988)

PROHIBITED CONDUCT:

Offender engages in sexual penetration through force, coercion, or threat; or where victim is incapable of consent; or where the victim is under influence of intoxicating substance; or

where victim is under 10; or where victim is between 10 and 16 and offender is at least 3 years older than the victim.

PENALTIES:

1st degree rape: maximum 25 years

2d degree rape; maximum 15 years

3d degree rape; maximum 10 years

HISTORY:

Enacted 1877; amended 1989; amended 1990 to eliminate exception for marital rape.

CROSS REFERENCES:

TITLE: Sexual Contact with Child

CITE: S.D. CODIFIED LAWS § 22-22-7-7.1 (Michie 1988)

OTHER

TITLE: Sexual Contact with Child under 16

CITE: S.D. CODIFIED LAWS § 22-22-7 (Michie 1988)

PROHIBITED CONDUCT:

Knowingly engaging in sexual contact with another person other than spouse, if the person is under the age of 16

PENALTIES: Maximum 15 years

TITLE: Criminal Pedophilia

CITE S.D. CODIFIED LAWS § 22-22-30.1 (Michie 1988)

PROHIBITED CONDUCT:

A person 26 or older accomplishes sexual penetration with a victim under 13 under any circumstances not constituting incest as defined in § 22-22-19.1

PENALTIES: Maximum 25 years

TITLE: Child Abuse

CITE: S.D. CODIFIED LAWS § 26-10-1 (Michie 1983)

TENNESSEE

INCEST

TYPE: Offenses Against the Family

TITLE: Incest

CITE: TENN. CODE ANN. § 39-15302 (Michie 1980)

PROHIBITED CONDUCT:

Sexual penetration as defined in § 39-13-501, with a person, knowing the person to be the actor's natural parent, child, grandparent, grandchild, and various other degrees of relation, or the person's brother or sister of the whole or half-blood or by adoption

PENALTIES: 3-15 years

CROSS REFERENCES:

TITLE: Commission of Act Against Child Under this Section Deemed Severe Child Abuse

CITE: TENN. CODE ANN. § 29-13-106 (Michie 1980)

TITLE: Reports of Incest

CITE: TENN. CODE ANN. § 37-1-405 (Michie 1980)

RAPE / STATUTORY RAPE

TYPE: Offenses Against the Person

TITLE: Rape

CITE: TENN. CODE ANN. § 39-13-502, 503, 506 (Michie 1980)

PROHIBITED CONDUCT:

Rape: Unlawful sexual penetration where offender uses force or coercion; where victim did not consent and offender should have known the victim did not consent; the offender knows the victim is mentally or physically incapacitated, or fraud is used.

Statutory Rape: Sexual penetration of a victim by the offender or of the offender by the victim when the victim is at least 13 but less than 18 and the offender is at least four years older than the victim.

PENALTIES:

Rape: 8-30 years

Aggravated Rape: 15-60 years

Statutory Rape: 1-6 years

CROSS REFERENCES:

TITLE: Transfer from Juvenile Court

CITE: TENN. CODE ANN. § 37-1-134 (Michie 1980)

TITLE: Compensation Claim Procedure for Child Sexual Abuse Victims

CITE: TENN. CODE ANN. § 29-13-108 (Michie 1980)

TITLE: Criminal Injuries Compensation Fund Privilege Tax Upon Persons Committing Sexual Offenses Upon Children

CITE: TENN. CODE ANN. § 40-24-107 (Michie 1980)

OTHER

TITLE: Indecency with a Child

CITE: TENN. CODE ANN. § 21.11 (Michie 1980)

PROHIBITED CONDUCT:

With a child younger than 17 and not his spouse, engaging in sexual contact with the child or exposing his anus or any part of the genitals, knowing the child is present, with intent to gratify the sexual desire of any person.

TITLE: Child Abuse

CITE: TENN. CODE ANN. § 39-15-401, 402 (Michie 1991)

TEXAS

INCEST

TYPE: Offenses Against the Family

TITLE: Prohibited Sexual Conduct

CITE: TEX. PENAL CODE ANN. § 25.02 (West 1994)

PROHIBITED CONDUCT:

Sexual intercourse or deviate sexual intercourse with a person he knows to be his ancestor or descendant by blood or adoption, his stepchild or stepparent, while the marriage creating the relationship exists, his parent's brother or sister of the whole or half blood or by adoption, or the children of his brother or sister of the whole or half blood or by adoption.

