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# Child Sex Abuse within the Family in Sub-Saharan Africa: Challenges and Change in Current Legal and Mental Health Responses

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# Child Sex Abuse Within the Family in Sub-Saharan Africa: Challenges and Change in Current Legal and Mental Health Responses

Cynthia Grant Bowman<sup>†</sup> & Elizabeth Brundige<sup>††</sup>

Child sex abuse within the family is extremely prevalent yet vastly underreported in sub-Saharan Africa. Until recently, state responses were deeply inadequate, characterized by outdated laws and legal procedures and scarce mental health services. In the past decade, however, many African countries have undertaken significant efforts, often informed by international law, to change their legal and mental health systems in order to respond more effectively to incest and other forms of child sex abuse. After discussing the risk factors for incest and the ways in which state responses have fallen short, this Article describes and evaluates a variety of legal and mental health reforms that African countries have adopted in recent years. While recognizing the importance of these reforms, the Article argues that these efforts must be strengthened and broadened. Efforts to bring offenders to justice and provide treatment for child victims must form part of a multidimensional approach that involves state and non-state actors, different professions, and the community at large, as well as include a focus on prevention. The Article concludes by setting forth some guidelines to inform the development of preventive measures and a more comprehensive and effective response to intra-familial child sex abuse.

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## Introduction

The front page of the December 1, 2006, *New York Times* displayed an article entitled “Sex Abuse of Girls Is Stubborn Scourge in Africa.”<sup>1</sup> The article recounted the stories of young girls who had been sexually abused, mostly by male relatives, resulting in brutal injuries. Menja, a five-year-old girl from Madagascar, was molested by her father’s brother.<sup>2</sup> For two weeks, she cried every time she urinated, but her family was unable to afford the medicine prescribed by the doctor.<sup>3</sup> Nine-year-old Kenia reported being sodomized by her uncle, who threatened to kill her if she told anyone.<sup>4</sup> Kenia acknowledged the abuse to a nurse at the local health

1. Sharon LaFraniere, *Sex Abuse of Girls Is Stubborn Scourge in Africa*, N.Y. TIMES, Dec. 1, 2006, at A1, available at <http://www.nytimes.com/2006/12/01/world/africa/01madagascar.html?pagewanted=all&r=0>.

2. *Id.*

3. *Id.*

4. *Id.*

clinic only because “the nurse threatened to operate if Kenia did not talk.”<sup>5</sup> As a result of the attack, she had a colostomy and two operations to close the surgical opening from that procedure, as well as other medical procedures to treat incontinence and anorexia.<sup>6</sup> For these girls, and the other sex abuse victims described in the article, their contact with the formal legal system resulted in failure and trauma.<sup>7</sup> In Kenia’s case, for example, officials failed to notify her parents about the single hearing that took place in the prosecutor’s office, her uncle recanted his original confession and was set free, and her case file mysteriously disappeared.<sup>8</sup>

Just as child sex abuse was not “discovered” in the United States until the 1970s,<sup>9</sup> though such abuse had undoubtedly been occurring for centuries, child sex abuse in sub-Saharan Africa did not become a topic of discussion within the disciplines of law and psychology, or in the media, until the 1980s and 90s.<sup>10</sup> This discussion is most advanced in South Africa, a country that is different in many ways from the rest of sub-Saharan Africa. Unlike other African countries with which it shares many traditions, South Africa is a comparatively developed country, though one of immense inequality.<sup>11</sup> Nonetheless, studies conducted in South Africa and experiments with new ways of confronting child sex abuse in the courts and the community can be very informative.

The experience of South Africa is useful for understanding child sexual abuse elsewhere in Africa for several reasons. First, most African countries, including South Africa, suffered from the imposition of colonial rule.<sup>12</sup> One result of that colonial rule is the coexistence of legal systems transplanted from the West with traditional cultures and customary law.<sup>13</sup> African countries are all also experiencing economic distress and the concomitant disruption of families.<sup>14</sup> Thus, despite immense variation among these local cultures and traditions, there are also similarities that allow us to reach meaningful insights based upon the experience in South Africa.

Second, in part due to its greater resources, South Africa has the most experience with legal and mental health approaches to child sex abuse—

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. See D. Kelly Weisberg, *The “Discovery” of Sexual Abuse: Experts’ Role in Legal Policy Formation*, 18 U.C. DAVIS, L. REV. 1, 1-3 (1984).

10. See Kevin Lalor, *Child Sexual Abuse in Sub-Saharan Africa: A Literature Review*, 28 CHILD ABUSE & NEGLECT 439, 440-44, 449-53 (2004).

11. See Ambar Narayan & Sandeep Mahajan, *The State of Opportunities in South Africa: Inequality among Children and in the Labor Market*, 2 INEQUALITY IN FOCUS 1, 1-5 (2013), <http://www.worldbank.org/content/dam/Worldbank/document/Poverty%20documents/Inequality-in-Focus-April2013.pdf>.

12. *Id.*; Bart Rwezaura, *Law, Culture and Children’s Rights in Eastern and Southern Africa: Contemporary Challenges and Present-day Dilemmas*, in LAW, CULTURE AND CHILDREN’S RIGHTS IN EASTERN AND SOUTHERN AFRICA 289, 319 (Welshman Ncube ed., 1998).

13. Christa Rautenbach, *Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law*, 60 J. LEGAL PLURALISM & UNOFFICIAL LAW 143, 144 (2010).

14. See Rwezaura, *supra* note 12, at 319-320; Marina Ottaway, *Africa*, FOREIGN POLICY 13, 13-14 (1999).

approaches that are designed to work in the traditional rural society that is, as is the case in so much of Africa, in the throes of rapid change. One can examine statutes, legal structures, and treatment models that have been tried in this setting—and have been subjected to critique by the very active South African Law Commission (SALC)<sup>15</sup> and by activist groups—and determine whether South African institutions and approaches might provide models for other African countries.

In Part I of this Article, we first establish that intra-familial child sex abuse is an extensive and massively underreported problem in Africa and explore reasons for the prevalence, underreporting, and apparent increase in incest over the last decades. We define incest as sexual abuse of a minor child<sup>16</sup> by a relative, including a parent, grandparent, sibling, aunt, or uncle, whether related by blood, adoption, or marriage (e.g., stepparents or, in cases of cohabitation, the mother's boyfriend).<sup>17</sup> In the African context, this group should perhaps be extended to include other caregivers because many African children are cared for by extensive networks of familial or quasi-familial relationships—multiple mothers if their fathers are polygamous, or even close neighbors.<sup>18</sup> For the purposes of this Article, our discussion of sexual abuse is limited to abuse that involves physical contact—including touching or fondling, and intercourse that is vaginal, anal, or oral.<sup>19</sup> Although sexual abuse of both female and male children

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15. In 2002, the South African Law Commission became the South African Law Reform Commission, the name by which it is known today. Judicial Matters Amendment Act 55 of 2002 § 4 (S. Afr.). In this Article, we refer to the Commission by its former name, under which it evaluated, critiqued, and proposed amendments to South Africa's sexual violence laws.

16. The age of majority may differ according to the law of the particular country, but it is typically 18 or sometimes 16. See, e.g., Trynie Davel, *The age of majority*, MAIL & GUARDIAN (Dec. 19, 2007), <http://mg.co.za/article/2007-12-19-the-age-of-majority> (“[M]ajority is therefore attained when a child reaches the age of 18 years or even earlier if the law applicable to the child specifies an earlier age for attainment of majority”).

17. This definition may differ from the definition of incest under the criminal law of a particular country. Incest, in the context of criminal law, has typically been defined as acts between persons who are prohibited by law from marrying, and the prohibitions on marriage may vary according to the degrees of relationship included. The crime of incest also typically applies only to vaginal sexual intercourse. See discussion *infra* Part III.A.1.

18. See Amelia Ann Kleijn, *The Demographic Profile and Psychosocial History of a Group of Convicted Perpetrators of the Rape of Children under the Age of Three Years*, 41 (2010) (unpublished Ph.D. dissertation, University of Witwatersrand), available at <http://wiredspace.wits.ac.za/bitstream/handle/10539/8574/VolI.PhD.pdf?sequence=6>.

19. See Rosana Norman et al., *Interpersonal Violence: An Important Risk Factor for Disease and Injury in South Africa*, 8 POPULATION HEALTH METRICS 1, 3 (2010), available at <http://www.ncbi.nlm.nih.gov/pubmed/21118578>; see also Kleijn, *supra* note 18, at 27 (defining sexual abuse as “interference with and needless touching of child’s genitalia; forcing child to view/touch/sexually manipulate adult; attempted or achieved penetration of genital/anal area”) (quoting C. PRITCHARD, *THE CHILD ABUSERS: RESEARCH AND CONTROVERSY* 12 (2004)). These definitions are more limited than some others. See, e.g., Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, art. 1, ¶ 5, Nov. 20, 2006, I.C.G.L.R. (defining child sex abuse as “any act which violates the sexual autonomy and bodily integrity” of children under the age of 18 under international law, including but not limited to rape, including statutory rape, and sexual assault); World Health Organization, *Report of the Consultation on Child Abuse Prevention* 7, 15-16 (1999), available at <http://www.who.int/mip2001/files/2017/>

occurs, many sources indicate that sexual abuse is more common among girls.<sup>20</sup> In one survey, respondents ranked sexual abuse as the most serious type of child abuse and considered parent-child intercourse, parent-child masturbation, and fondling by the parent of the child's genital area to be the worst types of child sexual abuse.<sup>21</sup>

Commentators offer a multitude of explanations for the prevalence of child sex abuse within the family in Africa; we discuss these theories in Part II. We then discuss, in Part III, the inadequacy of the legal structures that currently exist in African countries. Many originated as remnants of colonial rule<sup>22</sup> and are inadequate with respect to both the statutory definitions of incest and the severe problems associated with prosecuting and trying such a case. In Part IV, we present and evaluate a variety of legal reforms that have occurred in recent years, with a focus on reforms in South Africa.<sup>23</sup> Finally, after discussing the inadequacy of the mental health response to the problem of child sex abuse in Part V, we make a number of suggestions in Part VI for new approaches to prevention, some of them community-based and others a blend of traditional remedies and modern statutory law.

## I. Prevalance/Incidence of Incest<sup>24</sup>

### A. The Lack of Solid Data

Although there is increasing recognition that intra-familial child sex

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childabuse.pdf (defining child sexual abuse as “the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violate the laws or social taboos of society. . . . [which] may include but is not limited to: [t]he inducement or coercion of a child to engage in any unlawful sexual activity[; t]he exploitative use of child in prostitution or other unlawful sexual practices[; and t]he exploitative use of children in pornographic performances and materials”).

20. See, e.g., TIMOTHY OPOBO & ANSLEM WANDEGA, *CHILD SEXUAL ABUSE IN JINJA DISTRICT-EASTERN UGANDA*, (2011) (reporting that 98% of the victims of child sex abuse are girls); COX et al., *The Child Rape Epidemic, Assessing the Incidence at Red Cross Hospital, Cape Town, and Establishing the Need for a New National Protocol*, 97 *SO. AFR. MED. J.* 950, 953 (2007) (reporting that female rape victims outnumber males six to one at a South African hospital trauma center, but this may only indicate that young girls are more severely injured). But see VERED SLONIM-NEVO & LAWRENCE MUKUKA, *Child Abuse and AIDS-related Knowledge, Attitudes and Behavior Among Adolescents in Zambia*, 31 *CHILD ABUSE & NEGLECT* 143, 151-52 (2007) (more adolescent boys than girls reported sex abuse by a family member in one school-based Zambian study).

21. Lois Pierce & Vivienne Bozalek, *Child Abuse in South Africa: An Examination of How Child Abuse and Neglect Are Defined*, 28 *CHILD ABUSE & NEGLECT* 817, 823 (2004).

22. See SA LAW COMMISSION DISCUSSION PAPER 85 *Sexual Offences: The Substantive Law* §§ 3.6.1.1, 3.6.1.2.2, 3.6.1.2.3 (1999) (S. Afr.) [hereinafter *South African Law Comm'n Discussion Paper 85*].

23. Our research has primarily been limited to countries of Anglophone Africa.

24. Prevalence refers to the proportion of a population that has experienced child sex abuse; incidence is measured by the number of cases over a particular time period. See Kleijn, *supra* note 18, at 28.

abuse is widespread in Africa,<sup>25</sup> there is a dearth of hard data establishing its incidence. For a number of reasons, South Africa is ahead on this issue, having recognized child sexual abuse as a social problem comparatively early (in the 1980s).<sup>26</sup> Additionally, South Africa has an infrastructure of universities and scholars with the resources to study the problem, as well as medical schools, doctors, and psychotherapists that are interested in the issue.<sup>27</sup> There are also resources for treatment which, although still inadequate, are nowhere near as inadequate as in many other African countries.<sup>28</sup> Moreover, the post-apartheid government and legal system is leading the rest of Africa (and much of the world) in studying and developing a legal framework to address sexual violence against women.<sup>29</sup>

Even in South Africa, however, the incidence of incest is difficult to determine. Intra-familial child sex abuse crimes are most often charged as rape rather than incest because of the much higher penalty that attaches to a rape conviction—yet the South African Police Service (SAPS) does not report the number of child rape or sexual assault cases in which a close family member was the alleged perpetrator.<sup>30</sup> Available statistics suggest, however, that reported cases of child rape and sexual assault are increasing.<sup>31</sup> Between 1995 and 1996, child incest cases handled by the Child Protection Unit of SAPS increased from 221 to 253 (15%) while rape cases involving children increased from 10,037 to 13,859 (38%).<sup>32</sup> SAPS reported that sexual offence crimes against children increased from 25,428 to 28,128 (10.6%) between 2006–2007 and 2010–2011.<sup>33</sup> Neighboring Zambia experienced a sharper increase of 248% in reported cases of defilement (sex with a girl under the age of 16, regardless of consent) between

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25. See Diana Russell, *Towards Justice For Incest Survivors*, 27 *AGENDA* 62, 62 (1995); SA Law Commission Issue Paper 10 *Sexual Offences against Children*, § 3.5.1 (S. Afr.) [hereinafter *South African Law Comm'n Issue Paper 10*].

26. See Lator, *supra* 10, at 441, 456.

27. See generally *id.*

28. See U.N. Expert Group Meeting on Good Practices in Legislation on Violence Against Women, *A Brief Overview of Recent Developments in Sexual Offences Legislation in Southern Africa*, 8, U.N. Doc. EGM/GPLVAW/2008/EP.04 (May 12, 2008) (by Karen Stefiszyn) [hereinafter *Stefiszyn*]; World Health Organization, *Guidelines for Medico-Legal Care for Victims of Sexual Violence*, 2 (2003).

29. See, e.g., Stefiszyn, *supra* note 28 (“South Africa is the first country in the region to move from policy to law with respect to the provision of PEP at state expense to survivors of sexual violence”); cf. K. Alexa Koenig et al., *The Jurisprudence of Sexual Violence*, (Human Rights Ctr. at the University of California Berkeley, Working Paper, 50–51 May 2011), available at [http://www.law.berkeley.edu/HRCweb/pdfs/SVA\\_Jurisprudence.pdf](http://www.law.berkeley.edu/HRCweb/pdfs/SVA_Jurisprudence.pdf) (noting “the unique case of South Africa—the only sub-Saharan African country to provide an expansive and cohesive legislative response to sexual assault”).

30. Interview with Joan van Niekerk, Childline South Africa Office, in Johannesburg, South Africa (Aug. 22, 2013); Interview with a senior SAPS official, Pretoria, South Africa (Aug. 23, 2013).

31. See, e.g., *infra* notes 32, 33, and 34 and accompanying text.

32. *South African Law Comm'n Issue Paper 10*, *supra* note 25, § 3.2.1.

33. See SOUTH AFRICA POLICE SERVICE, *Crime Report 2010/2011*, 12 (Aug. 31, 2008), available at [http://www.saps.gov.za/about/stratframework/annual\\_report/2010\\_2011/10\\_crime\\_challenge\\_saps.pdf](http://www.saps.gov.za/about/stratframework/annual_report/2010_2011/10_crime_challenge_saps.pdf).

2007 and 2010.<sup>34</sup> These figures may reflect an increase in the incidence of child sex abuse, including within the family, an increase in reporting, or both. Only a small proportion of sexual offences are ever reported to the police, however, and child abuse by family members is especially likely to go unreported.<sup>35</sup>

The academic study of intra-familial child sex abuse in Africa began when pediatricians and other medical personnel started noticing severe injuries in children brought in to their clinics, injuries that were clearly caused by sex abuse.<sup>36</sup> Consequently, the earliest studies published were based on local, hospital-based populations; these samples were hardly representative, given that the abuse had to have produced injuries severe enough to cause families to seek medical help. Hospital-based studies began to appear in the 1980s, showing, for example, that of fifty cases in one Cape Town clinic in 1985, the perpetrator was either confirmed or suspected to be the father in fourteen cases, confirmed to be a stepfather in one case, and confirmed or suspected to be another relative in eight more.<sup>37</sup> In other words, the offender was a member of the child's own family in almost half of the cases. A later study reported that in cases presented to the trauma unit from 2003 to 2005, the offender in 7% of the cases was the father; in 4% of the cases, the uncle; and in 13% of the cases, other family members.<sup>38</sup> Another recent study of 5,308 child sexual abuse survivors who reported their abuse to a state hospital in the South African Province of KwaZulu-Natal between January 2001 and December 2006 found that approximately one-third (34%) had been sexually abused by a family member.<sup>39</sup>

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34. U.N. Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Addendum, Mission to Zambia*, ¶ 26, U.N. Doc. A/HRC/17/26/Add.4 (May 2, 2011) [hereinafter *Special Rapporteur on Violence Against Women*]; Victim Support Unit of the Zambian Police, *Gender Based Crime Statistics for the Year 2010* (on file with authors).

35. Samantha Waterhouse, *Open Society Foundation, The Impact of Changing Criminal Justice Responses to Child Victims of Sexual Abuse: Good Intentions, Questionable Outcomes*, 4 (2008), available at [http://osf.org.za/wp/wp-content/uploads/2012/09/CJL\\_Occasional\\_Paper\\_41.pdf](http://osf.org.za/wp/wp-content/uploads/2012/09/CJL_Occasional_Paper_41.pdf).

36. Such injuries included perineal tears, vaginal fistulae, or sexually transmitted diseases in a child under 10 years of age. See, e.g., R.W.K. Nduati & J.W.G. Muita, *Sexual Abuse of Children as Seen at Kenyatta National Hospital*, 69 E. AFR. MED. J. 350, 351 (1992); A.B. van As et al., *Child Rape - Patterns of Injury, Management and Outcome*, 91 S. AFR. MED. J. 1035, 1036 (2001); Marie-Antoinette Sossou & Joseph A. Yogtiba, *Abuse of Children in West Africa: Implications for Social Work Education and Practice*, 39 BRIT. J. SOC. WORK 1218, 1222 (2009).

37. A. M. Jaffe & P. Roux, *Sexual Abuse of Children—A Hospital-Based Study*, 74 S. AFR. MED. J. 65, 66 (1988); see also Deborah L. Westcott, *Sexual Abuse of Children: A Hospital-Based Study*, 65 S. AFR. MED. J. 895, 896-97 (1984). Many of the South African studies rely on records from the Red Cross Memorial Children's Hospital, which is the only dedicated trauma unit for children under thirteen in South Africa; the hospital treats 450-500 sexually abused children annually. A.B. van As et al., *supra* note 36, at 1035-38 (2001); Cox et al., *supra* note 20, at 950.

38. Cox et al., *supra* note 20, at 952.

39. Steven J. Collings, *Temporal Trends in the Nature and Scope of Reported Cases of Child Sexual Abuse in KwaZulu-Natal, South Africa*, 9 CHILD ABUSE RESEARCH 11, 12 (2008).



