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Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim

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PARENT-CHILD INCEST: PROOF AT TRIAL WITHOUT TESTIMONY IN COURT BY THE VICTIM

Incest between parent and child[1] long has been taboo.[2] Presently, it is a civil infraction in all states[3] and often leads to criminal penalties as well.[4] Despite these sanctions, however, parent-child incest remains a widespread problem.[5]

1. Sexual abuse is "physical contact between persons at different stages of development . . . for the purpose of the sexual gratification of the more mature person." Faller, *Sexual Abuse*, in SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN: A MANUAL OF INTERDISCIPLINARY PRACTICE 143, 144 (K. Faller ed. 1981). Parent-child incest is sexual abuse by the child's parent. Although this Note applies to all combinations of parent-child incest, it will refer to father-daughter incest, the most common form. AMERICAN HUMANE ASS'N, 1979 NATIONAL REPORT ON SEXUAL ABUSE, SPECIAL COMPUTER RUN (January 14, 1981) [hereinafter cited as COMPUTER RUN]. The perpetrator is the parent of the victim 68% of the time. *Id.* at summary sheet 1. The perpetrator is male 85% of the time, and the victim is female the same percentage of the time. *Id.* at Tables 4.1.1 & 4.1.2.

2. Commentators agree that incest is and has been rejected by virtually all cultures. *See, e.g.*, K. MEISELMAN, INCEST: A PSYCHOLOGICAL STUDY OF CAUSES AND EFFECTS WITH TREATMENT RECOMMENDATIONS 1 (1978); NATIONAL ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION 363 (1976) [hereinafter cited as JUVENILE JUSTICE]; Bagley, *Incest Behavior and Incest Taboo*, 16 SOC. PROB. 505 (1969); Machotka, Pittman & Flomenhaft, *Incest as a Family Affair*, 6 FAM. PROCESS 98 (1967) [hereinafter cited as Machotka]; Reifen, *The Sexual Offender and his Victim*, 12 INT'L CHILD WEL. REV. 109 (1959); Renshaw & Renshaw, *Incest*, 3 J. SEX EDUC. & THERAPY 2 (1977) [hereinafter cited as Renshaw]; Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1024 (1975).

3. Juvenile and family courts treat incest as a form of child abuse or neglect, even if sexual abuse is not specified in their jurisdictional statutes. NATIONAL ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS AND GOALS, A COMPARATIVE ANALYSIS OF STANDARDS AND STATE PRACTICES: ABUSE AND NELGECT 90 (1977) [hereinafter cited as COMPARATIVE ANALYSIS]. For example, some courts include incest under "depravity," "moral unfitness," or "emotional abuse" provisions, *id.* at 34, 82, 88, while all states authorize a determination of neglect for lack of proper parental care, *id.* at 46, 90. *See also* Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1 (1975); Wald, *supra* note 2, at 1024.

4. COMPARATIVE ANALYSIS, *supra* note 3, at 90. *See also* L. Berliner & D. Stevens, Advocating for Sexually Abused Children in the Criminal Justice System 2 (November 1976) (unpublished paper at Sexual Assault Center, Seattle) (child witnesses are "drawn into the adult criminal justice system") [hereinafter cited as Berliner].

5. There were 360,000 cases of sexual abuse reported to HEW in 1979. Meyers, *Incest: No One Wants to Know*, STUDENT LAW. 29, 30 (November 1980). Between 40% and 65% of such cases involve parents. *Id.* (40% of HEW cases); COMPUTER RUN, *supra* note 1, at Table 5.2 (65% of cases studied). Reporting trends indicate that actual incidence is

Unfortunately, current legal procedures devised to protect the child and to punish or rehabilitate the adult perpetrator actually punish the child[6] and leave the problem unresolved. In an incest case, unlike most child abuse cases, the victim's testimony is crucial;[7] it is unlikely that there will be any other evidence of the defendant's guilt. Yet forcing the child to reveal publicly the details of sexual involvement with her father exacerbates her psychological trauma and deep-seated, though undeserved, guilt feelings. Ironically, putting the child through the ordeal of testifying in open court also denigrates the reliability of her testimony. Moreover, directing intervention efforts toward testimony in court by the victim prevents successful treatment of the causes of sexual abuse.

This Note argues that the incest victim should not testify personally at trial. Rather, the child's testimony should be replaced with tape-recorded pretrial examinations of the victim by an expert, supplemented by the in-court testimony of the examining expert. Part I discusses how the present system of requiring in-court testimony by the victim harms the child, fails to correct the incest problem, and produces unreliable evidence. Part II outlines and discusses the merits of the proposed reform. Part III examines the proposed reform in light of the defendant's constitutional rights to due process and to confront witnesses against him. The Note concludes that the proposed reform would result in substantial benefits without infringing upon the defendant's constitutional rights.

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even higher. Meyers, *supra;* THE NATIONAL STUDY ON CHILD NEGLECT AND ABUSE REPORTING, ANNUAL STATISTICAL REPORT: NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 5-20 (1980) (reports increased nationally by 71% between 1976 and 1979). *See also* Kempe, *Incest and Other Forms of Sexual Abuse,* in THE BATTERED CHILD 198, 199 (3d ed. C. Kempe & R. Helfer 1981). In general, it is "a problem of immense proportions." Giarretto, *Humanistic Treatment of Father-Daughter Incest,* in CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY 143, 144 (R. Helfer & C. Kempe eds. 1976).

6. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 64 (1979) ("the harm done by inquiry may be more than that caused by not intruding") [hereinafter cited as J. GOLDSTEIN]; Reifen, *supra* note 2, at 116-17; Wald, *supra* note 2, at 1026.

7. Berliner, *supra* note 4, at 4; Meyers, *supra* note 5, at 54. Juvenile courts, on the other hand, often make a physically abused child a ward of the court on the basis of testimony by caseworkers, doctors, and other adults. Given the physical evidence of abuse, the child's testimony is seldom necessary and for that reason, is seldom taken.

I. INADEQUACY OF PRESENT PROCEDURES

A. *Effect on the Victim*

The average incest victim is a young female[8] who has been sexually abused by her father over a period of time.[9] In most cases the victim has conflicting feelings about her dual relationship with the perpetrator in which she is both offspring and sexual partner.[10] As a result, incest often is discovered only indirectly, after other problems draw attention to the child.[11]

When the person discovering incest reports it to state authorities, the victim often is taken from her home, which is traumatic in itself for most children,[12] and is subjected to repeated interviews by strangers.[13] These interviews usually are conducted in

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8. The victim is generally younger than 12. COMPUTER RUN, *supra* note 1, at Table 6.4.3 (56% of sexually abused children are 12 or under); V. DE FRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS vii (1969) (median age of victims is 11); Berliner, *supra* note 4, at 1; *The Child Victim of Incest*, N.Y. Times, June 15, 1981, at B9, col. 1; Reifen, *supra* note 2, at 116 (majority of victims under 10).

9. Incest usually has occurred for "at least two to four years" before being reported. Faller, *supra* note 1, at 146 (incest may "begin in early childhood and continue until adolescence"); Meyers, *supra* note 5, at 30. *See also* K. Faller & E. Tickner, Interdisciplinary Management of Child Sexual Abuse 5 (1981) (unpublished paper at the Interdisciplinary Project on Child Abuse and Neglect, Ann Arbor, Mich.) ("may persist for years"); Kempe, *supra* note 5, at 199; Wald, *supra* note 2, at 1025.