PENALTIES: 2-10 years

HISTORY: Amended 1993, substituted title "prohibited sexual conduct" for "incest"

CROSS REFERENCES:

TITLE: Termination of Parent-Child Relationship

CITE: TEX. PENAL CODE ANN. § 161.007 (West 1994)

TITLE: Sexual Offenses

CITE: TEX. PENAL CODE ANN. § 21.01 (West 1994)

RAPE / STATUTORY RAPE

TYPE: Assaultive Offenses

TITLE: Sexual Assault

CITE: TEX. PENAL CODE ANN. § 22.011 (West 1994)

PROHIBITED CONDUCT:

Intentionally or knowingly causing the penetration of the anus or female organ of another person without that person's consent; causing the penetration of the mouth of another person by the sexual organ of the actor without that person's consent; to contact or penetrate the mouth or sexual organ of another person; causes the penetration of the anus or female sexual organ of a child; causes the penetration of the mouth of a child by the sexual organ of the actor; causes the sexual organ of a child to contact or penetrate the mouth or sexual organ of another person; causes the anus of a child to contact the mouth or sexual organ of another person; causes the mouth of a child to contact the sexual organ of another person

PENALTIES: 2-20 years

HISTORY: Enacted 1879; amended 1985.

CROSS REFERENCES:

TITLE: Defines "child" as a person younger than 17 who is not the spouse of the actor

CITE: TEX. PENAL CODE ANN. § 22.011 (West 1994)

TITLE: Aggravated Sexual Assault

CITE: TEX. PENAL CODE ANN. § 22.021 (West 1994)

TITLE: Lewdness

CITE: TEX. PENAL CODE ANN. § 21.07 (West 1994)

OTHER

TITLE: Indecency with a Child

CITE: TEX. PENAL CODE ANN. § 21.11 (West 1994)

PROHIBITED CONDUCT:

With a child younger than 17 and not his spouse, engaging in sexual contact with the child, or exposing his anus or genitals knowing the child is present, with the intent to gratify the sexual desire of any person.

TITLE: Child Abuse

CITE: TEX. PENAL CODE ANN. § 22.04 (West 1993)

UTAH

INCEST

TYPE: Offenses Against the Family

TITLE: Incest

CITE: UTAH CODE ANN. § 76-7-102 (Michie 1997)

PROHIBITED CONDUCT:

Sexual intercourse with a person whom he knows to be an ancestor, descendant, brother, sister, uncle, aunt, nephew, niece, or first cousin. The relationships include blood relationships of the whole or half blood without regard to legitimacy, relationship of parent and child by adoption, and relationship of stepparent and stepchild while the marriage creating the relationship of a stepparent and stepchild exists.

PENALTIES: Maximum 5 years

HISTORY: Enacted 1973; amended 1983

RAPE / STATUTORY RAPE

TYPE: Sexual Offenses

TITLE: Unlawful Sexual Intercourse

CITE: UTAH CODE ANN. § 76-5-401, 402, 402.1 (Michie 1997)

PROHIBITED CONDUCT:

Rape: Sexual intercourse with another person without the victim's consent, regardless of marriage

Rape of a Child: Sexual intercourse with a child under 14

Unlawful Sexual Intercourse: Sexual intercourse with one under 16

PENALTIES:

Rape / Rape of a Child: 5 years to life sentence

Unlawful Sexual Intercourse:5 year maximum with leniency where actor is no more than three years older than victim

HISTORY:

Enacted 1973; amended 1979, 1983

OTHER

TITLE: Aggravated Sexual Abuse of a Child
CITE: UTAH CODE ANN. § 76-5-404.1 (Michie 1997)
PROHIBITED CONDUCT:
Touching genitalia of a child or taking indecent liberties with a child
PENALTIES: 1-15 years

TITLE: Child Abuse
CITE: UTAH CODE ANN. § 76-5-109 (Michie 1992)
UTAH CODE ANN. § 76-5-110 (Michie 1993)

VERMONT

INCEST

TYPE: Adultery and Bigamy
TITLE: Incest
CITE: VT. STAT. ANN. tit. 13 § 205 (1997)
PROHIBITED CONDUCT:
Fornication between persons who are prohibited to marry
PENALTIES: maximum 5 years
HISTORY: Enacted 1947; amended 1981