Incest and other forms of child sex abuse soon became topics for study by South African academics, especially psychologists, who based their findings on questionnaires administered to university or secondary school students about their childhood experiences.<sup>40</sup> These studies reported, variously, that up to 54.3% of students had experienced sexual abuse, and that, in a large number of cases, the perpetrators were family members.<sup>41</sup> Unfortunately, the various studies used different definitions of sexual abuse, so it is not easy to compare them or to draw definitive conclusions from them. Moreover, the samples were small and the students were not representative of the general population, who do not have higher education. Additionally, this type of retrospective self-reporting is not the most reliable method of investigation.<sup>42</sup>

A particularly egregious incident of child sex abuse in South Africa, involving the 2001 rape of a 9-month-old known as Baby Tshepang by a group including her great-grandfather and other relatives, led to widespread newspaper coverage.<sup>43</sup> When other similar incidents followed, talk of a “baby rape epidemic” spread in the country.<sup>44</sup> The perpetrator is likely to be a relative when a victim is younger than five years old,<sup>45</sup> which is not surprising given that children that age are rarely left alone. The Baby Tshepang rape provoked a national discussion and led to the establishment of the Parliamentary Task Group on the Sexual Abuse of Children.<sup>46</sup> In other countries, such as Kenya and Nigeria, concern over the rise of HIV/AIDS and its appearance in young children drew public attention to the

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40. Ann Levett, *A Study of Childhood Sexual Abuse Among South African University Women Students*, 19 S. AFR. J. OF PSYCHOL. 122 (1989); see also Steven J. Collings, *Childhood Sexual Abuse in a Sample of South African University Males: Prevalence and Risk Factors*, 21 S. AFR. J. PSYCHOL. 153 (1991); Steven J. Collings, *Child Sexual Abuse in a Sample of South African Women Students: Prevalence, Characteristics, and Long-Term Effects*, 27 S. AFR. J. OF PSYCHOL. 37 (1997) [hereinafter Collings, *Child Sexual Abuse - South African Women Students*]; S.N. Madu, *The Prevalence and Patterns of Childhood Sexual Abuse and Victim-Perpetrator Relationship Among a Sample of University Students*, 31 S. AFR. J. PSYCHOL. 32 (2001); S. N. Madu & K. Peltzer, *Risk Factors and Child Sexual Abuse Among Secondary School Students in the Northern Province (South Africa)*, 24 CHILD ABUSE & NEGLECT 259 (2000).

41. Levett, *supra* note 40, at 122 (43.6%); Collings, *Child Sexual Abuse - South African Women Students*, *supra* note 40, at 37 (34.8%); Madu & Peltzer, *supra* note 40, at 264 (54.3%).

42. See Ismail Yahaya et al., *A Comparative Study of the Socioeconomic Factors Associated with Childhood Sexual Abuse in Sub-Saharan Africa*, 11 PAN AFR. MED. J. 51, 54 (2012), available at <http://www.panafrican-med-journal.com/content/article/11/51/full/>; A. Revell et al., *The Prevalence of Unwanted Sexual Experiences Among Belgian and South African Students*, 43 J. SOC. WORK 191, 191 (2007).

43. Linda M. Richter, *Baby Rape in South Africa*, 12 CHILD ABUSE REV. 392, 393 (2003); Adele Balleta, *Alleged Rape of 9-month-old Baby Shocks South Africa*, 358 THE LANCET 1707, 1707 (2001). Rape of a child that young is accomplished by splitting the perineum with a knife or other object and is life threatening. Graeme J. Pitcher & Douglas M.G. Bowley, *Commentary, Infant Rape in South Africa*, 359 THE LANCET 274, 274 (2002).

44. See Richter, *supra* note 43, at 393, 397.

45. See Herman Grobler & Claudi van den Heever, *Your Child Is My Child: Community Education in Sexual Abuse for a High Risk Area*, 46 J. SOC. WORK 57, 65 (2010).

46. See Kleijn, *supra* note 18, at 4.

issue of child sex abuse.<sup>47</sup> In short, the problem of child sex abuse began to be publicized, and the issue made its way into the national media, raising public awareness of the problem and playing a critical role in policy development.<sup>48</sup>

Scholars and journalists in other African countries began to read and report on the South African studies and to undertake their own.<sup>49</sup> A 1995 hospital-based study in Zimbabwe reported that ten of the fifty-four cases reviewed (19%) involved incest; individually, the perpetrators were five fathers, three uncles, one brother, and one cousin.<sup>50</sup> An NGO in Zimbabwe that tracked 20,000 child sex abuse cases from 1998 to 2004 found that the number of incest cases among them ranged from 125 in 1998 to 940 in 2004; in sum, 2,930 cases out of the 20,000 involved incest.<sup>51</sup> A high-school-based Ethiopian study reported that 68.7% of female students had experienced some form of sexual abuse, 16.7% of which was perpetrated by family members.<sup>52</sup> A recent study by the Kenyan government showed that 31.9% of females between the ages of eighteen and twenty-four had experienced sexual abuse before the age of eighteen, 15.3% of which was committed by family members.<sup>53</sup> There is a remarka-

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47. Kevin Lalor, *Child Sexual Abuse in Tanzania and Kenya*, 28 *CHILD ABUSE & NEGLECT* 833, 841-42 (2004) (discussing the need for further research on the impact of HIV/AIDS on child sex abuse in Kenya and Tanzania); Lalor, *supra* note 10, at 448 (describing a 1988 study in Nigeria). Child abuse, including sexual abuse, came to public attention—especially to the attention of social workers in the region—in 1986, when the WHO held a seminar in Montreal on the topic for members from developing countries. Sossou & Yogtiba, *supra* note 36, at 1220.

48. A study of the press coverage in South Africa from January 2001 to December 2004 estimated that less than 1% of cases that were reported to the police—the only ones available for press coverage—were covered in the media, and some researchers relying on this coverage misrepresented the breadth of the problem by focusing on more egregious and less typical cases, giving attention to a disproportionately high number of assaults by strangers rather than the more common problem of intra-familial sex abuse. Nicole Corbella & Steven J. Collings, *The News About Child Sexual Abuse: A Systematic Analysis of Reports in the South African English-Language Press*, 35 *SOC. BEHAV. & PERSONALITY* 387, 395-96 (2007).

49. See *infra* notes 50-54; see, e.g., Karla Meursing et al., *Child Sexual Abuse in Matabeleland, Zimbabwe*, 41 *SOC. SCI. MED.* 1693 (1995).

50. Meursing et al., *supra* note 49, at 1698-99.

51. Girl Child Network, *Gravity of Girl Child Sexual Abuse in Zimbabwe: "Towards Creating A Culture of Prevention,"* 6-7, (2005), [http://www.kubatana.net/docs/sexual/gen\\_sexual\\_abuse\\_zim\\_050517.pdf](http://www.kubatana.net/docs/sexual/gen_sexual_abuse_zim_050517.pdf).

52. Dereje Worku et al., *Child Sexual Abuse and Its Outcomes Among High School Students in Southwest Ethiopia*, 36 *TROPICAL DOCTOR* 137, 138 (2006).

53. UNICEF et al., *Violence Against Children in Kenya: Findings from a 2010 National Survey*, 32, 44 (2010), available at [http://srsg.violenceagainstchildren.org/sites/default/files/documents/docs/VAC\\_in\\_Kenya.pdf](http://srsg.violenceagainstchildren.org/sites/default/files/documents/docs/VAC_in_Kenya.pdf). The same study found that 17.5% of male respondents between the ages of 18-24 had experienced sexual abuse before the age of 18, 11.5% of which was by family members. *Id.* at 32, 44. See also Nduati & Muita, *supra* note 36, at 351 (reporting on a retrospective study of twenty-one sexually abused children admitted to hospitals in 1984 and 1985 and finding that 9.5% of the cases involved abuse by a relative); Lalor, *supra* note 10, at 441-42 (reporting on a 1981 anthropological study of the Gusii tribe in Kenya that noted, in addition to actual father-daughter incest, sexual abuse of young girls by "adult men who in many instances are the classificatory fathers of their victims (i.e., they are closely related members of their victims' parents' generation)").

ble consistency among these statistics from a variety of countries: many studies report that 15–20% of child sex abuse cases are perpetrated by relatives.<sup>54</sup>

Another type of study undertaken involved reviewing court dockets to identify and count incest cases.<sup>55</sup> This method massively underestimates the total problem, as only a tiny fraction of child sexual abuse cases find their way into court, for reasons that are explored below, but it does provide insight into the proportion of incestuous abuse among court-involved cases. One Zimbabwean study involving the review of 291 court cases over the period from January 1989 to June 1992 revealed that relatives were the perpetrators in 29% of the cases.<sup>56</sup> A South African docket review of sex crimes against children from January 1996 to June 1997 showed that 14% of perpetrators were parents and an additional 12% were other family members, for a total of 26%.<sup>57</sup> Another study, based on the review of 11,926 rape cases reported at police stations in Gauteng Province in South Africa in 2003, found that 14% of the rapes of adolescent girls and 31.8% of the rapes of young girls under the age of 12 were committed by a relative.<sup>58</sup> Given that incest is the least likely type of child sex abuse to be taken to court or even reported at all, the actual percentages are undoubtedly much higher.<sup>59</sup>

Although fathers are the incest offenders in many cases, students responding to the questionnaires described above also emphasized the significance of abuse by stepfathers and uncles—stepfathers perhaps because they do not regard the child as their own,<sup>60</sup> and uncles because they play a

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54. See also Emily Chesshyre & Elizabeth M. Molyneux, *Presentation of Child Sexual Abuse Cases to Queen Elizabeth Central Hospital Following the Establishment of an HIV Post-exposure Prophylaxis Programme*, 21 MALAWI MED. J. 54, 55 (2009) (reporting that of the 65% of perpetrators who were known in one hospital-based study, 16% were family members); Avid Reza et al., *Violence Against Children in Swaziland: Findings from a National Survey on Violence Against Children in Swaziland: May 15-June 16, 2007*, 20 (2007), available at [http://www.unicef.org/swaziland/sz\\_publications\\_2007violenceagainstchildren.pdf](http://www.unicef.org/swaziland/sz_publications_2007violenceagainstchildren.pdf) (reporting that 15.7% of offenders in a Swazi study were male relatives other than father or stepfather while about 1% were fathers and an additional 1% were stepfathers), at 20; Revell et al., *supra* note 42, at 194 (reporting that 16.4% of child sex abuse was perpetrated by relatives); but see S.J. Collings et al., *Child Rape in Kwazulu-Natal, South Africa: An Analysis of Substantiated Cases*, 17 ACTA CRIMINOLOGICA 48, 49 (2004) (reporting that perpetrator was a family member in as high as 26% of cases in one hospital-based study).

55. See, e.g., Sally Nyandiyi-Bundy & Robert Bundy, *Child Sexual Abuse in Zimbabwe: An Analysis of Court Records*, 40 J. SOC. CHANGE & DEV. 21, 21 (1996).

56. *Id.* at 21.

57. SAVE THE CHILDREN, A SECTOR REVIEW OF CHILD ABUSE AND EXPLOITATION IN SOUTH AFRICA, 12–13 (2003).

58. LISA VETTEN ET AL., CTR. FOR THE STUDY OF VIOLENCE AND RECONCILIATION, TRACKING JUSTICE: THE ATTRITION OF RAPE CASES THROUGH THE CRIMINAL JUSTICE SYSTEM IN GAUTENG, 6, 34 (2008) available at [http://www.csvt.org.za/docs/tracking\\_justice.pdf](http://www.csvt.org.za/docs/tracking_justice.pdf).

59. Meursing et al., *supra* note 49, at 1694.

60. According to one girl in South Africa, “If [our mothers] get married to a new father, they need to leave their daughters behind. The girl can be much safer with her family rather than living with a stepfamily.” Inge Petersen et al., *Sexual Violence and Youth in South Africa: The Need for Community-based Prevention Interventions*, 29 CHILD ABUSE & NEGLECT 1233, 1241 (2005).

special role in certain cultures, a role which can become perverted as traditional values erode.<sup>61</sup> In Botswana, for example, the mother's brother plays a role in the lives of both his sister and her children, a role for which he was traditionally rewarded with material gifts; today, he may take that "gift" in the form of sex from his niece.<sup>62</sup>

Another way to determine the amount of public knowledge about the prevalence of incest, although qualitative, consists of holding fora or discussions among knowledgeable members of a community, such as children, parents, and/or professionals. A moderator asks participants to discuss their opinions about the occurrence and causation of child sex abuse and incest within their communities, and possible remedies for it.<sup>63</sup>

A gender rights NGO in Ghana carried out an ambitious study that combined a review of public records with focus group discussions and a large-scale countrywide survey.<sup>64</sup> The survey asked both women and adolescent girls about (1) being "touched against their will"; (2) "being forced to touch a man's private parts"; and (3) forced sex.<sup>65</sup> The results indicated that for 29% of adolescent girls their first sexual intercourse was by force and that male relatives committed 40% of these rapes, with stepfathers being the majority.<sup>66</sup> Another study reported that relatives, (including fathers, stepfathers, uncles, and cousins) perpetrated 15% of all child sexual abuse in Ghana.<sup>67</sup>

61. WOMEN AND LAW IN SOUTHERN AFRICA RESEARCH TRUST (BOTSWANA), NO SAFE PLACE: INCEST AND DEFILEMENT IN BOTSWANA 40, 49 (2002) (concerning the special role of maternal uncles) [hereinafter WLSA BOTSWANA, NO SAFE PLACE].

62. *Id.* at 41, 88. For more on child sex abuse by family members in Botswana, see Anikie M. Mathoma, et al., *Knowledge and Perceptions of Parents Regarding Child Sexual Abuse in Botswana and Swaziland*, 21 J. PEDIATRIC NURSING 67, 68-70 (2006) (reporting that a significant number of child sex abuse cases in Botswana, especially of repeated abuse, are committed by family members); Esther Salang Seloilwe & Gloria Thupayagale-Tshweneagae, *Sexual Abuse and Violence Among Adolescent Girls in Botswana: A Mental Health Perspective*, 30 MENTAL HEALTH NURSING 456, 458 (2009) (reporting on a case where a father was sleeping with his three daughters, who were 13, 15, and 18 years old).

63. See, e.g., Kevin Lalor, *supra* note 47, at 834 (reporting a 2000 study by Dungy and Mhagama in Tanzania that consisted of interviewing children, community leaders, and parents in selected communities and holding community fora; the discussions indicated sex abuse by fathers and other close male relatives occurs but is dealt with in the family); Opobo & Wandega, *supra* note 20, at 9 (reporting data collected through household interviews, focus group discussions, key informant interviews; adult informants opined that 24.9% of those who abuse children are fathers; 4% uncles; 1.6% aunts; 2.4% mothers; 5.9% stepmothers; and 4.7% stepfathers).

64. GENDER STUDIES & HUMAN RIGHTS DOCUMENTATION CTR., *BREAKING THE SILENCE & CHALLENGING THE MYTHS OF VIOLENCE AGAINST WOMEN AND CHILDREN IN GHANA: REPORT OF A NATIONAL STUDY ON VIOLENCE* 7 (Dorcas Coker Appiah & Kathy Cusack eds., 1999) [hereinafter *BREAKING THE SILENCE*].

65. Marilyn Aniwa, *Prevalence*, in *BREAKING THE SILENCE*, *id.* at 67-69.

66. *Id.* at 69 (40% of the rapes were committed by stepfathers, 6% by other male relatives, and 1% by fathers).

67. Kofi E. Boakye, *Culture and Nondisclosure of Child Sexual Abuse in Ghana: A Theoretical and Empirical Exploration*, 34 LAW & SOC. INQUIRY 951, 956 (2009) (citing Martilder E. Pappoe & Elizabeth Ardayfio-Schandorf, *The Dimension and Consequences of Violence against Women in Ghana*, STUDY REPORT 1 GHANA COMM'N OF WOMEN'S HEALTH (1998)).

Despite their limitations, these studies—reviews of hospital records, police reports, and court dockets; retrospective surveys of high school and university students; anecdotes; press reports; and structured community discussions—make clear that incest is a serious problem in Africa and constitutes a substantial proportion of child sex abuse incidents. However, there is general agreement among those who write about incest in Africa that it is massively underreported; what is known is only the tip of the iceberg.<sup>68</sup> We explore some of the reasons for the reluctance of victims to report in the next section.

## B. Under-reporting

There are many reasons for under-reporting that are common to crimes of sexual violence in general; other reasons are particular to crimes against children, and still others particular to incest. Reporting child sex abuse is typically a two-step process: (1) disclosure of the abuse to another person, and (2) reporting the crime to the authorities. One researcher of child sexual abuse speaks of the “problem recognition stage,” involving recognition that child sex abuse has taken place—both the discovery that the conduct has occurred and the conceptualization of that conduct as abuse—and the “consideration stage,” during which the victim and family assess the costs and benefits of seeking a legal remedy.<sup>69</sup>

Obviously abuse cannot be reported unless it has been disclosed in some way, whether through verbal disclosure or through physical symptoms, injuries, or behavioral changes.<sup>70</sup> Very young children are unlikely to understand what has been done to them or to have the vocabulary to describe it; some may also repress the memory of abuse.<sup>71</sup> Moreover, societal taboos and silence about sexual matters also hamper older children from understanding and disclosing what has happened to them.<sup>72</sup>

Children are least likely to tell anyone about sexual abuse in cases where the abuse is perpetrated by a trusted member of their own family.<sup>73</sup> This is true universally, but is especially so in Africa, where children are generally raised to be exceptionally deferential and obedient to older persons, especially males and specifically those males who have authority within their families.<sup>74</sup> This socialization makes it highly unlikely that a

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68. See *id.* at 954–56.

69. Natasha Hendricks, Developing a Psychosocial Understanding of Child Sexual Abuse Disclosure Among a Group of Child and Adolescent Females in Cape Town, South Africa 33–34 (August 2012) (unpublished thesis, University of Cape Town).

70. *Id.* at 25.

71. See Richter, *supra* note 43, at 394; Cox et al., *supra* note 20, at 953.

72. See Sossou & Yogtiba, *supra* note 36, at 1228.

73. See Hendricks, *supra* note 69, at 26 (reporting that only 30% of those abused by family spontaneously and unambiguously disclose verbally, whereas 43% of them disclose abuse through injuries and behavioral changes); cf. Hassan Saidi et al., *Child Maltreatment at a Violence Recovery Centre in Kenya*, 38 TROPICAL DOCTOR 87, 88 (2008) (reporting that almost 60% of victims of rapes within families refused to name the abuser).

74. See, e.g., WLSA BOTSWANA, NO SAFE PLACE, *supra* note 61, at 38; Alice Armstrong, *Consent and Compensation: The Sexual Abuse of Girls in Zimbabwe*, in LAW, CULTURE,

female child will report her father or uncle to the authorities.

The perpetrator may also swear the victim to secrecy and/or threaten her with punishment if she tells anyone.<sup>75</sup> One South African study reports that the two biggest factors inhibiting disclosure of abuse are the perpetrator's threats and the fear of the caregiver's reaction.<sup>76</sup> The initial reaction of the child's caregiver is critical both to reporting the crime and to the child's recovery from the trauma.<sup>77</sup> If the caregiver does not believe the child, the child will feel doubly betrayed, and children with non-supportive families suffer more severe psychological effects from the abuse, including post-traumatic stress disorder and dissociation.<sup>78</sup> 26% of a sample of 856 child sex abuse victims in one South African study reported being either punished or ignored when they disclosed the abuse.<sup>79</sup> To address this problem requires educating caregivers and the community at large to recognize behavioral signs that a child has been sexually abused, to understand what constitutes child sexual abuse short of intercourse, and to respond sensitively.<sup>80</sup> Education of caregivers is an important goal, as demonstrated by the fact that, in one study, 43% of parents could not even give a description of what is involved in child sexual abuse.<sup>81</sup>

Victims of intra-familial sexual violence are often reluctant to report crimes to the authorities because of the shame attached<sup>82</sup> and presumably because of dread over what the criminal process may involve. In Africa, this is exacerbated by the stigma of sexual violence (daughters may not be marriageable if it is known that they have been raped), and, in cases of incest, the family typically tries to conceal the crime in order to avoid bringing further shame upon the family.<sup>83</sup> One Ghanaian author speaks of

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TRADITION AND CHILDREN'S RIGHTS IN EASTERN AND SOUTHERN AFRICA, *supra* note 12, at 129, 144-45 [hereinafter Armstrong, *Consent and Compensation*].