10. The internal conflict resulting from the mix of attachment and revulsion the victim feels can seriously affect her ability to mature to responsible adulthood. *See* N.Y. Times, *supra* note 8 ("52 percent of the prostitutes in one penal institution had been incest victims"); J. GOLDSTEIN, *supra* note 6, at 63 (the "child often becomes either a seducer or . . . an inhibited person who is unlikely to enjoy normal sexual activity in later life"); J. HERMAN, FATHER-DAUGHTER INCEST (1981); K. MEISELMAN, *supra* note 2, at 29-30 (a higher-than-normal percentage of unwed mothers report incest experience), 194-261; Kempe, *supra* note 5, at 199 ("One-half of our runaway girls were involved in sexual abuse."); Meyers, *supra* note 5, at 52 (untreated incest victim likely to be totally frigid, be dependent on drugs, or become a prostitute: 75% of one group of teen-age prostitutes "had been incestually abused"); B. Myers, Developmental Disruptions of Victims of Incest and Child Abuse 3-4, 6-11 (1978) (unpublished paper at the Sexual Assault Center, Seattle) (description of extreme effects of father-daughter incest on one victim as she grew older).

11. Incest often is discovered after a teacher or doctor observes a behavioral or physical problem. COMPUTER RUN, *supra* note 1, at summary sheet 2 (sources of initial report include medical, school, social services, and law enforcement personnel); Faller, *supra* note 1, at 13. The normal practice is to report suspected abuse to an office of the state department of social services ("DSS"). DSS may then approach either the criminal prosecutor or the juvenile or family court prosecutor.

12. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 31-34 (1973); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1320 (1980) (removal, even from a bad home, may cause "serious psychological injury"); Wald, *supra* note 2, at 993-94.

13. Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal*

busy offices by people who do not normally deal with children.[14] The prosecutor, for example, probably has little experience interviewing child witnesses; in addition, the incest victim is but one of many complainants he must interview and prepare to testify. Consequently, when he interviews the child he is more concerned with her ability to convince the trier of fact than with her emotional well-being.[15] Besides the prosecutor, the child probably will be interviewed by a variety of other strangers, including medical doctors, social workers, police investigators, and perhaps even a polygraph expert.[16]

After being subjected to these bewildering experiences, the child must face the ordeal of testifying in court.[17] The experience of testifying in court can be intimidating even to the most secure adult.[18] To most children it is an unfamiliar and frightening experience,[19] but to the incest victim it can be especially traumatic. To begin with, the proceedings may be public,[20] requiring the child to relate embarrassing details of sexual encounters with her father before a number of adult strangers and in the presence of her parents, who are often angry and resentful.[21] In addition, defense counsel may accuse her of lying or

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Justice System, 15 WAYNE L. REV. 977, 1006 (1969). *See also* Berliner, *supra* note 4, at 3, 13; Meyers, *supra* note 5, at 54; Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 655-56 nn.141-44 (1976). Because the child is likely to be the sole witness, *see* note 7 and accompanying text *supra*, she is the focal point of attention. Berliner, *supra* note 4, at 4.

14. Berliner, *supra* note 4, at 4; Meyers, *supra* note 5, at 54; *see* Libai, *supra* note 13, at 986. If abuse or neglect charges are pursued in juvenile courts, the entire process may be somewhat better tailored to the child's needs than if criminal proceedings are used because the personnel of the juvenile court system are more familiar with the needs of children. *See, e.g.*, Wald, *supra* note 2, at 1027. Although less severe, perhaps, damage still occurs in the juvenile system as well. *Id.* at 1025-26. *See also* note 21 *infra*.

15. Giarretto, *supra* note 5, at 144; *see* Meyers, *supra* note 5, at 54; Reifen, *supra* note 2, at 117 (because of the inherent "focus of the investigation . . . no particular attention is paid to the extreme upheavals for the child concerned").

16. *See* D. WALTERS, PHYSICAL AND SEXUAL ABUSE OF CHILDREN 118-20 (1975); Meyers, *supra* note 5, at 53.

17. Libai, *supra* note 13, at 1021. A plea bargain may be struck in criminal court or services accepted voluntarily in juvenile or family courts, but neither alternative necessarily will prevent extensive interviewing.

18. Berliner, *supra* note 4, at 13.

19. *Id.*

20. Criminal proceedings are public as a matter of course, whereas juvenile and family court actions may be closed.

21. The likelihood of harm to the child is greater in the criminal justice system. This is mainly because of the inherent differences between the two systems. First, the primary thrust of the criminal system is to punish the wrongdoer, whereas the juvenile and family courts have been specially created to protect the child and help the family. *See* Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Mack,

wanting to hurt her father and family.[22]

Current practice further fails the victim — as well as society — by ignoring the systemic nature of incest as a family problem.[23] Adversarial procedures which might be appropriate in a case of sexual molestation by a stranger, for example, can worsen the individual and family problems underlying parent-

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The Juvenile Court, 23 HARV. L. REV. 104 (1909). Second, criminal proceedings are more formal, more adversarial, and insure the defendant special rights such as the right to a jury trial. Third, the juvenile justice system works more quickly, has ties with departments of social services, and specializes in child abuse and neglect cases. Such differences may provide good reason to handle incest cases in the juvenile courts. A number of commentators have noted the advantages of using the juvenile justice system, B. FLICKER, STANDARDS FOR JUVENILE JUSTICE: A SUMMARY AND ANALYSIS 27 (1977); Besharov, *Behind Closed Doors*, FAMILY ADVOCATE, Fall 1980, at 5 ("remedial services of child protection agencies are more effective than the punitive powers of the criminal court"), and the harm caused by the criminal system, COMPARATIVE ANALYSIS, *supra* note 3, at 90, 94; JUVENILE JUSTICE, *supra* note 2, at 363; Paulsen, *The Law and Abused Children*, in THE BATTERED CHILD 153, 154 (2d ed. R. Helfer & C. Kempe 1974) ("A criminal prosecution is a clumsy affair." It can "punish," "divide," and "destroy," but not "unite," "rebuild," or "arrange."); Wald, *supra* note 2, at 1027 (criminal penalties "should be eliminated"). *But see* J. GOLDSTEIN, *supra* note 6, at 65.

Although the juvenile system offers many advantages over the criminal system, it also causes a significant amount of harm under present practices. As in the criminal system, the prosecutor is in charge and the focus is on preparing the child to testify. Only some of the people involved in the juvenile justice system are trained to deal with children; few are knowledgeable about the problems involved with incest. For these reasons, improper removal, for example, is as likely to take place under the juvenile system as it is under the criminal system.

22. The father may wish, for example, to argue that the daughter is fantasizing or lying. The likelihood that an incest report is merely a fantasy of sexual involvement with the child's parent is a myth, according to Goodwin, Sahd & Rada, *Incest Hoax: False Accusations, False Denials*, 6 BULL. AM. ACAD. PSYCH. & LAW 269 (1978) [hereinafter cited as Goodwin]. *See also* K. MEISELMAN, *supra* note 2, at 37-39 (Freud's widely accepted theory was designed to relieve "the anxiety of *therapists*" who could not deal with the actual, high incidence of incest); Rush, *The Freudian Cover-Up*, 1 CHRYSALIS 31, 32 (1977). Yet reports often are attributed to fantasy. Kempe, *supra* note 5, at 199. Other theories such as motives to lie, to protect a boyfriend, *see* Goodwin, *supra*, at 270, or neurosis, *see* K. MEISELMAN, *supra* note 2, at 39, can be explored fully under this Note's proposed reform. *See* pt. II *infra*.

