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M—majority D—dissenting MO—wrote maj. opinion	Black, J. 8-19-37 D, DO	Powell, J. 12-9-71 **	same M	same M	same M, MO
CO—wrote con- curring opin. DO—wrote dis- senting opin.	Goldberg, J. 10-1-62 M, MO	Blackmun, J. 6-9-70 M	same M, MO	same M, MO	same D, DO
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C&D—concurring in part, dis- senting in part	Douglas, J. 4-17-59 M, MO	same M, CO	same M, CO	Stevens, J. 12-19-75 C&D	same M
C&DO—concurring and dissent- ing opinion	Clark, J. 8-24-49 M	Marshall, J. 10-2-67 M	same M	same M	same D, DO
Vote	White, J. 4-16-62 M, *	same M, CO, *	same D, DO	same C&D, C&DO	same M
	Harlan, J. 3-28-55 M, *, CO	Rehnquist, J. 12-15-71 **	same D, DO	same C&D	same M
	Stewart, J. 6-15-59 D, DO	same M	same M, CO	same M, CO	same M
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THE CRIME OF INCEST AGAINST THE MINOR CHILD AND THE STATES' STATUTORY RESPONSES

I. INTRODUCTION

The heretofore almost unmentionable subject of incest has received a good deal of attention lately in the popular press.¹ While the physical abuse of children has been much discussed by both the legal writers and the public in general, the sexual abuse of children, and incest in particular, has until recently been practically ignored.²

This note will focus upon sexual abuse of children within the family. Recent data indicates that the majority of children who are molested are assaulted by persons known to them. There have been estimates that in as many as half of the cases, the offender is the natural parent of the child.³ Another significant percentage of offenders is made up of other relatives of the child. Hence, it is especially appropriate to address specifically the problem of incestuous child abuse since it is within the family setting that a large portion of the sexual abuse of children occurs. "[S]exual activity between family members is probably the most common form of sexual exploitation of children in our culture and in all other civilized cultures."⁴ An analysis of the crime itself will be followed by an exploration of the state laws dealing with the crime.

¹ See, e.g., Masters and Johnson, *Incest: The Ultimate Sexual Taboo*, REDBOOK, Apr., 1976, 54 and Weber, *Incest: Sexual Abuse Begins at Home*, Ms., Apr., 1977, 64.

² Susan Brownmiller writes, in her book about rape, that the FBI has never produced a national analysis of sex crimes committed against the young, yet a 1969 study by the Children's Division of the American Humane Association, under the direction of Vincent De Francis, found that "[t]he sexually abused child is statistically more prevalent than the physically abused, or battered child." S. BROWN-MILLER, *AGAINST OUR WILL* 272, 277 (1975).

³ *Sexual Child Abuse* 1 (a bulletin compiled by Grace M. Erickson, Assistant Director, R.A.P.E. Relief Center, Louisville, Ky.) (1977).

⁴ Weeks, *The Sexually Exploited Child*, 69 S. MED. J. 848, 848 (1976).

The incestuous behavior runs the full range of sex experiences from indecent exposure, fondling and finger insertion to oral sex, sodomy, and full intercourse.¹³ "[T]he sexual trauma, even if not accompanied by physical injury, is likely to cause deep and long-lasting psychologic scars. . . ."¹⁴ The vast majority of the incestuous offenders are male¹⁵ and the "victims [are found to be] girls on a ratio of 10 girls to one boy."¹⁶

Because incest occurs in secrecy and exhibits few physical signs of abuse, it is difficult to detect by those outside of the family. Not much force is required to molest a child. The offender may use his position as an authority figure to persuade the child to engage in sexual activity.¹⁷ He may use threats of punishment, force, or enticements¹⁸ such as sums of money, gifts, or candy. The offender may use

the child's strong desire not to displease him, even though, to the child, the adult's request may [seem] unpleasant, or distasteful, or even bizarre. The child's wish and need to please him were exploited by the offender. In some instances the child was assured that what was requested was perfectly normal because of the very relationship between them."

¹³ Weber, *Incest: Sexual Abuse Begins at Home*, Ms., Apr. 1977 64, 64; *Sexual Child Abuse 2* (a bulletin compiled by Grace M. Erickson, Assistant Director, R.A.P.E. Relief Center, Louisville, Ky.) (1977); Rosenfeld, Nadelson, Krieger and Backman, *Incest and Sexual Abuse of Children*, 16 AM. ACAD. OF CHILD PSYCH. J. 327, 328 (1977).

¹⁴ Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. OF PSYCHOTHERAPY 398, 412 (1976).

¹⁵ The ratio was found to be 97 percent males to 3 percent females in adults who made sexual offenses against children in general, in the American Humane Association's 1969 study. (See note 2, *supra*.) De Francis, *Protecting the Child Victims of Sex Crimes Committed by Adults*, 35 FED. PROBATION, Sept. 1971, 15, 17.

¹⁶ *Id.*, at 18. "Male child victims were used in homosexual activities with the exception of part of the 3 percent of cases where the offender was a female." *Id.* [Because most incest victims are girls and most incest offenders are men, victims will be referred to as "she" and offenders will be referred to as "he" throughout the remainder of this note.]

¹⁷ Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. OF PSYCHOTHERAPY 398, 411 (1976).

¹⁸ De Francis, *Protecting the Child Victim of Sex Crimes Committed by Adults*, 35 FED. PROBATION, Sept. 1971, 15, 18.