75. See Hendricks, *supra* note 69, at 33; NAIRA KHAN, SEXUAL OFFENDERS OF CHILDREN: REVIEW OF THE LITERATURE 14 (1998); Christopher Chitereka, *Child Sexual Abuse in Zimbabwe: The Agenda for Social Workers*, 20 ASIA PAC. J. SOC. WORK & DEV. 29, 32 (2010) (describing how children remain silent because of bribes, threats, fear of non-belief, and the like).

76. Hendricks, *supra* note 69, at 68.

77. Ulrike Kistner et al., CHILD SEXUAL ABUSE AND HIV/AIDS IN SOUTH AFRICA, CTR. FOR AIDS DEV., RESEARCH AND EVALUATION FOR THE DEP'T OF HEALTH, 17-18 (2004).

78. Hendricks, *supra* note 69, at 72.

79. Steven J. Collings, *Nonsupportive Disclosure in Child Sexual Abuse: Confidants' Characteristics and Reactions*, 100 PSYCHOL. REP. 768, 769 (2007).

80. See Hendricks, *supra* note 69, at 60-61; see also Gertie Pretorius et al., *The Lived Experiences of Mothers Whose Children Were Sexually Abused by Their Intimate Male Partners*, 11 INDO-PACIFIC J. PHENOMENOLOGY 1, 1-2 (2011) (discussing the importance of addressing the psychological problems of victims' mothers, who may be overwhelmed with disbelief, anger, guilt, depression, blame and like emotions, especially if the abuser is their own partner, and thus be unable to provide support to their children).

81. Grobler & van den Heever, *supra* note 45, at 61.

82. WLSA BOTSWANA, NO SAFE PLACE, *supra* note 61, at 36-38.

83. See Moursing et al., *supra* note 49, at 1694; Juma Dwayera, *When Fathers Make Wives of Daughters. Girl Who Banished because Pregnant by Father Must leave to Avoid Stigma*, DAILY NATION (Kenya), May 3, 2000, reprinted in CYNTHIA GRANT BOWMAN & AKUA KUENYEHIA, WOMEN AND LAW IN SUB-SAHARAN AFRICA 375-76 (2003) (stating that mother did not want to report sexual violence because her daughter would never get married).

the “Collective Shame Problem,” which operates on two levels to prevent disclosure of child sex abuse: mothers are reluctant to disclose the abuse in order to both protect their daughters’ wider future interests and to prevent shame to the family unit in cases of incest.<sup>84</sup>

A child will also be extremely reluctant to disclose abuse if the perpetrator is the family’s breadwinner because of fears that this disclosure will have consequences for the family unit upon which she depends for survival.<sup>85</sup> One Zambian woman who had been abused by her uncle as a child reported that girls in this situation think “if you bring them to the police, there will be no one to keep me.”<sup>86</sup> Although all child sex abuse victims may feel something similar, her words have a particular truth in Africa, where sending the only wage earner to jail can bring economic disaster to the whole family and where children with no one to support them may end up on the street.

Victims and their family members may also refrain from reporting intra-familial child sex abuse for other reasons, such as lack of trust in the response from the police, fear of retraumatization of the victim by the criminal process, and a (realistic) sense that the offender is unlikely to be punished even if prosecuted.<sup>87</sup> Indeed, one knowledgeable commentator reported that, at a national workshop in South Africa:

[among] senior personnel in the criminal justice system and others who work with sexually assaulted children, when asked if they would report the sexual assault of their own child to the criminal justice system as it presently functions, there was unanimous agreement that they would seek an alternative solution.<sup>88</sup>

Being the complaining witness in any rape trial is difficult, and those problems are compounded for children, who may not have the vocabulary to articulate what has happened to them. This difficulty is particularly great in Africa, where sex is a taboo topic that families do not discuss, thus leaving children uninformed about the topic.<sup>89</sup>

For all these reasons, there is deep ambivalence in many African communities about the appropriateness of reporting a perpetrator of incest to the authorities at all and a preference for dealing with the situation within the family or the community, if not just attempting to ignore it.<sup>90</sup> But

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84. Boakye, *supra* note 67, at 960–63; see also Kleijn, *supra* note 18, at 29 (reporting that caregivers do not report for fear of further traumatizing the victim).

85. See Hendricks, *supra* note 69, at 2.

86. SUFFERING IN SILENCE: THE LINKS BETWEEN HUMAN RIGHTS ABUSES AND HIV TRANSMISSION TO GIRLS IN ZAMBIA, HUMAN RIGHTS WATCH 1, 27 (2002), available at <http://www.hrw.org/reports/2003/zambia/zambia1202.pdf> [hereinafter HUMAN RIGHTS WATCH, SUFFERING IN SILENCE].

87. See, e.g., Kistner et al., *supra* note 77, at 18.

88. Joan van Niekerk, *At the Coalface: The Childline Experience*, in *SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA* 263, 264 (Linda Richter et al. eds., 2004).

89. Oluyemisi Bangbose, *Legal and Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl*, 10 U. MIAMI INT’L & COMP. L. REV. 127, 130 (2001–02).

90. See, e.g., Rachel Jewkes et al., “If They Rape Me, I Can’t Blame Them”: Reflections on Gender in the Social Context of Child Rape in South Africa and Namibia, 61 SOC. SCI. & MED. 1809, 1818–19 (2005) [hereinafter, Jewkes et al., “If They Rape Me”].

keeping cases secret makes it impossible to know the parameters of the problem of incest and prevents victims from receiving psychological and medical treatment—which, with the very high rates of HIV/AIDS and other STDs in Africa, may be a death sentence.<sup>91</sup>

## II. Risk Factors for Child Sex Abuse Within the Family

The problem of incest in Africa is clearly a serious one, and most observers believe that the rates of incest and other forms of child sex abuse have been increasing.<sup>92</sup> Why is this so? Explanations virtually never focus upon the perpetrator's pathology or pedophilia.<sup>93</sup> Instead, they fall into the following types of risk factors: (1) socio-economic status; (2) sex inequality; (3) attitudes toward sexuality; (4) the status and socialization of children; (5) HIV/AIDS-related factors; (6) tradition-based explanations; and (7) risk factors based on the disruption of tradition.<sup>94</sup>

### A. Socio-Economic Risk Factors

African development has been accompanied by economic dislocation, poverty, and rapid urbanization.<sup>95</sup> Despite insistence that child sex abuse transcends all socio-economic groups,<sup>96</sup> poverty almost universally appears as a major risk factor.<sup>97</sup> One South African study of young girls who had experienced penetrative sexual abuse revealed that “[m]ost children within the study had dysfunctional family environments and communities with high unemployment, violence, poverty, and lack of physical and social infrastructure and services.”<sup>98</sup> As discussed earlier, poverty makes it difficult for victims to escape abuse or for their mothers to protect them if

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91. Indeed, child sex abuse is overtaking mother to child transmission as the main cause of HIV/AIDS in South Africa. Richard Mabala, *From HIV Prevention to HIV Protection: Addressing the Vulnerability of Girls and Young Women in Urban Areas*, 18 ENV'T & URBANIZATION 407, 417-18 (2006).

92. See, e.g., Meursing et al., *supra* note 49, at 1696-97.

93. See Carol A. Plummer & Wambui Njuguna, *Cultural Protective and Risk Factors: Professional Perspectives about Child Sexual Abuse in Kenya*, 33 CHILD ABUSE & NEGLECT 524, 529 (2009) (finding a plethora of risk factors that contribute to child sexual abuse; however, pedophilia was not one of the listed explanations). One major exception is a recent Ph.D. dissertation that analyzes the childhoods and psychosocial histories of men incarcerated for raping children under the age of three. Kleijn, *supra* note 18, at 179-214. Two other authors mention pedophilia as a potential cause of child sex abuse and incest, but do not place much emphasis on it as a main factor. Richter, *supra* note 43, at 396-97; Saidi et al., *supra* note 73, at 88.

94. See Plummer & Njuguna, *supra* note 93, at 528-29.

95. SAFER CITIES PROGRAMME & UN-HABITAT, *Strategy Paper on Urban Youth in Africa*, 4 (2004), available at [http://www.unhabitat.org/downloads/docs/5647\\_23903\\_2472\\_altedit.pdf](http://www.unhabitat.org/downloads/docs/5647_23903_2472_altedit.pdf).

96. Yahaya et al., *supra* note 42, at 1.

97. See, e.g., Romi Sigsworth, “Anyone Can Be a Rapist. . .”: An Overview of Sexual Violence in South Africa, 19 (2009), available at <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?id=110216&lng=en>; Sossou & Yogtiba, *supra* note 36, at 1220; Hendricks, *supra* note 69, at 33-34; Lalor, *supra* note 47, at 837; Linda M. Richter & Andrew R.L. Dawes, *Child Abuse in South Africa: Rights and Wrongs*, 17 CHILD ABUSE REV. 79, 85-86 (2008).

98. Hendricks, *supra* note 69, at 69.



the perpetrator is also the person upon whom they depend for economic survival. Furthermore, extremely high rates of unemployment in Africa—as high as 25.5% in South Africa and over 60% in Zimbabwe at present<sup>99</sup>—result in men spending more time at home with young children, often drinking, while their wives are at work.<sup>100</sup> Additionally, living conditions are overcrowded, causing adults to share sleeping areas with children.<sup>101</sup> On farms, multiple families may share a room as small as four meters by four meters, leaving no privacy for, or from, sex.<sup>102</sup>

The loss of a feeling of power resulting from unemployment is an important link to child abuse, creating what has been described as a crisis of masculinity.<sup>103</sup> In other words, incest and other forms of sexual violence are related to the “disempowerment and emasculation” of African men that results from unemployment and also from a heritage of colonialism and apartheid.<sup>104</sup> One South African child protection specialist opines that abuse of children results from conditions that obstruct the personal development of some members of society, who then rechannel their energy into violence.<sup>105</sup> In other words, disempowered men “use sex to reassert their masculinity.”<sup>106</sup>

## B. Sex Inequality

Discussions of child sex abuse and incest in Africa often note their integral connection to the vast disparity of power between men and women.<sup>107</sup> Ideologies of male entitlement and the dominant position of men within the family provide the perfect conditions for child sex abuse. A key element of patriarchal entitlement is an assumption that men have the

99. STATISTICS SOUTH AFRICA, *Quarterly Labour Force Survey, Quarter 3, 2012*, v (2012), available at <https://www.statssa.gov.za/Publications/P0211/P02113rdQuarter2012.pdf>; WORLD FOOD PROGRAMME, *Zimbabwe 2012 Facts and Figures*, 1 (2012), available at <http://www.wfp.org/sites/default/files/Zim%20Fact%20Sheet%2011%20April%202012.pdf>.

100. Richter & Dawes, *supra* note 97, at 86. See also Tabisile Msezane, *Sexual Exploitation of Girl Children Growing Up on Farms*, in THE NATIONAL CONSULTATIVE CONFERENCE AGAINST THE SEXUAL EXPLOITATION OF CHILDREN 60, 60 (Rose Barnes-September et al. eds., 1999); see also Loraine Townsend & Andrew Dawes, *Individual and Contextual Factors Associated With the Sexual Abuse of Children Under 12: A Review of Recent Literature*, in SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA, *supra* note 88, at 55, 71.

101. SAVE THE CHILDREN, *supra* note 57, at 24; see also WLSA BOTSWANA, *NO SAFE PLACE*, *supra* note 61, at 68.

102. Msezane, *supra* note 100, at 60.

103. See, e.g., Sigsworth, *supra* note 97, at 7, 19.

104. Carol Bower, *The Relationship Between Child Abuse and Poverty*, 56 *AGENDA* 84, 85 (2003).

105. Jackie Loffell, *Policy Responses to Child Sexual Abuse in South Africa*, in SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA, *supra* note 88, at 250, 251.

106. Denis McCrann et al., *Childhood Sexual Abuse Among University Students in Tanzania*, 30 *CHILD ABUSE & NEGLECT* 1343, 1344 (2006).

107. See, e.g., Sigsworth, *supra* note 97, at 20–24; Lalor, *supra* note 10, at 452–53; Ann Levett, *Contradictions and Confusions in Child Sexual Abuse*, 4 *S. AFR. J. CRIM. JUST.* 9, 18–19 (1991); Ann Levett, *Research Child Sexual Abuse: Some Problems and Comments*, in SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA, *supra* note 88, at 433; Plummer & Njuguna, *supra* note 93, at 429, 440–41.

right to take sexual advantage of women and children.<sup>108</sup> The power of patriarchy rests upon the patriarch's capacity to effect his will; one way to do that is by sexual intercourse, using violence if necessary.<sup>109</sup> Thus, violence becomes a strategy used by men to exert control over women.<sup>110</sup>

Studies show that child sex abuse is higher in communities with societal norms of female inferiority and sexual submissiveness.<sup>111</sup> Some scholars propose that the operative factor is a general hostility towards women.<sup>112</sup> Unsurprisingly, spousal battering is also widespread in Africa,<sup>113</sup> and battering of the mother is often associated with sexual abuse of her child.<sup>114</sup> Spousal battering exacerbates the situation, as mothers who are themselves abused do not feel able to protect their children from sexual abuse; yet, if they leave, these mothers expose their children to further abuse in their absence.<sup>115</sup> In addition to the denial and disbelief that mothers may experience upon discovering cases of incest, they are themselves likely to be submissive to the authority of their husbands and be fearful of upsetting the economy upon which the entire family depends.<sup>116</sup>

Children occupy the lowest rungs of the status hierarchy in many areas of Africa. This is especially true for girls, who may be treated as outsiders because they will ultimately belong to another family upon marriage.<sup>117</sup> If a man is supporting a girl child, he may feel entitled to sexual rights over her. For example, one Namibian father who was separated from his wife was reported to have told his daughter that if she was living under his roof, he expected her to have sex with him.<sup>118</sup> Another man raped his daughter to punish her when she came home late.<sup>119</sup> In these ways, men use rape as an instrument through which they communicate their control over the women and girls in their families.<sup>120</sup> In fact, in cases of the rape of an infant, several scholars argue that the violation is apparently intended to send a message of anger to the mother and to punish her for non-compli-

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108. Richter & Dawes, *supra* note 97, at 85.

109. Sigsworth, *supra* note 97, at 22.

110. *Id.*

111. Saidi et al., *supra* note 73, at 88.

112. See, e.g., Sigsworth, *supra* note 97, at 3; Saidi et al., *supra* note 73, at 88.

113. Cynthia Grant Bowman, *Domestic Violence: Does the African Context Demand a Different Approach?*, 26 INT'L J. L. & PSYCHIATRY 473, 475-76 (2003).

114. See Matthew J. Breiding et al., *Risk Factors Associated with Sexual Violence towards Girls in Swaziland*, 89 BULL. WORLD HEALTH ORG. 203, 203 (2011).

115. See Rachel Khatlane, *Domestic Violence: How it Contributes to Sexual Exploitation of Children*, in THE NATIONAL CONSULTATIVE CONFERENCE AGAINST THE SEXUAL EXPLOITATION OF CHILDREN, *supra* note 100, at 62, 62; van Niekerk, *supra* note 88, at 268.

116. Jewkes et al., "If They Rape Me," *supra* note 90, at 1819.

117. See, e.g., Janet Kabeberi-Macharia, *Reconstructing the Image of the Girl-Child, in LAW, CULTURE, AND CHILDREN'S RIGHTS IN EASTERN AND SOUTHERN AFRICA*, *supra* note 12, at 47, 47; Jewkes et al., "If They Rape Me," *supra* note 90, at 1819.

118. Jewkes et al., "If They Rape Me," *supra* note 90, at 1815.

119. Rachel Jewkes et al., *The Social Context of Child Rape in Namibia*, in UNRAVELLING TABOOS: GENDER AND SEXUALITY IN NAMIBIA, 167, 173 (Suzanne LaFont & Diane Hubbard eds., 2007).

120. *Id.*

ance with her partner's demands.<sup>121</sup>

### C. Myths about Male Sexuality

Male entitlement is rooted in widely accepted theories of male sexuality.<sup>122</sup> African commentators repeatedly testify to a culture that regards male sexuality as almost primordial—unstoppable once aroused, requiring the nearest female object.<sup>123</sup> This view is shared by both men and women.<sup>124</sup> Kevin Lalor, of the Dublin Institute of Technology School of Social Sciences and Law, notes in his literature review about child sexual abuse in Africa that both major tribes in Kenya agree on these propositions: (1) it is a “strongly held ideology in Kisumu, Kenya [center of the Luo tribe] that men must have access to sex constantly,”<sup>125</sup> and (2) “Kikuyu understandings of male sexuality by both men and women concur in considering the male sex drive to be strong and in the view that men need both a great deal of sex and variety in their sexual partners.”<sup>126</sup> Thus, if a father rapes his daughter when the mother is away at a funeral, is unavailable because of pregnancy, or has left because of domestic violence, some do not regard his turning to the daughter for sex in his wife's absence as abnormal behavior.<sup>127</sup>

Moreover, consonant with these constructions of masculinity that view men as unable to control their sex drive, women and girls are expected to comport themselves in ways that avoid arousing desire. This expectation normalizes sexual violence, blames the child victim, and causes her to blame herself and therefore not report the crime.<sup>128</sup>

### D. Status and Socialization of African Children

Children are regarded as property in many areas of Africa.<sup>129</sup> “Cultural values that encourage treating children as possessions,” in the words of one scholar, “pose no barrier to use of children to satisfy adult sexual desires.”<sup>130</sup> Moreover, the socialization of African children makes them

121. Petersen et al., *supra* note 60, at 1238; Saidi et al., *supra* note 73, at 88; Kleijn, *supra* note 18, at 77.

122. Lalor, *supra* note 10, at 452 (citing S.A. Buzzard, *Women's Status and Wage Employment in Kisumu, Kenya* (1982) (Ph.D. thesis, American University)).

123. See, e.g., Audrey Gadzekpo, *Societal Attitudes to Violence Against Women and Children, in BREAKING THE SILENCE & CHALLENGING THE MYTHS OF VIOLENCE AGAINST WOMEN & CHILDREN IN GHANA: REPORT OF A NATIONAL STUDY ON VIOLENCE*, *supra* note 64, at 120, 131–32; Sigsworth, *supra* note 97, at 21; Jewkes et al., “*If They Rape Me*,” *supra* note 90, at 1814; Petersen et al., *supra* note 60, at 1238.

124. Lalor, *supra* note 10, at 452.

125. *Id.* (citing S.A. Buzzard, *Women's Status and Wage Employment in Kisumu, Kenya* (1982) (Ph.D. thesis, American University)).

126. *Id.* (quoting N. Nelson, *Selling Her Kiosk: Kikuyu Notions of Sexuality and Sex for Sale in Mathare Valley, Kenya*, in *THE CULTURAL CONSTRUCTION OF SEXUALITY* (P. Caplan ed., 1987)).

127. Jewkes et al., “*If They Rape Me*,” *supra* note 90, at 1816.

128. Boakye, *supra* note 67, at 957–60.

129. Kabebere-Macharia, *supra* note 117, at 47.

130. Richter, *supra* note 43, at 398.

easy prey for incest; they have traditionally been taught absolute respect for and obedience to their parents and older persons in general.<sup>131</sup> An abuser who is both older and male, therefore, receives deference due both to his age and his sex.<sup>132</sup> In the case of incest, this is often coupled with the extreme deference owed to a parent figure.<sup>133</sup> One commentator notes that this ideology of filial respect was at one time appropriate under conditions where the interests of parent and child were interdependent, such as in an agrarian economy that required intensive labor from all members of the family.<sup>134</sup> Today, however, this ideology is subject to abuse; raising children to trust and obey parents and other adult authorities without question places them at risk of abuse.<sup>135</sup> A father can expect passivity and acquiescence, rather than resistance, to incest. One Nigerian observer points out that:

The African girl is born into a culture of male supremacy. . . . Daughters, in particular, dare not disobey the fathers' wishes . . . .