23. Incest arises from a constellation of family problems. *See* COMPUTER RUN, *supra* note 1, at summary sheet 2; Browning & Boatman, *Incest: Children at Risk*, 134 AM. J. PSYCHIATRY 69 (1977); Faller, *supra* note 1, at 149-51. An unsatisfactory marital relationship between the parents often is involved. D. WALTERS, *supra* note 16, at 114, 121, 124; Browning & Boatman, *supra*, at 70 (incest "acts as a homeostatic pressure valve within the marital relationship"). For a careful discussion of the problems of mothers and their involvement in father-daughter incest, see K. MEISELMAN, *supra* note 2, at 111-30. The mother may even abet the incestuous relationship. *Id.* at 112; D. WALTERS, *supra* note 16, at 114; Kempe, *supra* note 5, at 205; Schechter & Roberge, *Sexual Exploitation*, in CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY 128, 128, 133 (R. Helfer & C. Kempe eds. 1976). Social isolation and overcrowding also contribute to the occurrence of incest. K. MEISELMAN, *supra* note 2, at 142; Renshaw, *supra* note 2, at 5. Furthermore, younger daughters may be later victims. Faller, *supra* note 1, at 146 (successive incestuous relationships occur "often as an older child rebels"); Summit & Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 AM. J. ORTHO PSYCH. 237, 245 (1978).

child incest.[24] As a result, when the victim and perpetrator eventually return home, sexual abuse is likely to recur.[25]

All of these factors have a significant impact on the incest victim. After being removed from her home and subjected to a series of confusing, frightening, and perhaps hostile interviews, the victim feels punished rather than protected.[26] When she returns to an unchanged home situation after the legal process has run its course she may well feel entirely defeated. The current system may protect her temporarily from further sexual abuse by her father. But the price she must pay for this questionable service is long-term emotional distress,[27] confusion,[28] and feelings of guilt.[29]

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24. *See* Meyers, *supra* note 5, at 51 ("courts only intrude and do not . . . give anyone . . . a chance to work through" their problems). For example, the mother presently is forced to choose between her loyalties to the father and the daughter, usually to the daughter's loss, especially when the family is dependent on the father's earnings. K. MEISELMAN, *supra* note 2, at 40 ("Where a father is making . . . contributions . . . [family] members will tend to support him and reject the daughter."); Faller, *supra* note 1, at 155; Meyers, *supra* note 5, at 31; Summit & Kryso, *supra* note 23, at 244. The threat of prosecution may also discourage the father from acknowledging his problems. For descriptions of the father and the range of his problems, see, *e.g.*, K. MEISELMAN, *supra* note 2, at 84-111; Bagley, *supra* note 2, at 92-96; Summit & Kryso, *supra* note 23, at 717-24. The likely result is to worsen the problems. *See* Giarretto, *supra* note 5, at 152, 157; Meyers, *supra* note 5, at 54 (a "system which takes a father out of the family and puts him in jail without treatment is silly and unreasonable").

25. *See* JUVENILE JUSTICE, *supra* note 2, at 363 (meaningful treatment often must involve the entire family). *See also* Giarretto, *supra* note 5, at 149, 156; Libai, *supra* note 13, at 978; Machotka, *supra* note 2, at 114; Meyers, *supra* note 5, at 52, 54. Although there appear to be no exact recidivism figures, the likelihood of repeat offenses is great according to the current understanding of the father's problems. *See, e.g.*, Berliner, *supra* note 4, at 1 ("child molesting often is a compulsive behavior"); P. DECOURCY & J. DECOURCY, A SILENT TRAGEDY: CHILD ABUSE IN THE COMMUNITY [hereinafter cited as DECOURCY] (such "personality disorders" are successfully treated only if there is a "desire to change"; "a judgment imposed by others" is not sufficient).

26. *See* D. WALTERS, *supra* note 16, at 114; Faller, *supra* note 1, at 155; Giarretto, *supra* note 5, at 147. The child is likely to feel that she, not the father, is the wrongdoer—someone to be "gotten rid of" by removal. Meyers, *supra* note 5, at 52, 54. Such effects are ironic because removal may not be necessary for the child's protection in the first place. Faller, *supra* note 1, at 155.

27. *See* D. WALTERS, *supra* note 16, at 113; Berliner, *supra* note 4, at 2, 3; Libai, *supra* note 13, at 983-84 (lists aspects of current procedure which may cause "prolonged mental stress"); Schultz, *Interviewing the Sex Offender's Victim*, 50 J. CRIM. L.C. & P.S. 448, 451 (1960); Wald, *supra* note 2, at 1026 (criminal proceedings are especially harmful).

28. Giarretto, *supra* note 5, at 146; Meyers, *supra* note 5, at 52.

29. Kempe, *supra* note 5, at 209; Meyers, *supra* note 5, at 52, 54; Reifen, *supra* note 2, at 116-17, 119 ("guilt feelings may originate from the child himself, or they may be the result of outside intervention"); Wald, *supra* note 2, at 1026.

B. Reliability of the Victim's Testimony

Making the child incest victim testify in court has another distinct failing: it produces unreliable evidence. The trier of fact in an incest case faces a dilemma. Its determination of whether abuse occurred rests primarily upon the testimony of the child victim,[30] but child witnesses are widely acknowledged to be unhelpful.[31] They have a subjective sense of time, an inaccurate memory — especially with regard to experiences such as incest which are repeated over time — and a limited ability to communicate what they do understand and recall.[32] These natural disabilities tend to intensify when the child is afraid or under emotional stress, as the child may regress to a less mature state or withdraw entirely.[33] Incest victims are especially likely to suffer from these disabilities because they are young and find current pretrial and courtroom procedures especially traumatic.[34]

Compounding this problem is the inability of the trier of fact to assess reliably the testimony of this inadequate witness. In most litigation, the witnesses and triers of fact are all adults. The judge and jurors require no special expertise to assess the average adult witness' credibility accurately because they acquire the ability naturally through daily contact with other adults.[35] But this ability does not necessarily help the trier of

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30. *See* text at note 7 *supra*. As a rule, a child who complains of and describes sexual abuse is telling the truth. Conversation with K. Faller, Interdisciplinary Project on Child Abuse and Neglect, Ann Arbor, Mich. (October 13, 1981). Nonetheless, the law requires that the trier make an independent finding of fact. For this reason, and because the charges could conceivably be false in a given case, the judicial system requires reliable evidence.

31. B. CAULFIELD, THE LEGAL ASPECTS OF PROTECTIVE SERVICES FOR ABUSED AND NEGLECTED CHILDREN 47 (1978); D. WALTERS, *supra* note 16, at 114; Libai, *supra* note 13, at 1003 (citing People v. Price, 33 Misc. 2d 476, 226 N.Y.S.2d 460 (Ct. Spec. Sess. 1962) (more expertise and a better setting would be preferable for dealing with child witnesses)); *see* Annot., 81 A.L.R.2d 386 (1962).

32. Berliner, *supra* note 4, at 5, 6, 12, 13; Meyers, *supra* note 5, at 54. Additionally, the use of many interviews under present practices reduces the spontaneity and, hence, the accuracy of the child's memory at trial. Stern, *The Psychology of Testimony*, 34 J. AB. & SOC. PSYCH. 3, 14 (1939).

33. Berliner, *supra* note 4, at 10-11.

34. Meyers, *supra* note 5, at 54 (problems with prosecuting incest are so great that "prosecutors interested in a good conviction rate won't touch" them); Reifen, *supra* note 2, at 116. *See also* A. LEVIN, EVIDENCE AND THE BEHAVORIAL SCIENCES 514-20 (1956); Schultz, *The Child as Sex Victim: Socio-Legal Perspectives*, in 4 VICTIMOLOGY: A NEW FOCUS 177, 179 (I. Drapkin & E. Viano eds. 1973).