¹⁹ *Id.*

In cases of parent-child incest, the young child may remain silent because of her loyalty to the offending parent and her assumption that everything the parent does is right.²⁰ The child is apt to obey the parent's admonishments to keep quiet. Because of sexual excitement the child may have felt, as well as her egocentrism, the child often feels that she is responsible for the act. Though "the child may fear the forbidden act, the child's guilt often leads [her] to remain silent lest [she] be punished by . . . other adults."²¹

If the child does report the incest to her mother, often support is not forthcoming. This is for a variety of reasons. The mother may be immobilized by fear of physical injury to herself or by fear of losing her husband.²² Some mothers fear that the father will be sent to jail and the family will lose his financial support.²³ The mother may simply refuse to believe that her husband is capable of such behavior²⁴ or she may choose to protect her husband rather than her child, in which case the child will feel "isolated and vulnerable, taking the burden of guilt for the family dilemma upon herself."²⁵ In a surprisingly large percentage of cases, the mother knows full well that the incest is occurring, yet tacitly ap-

²⁰ Weeks, *The Sexually Exploited Child*, 69 S. MED. J. 848, 848 (1976).

²¹ *Id.* The child's fear that other adults will perceive her as the "guilty" party, though perhaps *unreasoned*, is not altogether *unreasonable*. Brownmiller points out that

[p]schoanalytic literature on child molestation points a wagging finger at the victim. In fact, the thrust of the psychoanalytic approach has been to pinpoint the child victim's "seductive" behavior. A frequently quoted study from the nineteen thirties described the "unusually attractive and charming personalities" of victimized children and cheerfully remarked that they showed less evidence of fear, anxiety, guilt or psychic trauma "than might be expected." A follow-up study posited that in many cases "it was highly probable that the child had used his [sic] charm in the role of seducer rather than that he [sic] had been the innocent one who had been seduced."

([sic] in original.) S. BROWN MILLER, *AGAINST OUR WILL* 276-76 (1976).

²² De Francis, *Protecting the Child Victim of Sex Crimes Committed by Adults*, 35 FED. PROBATION, Sept. 1971, 15, 16-17.

²³ Weeks, *The Sexually Exploited Child*, 69 S. MED. J. 848, 848 (1976).

²⁴ Weber, *Incest: Sexual Abuse Begins at Home*, Ms., Apr. 1977, 64, 64.

²⁵ Peters, *Children Who are Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. OF PSYCHOTHERAPY 398, 418 (1976).

proves.²⁴ This type of incest reflects the kind of family malfunctioning where the mother is "only too happy to turn over the burdensome sexual role to the daughters, and to this end mothers take jobs that require them to be absent from the home in the late afternoon and evening hours."²⁷

When incest is reported, it is not always because the informant was outraged by the occurrence and wished to seek help for the child. In some instances the mother can no longer tolerate the behavior toward herself of an abusive or alcoholic spouse. Sometimes the report relates to an old offense and is made "only to get even with the offender for some other and more recent behavior."²⁸ In some cases where the victim herself made the report,

the "trigger" which prompted the victim to report incest by the father was the father's refusal to permit the child to have outside friends. The father's repressed jealousy or his fear of discovery often is translated into a rigid, uncompromising attitude opposed to his teenaged daughter's going out on dates. The daughter, who may have docilely submitted to the incest, rebels against this unacceptable restriction and turns him in. In other incest cases, an older daughter may report her own abuse by the father to protect younger sisters from similar abuse.²⁹

Still other cases are discovered when the child becomes pregnant.³⁰

The harmful effects of incest upon the abused child are varied. Obviously there is physical harm to the small child when intercourse is completed. The child also may be infected with venereal disease. Only a part of incestuous behavior includes intercourse though, and even when there is no physical injury, psychological harm may nonetheless occur.³¹ Behavior and learning disorders are found in young

²⁴ De Francis, *Protecting the Child Victim of Sex Crimes Committed by Adults*, 35 FED. PROBATION, Sept. 1971, 15, 19.

²⁷ Weeks, *The Sexually Exploited Child*, 69 S. MED. J. 848, 848 (1976).

²⁸ De Francis, *Protecting the Child Victim of Sex Crimes Committed by Adults*, 35 FED. PROBATION, Sept., 1971, 15, 19.

²⁹ *Id.*

³⁰ Weber, *Incest: Sexual Abuse Begins at Home*, Ms., Apr. 1977, 64, 65.

³¹ The American Humane Association's 1969 study (see note 2, *supra*) found that "two-thirds of all sexually abused children had suffered some form of identifica-

children who have been sexually abused.³² A large number of adolescent runaways are children trying to escape from a sexually abusive relationship.³³ When physical escape is impossible, victims may turn to drugs³⁴ or alcohol. The child may suffer intense guilt over breakup of the family resulting from the incest and/or from enjoyment of the sexual experience.³⁵ The children often have poor sexual adjustment later in life, resulting in promiscuous behavior or prostitution, or conversely in "frigid/impotent marital relationships."³⁶

The effects of incestuous abuse differ from sexual abuse of children in general in several important ways. Because of this, it is believed by this writer that it is proper for the offense of incest to be an offense distinct from sexual abuse of children by strangers. One reason for this view is that a sexual encounter with a stranger is likely to be a one-time occurrence, whereas incestuous abuse is apt to be chronic, extending over a period of years,³⁷ because the abuser has ready access to the child.³⁸ The incestuous abuser holds his

ble emotional disturbance and 14 percent had become severely disturbed." S. BROWN MILLER, *AGAINST OUR WILL* 279 (1975).