. . . Disobedience, which is very rare, results in physical reprisal, denial of material support, and ostracism by the family or visitation of an unseen evil force because such disobedience is regarded as a taboo.<sup>136</sup>

Taking into account that open discussions of sex are also taboo,<sup>137</sup> the African girl is exceptionally vulnerable. As Oluyemisi Bamgbose, a professor of criminal law and criminology, describes, "each person is supposed to find out all there is [to] know by experience."<sup>138</sup> Unfortunately for many African women, that initiatory experience is frequently one of incest and rape.<sup>139</sup>

#### E. Risk Factors Related to HIV/AIDS

HIV/AIDS has also contributed to the sexual abuse of young girls in Africa.<sup>140</sup> The interaction between HIV/AIDS and sexual abuse is multifaceted. First, men fearing infection may seek to avoid it by sleeping with young girls who are unlikely to be infected.<sup>141</sup> Second, the belief that sex with a virgin can cure AIDS—the so-called "virgin-cleansing" myth—is

131. Jewkes et al., "If They Rape Me," *supra* note 90, at 1813-14; WLSA BOTSWANA, NO SAFE PLACE, *supra* note 61, at 38; Kabeberi-Macharia *supra* note 117, at 51-52.

132. WLSA BOTSWANA, NO SAFE PLACE, *supra* note 61, at 38; Kabeberi-Macharia, *supra* note 117, at 52.

133. Kabeberi-Macharia, *supra* note 117, at 51-52.

134. Rwezaura, *supra* note 12, at 310.

135. Sigsworth, *supra* note 97, at 23.

136. Bamgbose, *supra* note 89, at 129.

137. Ndishishi M. Nambambi & Pempelani Mufune, *What Is Talked About When Parents Discuss Sex with Children: Family Based Sex Education In Windhoek, Namibia*, 15 AFR. J. REPROD. HEALTH 120, 124 (2011).

138. Bamgbose, *supra* note 89, at 130.

139. See Feyisikemi Salako, *Nigeria: Incestuous Fathers On the Prowl*, ALL AFRICA, 3 (Jun. 7, 2013), <http://allafrica.com/stories/201306070145.html>.

140. Chitereka, *supra* note 75, at 32 (citing Plummer & Njuguna, *supra* note 93).

141. *See id.*

widely reported.<sup>142</sup> (This is similar to the belief in 19th-century Europe that sexual intercourse with children was a cure for venereal disease.<sup>143</sup>) This myth is also consonant with traditional African medicine, which sees illness as a condition of bodily pollution needing to be cleansed; for example, sex is viewed as having cleansing power after bereavement.<sup>144</sup> Some analysts tie the increase in all types of child sex abuse to the AIDS epidemic and virgin-cleansing myth.<sup>145</sup> AIDS has also caused the death of parents, leaving many children without the adults who have protected them, and often placing them in the care of members of their extended family or other caregivers who may abuse them.<sup>146</sup> In these ways, HIV/AIDS is both a cause and consequence of violence against children; it leaves children vulnerable to sexual abuse, which in turn increases the likelihood that they will contract the disease themselves, and it provides an incentive for men who are afraid of contracting the virus to seek out virgins.

#### F. Tradition

There are also reports that a number of traditional practices contribute to the vulnerability of African children to incest, especially girls. For example, several authors report that traditional healers in Zimbabwe recommend that fathers have sex with their daughters in order to have good luck, such as good health, abundant harvests, and more money.<sup>147</sup> ZINATHA, the association of traditional healers in Zimbabwe, denies this, saying that incest is against customary law, and has promulgated a regulation in its Code of Practice to the effect that “[i]t is unlawful for a traditional healer to prescribe sex with a young girl to a client to improve his business prospects or as a lucky charm.”<sup>148</sup> Yet, newspaper stories about daughters being raped on the instructions of traditional healers have been common in the past.<sup>149</sup> These stories are not surprising because, as author Alice Armstrong points out, many traditional healers are not regulated, operate in secrecy, and are unscrupulous, often fraudulently labeling inappropriate practices as “tradition.”<sup>150</sup> Moreover, in times of economic distress, people may be exceptionally vulnerable to a healer’s advice.

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142. SAVE THE CHILDREN, *supra* note 57, at 25; Lalor, *supra* note 10, at 455; Winifred Kamau, *Legal Treatment of Consent in Sexual Offences in Kenya*, 22 (2013), available at <http://theequalityeffect.org/pdfs/ConsentPaperKenya.pdf>; Saidi et al., *supra* note 73, at 88.

143. Lalor, *supra* note 10, at 455.

144. Rachel Jewkes, *Child Sexual Abuse and HIV Infection*, in *SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA*, *supra* note 88, at 130, 131.

145. See, e.g., Chitereka, *supra* note 75, at 33; Lalor, *supra* note 10, at 451–52.

146. See, e.g., van Niekerk, *supra* note 88, at 267.

147. ALICE ARMSTRONG, *CULTURE & CHOICE: LESSONS FROM SURVIVORS OF GENDER VIOLENCE IN ZIMBABWE* 88 (1998) [hereinafter ARMSTRONG, *CULTURE & CHOICE*]. [EDITORS COMMENT: I added a hereinafter because Armstrong has multiple publications cited in the article, so I just want to avoid ambiguity]

148. Rene Loewenson et al., *Report on Action Programmes*, in *SEXUAL ABUSE OF CHILDREN IN ZIMBABWE* 19, 29 (Rene Loewenson ed., 1997).

149. *Id.* at 20.

150. ARMSTRONG, *CULTURE & CHOICE*, *supra* note 147, at 88.

Other traditions may also encourage incest and child abuse. In Namibia, such traditions include “sexualized play and joking” between children and adults, which one author believes may “create space for ambiguity about the boundary between acceptable and unacceptable practices.”<sup>151</sup> Customs in Zimbabwe also involve touching young girls,<sup>152</sup> and, as soon as they develop sexually, young girls are widely seen by men as the natural and normal object of older men’s sexual desires.<sup>153</sup>

The customs of certain communities even appear to sanction some forms of incest. In a few communities in Kenya, the practice of “beading” permits a man to become betrothed to a young girl who is a close relative by placing beads around her neck and ultimately to marry her.<sup>154</sup> In some communities in Malawi, moreover, fathers are allowed to have sex with their daughters in order to determine how much their dowry should be worth.<sup>155</sup> Thus, the persistence of several traditional practices may encourage incest. However, traditions can also provide protective factors against this type of child abuse, as we discuss in the next section.

#### G. Disruption of Tradition as a Risk Factor

The destruction of traditional communities by colonialism, apartheid, and economic change has also played a major role in the current incidences of incest.<sup>156</sup> Although traditional prohibitions against incest may not fully mirror common law and statutory definitions,<sup>157</sup> most African societies had strong taboos against sexual relations with close blood relatives;<sup>158</sup> intact and functional families also protected their daughters from contact with the men whom cultural mores did not restrain. Incest offenders were traditionally ostracized and/or physically punished and shamed.<sup>159</sup> “Traditional laws protected children. Those found guilty of sexual offenses would be fined heavily, stoned, excommunicated, forced to

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151. Jewkes et al., “*If They Rape Me*,” *supra* note 90, at 1812.

152. Loewenson et al., *supra* note 148, at 28.

153. Meursing et al., *supra* note 49, at 1702-03; Jewkes et al., “*If They Rape Me*,” *supra* note 90, at 1812. More recent “customs” are also credited by some with contributing to the rise in sexual abuse of young girls, for example, sexualizing young girls through the media and community practices such as beauty contests. ANDY DAWES, SEXUAL OFFENCES AGAINST CHILDREN IN SOUTH AFRICA: CONSIDERATIONS FOR PRIMARY PREVENTION (SUBMISSION TO PARLIAMENT TASK TEAM ON SEXUAL ABUSE AGAINST CHILDREN) § 4.1 (2002), available at <http://www.pmg.org.za/docs/2002/appendices/020313childinstitute.htm> [hereinafter Dawes, Sexual Offences].

154. Kamau, *supra* note 142, at 24.

155. Ngeyi Rath Kamyongolo & Bernadette Malunga, *The Treatment of Consent in Sexual Assault Law in Malawi*, 17 (2011), available at <http://theequalityeffect.org/wp-content/uploads/2013/04/consent-paper-Malawi-NK.pdf>; see also Sigsworth, *supra* note 97, at 23.

156. Llor, *supra* note 10, at 449-50.

157. South African Law Comm’n Discussion Paper 85, *supra* note 22, § 3.6.1.2.

158. See Meursing et al., *supra* note 49, at 1697; Kamau, *supra* note 142, at 24; Kamyongolo & Malunga, *supra* note 155, at 17.

159. WLSA BOTSWANA, NO SAFE PLACE, *supra* note 61, at 44; Meursing et al., *supra* note 49, at 1697; cf. Nyandiyi-Bundy & Bundy, *supra* note 56, at 23 (noting that in traditional societies in Botswana, communities ostracized perpetrators of child sex abuse and ceremonially cleansed the victims).

migrate or have to undergo a humiliating cleansing ceremony.”<sup>160</sup>

In the past, the close bonds and proximity of family members made violation of these taboos more difficult than it is today, where families are often devastated by AIDS, migrant labor, parental absence, remarriage, and urbanization.<sup>161</sup> As a result, children are more likely to live with relatives or stepparents who may not be restrained by traditional prohibitions against incest. The tradition of communal responsibility for parenting also seems to be eroding, with responsibility for child care falling increasingly upon the nuclear rather than the extended family.<sup>162</sup> It is well known among experts that child abuse of all types is correlated with factors that increase stress upon the family unit, and in Africa this includes isolation from extended-family support networks, single and/or working parents, and having more children than a caregiver can monitor.<sup>163</sup>

Westernization and modernization have also had a destructive impact upon many traditional practices and rituals that at one time functioned to teach about family and sexual responsibility.<sup>164</sup> Moreover, traditional cleansing rituals helped to heal and reintegrate the victim of incest, while modern therapeutic assistance may be unavailable to her.<sup>165</sup> Although it would be impossible or undesirable to resuscitate some of these traditions (such as strict sex segregation), the current situation, with many Sub-Saharan African societies in between tradition and modernity may “provide the worst of all worlds for children and families.”<sup>166</sup>

In closing, incest is clearly multi-determined in Africa, with some or all of the risk factors described above playing a role in many cases. One more risk factor should be mentioned as well, even though it is not structural like the seven discussed above: substance abuse.<sup>167</sup> Substance abuse clearly plays a disinhibiting role in many of the offenses that are recorded. One author describes “drunken fathers” having sex with their daughters.<sup>168</sup> Another refers to two types of personalities seen in offending fathers, one of which is the “chronically brutal alcoholic,” who is difficult to treat.<sup>169</sup> Finally, child sex abuse, like other forms of domestic violence, appears to be transmitted from generation to generation; those who have experienced abuse themselves are more likely to become offenders later in

160. Plummer & Njuguna, *supra* note 93, at 528.

161. Madu & Peltzer, *supra* note 40, at 264.

162. See Opobo & Wandega, *supra* note 20, at 19; Petersen et al., *supra* note 60, at 1241; Lalor, *supra* note 47, at 836; V.M. Lema, *Sexual Abuse of Minors: Emerging Medical and Social Problem in Malawi*, 74 E. AFR. MED. J. 743, 745 (1997).

163. Richter, *supra* note 43, at 396; see also JAMES GARBARINO & GWEN GILLIAM, UNDERSTANDING ABUSIVE FAMILIES 41-46 (1980) (analyzing correlation between factors that increase stress upon parents and child abuse); Brandt Steele, *Psychodynamic Factors in Child Abuse*, in THE BATTERED CHILD 81, 89-90 (Ray E. Helfer & Ruth S. Kempe eds., 4th ed. 1987).

164. Bower, *supra* note 104, at 85.

165. Nyandiyi-Bundy & Bundy, *supra* note 56, at 23.

166. Plummer & Njuguna, *supra* note 93, at 531.

167. Richter & Dawes, *supra* note 97, at 86-87.

168. Opobo & Wandega, *supra* note 20, at 21.

169. Nduati & Muita, *supra* note 36, at 352-53.

life.<sup>170</sup> It is thus important to provide legal and other remedies that may interrupt this trend between generations. Where these remedies are not effective, a “culture of impunity” arises, with perpetrators knowing that there is little chance that they will be reported, arrested, or convicted, which becomes a risk factor in its own right.<sup>171</sup>

### III. Inadequacy and Reform in the Legal Remedies for Incest

The legal systems in most African countries are inadequate to address the problem of incest. The laws are not appropriate; police and prosecutors are unsympathetic, untrained, or both, and the problems facing anyone trying to take such a case to trial are legion.<sup>172</sup> In the past decade, however, there has been a significant increase in sexual-violence legislation in sub-Saharan Africa, along with several important efforts focused on improving the procedures within the criminal justice system in cases involving child sex abuse.<sup>173</sup>

In Section A of this Part, we discuss some of the existing inadequacies, including problems with the laws that criminalize child sex abuse within the family; problems with the investigation, prosecution, and trial of such cases; and problems with applicable sentencing laws and policies. In Section B, we describe and evaluate some of the key legal reforms that African countries have undertaken in the past decade, through new legislation and other measures aimed at improving the criminal justice process in cases involving child sex abuse.

#### A. Legal and Procedural Inadequacies

##### 1. Statutes

The laws against incest, both criminal and civil, have their origin in the regulation of marriage. Laws regulating marriage prohibit persons within certain degrees of relationship from intermarrying; the categories of persons who may not intermarry then determine the category of persons between whom incest is possible.<sup>174</sup> For example, an adult woman and her biological father or brother are consanguineous and cannot marry; both parties would be punished for incest if they engaged in sexual intercourse.<sup>175</sup> The common law offense of incest, which is reflected in the law of many African countries, requires conventional vaginal sexual intercourse and thus excludes other forms of sexual abuse that may cause substantial emotional or physical damage.<sup>176</sup> Incest also typically applies only

170. Saidi et al., *supra* note 73, at 88; Breiding et al., *supra* note 114, at 203.

171. Sigsworth, *supra* note 97, at 24.

172. See discussion *infra* Part III.A.

173. See discussion *infra* Part III.B.

174. South African Law Comm'n, Discussion Paper 85, *supra* note 22, §§ 3.6.1.1–3.6.1.2.

175. See *id.* § 3.6.1.2.2 (defining relations of consanguinity in South African law).

176. *Id.* §§ 3.6.1.1; 3.6.1.2.6 See also Ghana Criminal Code,, Act No. 29 of 1960 (consolidated to 1999 and as amended by Criminal Code (Amendment) Act 2003), Cap. 6, §§ 105(1)-(2) (2003); Lesotho Penal Code Act 2010 (Act No. 6 of 2012) § 53(2);



to offences against a family member of the opposite sex,<sup>177</sup> excluding from protection, for example, boys who are raped by their male relatives. Moreover, the legal definition of incest is often very narrow in terms of the members of the family with whom sex is proscribed, leaving out the stepfathers and uncles who are reported to be among the worst offenders.<sup>178</sup> In many countries, therefore, the crime of incest is based on a colonial model of the nuclear family that is inappropriate in Africa. It is also heterosexist. The statutory categories of age and consent may also conflict with customary law categories governing sex with young girls, leading to additional problems for law enforcement.<sup>179</sup>

The other crimes with which an incest offender might be charged are rape, indecent assault, and defilement. Defilement, which traditionally applied to sexual intercourse with a girl below a specified age (often sixteen) irrespective of consent, would be a common charge in a case involving the rape of a young girl.<sup>180</sup> However, this offence, like the offence of rape, traditionally required intercourse and thus excluded other types of sexual abuse.<sup>181</sup> Anything short of vaginal penetration would fall under

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Malawi Penal Code, Cap. 7:01, §§ 157(1), 158; Tanzania Penal Code, Cap. 16 (as amended by Sexual Offences Special Provisions Act of 1998), § 158(1), 160; Uganda Penal Code Act 1950, Ch. 120 (as amended by Penal Code (amendment) Act of 2007), § 149(1); Zambia Penal Code, Cap. 87, 7 LAWS OF REP. OF ZAMBIA (as amended by Penal Code (Amendment) Act, No. 15 of 2006 and Penal Code (Amendment Act) No. 2 of 2011), §§159(1)-(2), 161(1); Criminal Law (Codification and Reform) Act No. 23/2004, 2005 (Zimbabwe), § 75(2).

177. South African Law Comm'n, Discussion Paper 85, *supra* note 22, §§ 3.6.1.2.6. In some countries there are two provisions—one for incest by males against female family members and another for incest by females against male family members. *See, e.g.*, Ghana Criminal Code, Act No. 29 of 1960 (consolidated to 1999 and as amended by Criminal Code (Amendment) Act 2003) Cap. 6, §§ 105(1)-(2) (1998); The Sexual Offences Act, (No. 3 of 2006) (as amended to 2012) §§ 20, 21 (Kenya); Malawi Penal Code, Cap. 7:01, §§ 157(1), 158; Tanzania Penal Code, Cap. 16 (as amended by Sexual Offences Special Provisions Act of 1998), §§ 158(1), 160; Zambia Penal Code, Cap. 87, 7 LAWS OF REP. OF ZAMBIA (as amended by Penal Code (Amendment) Act No. 15 of 2006 and Penal Code (Amendment Act) No. 2 of 2011), §§ 159(1)-(2), 161(1).

178. Botswana Penal Code (as amended to 2005), §§ 168(1), 169; Ghana Criminal Code. Act No. 29 of 1960 (consolidated to 1999 and as amended by Criminal Code (Amendment) Act 2003), Cap. 6, §§ 105(1)-(2) (2003); Lesotho Penal Code Act 2010 (2012), § 53(2); Malawi Penal Code, Cap. 7:01, §§ 157(1), 158; WLSA BOTSWANA, NO SAFE PLACE, *supra* note 61, at 40.

179. *See C. Theodora van der Zalm, Protecting the Innocent: Children's Act 38 of 2005 and Customary Law in South Africa—Conflicts, Consequences, and Possible Solutions*, 22 EMORY INT'L L. REV. 891, 911-13 (2008); Armstrong, *Consent and Compensation*, *supra* note 74, at 133. For many traditional African families, the permissibility of sex with a young girl depends upon whether she is beyond puberty and her parents have consented. *See id.* at 132-33. Although there are strong taboos in most African societies against incest between close blood relatives, these norms may not apply in cases involving child sex abuse by stepfathers or relatives who are not part of the immediate family. *See supra* Part II.G.

180. *See, e.g.*, Malawi Penal Code, Cap. 7:01, § 138; Tanzania Penal Code, Cap. 16 (amended 1998), § 136; Uganda Penal Code Act 1950, Ch. 120 (amended 2007), § 129.

181. *See* Malawi Penal Code, Cap. 7:01, § 138 ; Tanzania Penal Code, Cap. 16 (amended 1998), § 136; Uganda Penal Code Act 1950, Ch. 120 (amended 2007), § 129. *See also* SOUTH AFRICAN LAW COMM'N, DISCUSSION PAPER 85, *supra* note 22, at v-vi (noting that the common law definition of rape [which governed in South Africa prior to the

laws against indecent assault, which typically were subject to shorter sentences.<sup>182</sup> For example, under the Ghanaian Criminal Code, the sentence for defilement (defined more broadly as “natural or unnatural carnal knowledge” of a child under the age of 16) is 7 to 25 years, but indecent assault, a misdemeanor, has only a six-month minimum sentence.<sup>183</sup>

In its extended inquiry into reform of the Sexual Offences Act and the law on sexual offences against children, the South African Law Commission recommended in 1999 that an offence called “Persistent Sexual Abuse of a Child” be included in the Act.<sup>184</sup> Such a law would apply if a person engaged in two or more sexual acts with a child over a 12-month period, thus obviating the evidentiary requirement of pleading specific instances.<sup>185</sup> The Commission concluded that this requirement was a substantial obstacle to the prosecution of incest cases, where abuse has usually taken place over a long period of time and the child is unable to cite dates and specific details of each incident.<sup>186</sup> Unfortunately, however, when the new Sexual Offences Bill finally reached the floor of the South African Parliament, these sections were not included.<sup>187</sup>

## 2. *Investigation and Prosecution*

An incest victim faces substantial obstacles if she or he decides to seek the prosecution of the abuser. First, incest is typically reported long after the offence took place; it may take weeks, months, or even years.<sup>188</sup> Victims of incest are particularly unlikely to disclose what has happened to them, so the crime may only be revealed by pregnancy, sexually transmitted diseases, or other injuries requiring medical treatment.<sup>189</sup> At that point, evidence is hard to obtain. In most African legal systems, however, the testimony of a child alone is inadequate and the law requires some form of corroborative evidence of the child sex abuse, such as medical evidence.<sup>190</sup> Police may be unwilling to investigate a case, and prosecutors may be unwilling to initiate court proceedings where they lack physical

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adoption of Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act No. 32 of 2007) (S. Afr.)], applied to “a man having intentional unlawful sexual intercourse with a woman without her consent”).