RAPE / STATUTORY RAPE

TYPE: Sexual Assault
TITLE: Rape
CITE: VT. STAT. ANN. tit. 13 § 205 (1997)
PROHIBITED CONDUCT:
Sexual act with another by compulsion and without the consent of the other; or by the use of force; . . . or the victim is under 16, except where the persons are married; or the person is under 18 and is entrusted to the actor's care or is the actor's child, grandchild, foster child, adopted child, or stepchild; or sexual act with a person under 16 where the victim is entrusted to the actor's care or is the actor's child, grandchild, foster child, adopted child, or stepchild; or the actor is 18 or older and resides in the victim's household and serves in a parental role to child
PENALTIES: maximum 30 years

OTHER

TITLE: Child Abuse
CITE: VT. STAT. ANN. tit. 13, § 1042 (1993)
VT. STAT. ANN. tit. 13, § 1044 (1993)
VT. STAT. ANN. tit. 13, § 1304 (1971)
VT. STAT. ANN. tit. 13, § 1305 (1971)
VT. STAT. ANN. tit. 13, § 1101 (1991)

VIRGINIA

INCEST

TYPE: Family offenses, crimes against children

TITLE:I ncest

CITE: VA. CODE ANN. § 18.2.366 (Michie 1997)

PROHIBITED CONDUCT:

Adultery or fornication with any person whom he or she is forbidden by law to marry, or adultery or fornication with daughter, granddaughter, son or grandson, father or mother

PENALTIES: 1-10 years, with enhancement to 20 years for victims under 18

RAPE / STATUTORY RAPE

TYPE: Criminal Sexual Assault

TITLE: Rape

CITE: VA. CODE ANN. § 18.2-61, 63 (Michie 1997)

PROHIBITED CONDUCT:

Rape: Sexual intercourse with any other person not the actor's spouse, if against the complainant's will, by force, threat, intimidation; or through use of the complainant's mental incapacity or physical helplessness, or with a child under 13 as the victim.

Carnal Knowledge of Child between 13 and 15: Carnal knowledge without force of child between 13 and 15

PENALTIES:

Rape: 5 years to life sentence

Carnal Knowledge of a Child between 13 and 15: 5-20 years with leniency for minor offenders who interacted with consenting partner

OTHER

TITLE: Child Abuse

CITE: VA. CODE ANN. § 18.2-57.2 (Michie 1992)

VA. CODE ANN. § 18.2-371.1 (Michie 1993)

WASHINGTON

INCEST

TYPE: Family Offenses

TITLE: Incest

CITE: WASH. REV. CODE ANN. § 9A.64.020 (West 1997)

PROHIBITED CONDUCT:

Sexual intercourse or sexual contact with ancestor, descendant, stepchild, adopted child, brother or sister of either the whole or half blood.

PENALTIES: WASH REV. CODE ANN. § 9.94A.310 (West 1997)

HISTORY:

Original statute enacted 1869; revised 1873, 1895, 1909, 1943, 1975. Current statute enacted 1985.

RAPE / STATUTORY RAPE

TYPE: Sex Offenses

TITLE: Rape

CITE: WASH REV. CODE ANN. § 9A.44.073, 6, 9 (West 1997)

PROHIBITED CONDUCT:

1st degree rape: Sexual intercourse by forcible compulsion where actor uses or threatens a deadly weapon, kidnaps a victim, inflicts serious physical injury, felon enters victim's building

2d degree rape: Sexual intercourse by forcible compulsion where victim physically or mentally impaired or where offender has supervision over institutionalized victim or engages in other forms of professional exploitation

3d degree rape: Sexual intercourse without consent as defined in § 9A.44.010(6)

1st degree rape of a child: Sexual intercourse with another under 12 where perpetrator is at least 2 years older than the victim.

2d degree rape of a child: Sexual intercourse with one 12 or 13 years old where perpetrator is at least 3 years older than the victim.

3d degree rape of a child: Sexual intercourse one 14 or 15 where perpetrator is at least 4 years older than the victim.

PENALTIES: WASH REV. CODE ANN. § 9.94A.310 (West 1997)

HISTORY:

Original statute enacted 1881; amended 1909, 1919, 1943, 1973; current statute effective 1988.