³² Rosenfeld, Nadelson, Krieger and Backman, *Incest and Sexual Abuse of Children*, 16 AM. ACAD. OF CHILD PSYCH. J. 327, 334 (1977).

³³ Weber, *Incest: Sexual Abuse Begins at Home*, Ms., Apr. 1977, 64, 64.

³⁴ *Id.*

John Siverson, a family therapist in Minneapolis who has treated more than 500 cases of adolescent drug addiction, reports that some 70 percent of his clients were caught in some form of family sexual abuse. The same is true of 44 percent of the female population at Odyssey House—a residential drug treatment program with centers in seven states. . . .

Id.

For a more detailed account of the Odyssey House findings, see, Benward and Densen-Gerber, *Incest as a Causative Factor in Antisocial Behavior: An Exploratory Study*, 4 CONTEMP. DRUG PROB. 323 (1975).

³⁵ Rosenfeld, Nadelson, Krieger and Backman, *Incest and Sexual Abuse of Children*, 16 AM. ACAD. OF CHILD PSYCH. J. 327, 334 (1977).

³⁶ Weeks, *The Sexually Exploited Child*, 69 S. MED. J. 848, 850 (1976).

³⁷ Weber, *Incest: Sexual Abuse Begins at Home*, Ms., Apr., 1977, 64, 64.

³⁸ It was found in the American Humane Association's 1969 study (see note 2, *supra*) that

[c]hildren were victimized repeatedly in 41 percent of the cases with the offense occurring many times, over periods of time ranging up to seven years in some cases.

Many of these long term situations involved offenders who were members of the child's own household. The offender had easy access to

victim in a particularly helpless position because the child is ordinarily financially and psychologically dependent upon him and, in addition, the abuser is in a natural position of authority over the child."³⁹

Secondly, incestuous abuse is likely to be more harmful psychologically than sexual abuse by a stranger.

Assault by a stranger seems to lead to less complex psychologic sequelae. The entire family and the criminal justice system are more likely to mobilize to support the child victim against a strange attacker. In contrast, family offenders split family loyalties, and the child's interest is likely to be ignored.⁴⁰

The fact that the assaulter is a relative may compound the problems emerging later in life. "The victim may, as a result of the incident, continue to be confused and troubled about trusting men."⁴¹

Another reason to distinguish incest is that it deprives the child of normal social development. The finding that "many of the abusing parents had been sexually abused as children offers further evidence that incest may impair the child's ability to achieve an adult sexual and parenting relationship, and may perpetuate the pattern in subsequent generations."⁴²

the child, accounting for the pattern of repetitive offenses. In these incest type cases, if there was more than one female child in the home, the offender frequently went down the line, beginning with oldest sibling and, in turn, transferring his attention to the next youngest in line.

De Francis, *Protecting the Child Victim of Sex Crimes Committed by Adults*, 36 FED. PROBATION, Sept., 1971, 15, 17.

³⁹ Brownmiller suggests that

(t)he unholy silence that shrouds the interfamily sexual abuse of children and prevents a realistic appraisal of its true incidence and meaning is rooted in the same patriarchal philosophy of sexual private property that shaped and determined historic male attitudes toward rape. For if woman was man's original corporal property, then children were, and are, a wholly owned subsidiary.

S. BROWN MILLER, *AGAINST OUR WILL* 281 (1975).

⁴⁰ Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. OF PSYCHOTHERAPY 398, 415 (1976).

⁴¹ *Id.*

⁴² Rosenfeld, Nadelson, Krieger and Bachman, *Incest and Sexual Abuse of Children*, 16 AM. ACAD. OF CHILD PSYCH. J. 327, 334 (1977).

A fourth important reason, in the opinion of this writer, to distinguish incest from child sexual abuse in general is greater actor culpability. It is simply *worse* for parents to sexually abuse their children than it is for disinterested parties. It is integral to our culture for parents to fill a nurturant role, and when they engage in destructive behavior directed at the child, such as incest, it is appropriate for special sanctions to be imposed.

III. THE STATE'S ROLE

From the foregoing discussion, the ideal function of the state laws concerning incest and the minor child becomes evident. First, the law should identify the victim and offender, and mark the incestuous behavior as criminal so that the criminal justice system can intervene between victim and offender to protect the victim from further abuse. A second requirement of the state laws concerning incest is that the law should provide the flexibility to allow the offender to be treated and rehabilitated⁴³—not simply incarcerated for a period of time and then released.

An examination of the laws dealing with incest in the United States reveals a wide variety of statutory responses. The effectiveness of many state statutes, as far as protection of the child victim goes, is hampered by the fact that in most states the statute is trying to do two jobs. The state law is trying to prevent marriage within certain degrees of relation by consanguinity or affinity *and* to prevent sexual abuse of children by their relatives. It does not take much analysis for one to realize that in actuality, two very different crimes come within the purview of statutes such as this.