182. See, e.g., Malawi Penal Code, Cap. 7:01, §§ 137, 155; Tanzania Penal Code, Cap. 16 (amended 1998), § 135, 156.

183. Ghana Criminal Code, Act No. 29 of 1960 (consolidated to 1999 and as amended by Criminal Code (Amendment) Act 2003), Cap. 6, §§ 101, 103.

184. South African Law Comm’n Discussion Paper 85, *supra* note 22, § 4.2.3.4.

185. *Id.*

186. *Id.*

187. See generally Criminal Law Amendment Bill, 2003, Bill 50-2003 (GG) (S. Afr.).

188. See, e.g., Mansah Prah, *Women’s and Girls’ Responses to Violence*, in *BREAKING THE SILENCE & CHALLENGING THE MYTHS OF VIOLENCE AGAINST WOMEN & CHILDREN IN GHANA: REPORT OF A NATIONAL STUDY ON VIOLENCE*, *supra* note 64, at 84, 94.

189. Meursing et al., *supra* note 49, at 1699; cf. Nyandiyi-Bundy & Bundy, *supra* note 56, at 22 (noting that in many cases of child sex abuse in Zimbabwe, the abuse was disclosed only “through the discovery of injury, damage, or infection”).

190. Patricia Kameri-Mbote, *Violence Against Women in Kenya: An Analysis of Law, Policy and Institutions, A Study Prepared for the Commonwealth Secretariat’s Gender and Youth Affairs Division*, 15-16 (2000), available at <http://www.ielrc.org/content/w0001>.

evidence of the abuse.<sup>191</sup>

Many child victims experience secondary victimization when they approach the police for assistance.<sup>192</sup> Police are drawn from the community and are mostly male.<sup>193</sup> They may treat the victim insensitively, not take her seriously, or be under social pressures of their own to disregard her, attitudes that in turn discourage reporting and prosecution.<sup>194</sup> Police stations often lack private waiting or interview rooms for child victims, and children and their families may be given little information about police procedures and be forced to wait for long periods of time before the child is brought to a doctor for medical examination and treatment.<sup>195</sup>

Moreover, doctors and other medical personnel are often unfamiliar with the legal definition of child sex abuse and the required procedures for obtaining and preserving evidence.<sup>196</sup> Examination procedures necessary for the collection of evidence are invasive and can cause pain and trauma for children, who are more likely than adults to suffer serious physical injuries as a result of sexual assault.<sup>197</sup> In some cases, examination under anesthetic may be necessary to prevent further injury and emotional stress to the child, as well as to ensure adequate evidence gathering.<sup>198</sup> Access to surgical facilities can also be important in ensuring the immediate treatment of any injuries that are discovered.<sup>199</sup> Yet even in Cape Town, which is one of the cities in Sub-Saharan Africa with the best resources, child victims of sexual violence are typically examined at rape response centers where anesthesia and surgical facilities are not available, and medical

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pdf; Loewenson et al., *supra* note 148, at 25; South African Law Comm'n Issue Paper 10, *supra* note 25, § 5.8.3.

191. AVON GLOBAL CENTER FOR WOMEN AND JUSTICE ET AL., "They are Destroying our Futures": Sexual Violence against Girls in Zambia's Schools, 41 (Oct. 2012), available at [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1004&context=avon\\_clarke](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1004&context=avon_clarke).

192. Sigsworth, *supra* note 97, at 25.

193. See, e.g., GENDERLINKS, *Peace building and Conflict Resolution*, SADC GENDER PROTOCOL 2013 BAROMETER MAURITIUS, 101 (2013), available at <http://www.genderlinks.org.za/article/mauritius-barometer-2013-chapter-8-peace-bilding-and-conflict-resolution-2013-12-15> (comparing women's representation in the police forces of thirteen SADC countries, which ranged from 6% in Mauritius and the Democratic Republic of Congo to 38% in the Seychelles).

194. *Id.*; Sigsworth, *supra* note 97, at 25.

195. Sigsworth, *supra* note 97, at 25.

196. See Cox et al., *supra* note 20, at 954; Meursing et al., *supra* note 49, at 1694.

197. Cox et al., *supra* note 20, at 163-64.

198. *Id.* at 163. The World Health Organization recommends that medical practitioners consider conducting an examination under anesthetic only where a child refuses to be examined or the medical practitioner suspects bleeding, the presence of a foreign body, or other conditions requiring medical attention. WORLD HEALTH ORGANIZATION, *Guidelines for Medico-Legal Care for Victims of Sexual Violence*, 85 (2003), available at <http://whqlibdoc.who.int/publications/2004/924154628x.pdf>. On the other hand, the Red Cross Memorial Children's Hospital in Cape Town, South Africa, which treats victims of sexual assault under the age of 14, has developed a standard protocol for the examination and treatment of such patients that includes detailed examination under anesthetic, with doctors noting that serious internal injuries may not be present that are not revealed by an initial external examination. Cox et al., *supra* note 20, at 161, 163.

199. Cox et al., *supra* note 20, at 163-64.

officers lack adequate expertise.<sup>200</sup>

Inadequate human and technological resources also present barriers to effective collection of evidence. In South Africa, long waiting periods of eighteen months or more for DNA evidence to be processed can prolong prosecutions of child sex abuse cases.<sup>201</sup> In other countries, DNA evidence is expensive and difficult to access at all.<sup>202</sup> In Zambia, police officers frequently do not have access to police vehicles and lack funds to pay for public transportation or gasoline, which further compromises their ability to conduct investigations.<sup>203</sup> Additionally, both police stations and medical facilities are effectively inaccessible in some rural areas.<sup>204</sup>

Investigating officers may not be trained to address child sexual abuse cases and thus may neglect to gather important evidence.<sup>205</sup> Police have been known to refer cases of incest back to traditional leaders rather than proceed to prosecute the offenders.<sup>206</sup> In other cases, corrupt practices may interfere with prosecution—for example, bribes by the offender to police or other officials that may result in the loss or destruction of docket and evidence.<sup>207</sup>

Finally, the laws of several African countries require that incest cases not be prosecuted without first obtaining approval from the National Director of Public Prosecutions or his or her equivalent<sup>208</sup>—a requirement that perhaps makes sense in cases involving sex between adult related persons, where each may be subject to prosecution. Where the incest laws are being used as a way to combat a particularly harmful form of child sex abuse, however, the requirement simply results in delays that prolong the trauma of the victim, especially if she must continue to live in the home of her abuser. Further, delay typically makes it less likely that a conviction will be obtained.<sup>209</sup>

### 3. Trial

A child incest victim faces enormous obstacles at trial, beyond the pressure that may already be brought to bear by her family and community

200. *Id.*

201. M.J. Ntlatleng, *Circumstances that Influence the Finalization of Child Sexual Abuse Cases in Tembisa*, 3 (Nov. 2011) (unpublished M.A. thesis, North-West University) (on file with the South African National Research Foundation).

202. See AVON GLOBAL CENTER, *supra* note 191, at 41.

203. *Id.* at 42.

204. Celestine I. Nyamu & James T. Gathii, *Toward Reform in the Law on Rape and Related Sexual Offences in Kenya*, in *WOMEN AND AUTONOMY IN KENYA: LAW REFORM AND THE QUEST FOR GENDER EQUALITY*, 52, 60 (Kivutha Kibwana, ed., 1994).

205. Ntlatleng, *supra* note 201, at 14.

206. WLSA BOTSWANA, *NO SAFE PLACE*, *supra* note 61, at 43.

207. *DEADLY DELAY: SOUTH AFRICA'S EFFORTS TO PREVENT HIV IN SURVIVORS OF SEXUAL VIOLENCE*, 16 *HUMAN RIGHTS WATCH* 11 (2004), available at <http://www.hrw.org/sites/default/files/reports/southafrica0304.pdf> [hereinafter *HUMAN RIGHTS WATCH, DEADLY DELAY*].

208. See Botswana Penal Code (as amended to 2005), § 171; Malawi Penal Code, Cap. 7:01, § 160; Uganda Penal Code Act 1950, Ch. 120 (as amended by Penal Code (Amendment) Act of 2007), § 151.

209. WLSA BOTSWANA, *NO SAFE PLACE*, *supra* note 61, at 36, 90.

to withdraw the case. Despite research showing that the testimony of children can be as reliable as that of adults,<sup>210</sup> the law of evidence in many African countries requires corroboration of the testimony of a child under a certain age (often 14) in order to convict, and the judges will instruct that evidence of a child on sexual matters should be evaluated with double caution—the so-called cautionary rule.<sup>211</sup> The victim, already severely traumatized by the incest, is likely to be re-traumatized by the search for corroboration, which may require intrusive physical examination and implies that she is not believed.<sup>212</sup> In many incest cases, moreover, there may be no medical evidence available, either because of delay in reporting or lack of physical injury.

In addition, under the adversary system of trial in Anglophone African countries, a victim is required to confront her abuser face to face in court and be subjected to aggressive cross-examination by defense counsel, which is both intimidating and re-traumatizing.<sup>213</sup> Although incest victims typically report the crime long after the fact (if at all),<sup>214</sup> the defense often attempts to impeach their credibility by questioning why they did not report the offense earlier,<sup>215</sup> demonstrating their inability to remember precise dates and facts, and by confronting them with prior inconsistent statements.<sup>216</sup> Previous inconsistent statements are common because children tend to disclose abuse gradually, little by little, making it appear that they have changed their stories.<sup>217</sup>

Additional problems are caused by cultural differences between the language of the courtroom, which typically requires anatomical detail, and that of incest victims.<sup>218</sup> Not only are these victims often very young, sometimes even toddlers,<sup>219</sup> but African children also lack knowledge about sexual activities either because of their young age or because of the taboo on discussing sexual matters.<sup>220</sup> They may seem to be confused and

210. See Victoria Talwar, R.C.L. Lindsay, & Kang Lee, *The Child Witness Project: Examining the Assessment of the Competence of Child Witnesses*, in CHILDREN AND THE LAW: ESSAYS IN HONOUR OF PROFESSOR NICHOLAS BALA, 77-92 (Sanjeev Anand ed., 2011) (discussing how, contrary to traditional assumptions, children's testimony in court after promising to tell the truth is relatively reliable and accurate).

211. Levett, *Contradictions and Confusions in Child Sexual Abuse*, *supra* note 107, at 16; Nyamu & Gathii, *supra* note 206, at 155-56; Jacqui Gallinetti, *Legal Definitions and Practices in Child Sexual Abuse*, in SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA, *supra* note 88, at 209, 220.

212. Loewenson et al., *supra* note 148, at 25.

213. Margaret Tembe-Thawala, *Risk Factors to Sexual Exploitation Among Children in Swaziland*, in THE NATIONAL CONSULTATIVE CONFERENCE AGAINST THE SEXUAL EXPLOITATION OF CHILDREN, *supra* note 100, at 63, 65.

214. WLSA BOTSWANA, NO SAFE PLACE, *supra* note 61, at 35-36.

215. SA Law Commission Discussion Paper 102 Process and Procedure, § 33.3.7.1 (2001) (S. Afr.) [hereinafter South African Law Comm'n Discussion Paper 102].

216. South African Law Comm'n. Issue Paper 10, *supra* note 25, § 5.2.1.

217. South African Law Comm'n Discussion Paper 85, *supra* note 22, § 5.17.18; South African Law Comm'n Issue Paper 10, *supra* note 25, § 5.2.1.

218. Tembe-Thawala, *supra* note 213, at 64.

219. See Richter, *supra* note 43, at 395.

220. Felicity Coughlan & Renette Jarman, *Can the Intermediary System Work for Child Victims of Sexual Abuse?*, 83 FAMILIES IN SOCIETY 541, 544 (2002).

thus not very credible as witnesses. Exacerbating all these obstacles are the immense delays caused by the backlog in court calendars—delays of up to two years in South Africa.<sup>221</sup> Because of these delays and the insufficiency of corroborating evidence, large numbers of incest offenders are acquitted, thus apparently vindicating them, undermining their victims, and threatening the safety of both the victims and other children within the family.<sup>222</sup>

It is not surprising, then, that many psychologists and social workers treating incest victims believe that taking a case to court, with the resulting attempts to discredit the victim's testimony and the unlikelihood of success, interferes with the work of healing.<sup>223</sup> Nor is it surprising that victims are reluctant to report the abuse. In the words of a Human Rights Watch report on Zambia:

[V]ictimised girls remain silent in the face of legal and social services systems that fail to act to protect girls' rights. To report a crime of sexual violence or abuse, a girl would face a police department that is rarely child- or gender-sensitive, health service providers that may scold her for being promiscuous, a court system lacking any facilities for youths, and a societal structure that teaches girls to be submissive to men. Even if she did report abuse, chances that officials would act against the abuser are minimal.<sup>224</sup>

In the face of all these obstacles, it is no wonder that so many victims of incest in Africa choose not to report or proceed to court against their abusers. Even if they did so, as we show in the next section, the chances that the offender would be punished are slim.

#### 4. Sentencing

Conviction is an unlikely outcome of the trial of an incest or child sex abuse case in Africa.<sup>225</sup> A 2000 study commissioned by the SALC found that only 9.1% of child rape cases between January 1997 and April 1998 resulted in convictions.<sup>226</sup> Childline, a group dealing with child sex abuse in South Africa, reports that out of hundreds of cases that came to its attention in one area in 2002, they were unable to identify a single case in which the offender was convicted.<sup>227</sup> The closer the relative, especially the father,

221. *Id.* at 545; Ntlatleng, *supra* note 201, at 16–17.

222. Coughlan & Jarman, *supra* note 220, at 545; see Nyamu & Gathii, *supra* note 206, at 156; South African Law Comm'n Issue Paper 10, *supra* note 25, § 3.4.

223. Levett, *Contradictions and Confusions in Child Sexual Abuse*, *supra* note 107, at 15.

224. HUMAN RIGHTS WATCH, *SUFFERING IN SILENCE*, *supra* note 86, at 2.

225. SOUTH AFRICAN LAW COMM'N ISSUE PAPER 10, *supra* note 25, § 3.4.

226. See SOUTH AFRICAN LAW COMM'N, *Research Paper 18, Conviction Rates and Other Outcomes of Crimes Reported in Eight South African Police Areas*, 19 (2001), available at <http://www.justice.gov.za/salrc/rpapers/rp18.pdf>.

227. Van Niekerk, *supra* note 88, at 268. Recent statistics from South Africa's National Prosecuting Authority (NPA), which do not distinguish between offences committed against children and those committed against adults, indicate that 65% of sexual offence cases that were finalized in 2011–12 resulted in convictions. NAT'L PROSECUTING AUTH., *2011–12 Annual Report*, 22 (2012). Some commentators have argued, however, that the focus on high conviction rates is misleading as it does not account for the larger

the less likely he is to be convicted; one Zimbabwean study of court dockets showed, for example, that fathers and grandfathers were significantly more likely to be acquitted than uncles.<sup>228</sup>

Before the recent reforms discussed in the next section, which enacted mandatory minimum sentences,<sup>229</sup> few offenders were given sentences commensurate with their crimes, sentences that would be likely to deter them or others from similar future offenses.<sup>230</sup> Although the applicable statute in Botswana for rape of a young girl provides for sentences up to life imprisonment, no maximum sentence was imposed between 1994 and 1999, and most sentences were five to six years, causing the legislature to amend the statute to add a ten-year minimum sentence.<sup>231</sup> There is still no minimum for the offence of incest, although a person convicted of incest with a child under sixteen can be sentenced to a maximum of life in prison.<sup>232</sup> One Kenyan study showed that sentences in defilement cases from 1989 to 1993 ranged from seven months to ten years.<sup>233</sup> A 1997 Zimbabwe study reported that the average sentences for incest were two to three years and those for statutory rape were one to five years with a \$1000 fine.<sup>234</sup> The rape of an adult woman was punished, on average, with sentences from twelve years to death.<sup>235</sup>

Prison sentences often conflict with traditional punishments under African customary law. In Zimbabwe, for example, the traditional punishment for child sex abuse was physical punishment or banishment of the offender and compensation.<sup>236</sup> Families living in rural areas governed by customary law may therefore avoid the state system and pursue community remedies instead.<sup>237</sup> Compensatory remedies may appear to ameliorate the economic consequences of child sex abuse for a family, specifically the economic consequences resulting from an abused child's diminished chances of contracting a marriage that will contribute *lobola*, or bride

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number of cases that the NPA has declined to prosecute. For example, in 2005–06, the NPA prosecuted only 14% of cases, declined to prosecute 60%, and referred the rest back to the police for further investigation. JEAN REDPATH, FAILING TO PROSECUTE? ASSESSING THE STATE OF THE NATIONAL PROSECUTING AUTHORITY IN SOUTH AFRICA, 41 (2012), ISS MONOGRAPH 186 available at <http://www.issafrica.org/uploads/Mono186WEB.pdf>.

228. Nyandiyi-Bundy & Bundy, *supra* note 56, at 23.

229. See discussion *infra* Part II.B.3.

230. Loffell, *supra* note 105, at 254; HUMAN RIGHTS WATCH, *Suffering in Silence*, *supra* note 86, at 62.

231. WLSA BOTSWANA, NO SAFE PLACE, *supra* note 61, at 83–84; Botswana Penal Code (as amended to 2005), § 147(1). Botswana was one of the first African countries to adopt statutory minimums for the offenses of rape and defilement and to make these crimes gender-neutral. Jill Thompson & Felly Nkewto Simmonds, *Population Council, Rape Sentencing Study: A Review of Statutory Sentencing Provisions for Rape, Defilement, and Sexual Assault in East, Central, and Southern Africa*, THE POPULATION COUNCIL 9 (2012), available at [http://www.popcouncil.org/pdfs/2012RH\\_RapeSentencingStudy.pdf](http://www.popcouncil.org/pdfs/2012RH_RapeSentencingStudy.pdf).

232. Botswana Penal Code (as amended to 2005) § 168(1).

233. Nyamu & Gathii, *supra* note 206, at 166, 188 App.2.

234. Loewenson et al., *supra* note 148, at 27.

235. *Id.*

236. Armstrong, *Consent and Compensation*, *supra* note 74, at 137.

237. *Id.*

price, to the family.<sup>238</sup> Families may also view compensatory remedies as a potential path out of poverty and as a source of greater direct benefits for the family than can be afforded by a formal justice system that is perceived as slow, ineffective, and expensive.<sup>239</sup> For the child who has been sexually abused, however, such remedies can contribute to secondary victimization by implying that it was her family, and not herself, who was harmed; by minimizing the trauma she experienced; and by reinforcing her feelings of guilt and violation.<sup>240</sup> The payment of compensation also appears to absolve the perpetrator and may enable the abuse to continue.<sup>241</sup>

In recent years, public outcry over the continued prevalence of child sex abuse and the inadequate legal frameworks available to combat impunity and protect child victims has led, in many African countries, to significant efforts at reform, which we discuss in the next section.<sup>242</sup>

## B. Legal Reform

African countries have attempted to address some of the problems described above by changing their statutes and introducing a variety of procedural changes. We describe and critique these changes in this section, focusing in particular on South Africa, where these reforms have been most developed and subjected to the most scrutiny. First, however, we discuss the major international law instruments applicable to intra-familial child sex abuse, which have helped to guide many of these reform efforts.