OTHER

TITLE: Child Molestation, sexual misconduct with a minor

CITE: WASH. REV. CODE ANN. § 9A.44.083, 6, 9 (West 1997)

PROHIBITED CONDUCT:

1st degree:Having or causing sexual contact with another person under 12 where perpetrator is at least 3 years older than the victim

2d degree:Having or causing sexual contact with another who is 12 or 13 and perpetrator is at least 3 years older than the victim.

3d degree:Having or causing sexual contact with another who is 14 or 15 where perpetrator is at least 4 years older than victim.

TITLE Child Abuse

CITE: WASH. REV. CODE § 9A.36.120, 130, 140 (West 1992)

WEST VIRGINIA

INCEST

TYPE: Crimes Against Chastity, Morality, and Decency

TITLE: Incest

CITE: W. VA. CODE § 61-8-12 (Michie 1966)

PROHIBITED CONDUCT:

Engaging in sexual intercourse or sexual intrusion with father, mother, brother, sister, daughter, son, grandfather, grandmother, grandson, granddaughter, nephew, niece, uncle or aunt.

PENALTIES: 5-15 years

HISTORY: Original statute enacted 1882. Current statute enacted 1966; amended in 1991 to increase maximum imprisonment from 10 to 15 years.

RAPE / STATUTORY RAPE

TYPE: Sexual Offenses

TITLE: Sexual Assault

CITE: W. VA. CODE § 61-8B-3, 4, 5 (Michie 1966)

PROHIBITED CONDUCT:

1st degree:Sexual intercourse or intrusion and inflicting serious bodily injury or employing deadly weapon or if defendant is 11 years old or less

2d degree:Sexual intercourse or intrusion of person without consent where lack of consent results from forcible compulsion or physical incapacitation

3d degree:Sexual intercourse or intrusion with person who is mentally defective or incapacitated, or if perpetrator is 16 or older and at least 4 years younger than defendant

PENALTIES:

1st degree:15-35 years

2d degree:10-25 years

3d degree:1-5 years

HISTORY:

Original statute enacted 1868; amended 1891; 1906; 1943; 1957; 1963; 1965. Current statute enacted 1966; amended 1976 to codify common law rape offenses.

CROSS REFERENCES:

TITLE: Definition of terms

CITE: W. VA. CODE § 61-8B-1 (Michie 1966)

TITLE: Lack of consent

CITE: W. VA. CODE § 61-8B-2 (Michie 1966)

TITLE: Sexual Abuse

CITE: W. VA. CODE § 61-8B-6, 7, 8 (Michie 1966)

TITLE: Sexual Misconduct

CITE: W. VA. CODE § 61-8B-9 (Michie 1966)

OTHER

TITLE: Sexual Abuse

CITE: W. VA. CODE § 61-8B-7, 8, 9 (Michie 1966)

PROHIBITED CONDUCT:

1st degree: Subject another person to sexual contact without consent when lack of consent results from forcible compulsion; or victim is physically helpless; or defendant is 14 or older and victim is 11 or younger

2d degree: Subject another person to sexual contact without victim's consent when such lack of consent is due to victim's incapacity to consent by reason of being less than 16 years old.

PENALTIES:

1st degree:1-5 years

2d degree: maximum 1 year

3d degree: misdemeanor

TITLE: Child Abuse

CITE: W. VA. CODE § 61-8D-3 (Michie 1992)

W. VA. CODE § 61-8B-1 (Michie 1986)

WISCONSIN

INCEST

TYPE: Crimes Against Sexual Morality

TITLE: Incest

CITE: WIS. STAT. ANN. § 944.06 (West 1996)

PROHIBITED CONDUCT:

Incest: Marrying or having nonmarital sexual intercourse with a person known to be a blood relative within a degree where marriage is prohibited by law.

Incest with a Child:Marrying or having sexual intercourse with a child he or she knows is related, either by blood or adoption in second degree or closer, or where offender is responsible for child's welfare and knows that a blood or adoptive relation exists, who has had or plans to have sexual intercourse with the child, and despite capability, fails to take action.