⁴³ Treatment and rehabilitation of the offender generally is not the province of the criminal justice system. This area is probably better handled by social agencies whose personnel are better equipped to deal with this thorny behavioral problem than the already overloaded prisons. At this time, treatment programs for incest are not widely available, but the successes and pioneering efforts of the few programs that are dealing with the incest problem (*see note 7 supra*) will hopefully serve as models in other communities. With the recent increase in awareness, understanding, and concern about incest and the efforts in Philadelphia and San Jose, one would expect to see treatment for the underlying problems of which incest is a symptom become more widely available.

The first is a more or less "victimless crime" with the sanctions applied for such reasons as to protect the genetic pool (where the statute encompasses only relationships by consanguinity), and to protect family solidarity (includes also relationships by affinity and adoption, and in some states includes deviate sexual intercourse within the class of prohibited behavior). The second crime apparently contemplated by the incest statutes involves, rather than two consenting adults (both actors in the crime), one adult actor and a child victim. In the first instance, any harm resulting from the crime will be a rather abstract harm to the state (i.e., an outrage against the public morality—risk of genetic harm is negligible in most instances).⁴⁴ In the second instance, however, the crime may result in harm to a young person which may be psychologically "crippling for life." In addition, if recent findings are to be believed, incest results in a genuine harm to the state as well, in the form of an increase in the problem of adolescent runaways, and a much higher incidence of mental illness, alcoholism, drug abuse, and prostitution in incest victims.

IV. EXISTING LAWS

The statutes will be surveyed and their strong points and weaknesses will be examined. Most suffer from a number of deficiencies, as far as protection of the child victim goes, but examination also reveals some excellent laws.

Only one state, Vermont, does not mention incest at all. Vermont does have statutes which describe and define the degrees of kinship within which marriage is prohibited,⁴⁵ and these are analogous to the incest statutes of some other states. However, Vermont statutes do not specifically address the problem of sexual abuse of the minor child by a relative. Incestuous behavior by adults is not differentiated in any way from sexual molestation by non-family members.⁴⁶

⁴⁴ See note 103, *infra*.

⁴⁵ VT. STAT. ANN. tit. 16, §§ 1, 2 (Cum. Supp. 1978).

⁴⁶ VT. STAT. ANN. tit. 13, § 2602 (1974) provides:

A prevalent class of incest laws are those which encompass both the function of prohibiting marriage between persons too closely related and also prohibiting sex with minor relatives. This class is represented by Alaska,⁴⁷ Arkansas,⁴⁸ District of Columbia,⁴⁹ Louisiana,⁵⁰ Missouri,⁵¹ Montana,⁵² New Mexico,⁵³ New York,⁵⁴ Pennsylvania,⁵⁵ and The Model Penal Code.⁵⁶

Closely related is the class of incest laws which only prohibits sex within certain degrees of kinship. The states included within this classification are Delaware,⁵⁷ Georgia,⁵⁸

Lewd or lascivious conduct with child. A person who shall wilfully and lewdly commit any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of such person or of such child, shall be imprisoned not less than one year nor more than five years.

VT. STAT. ANN. tit. 13, § 3252 (Cum. Supp. 1978) provides:

Sexual assault. A person who engages in a sexual act with another person, other than a spouse, and

(1) Compels the other person to participate in a sexual act:

(A) Without the consent of the other person; or

(B) By threatening or coercing the other person; or

(C) By placing the other person in fear that any person will be harmed imminently; or

(2) Has impaired substantially the ability of the other person to appraise or control conduct by administering or employing drugs or intoxicants without the knowledge or against the will of the other person; or

(3) The other person is under the age of 16 and they are not married to each other;

shall be imprisoned for not more than 20 years, or fined not more than \$10,000.00, or both.

Both encompass behavior that would be called incestuous in other states.

⁴⁷ ALASKA STAT. § 11.40.110 (1970).

⁴⁸ ARK. STAT. ANN. § 41-2403 (1977).

⁴⁹ D.C. CODE § 22-1901 (1967).

⁵⁰ LA. REV. STAT. ANN. § 14:78 (West 1974).

⁵¹ MO. ANN. STAT. § 563.220 (Vernon 1949).

⁵² MONT. REV. CODES ANN. § 94-5-606 (Mont. Crim. Code Supp. 1973).

⁵³ N.M. STAT. ANN. § 40A-10-3 (1953).

⁵⁴ N.Y. PENAL LAW § 255.25 (Consol. 1967).

⁵⁵ 18 PA. CONS. STAT. ANN. § 4302 (Purdon 1973).

⁵⁶ MODEL PENAL CODE § 230.2 (Tent. Draft No. 4 1955).

The Model Penal Code has not completely overlooked the problem of incestuous abuse of children though, as age differences and position of authority of actor over victim are aggravating factors in § 213.3, *Corruption of Minors and Seduction*, and § 213.4, *Sexual Assault*.

⁵⁷ DEL. CODE tit. 11, § 771 (1975).

Indiana,⁶⁰ Kentucky,⁶⁰ Minnesota,⁶¹ North Carolina,⁶² South Carolina,⁶³ Texas,⁶⁴ Utah,⁶⁵ Washington,⁶⁶ West Virginia,⁶⁷ and Wyoming.⁶⁸

Another statutory scheme that has been widely used is to have an incest statute which prohibits sexual intercourse among persons who are prohibited by another statute from marrying. States using this scheme are Alabama,⁶⁹ Arizona,⁷⁰ California,⁷¹ Connecticut,⁷² Florida,⁷³ Hawaii,⁷⁴ Idaho,⁷⁵ Iowa,⁷⁶ Maryland,⁷⁷ Massachusetts,⁷⁸ Mississippi,⁷⁹ Nebraska,⁸⁰ Nevada,⁸¹ North Dakota,⁸² Oklahoma,⁸³ Rhode Island,⁸⁴ South Dakota,⁸⁵ Virginia,⁸⁶ and Wisconsin.⁸⁷

⁶⁰ GA. CODE ANN. § 26-2006 (1977).