### 1. *International Law*

All African countries have ratified international and regional human rights treaties that impose upon them duties to protect children from sexual violence within the family and to provide redress where it occurs.<sup>243</sup> Many have directly incorporated those international standards into their constitutions and the new laws discussed below, either expressly<sup>244</sup> or by

238. *Id.* at 148.

239. Sossou & Yogtiba, *supra* note 36, at 1228; see Opobo & Wandega, *supra* note 20, at 25; see AVON GLOBAL CENTER, *supra* note 191, at 43.

240. See Adelaide Magwaza, *Sexual Abuse: A Socio-Cultural Developmental Perspective*, in CONTEMPORARY ISSUES IN HUMAN DEVELOPMENT: A SOUTH AFRICAN FOCUS 163–64 (Cheryl de la Rey et al. eds., 1997).

241. *Id.* at 163; see Richter & Dawes, *supra* note 97, at 85.

242. See, e.g., Lillian Artz, *Criminal Law (Sexual Offences) Amendment Act (32 of 2007): Reforms, Risks, and Revelations*, 2 (2010), OPEN SOCIETY FOUNDATION FOR SOUTH AFRICA, available at [http://osf.org.za/wp/wp-content/uploads/2012/09/CJIOccasionalpaper9\\_CriminalLawSexualOffencesAmendmentAct\\_LillyArtz1.pdf](http://osf.org.za/wp/wp-content/uploads/2012/09/CJIOccasionalpaper9_CriminalLawSexualOffencesAmendmentAct_LillyArtz1.pdf); see W. Onyango-Ouma et al., *The Making of the Kenya Sexual Offences Act, 2006: Behind the Scenes*, 9–13 (2009), available at [http://www.popcouncil.org/uploads/pdfs/2009RH\\_KenyaSexOffenses.pdf](http://www.popcouncil.org/uploads/pdfs/2009RH_KenyaSexOffenses.pdf).

243. See *infra* text accompanying note 256.

244. See, e.g., Law of the Child Act (Act No. 21 of 2009) (Tanz.) (explaining that the act's purpose is "to provide for reform and consolidation of laws relating to children, to stipulate rights of the child and to promote, protect and maintain the welfare of a child with a view to giving effect to international and regional conventions on the rights of the child"); Children's Protection and Welfare Act, (Act No. 7 of 2011) (Lesotho) ("The objects of this Act are to extend, promote and protect the rights of children as defined in



adopting provisions that reflect their international obligations.<sup>245</sup>

Although states, rather than individuals, are the primary duty-bearers under international law,<sup>246</sup> these obligations are not limited to situations where a child is in the custody of the state but also extend to situations where family members commit acts of violence.<sup>247</sup> The Convention on the Rights of the Child (CRC), which every African country other than Somalia has ratified, compels governments to “take all appropriate legislative, administrative, social and educational measures” to protect children from sexual violence “while in the care of parent(s), legal guardian(s), or any other person who has the care of the child.”<sup>248</sup> The Committee on the Rights of the Child, which monitors compliance with the CRC, has “recognize[d] that much of the violence experienced by children, including sexual abuse, takes place within a family context” and has emphasized “the necessity of intervening in families if children are exposed to violence by family members.”<sup>249</sup>

Sexual violence against girl children is also a form of discrimination against women that violates the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Under this Convention, ratifying states have an obligation to act with “due diligence” to prevent, respond to, protect against, and provide remedies for child sex abuse within the family.<sup>250</sup> The U.N. Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime, though non-binding, set out a practical framework that applies to the protection of child victims of incest. The Guidelines call upon states to develop laws, policies, procedures, and practices to address the needs of child victims and witnesses during the

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the 1989 United Nations Convention on the Rights of the Child, the 1990 African Charter on the Rights and Welfare of the Child and other international instruments, protocols, standards and rules on the protection and welfare of children to which Lesotho is signatory”); Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act No. 32 of 2007) (S. Afr.) (enacting the law in light of the consideration that “several international legal instruments, including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979, and the United Nations Convention on the Rights of the Child, 1989, place obligations on the Republic towards the combating and, ultimately, eradicating of abuse and violence against women and children”).

245. See, e.g., S. AFR. CONST. 1996, § 21(d) (providing that “every child has the right . . . to be protected from maltreatment, neglect, abuse, or exploitation”); Sexual Offences Act (No. 3 of 2003), §§ 8-14 (Lesotho) (making various forms of child sex abuse, as well as the failure to report it, criminal offences).

246. See *infra* text accompanying notes 256-57.

247. See *infra* text accompanying notes 256-57.

248. Convention on the Rights of the Child, Nov 20, 1989, 1577, U.N.T.S. 3, art. 19(1), available at [https://treaties.un.org/doc/Publication/CTC/Ch\\_IV\\_11bk3.pdf](https://treaties.un.org/doc/Publication/CTC/Ch_IV_11bk3.pdf). Somalia has signed, but not yet ratified the Convention on the Rights of the Child. *United Nations Treaty Collection: Chapter IV Human Rights*, UNITED NATIONS, [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en) (last updated Apr. 3, 2014, 5:00AM).

249. Committee on the Rights of the Child, ¶ 72(d), CRC/C/GC/13, General Comment No. 13 (2011).

250. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, arts. 1 & 2; Committee on the Elimination of Discrimination Against Women, ¶ 9, General Recommendation No. 19 (1992).

criminal justice process, for example, by providing a specialist to assist the child at trial and by developing modified, child-sensitive court environments.<sup>251</sup>

African regional treaties also require countries to pursue legislative, administrative, social, and educational measures to prevent child sexual abuse<sup>252</sup> and to provide redress to victims.<sup>253</sup> Most recently, sub-regional organizations of African states have undertaken additional legal duties to combat child abuse through the ratification of sub-regional treaties.<sup>254</sup> In February 2013, the Southern African Development Community's Protocol on Gender and Development entered into force, requiring member states to protect children from sexual abuse through appropriate laws, policies, and programs<sup>255</sup> and to provide meaningful remedies to victims of abuse.<sup>256</sup> The 2006 Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, which applies in the states that have ratified the Pact on Security, Stability and Development in the Great Lakes Region, contains even more specific provisions aimed at addressing child sexual abuse.<sup>257</sup> For example, member states agree to institute simplified procedures for filing complaints of sexual violence and criminal procedures that are sensitive to the needs of survivors of such violence.<sup>258</sup> Reflecting a

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251. Guidelines on Justice Matters involving Child Victims and Witnesses of Crime were adopted by the Economic and Social Council in its resolution 2005/20 of 22 July 2005, ¶¶ 24, 30(d), available at <http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf>. The South African Constitutional Court has looked to this instrument for guidance on the treatment of child witnesses. See *Director of Public Prosecutions et al. v Mokoena and Phaswane*, Case No. CCT 36/08, [2009] ZACC 8, ¶¶ 78-80, 98 (S. Afr.).

252. African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49 (1990), art. 16(1), 1990; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 3(4), 4 (1)-(2), July 11, 2003.

253. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 25; Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children (Great Lakes Protocol), art. 4, 6, Nov. 30, 2006 [hereinafter Great Lakes Protocol]; See Southern African Development Community Protocol on Gender and Development, art. 32, Aug. 17, 2008 [hereinafter SADC Protocol].

254. See *infra* notes 263-67 and accompanying text.

255. See SADC Protocol, art. 11. The SADC Protocol was adopted in August 2008 and entered into force in February 2013. The SADC Protocol has been ratified by Angola, the Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe, and it has been signed but not ratified by Madagascar. Botswana and Mauritius have not signed or ratified the treaty.

256. *Id.* art. 32.

257. See Angela Ndinga-Muvumba, *Preventing and Punishing Sexual Violence: The Work of the International Conference of the Great Lakes Region*, ACCORD, 1-2 (2012), available at [http://mercury.ethz.ch/serviceengine/Files/ISN/152615/ipublicationdocument\\_singledocument/bd50ace1-a60c-45bf-b5c0-1d0fede0ff9e/en/ACCORD-policy-practice-brief-17.pdf](http://mercury.ethz.ch/serviceengine/Files/ISN/152615/ipublicationdocument_singledocument/bd50ace1-a60c-45bf-b5c0-1d0fede0ff9e/en/ACCORD-policy-practice-brief-17.pdf).

258. See Great Lakes Protocol, art. 6(4)-(5). The Great Lakes Protocol was signed on November 2006, and entered into force in June 2008. The Protocol has been ratified by Burundi, the Democratic Republic of Congo, Kenya, South Sudan, Sudan, Tanzania, Uganda, Zambia, Republic of Congo, and the Central Africa Republic. Among the member states of the International Conference on the Great Lakes Region, only Angola has not yet ratified the Protocol.

trend in Africa towards enhanced sentencing, they also encourage imposing the maximum prison sentence provided by the law for any person convicted of child sex abuse.<sup>259</sup>

As noted above, international and regional human rights standards have guided many of the domestic legal reforms that African states have undertaken to address the problem of incest and other forms of child sex abuse.<sup>260</sup> African courts, too, have looked to international law in upholding the rights of children to be protected from abuse and the responsibility of the state to guarantee that protection.<sup>261</sup> For instance, a recent case in Kenya, *CK v. Comm'r of Police*,<sup>262</sup> concerned eleven girls who had suffered defilement and other forms of abuse, including three who were victims of incest at the hands of an uncle, father, and stepfather, respectively.<sup>263</sup> The petitioners had reported these incidents to the police, but the police officers did not take appropriate action, instead blaming the victims for their abuse, demanding money, humiliating them, and ignoring them.<sup>264</sup> In a landmark decision, the High Court found that by failing to enforce the law and conduct prompt, effective, and professional investigations into the girls' complaints, the police had "contributed to the development of a culture of tolerance for pervasive sexual violence against girl children and impunity."<sup>265</sup> Their inaction had, therefore, violated the girls' rights to protection from violence and access to justice (among other rights) under both the Kenyan Constitution and international and regional law.<sup>266</sup> As this decision suggests, international law may be deeply relevant to efforts to address child sex abuse, whether through court decisions or through the reform of problematic laws and procedures.

## 2. Changing the Law

Over the past decade, a number of countries, including Liberia, Kenya, Lesotho, Namibia, South Africa, and Tanzania, have promulgated new specialized sexual offences laws, and others have enacted relevant amendments to existing laws.<sup>267</sup> Mauritius, Nigeria, and Rwanda have adopted specialized Children's Acts that contain severe criminal penalties for child sex abuse,<sup>268</sup> while other countries have enacted Children's Acts that

259. *Id.* art. 5(1).

260. See *supra* notes 251-67 and accompanying text.

261. See *infra* notes 270-74 and accompanying text.

262. C.K. Through Ripples International As Her Guardian and Next Friend & 11 Others v Commissioner of Police/Inspector General of the National Police Service & 3 Others [2013] K.L.R. (Kenya).

263. *Id.* at 3.

264. *Id.* at 3-6.

265. *Id.* at 8-9.

266. *Id.* at 8-11.

267. Nduku Kilonzo et al., *Sexual Violence Legislation in sub-Saharan Africa: The Need for Strengthened Medico-Legal Linkages*, 17 REPRODUCTIVE HEALTH MATTERS 10, 12 (2009); THOMPSON & NKEWTO SIMMONDS, *supra* note 231, at 8.

268. Child Protection Act 30 of 1994 (Mauritius) (as amended to 2008), §§ 14, 18 (providing that anyone who causes, allows, or incites a child to be abused by himself or someone else is liable to a fine and penal servitude for a term of up to twenty years);

impose fines or modest terms of imprisonment on persons who allow a child to be abused.<sup>269</sup>

Legislative reform has led to more expansive definitions of incest and of other offences under which it may be prosecuted. Recently enacted laws in Ethiopia and Kenya have included “indecent acts” and penetration within the definition of incest.<sup>270</sup> South Africa’s 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Act defines incest as involving an “act of sexual penetration” between two persons and now can be used to punish homosexual abuse of children by a female or male relative.<sup>271</sup> Several countries have expanded the categories of persons who may be perpetrators of incest: Kenya, Uganda, Zambia, and Zimbabwe include aunts and uncles; Lesotho, Uganda, and Zimbabwe include step-parents; and Lesotho, South Africa, and Zimbabwe include adoptive parents.<sup>272</sup> Countries have also amended their laws to make the offences of

Child’s Rights Act, 2003 (Nigeria), §§ 31–32 (providing that any person who has sexual intercourse with a child under the age of eighteen is liable to life imprisonment and that anyone who sexually abuses a child in any other way is liable to imprisonment for fourteen years); Law No. 27 of 2001 Relating to Rights and Protection of the Child Against Violence, 28 April 2001 (Rwanda), arts. 33–36 (providing that any sexual relations with a child under eighteen is rape and punishable by imprisonment of between twenty to twenty-five years if the child is between ages fourteen and seventeen; life imprisonment if the child is under fourteen or the crime is committed by a parent, guardian or other specific categories of persons; and death if the rapist infects the child with an incurable disease or causes her death).

269. See, e.g., Children’s Act No. 8 of 2009, § 25 (Botswana); Children’s Act No. 560 of 1998 (Ghana), §§ 6, 15; Children’s Act No. 8 of 2001 (Kenya), §§ 15, 20; Children’s Protection and Welfare Act, 2011 (Lesotho), § 44(III). A number of Children’s Acts also mandate reporting of child abuse, see, e.g., Children’s Act No. 560 of 1998 (Ghana), § 17, and include sexual abuse as one of the factors that can form the basis for finding a child in need of care and taking the child into state custody. See SOUTH AFRICAN LAW COMM’N ISSUE PAPER 10, *supra* note 25, § 4.12.3.

270. Revised Criminal Code 2004 (2005) § 655 (Ethiopia) (criminalizing “indecent acts between persons related by blood”); Sexual Offences Act (No. 3 of 2006) (as amended to 2012) §§ 2(1), 20(1), 21 (Kenya) (including in the crime of incest “indecent acts,” which are defined as “any contact between the genital organs of a person, his or her breasts and buttocks with that of another person” and “exposure or display of any pornographic material to any person against his or her will”).

271. Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act No. 32 of 2007) § 12 (S. Afr.); Jacqui Gallinetti, *Legal Definitions and Practices in Child Sexual Abuse*, in *SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA*, *supra* note 88, at 213 (noting that the South African Law Commission recommended applying the statutory definition of sexual penetration to the offence of incest so that it might extend to forms of abuse previously excluded, such as the abuse of children by relatives of the same gender); see also Botswana Penal Code (as amended to 2005), § 168 (1) (providing that “any person who knowingly has carnal knowledge of another person” who is a prohibited type of relative is guilty of incest).

272. Lesotho Penal Code Act 2010 (2012), § 53(4); Sexual Offences Act (No. 3 of 2006) (as amended to 2012) §§ 20(1), 21 (Kenya); Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act No. 32 of 2007) §12(2)(c) (S. Afr.); Uganda Penal Code Act 1950, Ch. 120 (as amended by Penal Code (Amendment) Act of 2007), § 149(1); Zambia Penal Code, Ch. 87 (as amended by Penal Code (Amendment) Act No. 15 of 2006 and Penal Code (Amendment Act) No. 2 of 2011), §§159(1)-(2), 161(1); Criminal Law (Codification and Reform) Act No. 23/2004, 2005 (Zimbabwe), § 75(2).

rape and defilement gender neutral,<sup>273</sup> to include penetrative anal or oral sex within their definitions,<sup>274</sup> and to increase penalties for the offence of sexual assault.<sup>275</sup> A number of countries have increased the age of consent to eighteen.<sup>276</sup> Lesotho also included in its 2003 Sexual Offences Act the offence of “Persistent Sexual Abuse of a Child” that the SALC had urged South Africa’s legislature to adopt.<sup>277</sup> The following discussion considers in more detail the legislative reform experiences of South Africa and Kenya.

#### a. South Africa

By 1997, the SALC was engaged in discussing the necessity for statutory change in South Africa with respect to sexual offences against children.<sup>278</sup> Describing the problems of prosecuting these crimes under the current system, the Commission introduced a series of questions for comment.<sup>279</sup> Stating that many child sex abuse cases were intra-familial, the Commission pondered the role of legal remedies in this area, which it recognized neither focused on the needs of the victim nor addressed the underlying roots in male attitudes and gender inequality.<sup>280</sup> After hearings concerning this issue, in 1999 the SALC issued a discussion paper, in which it reported its findings and proposed changes in the law.<sup>281</sup> The Commission concluded that more attention should be paid to abuse in the home, in part because such abuse plays a major role in commercial sexual exploitation of children, who run away from home to escape incest and then often fall prey to prostitution and human trafficking.<sup>282</sup> The traditional law against incest fails adequately to address the problem, it reported, because it was limited to vaginal sexual intercourse and did not

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273. Botswana Penal Code (as amended to 2005), § 147; Sexual Offences Act (No. 3 of 2006) (as amended to 2012) § 8 (Kenya); Lesotho Penal Code Act 2010 (2012) § 49; Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act No. 32 of 2007) § 15 (S. Afr.); Law No. 27 of 2001 Relating to Rights and Protection of the Child Against Violence, 28 April 2001, art. 33 (Rwanda); Combating of Rape Act (2000) §§ 1, 2 (Namibia); Combating of Immoral Practices Amendment Act of 2000, §§ 1, 2 (amending § 14 of the Combating of Immoral Practices Act (1980)) (Namibia); Uganda Penal Code Act 1950, Ch. 120 (as amended by Penal Code (Amendment) Act of 2007), §§ 129(1), (7), 147.

274. Combating of Rape Act (2000) §§ 1 (Namibia); Combating of Immoral Practices Amendment Act of 2000, §§ 1, 2 (amending § 14 of the Combating of Immoral Practices Act (1980)) (Namibia); Criminal Law (Sexual Offences and Related Matters) Amendment Act §§ 1, 15 (S. Afr.); Uganda Penal Code Act 1950, Ch. 120 (as amended by Penal Code (amendment) Act of 2007), § 129(1), (7).

275. See, e.g., Sexual Offences Act (No. 3 of 2006) (as amended to 2012) §§ 3(3), 11(1) (Kenya) (minimum of ten years for penetrative sexual assault and for non-penetrative indecent acts with a child).

276. See, e.g., *id.* § 8; Law No. 27/2001 Relating to Rights and Protection of the Child Against Violence, 28 April 2001 (Rwanda), arts. 1, 33; Uganda Penal Code Act 1950, Ch. 120 (as amended by Penal Code (amendment) Act of 2007), § 129.

277. Sexual Offences Act, No. 3 of 2003, § 9 (Lesotho).

278. See SOUTH AFRICAN LAW COMM’N ISSUE PAPER 10, *supra* note 25, §§ 1.1, 1.2.

279. *Id.* § 6.2.

280. *Id.* § 4.2.1.

281. See SOUTH AFRICAN LAW COMM’N DISCUSSION PAPER 85, *supra* note 22, at ii.

282. *Id.* § 3.6.7.4.

apply to all the relevant caregivers.<sup>283</sup> The Commission recommended retaining the common law offence of incest but making it gender-neutral and applicable to any act of sexual penetration.<sup>284</sup> In addition, as noted above, it recommended passage of an offence against “Persistent Sexual Abuse of a Child,” which was specifically targeted at the conduct involved in intra-familial child sex abuse.<sup>285</sup>

After going through several drafts of the new legislation, the National Assembly and National Council of Provinces passed the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Sexual Offences Act), and the President signed the Act into law on December 14, 2007.<sup>286</sup> However, various SALC recommendations aimed at improving the conviction rates and court experiences for children were not included in its provisions as passed by the legislature.<sup>287</sup>

The Act also does not contain the offence of “Persistent Sexual Abuse of a Child” recommended by the SALC. However, as recommended by the Commission, it does include an expanded offence of incest pertaining to all persons who could not lawfully marry one another because of consanguinity, affinity, or adoption who engage in an act of sexual penetration with each other.<sup>288</sup> The Act also provides that a child cannot be prosecuted for incest without written authorization by the Director of Public Prosecutions.<sup>289</sup> The chapter on sexual offences against children creates a crime of consensual sexual penetration, or statutory rape, as to children below the age of sixteen, and another crime of consensual sexual violation, or statutory sexual assault short of penetration.<sup>290</sup> In October 2013, the Constitutional Court declared these provisions constitutionally invalid insofar as they criminalized consensual sexual relations between adolescents who were between twelve and fifteen years of age, but the Court suspended the declaration of invalidity for 18 months to give Parliament time to enact amended legislation.<sup>291</sup> The Act also redefines the offence of rape as a

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283. *Id.* §§ 3.6.1.2.6, 3.6.2.4.