35. In extensive daily interactions with one another, adults rely significantly on nonverbal cues to communicate. R. APPLBAUM, K. ANATOL, E. HAYS, O. JENSEN, R. PORTER & J. MANDEL, FUNDAMENTAL CONCEPTS IN HUMAN COMMUNICATION 110 (1973) ("We communicate no more than 35% of our social meaning through the verbal portions of a mes-

fact evaluate a child witness' credibility.[36] Normal adult understanding may prove sufficient when assessing the credibility of a child witness who is not personally involved with the subject of inquiry. For example, in a traffic accident case the only problem facing the trier of fact might be to determine whether the child witness actually saw the car run a red light. But the problems facing the trier of fact in an incest case are more significant and problematic, because the child witness is emotionally involved,[37] is testifying on an especially sensitive topic, and presents a complex question with respect to possible motives for lying.[38] Thus, the trier of fact is likely to react with strong feelings but little objective understanding in an incest case.

In summary, the current system of pretrial interviews and in-court testimony of the victim fails to address adequately the unique problems presented by parent-child incest. Not only is the child victim exposed to considerable risk of severe emotional trauma, but in addition, the evidence presented to the trier of fact is unreliable. The next section discusses a proposal for reform designed to solve these problems.

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sage."); M. KNAPP, NONVERBAL COMMUNICATION IN HUMAN INTERACTION 12 (1972). Adults interpret these cues through familiarity with the range of feelings, concerns, thought processes, and forms of expression of adults generally. G. MYERS & M. MYERS, THE DYNAMICS OF HUMAN COMMUNICATION 12-13 (1976) (We communicate "selectively" using a "classification system" developed by sorting out our many experiences.). Thus, adults obtain needed information from one another by evaluating each other's demeanor.

Admittedly, any jury may have limited expertise with regard to a given witness because of differences of race, sex, or class. But such cultural differences, though present, are commonly recognized and addressed. Children, on the other hand, are a particularly invisible minority. Since knowledge on incest and people with some degree of expertise at dealing with incest victims are increasingly available, it would be logical to make use of them.

36. Adults do not commonly interact extensively, if at all, with children. The jury will not likely be made up of housewives with children the age and character of the victim. P. FRANCIS, HOW TO SERVE ON A JURY 9-10, 73 (1979) (women in at least nine states are excusable on ground of gender alone). Even housewives, though, would not necessarily have the ability to assess accurately a child's credibility. Certainly, there is no standard measure of the qualifications of parents as there is of professionals. Furthermore, adults who interact with children normally do not do so in a context in which they must assess the child's credibility. Even juvenile court judges are not likely to have as much training in assessing the credibility of children as of adults, if for no other reason than that many such judges have neither special training nor experience. See DECOURCY, *supra* note 25, at 12; Wald, *supra* note 2, at 1001 n.98, 1016 n.168 ("little or no specialized training"). Nor are triers of fact likely to recall accurately, much less understand, the feelings and thought processes of children.

The evaluation of a child witness by an untrained adult is especially suspect because a child may act like an adult while experiencing entirely different thoughts or emotions than an adult. *See* A. LEVIN, *supra* note 34, at 526-28; Berliner, *supra* note 4, at 5.

37. *See* Meyers, *supra* note 5, at 51.

38. *See* Goodwin, *supra* note 22, at 270.

II. A PROPOSAL FOR REFORM

For the reasons suggested in the preceding section, the incest victim should not be required to testify in court. Nor should she be subjected to a series of pretrial interviews conducted by persons incapable of recognizing and accommodating her emotional needs. Under the proposed reform,[39] the child's only contact with the legal system would be through a specially trained social services worker.[40] This expert must have dual qualifications: first, he or she must be qualified to deal with victims of child sexual abuse;[41] and second, he or she must be familiar enough

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39. This proposal is based in part on suggestions made by Donald Duquette, Director of the Interdisciplinary Project on Child Abuse and Neglect, Ann Arbor, Michigan, and on practices in other nations. *See* Libai, *supra* note 13; Reifen, *supra* note 2; Reifen, *Protection of Children Involved in Sexual Offenses: A New Method of Investigation in Israel*, 49 J. CRIM. L.C. & P.S. 222 (1959). Mr. Duquette suggests that the child be questioned in chambers with both parties present, or that a specialist chosen by both parties interview the child elsewhere and a videotape be made.

Mr. Libai suggests, based on practice in Israel and other nations, a special hearing with full cross-examination conducted in a "child courtoom." A recording of that special hearing would then be used at the trial in lieu of live testimony by the child. Libai, *supra* note 13, at 1028. No jurisdiction uses this procedure to the author's knowledge. Although it would protect the victim from being subjected to public view and from testifying before her father or a jury, it has the disadvantages of demanding more of judicial resources, failing to protect the child from the traumatic experience of adversarial cross-examination, and failing to add expertise to the analysis of the child's story.

40. This expert should have the power to protect the child by limiting access to her. The only limits on this power should be regulation on the basis of professional competence by the expert's supervisor, and the power of the courts to order dismissal of the case if necessary access or assistance is not provided. The expert, rather than the prosecutor, should have power over the alternative remedy of compelling the child to testify in extraordinary circumstances, where both necessary and sufficiently safe to the child to justify it. *See* Westen, *Reflections on Alfred Hill's "Testimonial Privilege and Fair Trial,"* 14 U. MICH. J.L. REF. 371, 373-74 (1981) (noting the "alternative remed[ies]" of dismissal and compelling testimony, where assertion of a privilege not to testify threatens the defendant's right to a fair trial). The expert must also consider the child's wishes and the need to satisfy the burden of proof. As a rule, however, the child should be kept out of court. This shift of power from the prosecutor is necessary to prevent undermining the proposed reform. Because of the ongoing professional relationship with the prosecutor, the expert will not unreasonably withhold the child from testifying. Yet the expert best knows when the child should not testify despite the likelihood of dismissal of the prosecution. Of course, the issue here is not one of fairness to the defendant, for the court can prevent an unfair trial by ordering dismissal.

41. Most counties now have at least one trained professional who could deal with sexual abuse cases. Schultz, *supra* note 34, at 185. *See also* Alpert & Schechter, *Sensitizing Workers to the Needs of Victims: Common Worker and Victim Responses*, 4 VICTIMOLOGY 385 (1979). Although these professionals are not all adequately trained, the time and expense required to complete training need not be great. Reifen, *supra* note 2, at 119 (training "can be acquired . . . easily by professional people trained in the social sciences"). Some training in these skills is now available. Faller, *supra* note 1, at 160. *See also* Giarretto, *supra* note 5.

with legal standards and practices to assist the trier of fact in assessing the victim's credibility.[42]

Whenever the expert and victim meet, the sessions should be conducted in a room designed to facilitate unobstrusive recording and observation.[43] If legal action is initiated, both parties to the action would then be allowed to observe the interviews and submit questions to the expert, who subsequently would pursue them with the victim. Questions that arise during a session could be given to the expert during a recess. Alternatively, the parties and the court could watch or hear the tapes after the session and submit additional questions to the expert at that time. This process would continue until either the parties are satisfied or the expert determines that the child's needs dictate that the limit of reasonable inquiry has been reached.[44]

At trial, relevant portions of the recordings would be played in lieu of the victim's personal testimony. Either party would be free to call the examining expert as a witness.[45] The expert should be prepared to describe the methods used to examine the victim, explain relevant information on incest generally, and also discuss specific reasons, both in theory and in application, why one might believe or doubt the victim's story.[46] The expert might also discuss the significance of nonverbal communications,

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A manual, including a role description, an outline of procedures, readings, and a bibliography on incest and child development could be the major training tool. Conversation with D. Duquette, Director, Interdisciplinary Project on Child Abuse and Neglect, Ann Arbor, Michigan. The manual could be supplemented with a weekend seminar or personal contact with an expert or existing program. Moreover, published discussion of theories, methods, and practical experiences would be helpful in developing and improving training programs.