PENALTIES:

Incest: maximum 10 years

Incest with a Child: maximum 20 years

HISTORY:

Original statute enacted in 1858

CROSS REFERENCES:

TITLE: Who Shall Not Marry

CITE: WIS. STAT. ANN. § 948.06 (West 1996)

RAPE / STATUTORY RAPE

TYPE: Offenses Against Life and Bodily Security

TITLE: Sexual Assault

CITE: WIS. STAT. ANN. § 940.225 (West 1996)

PROHIBITED CONDUCT:

1st degree: Sexual conduct or intercourse with another person without consent, and causing pregnancy or great bodily harm, or threatening use of dangerous weapon, or aided by one or more persons using force or violence

2d degree: Sexual contact or intercourse with a person without consent by use of threat of force, or person causes injury or illness, or victim has mental illness, or victim is unconscious, or person is aided by another person.

3d degree: Sexual intercourse with another without consent.

4th degree: Sexual contact with another person without consent.

PENALTIES:

1st degree: Maximum 40 years

2d degree: Maximum 20 years

3d degree: Maximum 5 years

4th degree: Maximum 9 months

HISTORY:

1839 statutes included a carnal knowledge rape statute; age for statutory rape was set at 10 years old; 1898 raised this to 14 years old; 1921 the age of consent was raised to 16 years old; 1955 rape law rewritten, but maximum penalty of 30 years was retained as well as the common law definition of rape, new offense of sexual intercourse without consent; rape reform legislation passed in 1975.

OTHER

TITLE: Sexual Assault of a Child

CITE: WIS. STAT. ANN. § 948.02 (West 1996)

PROHIBITED CONDUCT:

1st degree: Sexual contact or sexual intercourse with a person who has not attained the age of 13

2d degree: Sexual contact or sexual intercourse with person who has not attained age of 16

Failure to Act: Person responsible for a child under 16 fails to take action to prevent sexual intercourse or contact to occur when that person has knowledge that the activity is occurring or knows a person has the intent to engage in the activity.

TITLE: Child Abuse

CITE: WIS. STAT. § 948.03 (West 1987)

WYOMING

INCEST

TYPE: Offenses Against the Family

TITLE: Incest

CITE: WYO. STAT. ANN. § 6-4-4-2 (Michie 1997)

PROHIBITED CONDUCT:

Knowing sexual intrusion or sexual contact with an ancestor or descendant, or a brother or sister of the whole or half blood

PENALTIES: Maximum 5 years

HISTORY:

Current version of law enacted in 1983

CROSS REFERENCES:

TITLE: Bigamy

CITE: WYO. STAT. ANN. § 6-4-4 (Michie 1997)

RAPE / STATUTORY RAPE

TYPE: Offenses Against the Person

TITLE: Sexual Assault

CITE: WYO. STAT. ANN. §§ 6-2-302-304 (Michie 1997)

PROHIBITED CONDUCT:

1st degree: Inflicting sexual intrusion on a victim and making victim submit by use of physical force; threat of death or serious bodily injury; victim physically helpless or mentally disabled

2d degree: Inflicting sexual intrusion on a victim and threats of retaliation against victim's family, or administration of a substance impairing control; or actor in position of authority and uses authority

3d degree: Inflicting sexual intrusion on a victim where the actor is at least 4 years older than a victim who is less than 16; or sexual contact with a person under 14

PENALTIES:

1st degree: 5-50 years

2d degree: 1-20 years

3d degree: 1-15 years

HISTORY:

1876 compilation included carnal knowledge rape statute, male must be over 14, female under 10; 1887 revision raised statutory age to 14; 1889 revision raised statutory age to 18; 1965 rape statute rewritten to prohibit three degrees of rape; reform legislation passed in 1977

CROSS REFERENCES:

TITLE: Rape Shield Law

CITE: WYO. STAT. ANN. § 6-2-312 (Michie 1997)

OTHER

TITLE: Child Abuse

CITE: WYO. STAT. ANN. § 6-2-503 (Michie 1997)
WYO. STAT. ANN. § 14-3-202 (Michie 1993)

PROHIBITED CONDUCT:

An adult at least six years older than victim intentionally or recklessly inflicts upon a child under 16 physical injury as defined in § 14-3-202(a)(ii)(B) or mental injury, defined in § 14-3-202(a)(ii)(A) as observable injury to psychological capacity or emotional stability.

PENALTIES: 1-5 years