284. *Id.* §§ 3.6.7.10.

285. *Id.* § 4.2.

286. Republic of South Africa, Government Gazette, Vol. 510, No 30599, Dec. 14, 2007.

287. See SOUTH AFRICAN LAW COMM’N DISCUSSION PAPER 85, *supra* note 22, §§ 3.1–4.8.1.

288. Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act No. 32 of 2007) § 12(1)–(2) (2007) (S. Afr.). Sexual penetration is defined as “any act which causes penetration to any extent whatsoever by – (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; [or] (c) the genital organs of an animal, into or beyond the mouth of another person.” *Id.* § 1.

289. *Id.* § 12.

290. *Id.* §§ 15–16.

291. *The Teddy Bear Clinic for Abused Children and RAPCAN v. Minister of Justice and Constitutional Development and Others* (CCT 12/14), [2013] ZACC 35, 2014 (2) SA 168 (CC) (October 3, 2013), ¶ 117 (S. Afr.). Notwithstanding the suspension of the order of invalidity, the Court placed a moratorium on prosecutions of children under age 16 for violations of the impugned provisions. *Id.* The Court also ordered the Minister of Jus-

nonconsensual act of penetration, which applies to children as well as adults, and, under the Criminal Law Amendment Act of 1997, the offence no longer requires proof of lack of consent for a child under twelve.<sup>292</sup>

Through these expanded definitions of sexual offences, South Africa's Sexual Offences Act increases the opportunities for redress available to child victims of interfamilial sexual abuse. Other provisions address some of the evidentiary problems in prosecuting sex offences, stating, for example, that no inference may be drawn from a victim's delay in reporting a sexual offence.<sup>293</sup> The Act also abolished the cautionary rule with respect to sexual offences, which required courts to recognize the "inherent danger" of relying on a complainant's testimony and to satisfy itself of the existence of a safeguard against that danger, such as corroboration of the complainant's testimony.<sup>294</sup> The Act did not adopt the SALC's proposal to do away with the similar caution often given regarding the evidence of a child.<sup>295</sup> In addition, the Act provides for compulsory HIV testing of alleged sex offenders and the provision of post-exposure prophylactic medication to victims.<sup>296</sup>

The South African Sexual Offences Act contains a number of provisions that are clearly modeled on the systems in other nations, such as a national registry of sex offenders<sup>297</sup> and mandatory reporting.<sup>298</sup> It creates an obligation for any person who knows that a sexual offence has been committed against a child to report the abuse immediately to the police or face criminal prosecution.<sup>299</sup> A number of other African countries, including Botswana, Ghana, Mauritius, and Uganda, have also adopted laws that mandate reporting of child abuse.<sup>300</sup> There is substantial disagreement, however, over whether mandatory reporting laws are beneficial in Africa.<sup>301</sup> Some argue that reporting cases to legal authorities is critical, in order to stop incest from recurring and to emphasize that the problem is a social—not a private—one;<sup>302</sup> others fear that mandatory

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tice to expunge from the Sexual Offences Register any adolescent under the age of 16 who had been convicted of a violation under sections 15 or 16 of the act. *Id.* ¶ 112.

292. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, §§ 3, 57(1) (2007) (S. Afr.).

293. *Id.* § 59.

294. *Id.* § 60. See *S. v Jackson* (35/97), [1998] ZASCA 13, 1998 (4) BCLR 424 (SCA) (20 March 1998), at 10–12 (S. Afr.).

295. SOUTH AFRICAN LAW COMM'N, DISCUSSION PAPER 102, *supra* note 215, § 31.4.3.2

296. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 §§ 28–30 (S. Afr.).

297. *Id.* §§ 40–53.

298. *Id.* § 54.

299. *Id.* § 54.

300. See Children's Act No. 8 of 2009, §§ 25(2), 43 (Botswana); Children's Act of 1998, § 17 (Ghana); Child Protection Act No. 30 of 1994, § 11 (Mauritius) (applies to members of school staff and medical or paramedical professions); The Children's Act 1997 ch. 59 § 11, (Uganda).

301. See, e.g., SOUTH AFRICAN LAW COMM'N DISCUSSION PAPER 102, *supra* note 215, at 12–17; Compare Meursing et al., *supra* note 49, at 1703 with Loewenson et al., *supra* note 148, at 30.

302. Meursing et al., *supra* note 49, at 1703.

reporting laws may raise expectations the system is not equipped to fulfill.<sup>303</sup>

b. Kenya

In Kenya, law reform was undertaken in direct response to publicity over a particularly egregious case.<sup>304</sup> The case of *R v. Duncan Gichuhi Waiyaki* dramatically illustrated the difficulties involved in seeking justice through the courts for intra-familial child sex abuse.<sup>305</sup> This case, filed in 1995, involved incest by a father against his twin nine-year-old daughters, whose testimony was supported by their mother and by medical evidence that one of the girls had been infected with a venereal disease.<sup>306</sup> The case took four years, with a total of seventeen court appearances, to prosecute.<sup>307</sup> It took over one year from the time of the offense to obtain the Attorney General's consent to prosecute.<sup>308</sup> The defendant was released on bond and had to be warned against threatening the girls and interfering with other witnesses.<sup>309</sup> The doctor who had examined the girls had to be compelled to appear to give evidence and did not do so until a year and a half after the original summons.<sup>310</sup> His medical evidence was apparently regarded as the crucial corroboration, although there was testimony by both girls that was supported even further by their mother's testimony about their physical condition and earlier statements that her daughters had made to her.<sup>311</sup> Eight different prosecutors appeared in the case and the quality of their representation was poor; most glaringly, they did not introduce evidence to link the venereal infection with that of the father.<sup>312</sup> In 1999, the court ruled that there was a lack of material evidence sufficient to convict, disregarding the mother's testimony on the grounds that her impending divorce from the father prejudiced her against him.<sup>313</sup>

In response to the uproar over this father's acquittal, the Federation of Women Lawyers in Kenya (FIDA-Kenya) and the Attorney General's office drafted a Sexual Offences Bill that would simplify the procedure for trying such cases and omit the requirement of consent from the Attorney General's Office.<sup>314</sup> The bill provided that witnesses who are vulnerable because of age, trauma, relationship to the offender, or nature of the case may, if the court so decides, give their evidence in camera (not in open

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303. See, e.g., Loewenson et al., *supra* note 148, at 30.

304. Mbugua, *supra* note 209, at 13; see generally, Onyango-Ouma, *supra* note 242, at 12, 14.

305. Republic v. Duncan Gichuhi Waiyaki, Criminal Case No. 929 of 1995 (Kenya), cited in Kameri-Mbote, *supra* note 190, at 18-19; see also Mbugua, *supra* note 209, at 6-13.

306. Kameri-Mbote, *supra* note 190, at 18; Mbugua, *supra* note 209, at 7.

307. Kameri-Mbote, *supra* note 190, at 18; Mbugua, *supra* note 209, at 7-8.

308. Mbugua, *supra* note 190, at 7.

309. Kameri-Mbote, *supra* note 190, at 18; Mbugua, *supra* note 209, at 9.

310. Mbugua, *supra* note 209, at 10.

311. *Id.* at 8; Kameri-Mbote, *supra* note 190, at 18.

312. Mbugua, *supra* note 209, at 11.

313. *Id.* at 11-12; Kameri-Mbote, *supra* note 190, at 18.

314. Mbugua, *supra* note 209, at 13.



court) and/or through an intermediary.<sup>315</sup> This system, a variant of which has been available in South Africa since 1991, provides for an intermediary to convey the general purport of questions asked by the attorneys to the vulnerable witness, in essence translating the legalistic and adversarial proceedings for her.<sup>316</sup>

A version of this bill, which became law as the Kenyan Sexual Offences Act in 2006, widens the definition of sexual offences, so that they are not limited to vaginal intercourse, includes offences against boys, creates an offence of statutory assault, and adds high minimum sentences for sexual offences against children.<sup>317</sup>

A strange thing happened to the bill on its way through the largely male parliament, however. Not only was the offence of marital rape dropped, but the following provision was *added* by the house, as section 38: “Any person who makes false allegations against another person to the effect that the person has committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that for the offence complained of.”<sup>318</sup> In other words, if a person makes a false allegation of sexual abuse, that person can be subject to the same penalties as the offender. The standard for showing that an accusation was false is unclear but surely the standard cannot simply be failure to win a conviction. With the steep penalties against rape, incest, and sexual assault in the new bill, it is difficult to imagine a better way to deter reporting and prosecuting sexual offences in a country where they are already vastly underreported. The brief Parliamentary debate over the provision suggests that fears on the part of male parliamentarians about accusations of rape led to the decision to insert this section into the bill at the last minute.<sup>319</sup> As the National Assembly member who proposed the amendment explained, “[a] person making an allegation that I attempted to rape or I raped her, knowing very well that I could easily go to jail for life, must also be prepared to go to jail for life in the event that she is found to be making false allegations.”<sup>320</sup>

The women’s rights groups that had pushed for the reform were outraged by the addition of section 38<sup>321</sup> and vigorously advocated for its repeal.<sup>322</sup> FIDA-Kenya filed a court case challenging the constitutionality of section 38, on the ground that the section discriminated against women, who form the majority of sexual offences victims, and denied survivors of

315. Sexual Offences Act (No. 3 of 2006) § 31 (Kenya).

316. *Id.* §§ 2, 31(4)(b).

317. *Id.* §§ 2(1), 5, 8–11, 20–21, 31(4)(b).

318. *Id.* § 38.

319. National Assembly Official Report, Parliamentary Debate, *Hansard*, 31 May 2006, at 1104–07 (Kenya).

320. *Id.* at 1104–05 (statement of Mr. Muturi).

321. See *Acrimony as House Debates Sexual Offences Bill*, THE STANDARD (Apr. 27, 2006), <http://www.accessmylibrary.com/article-1G1-145051697/kenyan-mps-storm-out.html>.

322. University of California, Berkeley Law School Human Rights Center, *Sexual Offences Act: Implementation Workshop - Comprehensive Report*, 12–13 (2012), available at [http://www.law.berkeley.edu/HRCweb/pdfs/SOA\\_Summary\\_Report\\_April-2012.pdf](http://www.law.berkeley.edu/HRCweb/pdfs/SOA_Summary_Report_April-2012.pdf).

violence their right to legal protection.<sup>323</sup> At the same time, a Task Force established by the Kenyan Attorney General to oversee implementation of the Sexual Offences Act also recommended the repeal of section 38.<sup>324</sup> Parliament tabled an amendment to the Act that would repeal the provision, prompting impassioned debate in the National Assembly. In support of the amendment, the Attorney General explained that:

[I]t became very clear, from all of the research done by this very distinguished [task force], that this provision, which was enacted in good faith, had become a hindrance. In many police stations in many places where victims of sexual assault got to complain, they are told by the officers receiving their complaints: "Do you know that if you do not have enough evidence on this case, you will go in for the period that your attacker could have gone in for?"<sup>325</sup>

During the debate, others raised the old specter of women trapping men with false claims of rape, warning that if section 38 were repealed, "people knowing that they will not be punished for giving false evidence can run rings around many people, mainly males, and we will wonder where Parliament was when this was being handled."<sup>326</sup> Ultimately, however, opposition to the provision prevailed, and Parliament repealed the provision in July 2012.<sup>327</sup>

These stories of legislative reform in South Africa and Kenya reflect the broader trend in Sub-Saharan Africa toward a more robust legal response to sexual offences, including intra-familial child sex abuse.<sup>328</sup> This process has not been without substantial resistance and setbacks, as Kenya's recent experience with the ill-fated section 38 clearly demonstrates. Nor have legislatures gone as far as advocates and experts have urged. South Africa's Sexual Offences Act has been criticized for failing to adopt several of the SALC's recommendations such as abolishing the cautionary rule concerning child witnesses, and the Act's mandatory reporting requirement remains controversial.<sup>329</sup> Nonetheless, in the many countries that have amended their criminal laws or enacted new ones, redress is no longer limited to girls who have been vaginally raped by fathers or brothers; rather, most forms of intra-familial child sex abuse may now be prose-

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323. FIDA-Kenya, *Casting the Vote: Is it the Turning Point for Women?*, 23 (2012), available at <http://fidakenya.org/wp-content/uploads/2013/08/FIDA-REPORT-2012.pdf>; FIDA-Kenya, *So Far-How Far?*, 26-27 (2007) available at <http://fidakenya.org/wp-content/uploads/2013/08/Annual-Report07-Final.pdf>.

324. National Assembly Official Report, Parliamentary Debate, *Hansard*, 20 June 2012, at 70 (Kenya).

325. *Id.* (statement of Prof. Muigai, Attorney General).

326. National Assembly Official Report, Parliamentary Debate, *Hansard*, 29 May 2012, at 46-47 (Kenya).

327. Statute Law (Miscellaneous Amendments) Act, No. 12 of 2012, at 32 (amending the Sexual Offences Act (No. 3 of 2006) by deleting § 38) (Kenya).

328. Kim Thuy Seelinger et al., *The Investigation and Prosecution of Sexual Violence* 4-5 (Human Rights Center, University of California, Berkeley, Working Paper, 2011).

329. See, e.g., SOUTH AFRICAN LAW COMM'N DISCUSSION PAPER 102, *supra* note 215, at 12-17 (discussing the issues associated with mandatory reporting laws).

cuted as incest, rape, defilement, or another sexual offence.<sup>330</sup>

### 3. Increasing Criminal Penalties

In many African countries, frequent media reports of sexual violence against children have contributed to public support for harsher sentencing.<sup>331</sup> Students, police, and tribal leaders interviewed in Botswana all thought the five-year maximum sentence for incest was too lenient and recommended that it be raised to the level for defilement and rape (now ten years to life).<sup>332</sup> Women interviewed in Ghana called for men who have violated young girls to be jailed for long periods.<sup>333</sup>

A common response for many countries in Sub-Saharan Africa has been to raise the sentences for rape, defilement, and incest.<sup>334</sup> One study of statutory sentencing provisions for sexual offenses in twelve Southern and East African countries found that, between 1998 and 2011, ten of the twelve countries increased the penalties for rape and/or defilement and nine adopted minimum sentences for such offenses.<sup>335</sup> For example, in the 2006 Kenyan Sexual Offences Act, the penalties for defilement were raised to mandatory life if the victim is eleven or under, a twenty-year minimum if the victim is between twelve and fifteen years old, and a fifteen-year minimum if the victim is between sixteen and eighteen years old.<sup>336</sup> The Act raised the minimum sentence for incest to ten years, and if the victim is under eighteen, the offender is liable to be sentenced to life in prison.<sup>337</sup> Rwanda's Law Relating to the Rights and Protection of the Child Against Violence provides for a minimum of twenty to twenty-five years for any sexual relations with a child between the ages of fourteen and eighteen and for mandatory life imprisonment if the child is under age fourteen or the perpetrator is a parent or guardian.<sup>338</sup>

There is however, little evidence that longer sentences have led to a decrease in sexual violence or an increase in rates of reporting and conviction.<sup>339</sup> A "catch-22" problem arises with respect to raising the statutory sentences for incest and defilement; although perpetrators might be deterred by heavy punishments, families will become even more reluctant

330. Seelinger *supra* note 328, at 4; *see, e.g.*, Sexual Offences Act (No. 3 of 2006) (as amended to 2012) §§ 2(1), 5, 8-11 (Kenya).

331. *See, e.g.*, Onyango-Ouma, *supra* note 242, at 12; *Media United in Outrage Over Rape*, NEWS 24 (Aug. 2, 2013), <http://www.news24.com/SouthAfrica/News/Media-united-in-outrage-over-rape-20130208>.

332. *See* WLSA BOTSWANA, NO SAFE PLACE, *supra* note 61, at 85.

333. *See* GADZEKPO, *supra* note 123, at 133.

334. *See* THOMPSON & NKEWTO SIMMONDS, *supra* note 231, at 17.

335. *Id.* at 9-10.

336. Sexual Offences Act (No. 3 of 2006) (as amended to 2012) § 8 (Kenya).

337. *Id.* §§ 20, 21. The Tanzanian parliament took a similar approach in the Sexual Offences Special Provisions Act of 1998, making the penalty for incest a minimum of thirty years in prison where the victim was a female under the age of eighteen. Tanzania Penal Code, Cap. 16 (as amended by Sexual Offences Special Provisions Act of 1998), § 158.

338. Law No. 27 of 2001 Relating to Rights and Protection of the Child Against Violence, 28 April 2001 (Rwanda), arts. 34, 36.

339. THOMPSON & NKEWTO SIMMONDS, *supra* note 231, at 17.

to report crimes if the result could be life imprisonment for the breadwinner, and offenders will certainly be deterred from pleading guilty, although a guilty plea could be an optimal outcome for the victim.<sup>340</sup> In addition, data from South Africa reveals that after the South African Parliament enacted mandatory minimum sentences for sexual offences, the number of cases referred to a court that were withdrawn before the completion of proceedings increased from 52% in 2000 to 67% in 2005.<sup>341</sup> This suggests that mandatory minimums may discourage rape victims from following through with their cases.<sup>342</sup> High mandatory sentences may also make some courts hesitant to convict at all if they believe that a sentence would be unjust in light of the circumstances of the case.<sup>343</sup>

In several countries that provide for statutory minimums, including South Africa and Namibia, the relevant statutes permit judges to impose lower sentences where “substantial and compelling” or “extenuating” circumstances exist.<sup>344</sup> These provisions are open to varied interpretations, and courts have been criticized for applying them unevenly and inappropriately and for frequently imposing sentences well below the minimum.<sup>345</sup> Such outcomes demonstrate the need for sentencing guidelines to inform the application of statutory exceptions, particularly where judges may be inclined to rely on such exceptions to avoid high mandatory minimum sentences that they find unjust.

In South Africa, judicial discretion to depart from a mandatory minimum is coupled with a life sentence for the rape of a child under the age of sixteen that does not meet the “substantial and compelling circumstances” exception.<sup>346</sup> This sentence applies to nonconsensual sexual penetration and to sexual penetration of a child under the age of twelve regardless of consent.<sup>347</sup> Most other rapes, including the rape of a young person between the ages of sixteen and eighteen, carry a ten, fifteen, and twenty-year minimum for a first, second, and third offence, respectively.<sup>348</sup> There has been little evidence to suggest that these mandatory minimums have effectively deterred potential perpetrators; reported rape rates remained rel-

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340. SOUTH AFRICAN LAW COMM'N ISSUE PAPER 10, *supra* note 25, § 5.11.12; Boakye, *supra* note 67, at 971.

341. Michael O'Donovan & Jane Redpath, *The Impact of Minimum Sentencing in South Africa*, 71 (2006), available at <http://quanta.org.za/wp-content/uploads/2007/03/SENTENCING%20REPORT%202%20Minimum%20Sentencing.pdf>.

342. *Id.*

343. See THOMPSON & NKEWTO SIMMONDS, *supra* note 231, at 15.

344. See, e.g., Combating of Rape Act (2000) § 3(2) (Namibia); Criminal Law Amendment Act, No. 5 of 1997 § 51, Schedule (S. Afr.) (as amended) (S. Afr.).