⁶¹ IND. CODE ANN. § 35-46-1-3 (Burns 1975) (effective Oct. 1, 1977).

⁶² KY. REV. STAT. § 530.020 (1975).

⁶³ MINN. STAT. ANN. § 609.365 (West 1964).

⁶⁴ N.C. GEN. STAT. § 14.178 (1969).

⁶⁵ S.C. CODE § 16-15-20 (1976).

⁶⁶ TEX. PENAL CODE ANN. § 25.02 (1974).

⁶⁷ UTAH CODE ANN. § 76-7-102 (1977).

⁶⁸ WASH. REV. CODE ANN. § 9A.64.020 (1977).

⁶⁹ W. VA. CODE § 61-8-12 (1966).

⁷⁰ WYO. STAT. § 6-85 (1957).

⁷¹ ALA. CODE tit. 13, § 13-83; tit. 30, § 30-1-1 (1975). [In footnotes 68 through 86, the incest statute will be listed first, and the prohibited degrees of marriage statute which defines incest will be listed second.]

⁷² ARIZ. REV. STAT. § 13-3608 (effective Oct. 1, 1978); § 25-101 (1956).

⁷³ CAL. PENAL CODE § 285; CAL. CIV. CODE § 4400 (West 1970).

⁷⁴ CONN. GEN. STAT. ANN. §§ 53a-191; 46-1 (West 1958).

⁷⁵ FLA. STAT. ANN. §§ 741.22; 741.21 (West 1964).

⁷⁶ HAW. REV. STAT. §§ 707-741; 572-1 (1976).

⁷⁷ IDAHO CODE §§ 18-6602; 32-205 (1947).

⁷⁸ IOWA CODE ANN. §§ 704-1; 595-19 (West 1946).

⁷⁹ MD. ANN. CODE art. 27, § 335 (1976); art. 62, § 2 (1972).

⁸⁰ MASS. ANN. LAWS ch. 272, § 17 (Michie/Law. Co-op 1968); ch. 207, §§ 1, 2 (Michie/Law. Co-op 1969).

⁸¹ MISS. CODE ANN. §§ 97-29-5; 93-1-1 (1972).

⁸² NEB. REV. STAT. §§ 28-703; 28-702 (Supp. 1977).

⁸³ NEV. REV. STAT. §§ 201.180; 122.020 (1977).

⁸⁴ N.D. CENT. CODE §§ 12.1-20-11 (1976); 14-03-03 (1971).

⁸⁵ OKLA. STAT. ANN. tit. 21, § 885; tit. 43, § 2 (West 1941).

⁸⁶ R.I. GEN. LAWS §§ 11-6-4; 15-1-1; 15-1-2 (1956).

⁸⁷ S.D. COMPILED LAWS ANN. §§ 22-22-19; 25-1-6; 25-1-7 (1976).

⁸⁸ VA. CODE §§ 18.2-366; 20-38.1 (1975).

⁸⁹ WIS. STAT. ANN. §§ 944.06 (West 1957); 245.03 (West Cum. Supp. 1978-1979).

In the three statutory configurations mentioned above, all closely allying prohibited marriage with sex crimes against minors by relatives, the class of victims protected by the statutes varies greatly.⁸⁸ In some states, incest is defined as being only among blood relatives, which suggests that genetic considerations prompted enactment of the statute. In others, stepchildren and adopted children are included, which indicates that the legislatures at least were mindful of child victims in enacting their incest statutes. In a few states, the prohibition against sex or marriage with a stepchild, or between uncle and niece survives dissolution of the marriage which created the relationship by affinity.⁸⁹ This suggests that these legislatures were also concerned with family solidarity.

Besides variations in the class of persons encompassed in the incest statute, there are also variations in the kinds of behavior prohibited. A few states have included deviate sexual intercourse within the incest statute.⁹⁰

Some states have directly dealt with the problem of parent-child incest by enacting incest statutes which are supplemented by separate aggravated incest statutes which specifically address parent-child incest. These are Colorado, Kansas, New Jersey, and Illinois. The laws of these states vary in their details and each will be discussed below.

The Colorado statutes read in full:

Incest. Any person who knowingly marries or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood, or an uncle, aunt, nephew, or niece of the whole blood commits incest, which is a class 5 felony.⁹¹

⁸⁸ See table following text.

⁸⁹ See, e.g., MASS. ANN. LAWS ch. 207, § 3 (Michie/Law. Co-op 1969) which provides:

The prohibition of the two preceding sections shall continue notwithstanding the dissolution, by death or divorce, of the marriage by which the affinity was created, unless the divorce was granted because such marriage was originally unlawful or void.

See also, VA. CODE § 20-39 (Cum. Supp. 1978) and W. VA. CODE § 48-1-4 (1976).

⁹⁰ See, e.g., IND. CODE ANN. § 35-46-1-3 (Burns Cum. Supp. 1977); ILL. ANN. STAT. ch. 38, §§ 11-10, 11-11 (Smith-Hurd Cum. Supp. 1978).