42. In order to be truly helpful in this role, the expert should understand the importance of objectivity and be familiar with pretrial and trial procedures. Such training could be provided by court personnel or through experience. The expert must realize the dual purpose of the job: to aid the child and to help the trier of fact rationally decide whether to believe the child.

43. Recording with an audio cassette would be preferable to a printed transcript because it can convey tone of voice, hesitation, and more. *See* Libai, *supra* note 13, at 990. A videotape would likewise be preferable to cassette recordings and is often used to record court proceedings today. In fact, "videotaped testimony sometimes results in higher retention levels" than live testimony. G. MILLER & N. FONTES, VIDEOTAPE ON TRIAL 207-08 (1979).

44. Once the expert is confident that the child has told everything she can remember or has responded fully to all defense questions, there would be no point in continuing the interrogation. The expert might also end the examination process if the harm it causes the child outweighs the risk of dismissal or loss at trial. *See* notes 6 & 40 *supra*.

45. The court should allow the accused to use leading questions, even though the expert is technically neutral, to ensure the opportunity to pursue all lines of defense. *See* pt. III A *infra* (discussing due process); note 81 and accompanying text *infra* (discussing the confrontation right and rape-victim shield laws).

46. *See* note 42 *supra*.

such as gestures or facial expressions, made by the victim during the sessions.

The proposed reform would benefit victims of incest in several ways. For example, discussing the incestuous home situation with a knowledgeable adult in a private setting will begin therapy, rather than extend the trauma for the child. At the same time evidence is being collected for trial, the victim will learn to accept herself: although she participated, she is not guilty; although "going public" may hurt her family, it is important for her to tell the truth.[47] The victim also will benefit greatly from the expert's knowledge of the underlying causes of parent-child incest. The examining expert will facilitate provision of services to the victim and her family by other workers.[48] Prosecution will not be the primary focus but one option, necessary only if the father does not voluntarily acknowledge his responsibility. Fewer trials may be required under the proposal because abusing fathers will see that, although the primary purpose of intervention is to help, the state will have well-developed, convincing evidence to convict if prosecution becomes necessary. With no trial, the victim will be spared much suffering. But even if the prosecution proceeds to trial, the proposed reform will spare the victim the ordeal of testifying in court. The victim would not have to suffer the emotional anguish that results from publicly having to discuss the embarrassing details of her father's behavior. No one would publicly accuse her of lying or wanting to hurt her family. Instead of being a traumatic ordeal of formal, unfriendly proceedings that exacerbates the victim's problems, intervention will reinforce her self-respect and begin correcting the existing damage.

The evidence obtained using the proposed reform also will be more reliable than the victim's personal in-court testimony. The expert will conduct the interview sessions so as to minimize the victim's emotional stress. This factor in itself should greatly enhance the victim's ability to remember and communicate relevant facts.[49] Moreover, unlike the attorneys at trial, the examin-

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47. False retractions may be a greater problem than false accusations. *See, e.g.*, Goodwin, *supra* note 22, at 273.

48. There is presently a danger that the child's needs will be ignored, particularly in a criminal prosecution, where the focus is more likely to be punishment of the perpetrator. *See* note 15 and accompanying text *supra*. Like any professional involved with a child at risk, the expert would, for example, make recommendations to the department of social services concerning removal or non-removal arrangements, as is best for the child.

49. *See* text accompanying notes 32-34 *supra*. It has been suggested that what is needed for more reliable evidence is examination of the child by someone with expertise,

ing expert presumably will be experienced in dealing with children.[50] Thus, the expert will better recognize the limits of the child's ability to comprehend facts and communicate them to others. Additionally, the expert will be available to explain these considerations to the trier of fact when the tapes are played at trial. Thus, the expert's supplemental testimony could significantly enhance the trier of fact's ability to understand and assess the credibility of the victim's story.

Under the proposed reform the parties will have the opportunity to ask questions (through the expert) a number of times and on any issue before trial. If the expert fails to address a particular topic to a party's satisfaction, that party will have the right to submit further questions. Thus, the parties will be afforded several opportunities to "examine" the victim. This procedure should result in a more complete revelation of the victim's knowledge than would be possible through the ritual of direct and cross-examination at trial. Furthermore, both parties will be free to argue to the trier of fact any perceived inadequacies in the expert's conduct of the interview sessions. The recordings themselves will provide a reliable basis for considering such charges.

III. DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE PROPOSED REFORM

Notwithstanding its many advantages, the proposed reform must be evaluated in light of its potential impact on the accused's constitutional rights.[51] To be acceptable the proposal

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in a quiet environment, soon after the event is reported and with no time pressure or other distractions. Berliner, *supra* note 4, at 11; Reifen, *supra* note 2, at 119 (quality of first contact with child and "neutral environment" are "of the greatest importance"). *See also* D. WALTERS, *supra* note 16, at 135-36. Thus, the child expert should interview the child as soon as possible after incest is reported. Recording these early interviews preserves this more reliable evidence for use at any later trial or on appeal. K. Faller & E. Tickner, *supra* note 9, at 17.

50. *See* note 41 *supra*. An adult who can deal with children, ask the right questions, and evaluate the answers is necessary. Such a child examiner would know how to develop a relationship of confidence and how to obtain the full story without putting words in the child's mouth. Stern, *supra* note 32. The expert should also be able to recognize signals of fabrication through the child's conduct and words.

51. The proposed reform is intended to apply to all parent-child incest cases, and only to such cases. There need be no great concern that the proposed reform would dilute the rights of accused persons in other settings. While the needs of parent-child incest victims might appear no more compelling than those of rape victims or abused spouses, for example, they are clearly distinguishable. No other type of case involves the unique circumstances characteristic of a parent-child incest case.

must not derogate his rights to due process and to confront witnesses against him. The following sections examine the limits and theoretical underpinnings of these rights. Although the tapes would be hearsay,[52] this Note does not address the hearsay issue *per se* because the hearsay rule reflects essentially the same concerns as those of the confrontation clause. The Note concludes that the proposed reform would allow for full accommodation of the rights of the accused.

A. Due Process

The fourteenth amendment[53] guarantees every citizen an opportunity to be heard[54] before being deprived of any liberty interest.[55] To satisfy this requirement the state must allow the ac-

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In all cases to which the proposal is addressed, the victim is a child, the perpetrator is the parent, and the violation involves a taboo sexual relationship. Not only do the incestuous behavior and society's reaction to it have long-lasting emotional effects on the child's growth, personal relationships, and parenting ability, but also the involvement of the family and the complexity of the relationship with the perpetrator distinguish otherwise similar cases such as rape. The incest victim, unlike the witness to intrafamilial violence or the victim of physical abuse, is not only the child of the defendant nor merely his adversary witness, but also his accomplice. Her confusion and sense of guilt at her involvement is thus potentially far greater than other victims' experience. In sum, the trauma to the parent-child incest victim is greater; her usefulness as a witness is less; the victim is likely to have positive ties to the perpetrator; and other family members are likely to be involved. No other case, however similar in some respects, shares all of these complicating factors.

52. *See* FED. R. EVID. 801. The tapes probably would not be admissable under any of the recognized exceptions to the hearsay rule. *See id.* 803-804. New exceptions to the hearsay rule must satisfy two tests. The first test at common law, necessity, does not require that the declarant be strictly unavailable to testify, but only that demanding the declarant's presence would pose a great burden on the proponent of the statement. *See, e.g.*, Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 396-97 (5th Cir. 1961). The second common law prerequisite for admission of hearsay statements is that there be sufficient "circumstantial guarantees of trustworthiness." *Id.* at 395.

53. The fourteenth amendment reads: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. The due process clause applies to civil as well as criminal proceedings.

54. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), the Court stated that the opportunity to be heard is the "fundamental requirement of due process." Other assurances of a fair trial guaranteed under the due process clause, but not affected by the proposed reform, include timely notice, Armstrong v. Mango, 380 U.S. 545 (1965), assistance of counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), an impartial tribunal, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), a speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967), and a public trial, *In re* Oliver, 333 U.S. 257 (1948).

55. A parent accused of sexual abuse may be deprived of liberty in several ways. The most obvious is incarceration as a result of criminal conviction. After either civil or criminal action he may have to attend therapy sessions, accept rehabilitative services, or allow intrusive monitoring of his personal life. Moreover, he may eventually lose his power to direct the upbringing of his child(ren), since a finding of abuse can lead to termination

cused to call his own witnesses and otherwise present evidence to establish a defense.[56]

Adoption of the proposed reform will add to, rather than diminish, the opportunity of the accused to be heard. Under the proposal, the accused will be allowed to view the tapes that are to be introduced at trial. Thus, he will have ample prior knowledge of the strengths and weaknesses of the prosecution's case.[57] This knowledge will enable him to tailor his defense to his best advantage.[58] Also, by being allowed to question the victim through the expert, the accused will benefit from the expert's special ability to test the veracity of the victim's story.

If the accused believes that the expert's inquiry was incomplete, he will have the right to seek an order for further questioning or dismissal.[59] At trial, the tapes will reflect the expert's thoroughness; the accused then can use them to support his argument to the trier of fact. In addition, the expert will be available for cross-examination. The accused could challenge the soundness of the expert's theories and techniques, and elicit reasons to doubt the victim's story from the expert. Moreover, the accused's right to call witnesses on his own behalf will remain unimpaired.[60] Thus, the proposed reform will add to, rather than diminish, the accused's ability to obtain information and present arguments favorable to him.

The proposal will contribute to a fair hearing for the accused in two additional ways. First, under the proposed reform, the trier of fact will be better prepared to ascertain the truth. Presently, even if the case is tried in juvenile court, the judge is not likely to have the expertise necessary to elicit from the child her complete story or to assess adequately her credibility.[61] Even a

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of parental rights.

56. Washington v. Texas, 388 U.S. 14, 19 (1967).

57. This would put the defendant in a much better position than he is under the present criminal system where there is no right to pretrial discovery.

58. Allowing the defendant to view the tapes might also help to speed the judicial process. After viewing the evidence he would confront at trial, the defendant might be more inclined to plead guilty or plea-bargain.

59. The expert would choose between these alternatives. *See* note 40 *supra.*

60. It is unlikely that the defendant could call any witnesses to testify as to the occurrence or non-occurrence of the alleged acts. He might want to call an expert witness to rebut the testimony given by the examining expert. With regard to the right to compel the victim to testify, see the discussion of confrontation at pt. III B *infra;* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 HARV. L. REV. 567, 625 (1978) ("the measure of a defendant's right to produce and elicit testimony from witnesses is the same in each case," whether it is confrontation or compulsory process).

61. *See* DECOURCY, *supra* note 25, at 12; Wald, *supra* note 2, at 1001 n.98, 1016-17 n.168.

judge who does have such expertise probably lacks the time it takes to conduct a thorough interrogation of the child. Under the proposal, the trier of fact will have the benefit of a neutral third party's reasoned analysis and advice. Thus, just as the accused will have a better opportunity to present his defenses under the proposal, so too will the trier of fact have a better opportunity to make a fair, well-reasoned decision.[62]

Finally, the proposal will contribute to the father's right to a fair hearing by depriving the prosecutor of the prejudicial effect of the child victim's presence in court. A jury understandably might sympathize with a frightened child as she testifies, especially during cross-examination. An entirely different effect can be achieved by showing the child on tape, quietly talking with the expert. The facts will be presented to the jury more thoroughly and with less emotion.

B. The Confrontation Right

The sixth amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[63] The Supreme Court has said

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62. See discussion of the weakness of the present system in pt. I B *supra;* Note, *State Intrusion into Family Affairs: Justifications and Limitations,* 26 STAN. L. REV. 1383, 1398 (1974) ("A judicial decision maker simply is not in a position to render reasoned principled judgments on child welfare issues without hearing particularized expert evidence.").

63. U.S. CONST. amend VI.

The Supreme Court has not answered definitively the question of whether the confrontation clause applies in civil trials for child neglect or abuse. The Court has gone only so far as to hold that the confrontation clause applies to a juvenile court proceeding in which the juvenile faces the possibility of incarceration. *See In re* Gault, 387 U.S. 1, 13 (1967). One might argue that, because the accused are adults rather than children, and because the serious risk of termination of parental rights is involved, the confrontation right should be extended to child abuse cases. Yet in at least two major cases, the Supreme Court has declined to extend comparable protections to cases handled in juvenile and family courts. *See* Lassiter v. Department of Social Services, 101 S. Ct. 2153, 2163 (1981) (appointment of counsel, although required by the sixth amendment in criminal cases, and "enlightened and wise" in civil cases, is not constitutionally required in every termination-of-parental-rights case); McKeiver v. Pennsylvania, 403 U.S. 528, 540, 545 (1971) (extending the constitutional right to jury trial to all juvenile actions would "likely be disruptive of the unique nature of the juvenile process," "put[ting] an effective end to . . . the . . . prospect of an intimate, informal protective proceeding"). The analysis employed in these cases suggests the Court would treat the confrontation right similarly.

This Note deals with the confrontation clause, nonetheless, because criminal courts often are used in incest cases, and because some state courts may independently apply the confrontation right in civil cases. For example, in *In re* S. Children, 102 Misc. 2d 1015, 1017-18, 424 N.Y.S.2d 1004, 1005-06 (Family Ct. 1980), the court held that the right of confrontation, applicable through the fourteenth amendment, could not be de-

that the purpose of the confrontation clause is to assure that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement."[64] Cross-examination of the declarant in court normally serves this purpose.[65] When conducted by a skilled lawyer, cross-examination can be very helpful to the trier of fact assessing a witness' credibility.[66] In incest cases, however, special problems[67] complicate matters, effectively negating the value of cross-examination. This Note contends that where the traditional rationale underlying the confrontation clause would best be served by alternate methods, the confrontation clause does not require cross-examination in court.

The Supreme Court has never said that the confrontation clause mandates cross-examination in every case.[68] As applied

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nied a father charged with incest absent "justifiable circumstances." Such circumstances, the court explained, include "[t]ender years, mental health, behavior in the courtroom, [and] the need to shield some children from the emotional trauma certain disclosures would be likely produce." These are factors which could significantly limit the assertion of the right by the father in incest cases. *See also* N.Y. FAMILY CT. LAW § 1046(a)(vi) (McKinney 1975)("previous statements made by the child relating to any allegations of abuse or neglect shall be admissible"); P. PRESCOTT, THE CHILD SAVERS: JUVENILE JUSTICE OBSERVED 116 (uncorrected proof 1981).

64. Dutton v. Evans, 400 U.S. 74, 89 (1970) (quoting California v. Green, 399 U.S. 149, 161 (1970)). Some of the concerns present in evaluating the truth of prior statements are prejudice; mistake of identification due to error, deceit, or memory; and the opportunity of the defendant to avoid these dangers. Ohio v. Roberts, 448 U.S. 56, 66-73 (1980); Mancusi v. Stubbs, 408 U.S. 204, 215 (1972); Dutton v. Evans, 400 U.S. 74, 88-89 (1970). *See also* Baker, *The Right to Confrontation, the Hearsay Rule, and Due Process—A Proposal for Determining When Hearsay May be Used in Criminal Trials*, 6 CONN. L. REV. 529, 532 (1974) (the clause is a "constitutional barrier against such flagrant abuses as trial by anonymous accusers"); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99-101 (1972) (the confrontation clause is intended to prevent conviction by an untested and later recanted confession of an alleged co-conspirator); Younger, *Hearsay and Confrontation, Or What Every Criminal Defense Lawyer Should Have in Mind When He Objects to the Prosecutor's Offer of Hearsay*, 2 NAT'L. J. CRIM. DEF. 65, 66 n.4 (1976).