⁹¹ COLO. REV. STAT. § 18-6-301 (1973).

Aggravated Incest. (1) Any person who has sexual intercourse with his or her natural child, stepchild, or child by adoption, unless legally married to the step-child or child by adoption, commits aggravated incest.

(2) For the purpose of this section only, "child" means a person under twenty-one years of age.

(3) Aggravated incest is a class 4 felony.¹³

Note that in the incest statute, both marriage and intercourse are prohibited between persons too closely related by blood. By this statute, the state's interest in protecting the genetic pool is served, but there is no interference by the state in marriages between persons related only by affinity. Nor is there any prohibition against marriages between uncles and nieces or aunts and nephews of the half blood, where danger of genetic damage to offspring is remote. Colorado's incest statute is exemplary in pinpointing the class of persons between whom marriage and sex should be prohibited without undue restrictions on marriage unjustified by biological concerns. The aggravated incest statute does a good job of identifying actor and victim in cases of incest against the child. The inclusion of stepchildren and adopted children within the protected class is good, as stepchildren and adopted children are just as subject to the psychological harm (rather than genetic risk) which the statute seeks to prevent, and stepchildren and adopted children are just as subject to chronic abuse as are natural children. The statute could be improved by including deviate sexual intercourse in the prohibited behavior, since it is primarily physical and psychological harm to the child, rather than a genetic risk which the statute is concerned with. Colorado should be commended for having a statute which identifies the problem of incest with children without undue restrictions on marriage. (Note that legal marriage to the stepchild or adopted child is a defense against aggravated incest.)

Kansas also has used the incest plus aggravated incest approach, but its statutes are somewhat different than Colorado's, reading:

¹³ COLO. REV. STAT. § 18-6-302 (1973).

Incest. Incest is marriage to or engaging in sexual intercourse with a person known to the defendant to be related to him as brother or sister of the one-half as well as the whole blood, uncle, aunt, nephew or niece.

Incest is a class E felony.¹⁴

Aggravated incest. (1) Aggravated incest is sexual intercourse or any unlawful sexual act by a parent with a person he knows is his child.

(2) Parent for the purposes of this section means a natural father or mother, an adoptive father or mother, a stepfather or stepmother or a grandfather or grandmother of any degree.

(3) Child for the purposes of this section means a son, daughter, grandson or granddaughter, regardless of legitimacy or age; and also means a stepson or stepdaughter or adopted son or adopted daughter under the age of eighteen (18).

(4) Aggravated incest is a class D felony.¹⁵

Kansas includes an even broader class of victims (grandchildren also), than does Colorado, within the aggravated incest statute. Kansas also has a broader range of prohibited conduct (i.e., "any unlawful sexual act"). Thus all incestuous conduct,¹⁶ not just intercourse, comes within the purview of the statute. For these reasons, Kansas has one of the better statutes.

New Jersey's statutes read:

Incest

Persons who intermarry within the degrees prohibited by law, or who, being related within such degrees, together commit fornication and adultery, are guilty of incest, and each shall be punished by a fine of not more than \$1,000, or by imprisonment for not more than 5 years, or both.¹⁷

Incestuous conduct between parent and child

A parent who commits incest, fornication, adultery or lewdness with, or an act of indecency towards, or tending to debauch the morals and manners of a child of such parent, or who makes any infamous proposal to a child of his own flesh and blood, with

¹⁴ KAN. STAT. § 21-3602 (1974).

¹⁵ KAN. STAT. § 21-3603 (1974).

¹⁶ See text accompanying note 13 *supra*.

¹⁷ N.J. REV. STAT. § 2A: 114-1 (1969).

intent to commit adultery or fornication with the child, is guilty of a high misdemeanor, and shall be punished by a fine of not more than \$1,000, or by imprisonment for not more than 15 years, or both."

Thus, New Jersey has encompassed all incestuous conduct within its statute, but has left the class of stepchildren and adopted children unprotected by the statute, so that sexual abuse by a stepfather or adoptive father would fall under sex crimes in general, and would not be distinguished from sexual abuse by a stranger.

Illinois' incest and aggravated incest approach differs somewhat from the three states discussed above. The Illinois statutes read:

Incest

(a) Any person who has sexual intercourse or performs an act of deviate sexual conduct with another to whom he knows he is related as follows commits incest:

Brother or sister, either of the whole blood or the half blood.

(b) Sentence. Incest is a class 3 felony."⁹⁷

and

Aggravated Incest

(a) Any male or female person who shall perform any of the following acts with a person he or she knows is his or her daughter or son commits aggravated incest:

(1) Has sexual intercourse; or

(2) An act of deviate sexual conduct.

(b) "Daughter" for the purposes of this Section means a blood daughter regardless of legitimacy or age; and also means a step-daughter [sic] or an adopted daughter under the age of 18.

(c) "Son" for the purposes of this Section means a blood son regardless of legitimacy or age; and also means a step-son [sic] or an adopted son under the age of 18.

(d) Sentence. Aggravated incest is a class 2 felony."⁹⁸

Illinois has thus restricted its criminal incest laws to

⁹⁷ N.J. REV. STAT. § 2A: 114-2 (1969).

⁹⁸ ILL. ANN. STAT. ch. 38 § 11-11 (Supp. 1978).

⁹⁹ ILL. ANN. STAT. ch. 38 § 11-10 (Supp. 1978).

situations that involve either abuse of family authority or the possibility of genetic risk.¹⁰⁰ Deviate sexual intercourse has been included.¹⁰¹

The Illinois criminal incest statutes are novel in that they are quite narrow, only prohibiting sex between parents and their children and between brothers and sisters. The comments show that the legislature was cognizant of the difficulties that arise when the same statute attempts to cover sex crimes against minors and also to prohibit marriage within certain degrees of relationship.¹⁰² Under Illinois' statute, criminal incest penalties for sexual activity between two adults is limited to those relationships which pose a "biological risk."¹⁰³ Incestuous behavior which falls short of

¹⁰⁰ Committee Comments following ILL. ANN. STAT. ch. 38 § 11-10 (1972).

The comments continue:

[C]riminal penalties are limited in the case of adoptive and stepdaughters to those situations where parental authority may be abused in taking advantage of a young and dependent child. By the time a female has arrived at age 18, it is felt that she is ordinarily sufficiently mature and autonomous to be free from undue parental pressure to submit to sexual advances. However, where blood daughters are involved, whatever biological risk may exist remains present irrespective of the age of the daughter—and thus though the daughter may be sufficiently adult to be free from paternal pressures in such matters, the biological risk remains and intercourse ought to be discouraged.

Id.

¹⁰¹ The comments say:

[The section] covers not only normal heterosexual intercourse which may result in conception, but other forms of sexual activity in which this possibility does not exist. Proscription of deviate sexual conduct was included principally out of concern for the protection of a young daughter, irrespective of blood relationships.

Id.

¹⁰² [The section] abandons the idea that criminal incest provisions must be identical in scope to similar marriage prohibitions. Denying the right to marry may justly be responsive to influences which are not so compelling when the scope of criminal laws are seriously reviewed.

Committee Comments following ILL. ANN. STAT. ch. 38 § 11-11 (1972).

See ILL. ANN. STAT. ch. 40 § 212 (Cum. Supp. 1978) for the prohibited marriage statute.

¹⁰³ [C]riminal restrictions on incest have been limited to a very narrow scope: parent-child and brother-sister. This may be said to be the area of greatest "biological risk" and clearly it presents no problems in relation to the recognition of foreign marriages. The "biological risk" rationale for incest prohibitions is probably most overrated. Reviewing

intercourse or deviate intercourse would fall under sex crimes in general in Illinois.

Oregon also has a somewhat novel approach to the crime of incest. Its incest statute says:

Incest

(1) A person commits the crime of incest if he marries or engages in sexual intercourse or deviate sexual intercourse with a person whom he knows to be related to him, either legitimately or illegitimately, as an ancestor, descendant or brother or sister of either the whole or half blood.

(2) Incest is a Class C felony.¹⁰⁴

Stepchildren and adopted children are included by way of another statute which says in pertinent part: "Descendant includes persons related by descending lineal consanguinity, step-children and lawfully adopted children."¹⁰⁵

Oregon does not stop there though. Age and relationship are aggravating factors in the rape law, which reads:

Rape in the first degree

(1) A person who has sexual intercourse with a female commits the crime of rape in the first degree if:

current scientific data, the commentators of the Model Penal Code have explained:

First—an unusual risk of defective offspring occurs only when the blood line carries a "relatively rare, recessive, unfavorable gene." If the gene is not relatively rare, the probabilities of defective offspring is [sic] not substantially enhanced by marriage within the blood line. If the gene is not recessive, it is not necessary that both parents carry it in order to effect the offspring.

Second—more importantly, marriage outside the blood line spreads the unfavorable genes more widely in the population, so that in the long run, there is a greater risk of genetically defective offspring resulting from the mating of unrelated persons. Model Penal Code comment at 231-33 (Tent. Draft No. 4, 1955).

Thus, it appears that genetics does not provide a very convincing scientific rationalization for broad ranging prohibitions against intra-family matings. . . .

There is, however, an enhanced possibility of genetically defective offspring in the first succeeding generation where the relationship is very close. And cultural traditions afford a basis for concern in the criminal law.

Committee Comments following ILL. ANN. STAT. ch. 38 § 11-11 (1972).

¹⁰⁴ OR. REV. STAT. § 163.525 (1977).

¹⁰⁵ OR. REV. STAT. § 163.605 (1977).

(a) The female is subjected to forcible compulsion by the male; or

(b) The female is under 12 years of age; or

(c) The female is under 16 years of age and is the male's sister, of the whole or half blood, his daughter or his wife's daughter.

(2) Rape in the first degree is a Class A felony.¹⁰⁶

The sodomy law¹⁰⁷ also contains the same provisions. Incestuous behavior which falls short of intercourse or deviate sexual intercourse falls under sex crimes in general.

Maine is another loner in its dealings with incest. Maine's new incest law provides:

Incest

1. A person is guilty of incest if, being at least 18 years of age, he has sexual intercourse with another person as to whom he knows he is related within the [second] degree of consanguinity.¹⁰⁸

The Comment tells us that

[t]his section provides for the crime of incest only when the participants are at least 18 years old. Sexual intercourse with a child under the age of 14 will be rape under section 252 of chapter 11, which intercourse with a child between 14 and 18 is punishable as sexual abuse of minors under section 254 of chapter 11.