65. California v. Green, 399 U.S. 149, 156-58 (1970); Westen, *supra* note 60, at 574-81 (discussing rights of the accused to have present, and to cross-examine, witnesses against him).

66. Snyder v. Massachusetts, 291 U.S. 97, 107 (1934); Mattox v. United States, 156 U.S. 237, 242-43 (1895) (cross-examination allows "testing the recollection and sifting the conscience of the witness . . . face to face with the jury in order that they may . . . judge by his demeanor whether he is worthy of belief"); Libai, *supra* note 13 (quoting Pointer v. Texas, 380 U.S. 400, 406-07 (1965)). The "ordeal of cross-examination," Mattox v. United States, 156 U.S. at 244, has been called the "greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. at 158 (quoting 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (rev. J. McNaughton 1961)).

67. *See* pt. I B *supra*.

68. The confrontation right and cross-examination are not coextensive. The belief that they are is "an understandable misconception." California v. Green, 399 U.S. at 172-73 (Harlan, J., concurring). *See* Westen, *supra* note 60, at 584 ("The Court has invoked the confrontation clause to prohibit the state from using an out-of-court statement only where the same evidence was available and capable of being produced in more reliable

by the Court, the confrontation clause is not an absolute rule but an expression of the tension between two policies.[69] The first policy is that an innocent party should not be wrongly convicted.[70] If this were the only policy behind the confrontation clause, the right would be absolute: any criminal defendant would be able to force the prosecution to make its case through testimony in court or risk dismissal. But a second policy — against setting a guilty criminal free — requires considering alternatives to dismissal where the prosecution cannot produce a witness to give crucial testimony in court. As a result, the Supreme Court has long recognized the exceptions of dying declarations[71] and prior testimony of unavailable witnesses[72] as instances where, because of the need for crucial evidence, prior out-of-court statements may be admitted into evidence without cross-examination of the declarant at trial. These exceptions are characterized by the unavailability of the declarant and the presence of circumstances which indicate that the statements are reliable. The rationales which combine to justify the two well-established exceptions support the proposed reform as well.[73]

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form" in court.) *But cf.* Barber v. Page, 390 U.S. 719, 725 (1968) (treating cross-examination as a constitutional right under the confrontation clause).

69. The unconditional wording of the confrontation clause does not give it an unqualified scope. Ohio v. Roberts, 448 U.S. 56, 63 (1980) (to do so "would abrogate virtually every hearsay exception"); Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1200-01 n.65 (1979); Younger, *supra* note 64, at 37. Strictly worded constitutional rights regularly are enforced pragmatically rather than woodenly. For example, the Supreme Court held, in Dennis v. United States, 341 U.S. 494, 503 (1951), that the first amendment command that Congress make no law abridging free speech "is not an unlimited, unqualified right, but . . . must, on occasion, be subordinated to other values and considerations."

Similarly, the confrontation right has not been applied absolutely: it can be waived, United States v. Carlson, 547 F.2d 1346, 1357-59 (8th Cir. 1976) (discussing express waiver, waiver by stipulation as to admission of evidence, waiver by guilty plea, waiver by absence from the jurisdiction, and waiver by misconduct); its denial may be harmless error, Parker v. Randolph, 442 U.S. 62, 74-75 (1979); Schneble v. Florida, 405 U.S. 427, 430-32 (1972); it has been held subject to balancing with other interests, Ohio v. Roberts, 448 U.S. 56, 64 (1980) (citing Chambers v. Mississippi, 410 U.S. 284, 295 (1973)); Mattox v. United States, 156 U.S. 237, 243 (1895) (rules such as the confrontation right "must occasionally give way to considerations of public policy and the necessities of the case"); and it is subject to exception, *see, e.g.*, Pointer v. Texas, 380 U.S. 400, 407 (1965).

70. *See* Baker, *supra* note 64, at 532-34; Graham, *supra* note 64, at 99-101; Younger, *supra* note 64, at 32 n.4.

71. Clyde Mattox v. United States, 146 U.S. 140, 151 (1892). *See generally* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 281-297 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

72. Mattox v. United States, 156 U.S. 242, 240-44 (1895). *See generally* MCCORMICK, *supra* note 71, at §§ 254-261.

73. *See* Pointer v. Texas, 380 U.S. 400, 407 (1965) ("There are other analogous excep-

1. Policy basis for an exception— The two traditional exceptions to the confrontation clause apply when the declarant is not available to testify at trial.[74] Nevertheless, the courts have not required absolute unavailability, but have considered it a discretionary matter based on a policy against incurring excessive costs or delay[75] as well as the policy against letting the guilty go free. As a result, if a court finds that procuring a critical witness would entail inordinate expense or delay, it will find that witness unavailable.[76]

Although the victim of parental sexual abuse is physically available to testify if the state so requires,[77] equally strong policy considerations justify recognizing an exception in such cases. The justification actually is greater where the expense of securing live testimony is measured in human costs rather than time or money.[78] Forcing the incest victim to testify at trial is costly indeed from the standpoint of both the victim and society.[79]

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tions which might not fall within the scope of the constitutional rule requiring confrontation of witnesses.").

74. Ohio v. Roberts, 448 U.S. 56, 65 (1980).

75. For example, the court must decide whether the state has made sufficiently diligent effort to find the declarant or procure his presence. *See, e.g.*, Mancusi v. Stubbs, 408 U.S. 204, 209-13 (1972) (declarant had moved to Sweden); Barber v. Page, 390 U.S. 719, 722-25 (1968) (witness incarcerated in federal prison outside the state); Motes v. United States, 178 U.S. 458, 471 (1900) (declarant disappeared from the courthouse after being left in the custody of another witness); United States v. Hart, 546 F.2d 798, 800-01 (9th Cir. 1976) (witness had returned to his home in Mexico).

76. *E.g.*, Mancusi v. Stubbs, 408 U.S. at 209-13 (witness who had moved to Sweden found to be unavailable). Also, the state must make good-faith efforts to procure the presence of the declarant. Barber v. Page, 390 U.S. at 725.

77. Because the victim is physically available, some commentators have assumed that reform of the type suggested would be unconstitutional. *See, e.g.*, Libai, *supra* note 13, at 1025-26.

78. Our system of justice manifests a concern with human costs at many levels. The eighth amendment prohibits cruel and unusual punishment, and prisons, despite their problems, attempt to provide for more than mere physical survival. Bankruptcy procedures protect enough of the assets to cover necessaries. Tort law struggles to develop a fair system for compensating victims' loss of companionship and mental distress. Most pertinent here are the informal procedures and the "best interest" standards of the juvenile/family courts.

Furthermore, it is as sensible to establish an exception to protect the incest victim from trauma as it is to protect the taxpayer from expenditure and the accused from delay. The only difference between the first and the latter two harms is the value at risk. In light of the fact that money and time have recognizable value only in relation to human needs and values, the cost in harm to a person must be valued at least as highly as money and time.