Thus, Maine has effectively identified the degrees of relationship where a genetic risk justifies the sanction against sex,¹⁰⁹ and extends its criminal prohibition no further, but Maine fails entirely to consider relationship as an aggravating factor in the sexual abuse of minors.

Michigan, in its new criminal code, has changed the thrust of its incest laws. The old incest law¹¹⁰ has been repealed, and criminal penalties are no longer applied for marriages or consensual intercourse within prohibited degrees.

¹⁰⁶ OR. REV. STAT. § 163.375 (1977).

¹⁰⁷ OR. REV. STAT. § 163.405 (1977).

¹⁰⁸ ME. REV. STAT. tit. 17-A § 556 (Supp. 1978).

¹⁰⁹ See note 103 *supra*.

¹¹⁰ MICH. COMP. LAWS ANN. § 750.333 (1968) (repealed 1975).

For protection of the minor child against sex crimes by adults, relationship and age are aggravating factors as seen in the following:

First degree criminal sexual conduct

(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(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, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

* * *

(2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or any term of years.¹¹¹

Sexual behavior short of sexual penetration falls under *Second degree criminal sexual conduct*,¹¹² which prohibits sexual contact under the same circumstances as (a) and (b) above.

The Michigan statute is exemplary in that it perceives the relationship of actor to victim as an aggravating factor in sexual conduct less serious than actual sexual penetration. Also, the statutes identify unrelated actors who are in a position to do as great harm to the child as an incestuous abuser, or who share a similar degree of culpability, i.e., member of the same household or person in position of authority over the victim who used the authority to coerce the victim to submit.¹¹³

New Hampshire has a scheme quite similar to Michi-

¹¹¹ MICH. COMP. LAWS ANN. § 750.520b (Cum. Supp. 1978-1979).

¹¹² MICH. COMP. LAWS ANN. § 750.520c (Cum. Supp. 1978-1979).

¹¹³ If the child is in the same household as the molester, the child runs the same risk of chronic abuse as if the molester were a relative in the same household. The offender who abuses his position of authority over the child merits special punishment because of his "unfair advantage" over the victim as much as if the abuser were a relative.

gan's in that it uses the same aggravating factors¹¹⁴ as in the above quoted Michigan statute. However, New Hampshire has chosen to retain its criminal sanctions for intercourse and marriage within the prohibited degrees.¹¹⁵

Ohio's statutory scheme also resembles Michigan's, in that *criminal* penalties are no longer applied for marriages within prohibited degrees. Incestuous abuse of minor children is encompassed in:

Sexual Battery

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

...

(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis.

(B) Whoever violates this section is guilty of sexual battery, a felony of the third degree.¹¹⁶

The statute is strong in that it clearly identifies the offenders who are in a position to do the worst damage to the child. Also, the definition of sexual conduct¹¹⁷ includes not only sexual intercourse, but also oral and anal sex, which could be as damaging to the child as vaginal intercourse would be.

V. CONCLUSION

It is the hope of this writer that this note will help somewhat to increase understanding of the incest problem. While there are some very good laws on incest (notably, Michigan, Ohio, and New Hampshire), most current laws deal awkwardly with the problem of incestuous abuse of the minor child. In the majority of states, there is a need for the legislatures to examine the goals of their incest laws and to restructure their statutes to meet these goals.

MARY KATHERINE DAUGHERTY

¹¹⁴ N.H. REV. STAT. ANN. §§ 632-A:2, 632-A:3, 632-A:4 (Cum. Supp. 1977).

¹¹⁵ N.H. REV. STAT. ANN. § 639:2 (1974).

¹¹⁶ OHIO REV. CODE ANN. § 2907.03 (Baldwin, 1974).

¹¹⁷ OHIO REV. CODE ANN. § 2907.01(A) (Baldwin, 1974).

Addendum

Regarding the tables:

I have attempted to graph the statutes according to the letter of the law. Hence, the graphed results may look anomalous in some instances because judicial interpretation has not been shown. For instance, if a particular statute was silent on the subject of brothers and sisters of the half blood, they were not included on the table. It is probable, however, that in all instances where sex and marriage between brothers and sisters is prohibited, the law would be construed to include brothers and sisters of the half blood. Also, judicial interpretation would likely equate children by adoption with natural children in cases where the statute is not limited to blood relationships.

Only the class to whom criminal penalties apply is included in the graph. In some instances, the class of persons who would not be able to contract a valid marriage is larger than the class to whom criminal sanctions are applied for marriage and/or intercourse in violation of the law.

Statutes which were set out in full in the text or footnotes were not included in the tables, as the peculiarities of these statutes did not lend themselves to the table format. The states not included in the table are Colorado,¹¹⁸ Illinois,¹¹⁹ Kansas,¹²⁰ Maine,¹²¹ Michigan,¹²² New Jersey,¹²³ Ohio,¹²⁴ Oregon,¹²⁵ and Vermont.¹²⁶

¹¹⁴ See text accompanying notes 90,91.

¹¹⁹ See text accompanying notes 98,99.

¹²⁰ See test accompanying notes 92-94.

¹²¹ See text accompanying note 114.

¹⁷ See text accompanying notes 108-110.

¹²³ See text accompanying notes 96,97.

¹⁷¹ See text accompanying notes 116, 117.

¹²⁹ See text accompanying notes 104-107.

¹²⁸ See notes 45, 46.

[illegible]