79. *See* pt. I *supra*. Society suffers in three ways from currently used, inappropriate procedures. First, the incest problem remains because the emphasis on prosecution with in-court victim testimony prevents proper treatment of its causes. *See* notes 23-25 and accompanying text *supra*. Second, money spent to prosecute and punish the perpetrator is largely wasted. *Id.* Third, the integrity of the judicial system suffers when it must pass judgment without a rational basis for decision. *See* notes 31-38 and accompanying text

Furthermore, even if dollar costs alone were the standard, it would be in the state's interest to resolve rather than aggravate the incest problem.[80] Policy considerations of all types argue strongly for recognizing a new exception in the special circumstances of parent-child incest.[81]

2. *Reliability of the evidence*— To fit under one of the exceptions to the confrontation clause, the out-of-court statement must arise in circumstances which suggest that it is reliable. Under the dying declaration exception, it has been assumed historically that something said under a "sense of impending death" is likely to be true.[82] Whatever the merits of this assumption, the rule clearly is a legal fiction. As such, it provides little help in analyzing the strictures of the confrontation clause.

The basis of reliability of prior testimony of an unavailable witness provides better guidance. Prior testimony by an unavailable witness is considered reliable because it arose during a prior hearing at which the accused had an opportunity to challenge its truthfulness.[83] This requirement should be a demanding assurance of reliability, but in practice it is not rigorously applied. For example, actual cross-examination by the defendant at the

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supra. Use of the proposal will allow the state to overcome these problems.

80. In 1969, the annual national cost of foster care alone, not counting other services to families, was $363 million. D. FANSHEL & E. SHINN, CHILDREN IN FOSTER CARE 30 (1978). The cost is much higher today. For example, New York City figures indicate that some expenses have more than doubled. *Id.* Furthermore, the cost of institutionalized care far exceeds the cost of foster family care. S. KATZ, WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN 108 n.11 (1971); J. PERS, GOVERNMENT AS PARENT: ADMINISTERING FOSTER CARE IN CALIFORNIA 77 n.4 (1976) (institutional care four times as high as foster family care).

81. The proposed reform is consistent with the holding of the Supreme Court, in Davis v. Alaska, 415 U.S. 308, 319 (1975), that a defendant's confrontation right outweighs the policy of keeping juvenile records privileged. The degree of potential harm to the minor was very different in *Davis*. The Court characterized it as a "temporary embarrassment." *Id.* at 319. In contrast, the risk to the parent-child incest victim is significant, direct, and of potentially long-lasting psychological effect. *See* pt. I A *supra*. Furthermore, unlike the lower court's error in *Davis*, use of the proposal does not block pursuit of any defense theory, such as bias for the witness, which might do "serious damage to the strength of the State's case." 415 U.S. at 319.

For the same reason, the proposed reform avoids the major weakness of rape shield laws. *See* Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 545, 571 (1980) (arguing that some shield laws violate the confrontation clause because they block all inquiry into some issues and involve *per se* exclusionary rules). *See generally* Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 10-14 (1977). The proposal is essentially a procedural change, and does not prevent inquiry into any given issue. It also leaves the judge discretion to order dismissal if necessary to avoid unfairness to the accused.

82. Kirby v. United States, 174 U.S. 47, 61 (1898).

83. MCCORMICK, *supra* note 71, at § 255.

prior hearing is not essential.[84] Instead, and more helpfully, the Court has turned to the generalized concept of "indicia of reliability"[85] — indications that there is adequate reliability to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement."[86] Using the Court's analysis, a prior statement by the unavailable witness bears "indicia of reliability" if it (1) is not inherently deceptive, (2) raises no problems of false identification or faulty recollection, (3) was made in circumstances not suggesting a motive to lie, and (4) was given under oath (5) in a judicial hearing which provided a reliable record (6) at which the accused was represented by counsel, and (7) at which the accused had an adequate opportunity to question the witness through cross-examination or its equivalent in form and purpose.[87] Under the proposed reform, the out-of-court testimony by the victim will bear several of these indicia of reliability supplemented by other "particularized guarantees of trustworthiness."[88]

The tapes, along with the expert's testimony, will reveal (1) whether the victim's statements were inherently deceptive, (2) whether there were problems of faulty recollection,[89] and (3) whether the child's circumstances suggest a motive to lie. Additionally, the tapes will provide as accurate a record as is possible.

The purpose of the oath is to ensure that the witness understands the importance of telling the truth.[90] In most cases involving child witnesses, an informal examination by the judge serves this purpose.[91] However, a specially trained expert would better be able to communicate to the child the importance of telling the truth, and also to evaluate the child's comprehension of it.[92]

Although the proposal contemplates representation by coun-

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84. *See* Ohio v. Roberts, 448 U.S. 56, 70 (1980).

85. *See id.* at 65-66, 70-71 (quoting California v. Green, 399 U.S. 149, 165 (1970)); Dutton v. Evans, 400 U.S. 74, 88-89 (1970). The Court has never required that any particular factor or set of factors be present in every case.

86. Mancusi v. Stubbs, 408 U.S. 204, 213 (1972).

87. *See* Ohio v. Roberts, 448 U.S. 56, 65-66, 70-71 (1980); Mancusi v. Stubbs, 408 U.S. at 215-16; Dutton v. Evans, 400 U.S. 74, 88-89 (1970).

88. *See* Ohio v. Roberts, 448 U.S. at 66.

89. Considering the nature of the offense, it is not likely that there will be problems of identification.

90. MCCORMICK, *supra* note 71, at § 245.

91. *See* Annot., *supra* note 31, at 389 (court must establish, for example, that the child believes it is wrong to lie and that she will be punished if she does).

92. *See* notes 42, 49-50 *supra*.

sel,[93] it does not anticipate cross-examination of the victim at trial.[94] Indeed, the absence of in-court cross-examination is central to the proposal. Nonetheless, the proposal does offer at least the equivalent of cross-examination. The testimony obtained under the proposal would be more reliable than can presently be obtained through cross-examination because the defendant would be allowed to question the victim through the expert. The information obtained through this procedure would be highly reliable because (1) the proposal mandates an early interview, in a setting conducive to the child's needs and the parties' observation; (2) the expert would be especially qualified to elicit relevant information from the victim; (3) defense counsel would have several opportunities to ask questions; (4) the expert would be available later to answer questions; and (5) recording the interviews would assure thorough efforts to discover the truth.[95]

Thus, according to these "indicia of reliability," the reliability of evidence under the proposed reform would be at least equal to, if not greater than, that normally associated with prior testimony of an unavailable witness. It would be ironic indeed to reject the proposal because it does not allow for strict confrontation, when it would provide a more satisfactory basis for evaluating the truth of the child's allegations — the very purpose of the confrontation clause.

CONCLUSION

The state currently intervenes in cases of parent-child incest with procedures which are inappropriate to the needs of the victim and society. These procedures aggravate the emotional trauma of the victim, fail to address the causes of incest, and

93. The proposal actually goes one step further. It establishes a minimum standard of competent representation: preparation by listening to the tapes, submitting questions, and developing arguments for court.

94. In view of the opportunities which the proposal gives the father to raise defenses, a face-to-face encounter could provide little more than a chance to intimidate the child. While having an opportunity to try to "break down" the witness is no doubt an oft-used tradition, when the witness is a child — especially an incest victim — the tradition can lead to little but harassment, which is not a legitimate reason to allow cross-examination. *See* Smith v. Illinois, 390 U.S. 129, 133 (1968) ("There is a duty to protect [a witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate . . . .") (quoting Alford v. United States, 282 U.S. 687, 692-94 (1931)).

95. Knowing that the tapes will be shown at trial will encourage the expert to do as thorough a job as possible. The parties' ability to ask questions through the expert also should promote thoroughness.

provide unnecessarily unreliable evidence at trial. This Note suggests an effective solution to these problems which is consistent with the constitutional rights of the accused to confrontation and due process.

—Dustin P. Ordway