345. THOMPSON & NKEWTO SIMMONDS, *supra* note 231, at 15.

346. Criminal Law Amendment Act, No. 5 of 1997 § 5, Schedule 2 (S. Afr.) (as amended) (S. Afr.).

347. *Id.*

348. *Id.* The offences of incest and statutory rape—defined as consensual sexual penetration of a child of between twelve and sixteen years—do not have minimum sentences and instead have maximum penalties of seven years and six years, respectively. Criminal Law (Sexual Offences and Related Matters) Amendment Act, Schedule § 5 (amending § 22 (3) (e)-(f) of Act No. 23 of 1957) (S. Afr.).

atively constant in the first decade after their adoption in 1997.<sup>349</sup> As one South African activist observed in 2003:

It is also unrealistic to believe that heavier sentences . . . will stem the tide of child abuse. Minimum sentence legislation has been in place for several years in South Africa and we still experience a rising tide of reports of child sexual abuse. The conviction rate is, at best, five per cent of all reported cases and thus it is clear that most sexual offenders will never be held accountable for their abusive behaviour.<sup>350</sup>

Moreover, judges have regularly exercised their statutory discretion to depart from the minimum sentences, effectively turning the statutory exception for “substantial and compelling circumstances” into the rule for rapes that require life in prison.<sup>351</sup> Of the convictions between January 1997 and April 1998 for the rape of a child and other types of rape to which the mandatory life sentence applied, judges sentenced more than 75% of offenders to less than half of the minimum.<sup>352</sup> Lacking sentencing guidelines<sup>353</sup> or a statutory definition of “substantial and compelling circumstances,” judges relied on a variety of factors to justify their departure from the maximum sentence, some of which reinforced harmful societal beliefs about rape. For instance, one judge explained that a father’s “gentleness” in raping his daughter, even though he had threatened to cut her throat and she had been bleeding after the rape, warranted a departure from a life sentence.<sup>354</sup> In another case, South Africa’s Supreme Court of Appeal declined to impose a life sentence on a father who raped his daughter because he did not pose a threat to the public and the daughter did not appear to be physically injured.<sup>355</sup>

Responding to protests by civil society organizations over judges’ application of the “substantial and compelling test,” the South African Parliament passed new legislation in 2007 prohibiting judges from relying on the victim’s sexual history, the victim’s apparent lack of physical injury, the defendant’s cultural or religious beliefs about rape, or the previous relationship between the defendant and complainant.<sup>356</sup> This law provides impor-

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349. Kristina Scurry Baehr, *Mandatory Minimums Making Minimal Difference: Ten Years of Sentencing Sex Offenders in South Africa*, 20 *YALE J. L. & FEMINISM* 213, 229–32 (2008–09).

350. Van Niekerk, *supra* note 88, at 274.

351. Scurry Baehr, *supra* note 349, at 233.

352. *Id.* (citing Ron Paschke & Heather Sherwin, *SOUTH AFRICAN LAW COMM’N, QUANTITATIVE RESEARCH REPORT ON SENTENCING* 57 (2000)). A more recent study of a representative, random sample of rape cases filed in Gauteng Province in 2003 found that among perpetrators convicted of raping a girl under the age of sixteen, the median average sentence was 16.5 years, indicating that many sentences in this group were well below the statutory minimum of life imprisonment. Lisa Vetten & Francois van Jaarsveld, *The (Mis)Measure of Harm: An Analysis of Rape Sentences Handed Down in the Regional and High Courts of Gauteng Province*, 11 (Tshwaranang Legal Advocacy Ctr. Working Paper No. 1, 2008), available at <http://www.tlac.org.za/wp-content/uploads/2012/01/Mis-measure-of-Harm.pdf>.

353. See THOMPSON & NKEWTO SIMMONDS, *supra* note 231, at 16.

354. Scurry Baehr, *supra* note 349, at 236.

355. *Id.* at 234.

356. Criminal Law (Sentencing) Amendment Act of 2007 § 1(3)(aA).

tant limits on the justifications judges may use in finding substantial and compelling circumstances. It leaves unchanged, however, the mandatory life sentence for certain rapes that judges appear to view as unjust or disproportionate to the much lower sentences that apply to other forms of rape and sexual violence. Judges have thus continued to look for other factors to justify departing from the mandatory statutory sentence.<sup>357</sup> In addition, the law's disparate treatment of offences against girls aged fifteen or younger and those who are sixteen years or older results in a lack of proportionality and may send a message that the rape of older girls and women is not as serious in comparison.<sup>358</sup>

By raising sentences and enacting mandatory minimums, African countries have expressed a commitment to addressing the endemic occurrence of sexual violence, including child sex abuse within the family. Sentencing reforms have been motivated by various goals including retribution, incapacitation of serious offenders, proportionality between the crime and its punishment, consistency in sentencing, and inducement of cooperation, where mandatory minimums might help to convince offenders to cooperate with the authorities.<sup>359</sup> Many of these goals appear to have been met.<sup>360</sup> As noted above, however, the deterrent effect of these sentencing reforms is uncertain.<sup>361</sup> Moreover, without sentencing guidelines, judges have struggled to apply the narrow statutory exceptions that exist in some countries, often giving inappropriate justifications for departing from the minimum.<sup>362</sup> Finally, in some cases, harsh minimum sentences may have had the paradoxical effect of dissuading some victims from reporting or from pursuing cases to completion given the grave consequences this would have on the perpetrator, who, in the case of incest, is also a member of the family.

#### 4. *Changing the Procedures*

In addition to adopting new or amended laws that address child sex abuse, a number of African countries have made attempts to reform the procedures under which incest and child sex abuse cases are prosecuted and tried.<sup>363</sup> In this section, we focus on several of these reforms, including specialized police units, one-stop centers, sexual offences courts, and

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357. See, e.g., *Ndou v. S* (93/12) [2012] ZASCA 148; 2014 (1) SACR 198 (SCA) (28 September 2012), ¶¶ 13, 18 (S.Afr.) (overturning the life sentence imposed by the lower court in the case of a man who had raped his 15-year-old daughter and imposing a 15-year sentence instead on the ground that the young girl had not resisted and the man had previously given her gifts after he raped her).

358. See Vetten & van Jaarsveld, *supra* note 352, at 4.

359. SOUTH AFRICAN LAW COMMISSION ISSUE PAPER 11, SENTENCING: MANDATORY MINIMUM SENTENCES, §§ 2.1-2.29, 3.33, 4.5 (1997) (S. Afr.).

360. *Id.*

361. *Id.*

362. *Id.*

363. Cheryl Frank & Samantha Waterhouse, *One Step Forward, Two Steps Back? The Impact of SAPS Restructuring of the FCS Unit*, 28 S. AFR. CRIME QUARTERLY 25, 25 (2009), available at <http://www.issafrica.org/uploads/CQ28FRANK.PDF>.

systems of intermediaries who are appointed to assist child witnesses in court.

a. Specialized Police Units

A number of African countries, including Ghana, Liberia, Mauritius, Mozambique, Namibia, South Africa, and Zambia, have established specialized police units to handle crimes of child abuse, family violence, and sexual assault.<sup>364</sup> Although these units vary in effectiveness and available resources, they all, according to one comparative study, appear to improve the treatment of child victims of sex abuse.<sup>365</sup> These units also tend to lead to better outcomes. A South African study of the attrition of reported rape cases found that cases that were handled by South Africa's Family Violence, Child Protection and Sexual Offences Unit (FCS) were significantly more likely than those handled by regular police detectives to result in arrest, to escape withdrawal by the police or prosecutor, and to result in a conviction.<sup>366</sup> In 2006 the National Commissioner of Police decided to disband the specialized units and integrate FCS officers into individual police stations, which had a number of negative effects on the handling of sexual violence cases and may have resulted in fewer convictions;<sup>367</sup> this decision was reversed in 2010.<sup>368</sup>

Some specialized units also play an important role in educating the public and encouraging reporting. Zambia's Victim Support Unit (VSU), established in 1999, has an office in every major police station.<sup>369</sup> All cases that are reported to the VSU are handled by its officers, who receive specialized training and can mediate disputes, investigate complaints, provide counseling, and arrest and prosecute alleged perpetrators.<sup>370</sup> VSU officers often collaborate with civil society organizations, and they have undertaken innovative strategies to address sexual violence, such as visiting schools to teach students about their rights.<sup>371</sup> According to one commentator, the unit has undertaken a public education campaign to sensitize the police and public to the needs of vulnerable persons, a cam-

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364. Lisa Vetten, Tshwaranang Legal Advocacy Centre, *Will Any Police Officer Do? The Organization of the South African Police Service's (SAPS) Response to Sexual Offences*, Policy Brief 4 (June 2012), at 2 [hereinafter Vetten, *Will Any Police Officer Do?*], available at [http://www.tlac.org.za/wp-content/uploads/2012/01/TLAC-Policy-Brief-4.SAPS\\_response\\_to\\_sexual\\_offences.pdf](http://www.tlac.org.za/wp-content/uploads/2012/01/TLAC-Policy-Brief-4.SAPS_response_to_sexual_offences.pdf); Frank & Waterhouse, *supra* note 373, at 29; Written Replies by the Government of Ghana Concerning the List of Issues (CRC/C/GHA/Q/2) received by the Committee on the Rights of the Child Relating to the Consideration of the Second Periodic Report of Ghana, U.N. Doc. CRC/C/GHA/Q/2/Add.1,11, Jan. 11, 2006, at 11.

365. Vetten, *Will Any Police Officer Do?*, *supra* note 364, at 3.

366. *Id.* at 4-5.

367. Frank & Waterhouse, *supra* note 364, at 25. The system was fully restored in April 2011. *Id.*

368. Vetten, *Will Any Police Officer Do?*, *supra* note 364, at 1, 5.

369. Zambia Police Act No. 14 of 1999, 8 LAWS OF REP. OF ZAMBIA Ch. 107 § 53 (1999).

370. *Special Rapporteur on Violence Against Women*, *supra* note 34, ¶ 73.

371. AVON GLOBAL CENTER, *supra* note 191, at 41.

paign that offers a positive example for the region.<sup>372</sup>

At the same time, the VSU's effectiveness is limited by lack of resources, including adequate staff, transportation, and private interviewing rooms.<sup>373</sup> For example, VSU officers in the town of Kafue share one bicycle and one motorbike, which they often lack funds to fill with gas.<sup>374</sup> This sometimes leaves the officers unable to transport victims of abuse to the hospital, conduct effective investigations, or follow up with complainants after they have returned to their communities.<sup>375</sup> These challenges are familiar to specialized units in other resource-strapped countries. For example, officers in Namibia's Women and Child Protection Units lack facilities such as toilets and washing areas, specialized training, and connections with other service providers.<sup>376</sup>

#### b. One-Stop Centers for Victims of Sexual Violence

In addition to specialized police units, some African countries have developed one-stop centers for women and child victims of sexual violence that provide an integrated response to their needs.<sup>377</sup> Some are run by NGOs in private facilities while others are offered in hospitals; according to one recent study of one-stop centers in Zambia and Kenya, the hospital-based center is a more effective and sustainable model in providing services to victims.<sup>378</sup>

South Africa has various one-stop centers managed by different government departments and institutions.<sup>379</sup> Perhaps best known, the Thuthuzela Care Centres are based at major hospitals throughout South Africa under the supervision of the National Prosecuting Authority's Sexual Offence and Community Affairs division.<sup>380</sup> These Centres centralize the reporting, examination, and counseling functions needed by victims of sexual assault;<sup>381</sup> they have also played an important role in monitoring cases and recording data, which has enabled justice system actors to

372. Simon Robbins, *Addressing the Challenges of Law Enforcement in Africa: Policing in Sierra Leone, Tanzania and Zambia*, Policy Brief No. 16, 3 (2009), available at <http://www.issafrica.org/uploads/NO16OCT09.PDF>.

373. *Special Rapporteur on Violence Against Women*, *supra* note 34, ¶ 26.

374. AVON GLOBAL CENTER, *supra* note 191, at 42.

375. *Id.* at 73; *Special Rapporteur on Violence Against Women*, *supra* note 34, ¶ 26.

376. Vetten, *Will Any Police Officer Do?*, *supra* note 364, at 3.

377. See Jill Keesbury et al., *A Review and Evaluation of Multi-Sectoral Response Services (One-Stop Centers) for Gender-based Violence in Kenya and Zambia*, 1 (2012), available at [http://www.popcouncil.org/pdfs/2012RH\\_SGBV\\_OSCRevEval.pdf](http://www.popcouncil.org/pdfs/2012RH_SGBV_OSCRevEval.pdf).

378. *See id.*

379. MINISTERIAL ADVISORY TASK TEAM ON THE ADJUDICATION OF SEXUAL OFFENCE MATTERS, Report on the Re-establishment of Sexual Offences Courts, 13 (2013), available at <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf> [hereinafter MINISTERIAL ADVISORY TASK TEAM].

380. Training Resources Group and Play Therapy Africa, *Strengthening Child Protection Systems in Sub-Saharan Africa*, 52 (Prepared for the Inter-Agency Group on Child Protection Systems in Sub-Saharan Africa, Working Paper, 2012), available at [http://www.unicef.org/wcaro/english/strengthening\\_child\\_protection\\_systems\\_in\\_sub-Saharan\\_Africa\\_-\\_August\\_2012\\_.pdf](http://www.unicef.org/wcaro/english/strengthening_child_protection_systems_in_sub-Saharan_Africa_-_August_2012_.pdf).

381. *See id.*



receive feedback from victims and to track the progress of cases. This information in turn has enabled the government to identify and address problems in the criminal justice process.<sup>382</sup> For example, reports from children of the trauma they experienced when testifying in court led to the development of special procedures to assist child witnesses.<sup>383</sup>

Nonetheless, the diversity of one-stop centers and other victim services in South Africa may lead to confusion and duplication of resources. A recent government-appointed task force urged the government to develop a common policy to improve coordination and consider the possibility of merging the different entities, including the Thuthuzela Care Centres and FCS Unit of the South African Police, into a model one-stop center.<sup>384</sup>

### c. Specialized Sexual Offences Courts

Specialized Sexual Offences Courts were established in South Africa beginning in 1993.<sup>385</sup> By the end of 2004, there were 74 specialized courts, some of them dealing only with child victims, which were equipped so that children could give their evidence in a child-friendly environment.<sup>386</sup> According to a National Prosecuting Authority (NPA) blueprint, with which about half the courts were fully compliant at that time, Sexual Offences Courts were to be equipped with closed-circuit TV facilities, intermediaries to assist child victims, separate waiting areas for the accused and complainant, dedicated prosecutors trained in prosecuting sexual offences cases, and support and court-preparation services for complainants and their families.<sup>387</sup> One study of the specialized courts' impact on justice for children found that Sexual Offences Courts that had implemented the blueprint improved access to courts in child sex abuse cases, with more expeditious proceedings and better conviction rates.<sup>388</sup>

Beginning in 2005, however, the Sexual Offences Courts began a slow demise. In May of that year, the then-Minister of Justice and Constitutional Affairs praised the success of the Sexual Offences Courts but expressed concern that those courts had more resources than other courts and that this had led to an unequal distribution of services to all victims of

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382. *See id.*

383. *Id.* at 52-53.

384. MINISTERIAL ADVISORY TASK TEAM, *supra* note 379, at 15, 96.

385. Several other African countries, including Zimbabwe and Namibia, have also established specialized courts that handle sexual offences cases. THOMPSON & NKEWTO SIMMONDS, *supra* note 231, at 6.

386. *Id.* at 6, 27, 29; HUMAN RIGHTS WATCH, *DEADLY DELAY*, *supra* note 207, at 59; MASTOERA SADAN, *Challenges of Service Evaluation in the Wynberg and Cape Town Sexual Offences Courts and Their Related Services*, in *SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA* 227, 231 (Linda Richter et al. eds., 2004).

387. MINISTERIAL ADVISORY TASK TEAM, *supra* note 379, at 20-22.

388. J.M. Reyneke & H.B. Kruger, *Sexual Offences Courts: Better Justice for Children?* 31 J. FOR JURIDICAL SCIENCE 73, 93-94, 98-99 (2006). A 2003 audit of sexual offences cases conducted by the National Prosecuting Authority over the past year found a 42% conviction rate for rape in all regional courts as compared with a 62% conviction rate in Sexual Offences Courts. MINISTERIAL ADVISORY TASK TEAM, *supra* note 379, at 24.

crime.<sup>389</sup> She also acknowledged concerns that some sexual offences courts, particularly those outside of large urban areas, were extremely under-resourced and could not comply with NPA standards.<sup>390</sup> Another challenge, though not included in the Minister's statements, was that magistrates resisted being assigned to these courts, feeling that they were not given coping strategies for dealing with the traumatic effects of working on such cases<sup>391</sup> and that the assignment would deny them exposure to other areas of the law and limit career advancement.<sup>392</sup> The Minister thus called for a review of the specialized courts, which was interpreted as a moratorium on the creation of new courts.<sup>393</sup> Around the same time, the government developed a policy to reduce case backlogs and improve efficiency.<sup>394</sup> This led to the dismantling of Sexual Offences Courts—several became Dedicated Sexual Offences Courts that give priority to sexual offences cases but hear other cases as well, while others turned into regular regional courts.<sup>395</sup> Eventually, South Africa no longer had any courts dedicated exclusively to sexual offences.<sup>396</sup>

As sexual violence in South Africa continued unabated, however, Parliament began to raise concerns about the termination of the Sexual Offences Courts.<sup>397</sup> In January 2011, the U.N. Committee on the Elimination of Discrimination Against Women, which is charged with monitoring state implementation of CEDAW, sharply criticized South Africa for abandoning the courts, which had been heralded as a global best practice.<sup>398</sup> In June 2012, the government created a Ministerial Advocacy Team on the Adjudication of Sexual Offences Matters to consider the viability of re-establishing the Sexual Offences Courts.<sup>399</sup>

The task team's report, which was published on August 6, 2013, unequivocally found not only that reconstituting current courts as Sexual Offences Courts was feasible but also that there was a clear and compelling need to re-establish them.<sup>400</sup> The task team also offered recommendations aimed at addressing some of the problems that compromised the effectiveness of the earlier specialized courts, such as ensuring that the courts are staffed with individuals who have specialized training in handling sexual violence cases and in working with vulnerable victims.<sup>401</sup>

In a press briefing at which the task team's report was released, the current Minister of Justice and Constitutional Development accepted the

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389. MINISTERIAL ADVISORY TASK TEAM, *supra* note 379, at 23.

390. *Id.*

391. See Rajaa Azzakani, *South Africa: Stress of Sexual Offence Courts*, ALLAFRICA.COM (Apr. 17, 2013), <http://allafrica.com/stories/201305071093.html>.

392. *See id.*

393. *Id.* at 24.

394. MINISTERIAL ADVISORY TASK TEAM, *supra* note 379, at 23.

395. Azzakani, *supra* note 391, at 24.

396. *Id.* at 9.

397. MINISTERIAL ADVISORY TASK TEAM, *supra* note 379, at 6.

398. Azzakani, *supra* note 391, at 6.

399. *Id.* at i.

400. *Id.* at 12, 14.

401. *Id.* at 97-100.

team's findings and stated that the Justice Department had identified fifty-seven regional courts that would be fitted with new technology in the coming year so as to operate as Sexual Offences Courts.<sup>402</sup> The first Sexual Offences Court was re-opened less than three weeks later.<sup>403</sup> Welcomed by experts and civil society, the reinstatement of South Africa's Sexual Offences Courts reflects the recognition that without such courts, high caseloads, poor investigations, unprepared witnesses, and skepticism about the testimony of children lead both to acquittals and substantial re-traumatization of child sex abuse victims.<sup>404</sup>

#### d. Intermediary Services for Child Witnesses

Several countries, including Namibia, South Africa, and Zimbabwe, permit the appointment of an intermediary to assist a child witness in court.<sup>405</sup> In South Africa, which has had an intermediary system since 1991,<sup>406</sup> the intermediary is usually a social worker who sits with the child in an out-of-court room that is connected to the courtroom via closed circuit television or through a one-way mirror that allows the child to be seen but blocks his or her view of the alleged perpetrator.<sup>407</sup> The intermediary wears earphones so that she can hear and translate questions into language that the child will understand; the child speaks into a microphone and can be seen and heard by those in the courtroom.<sup>408</sup> The child is thus shielded from direct exposure to the adversarial and formal environment of the courtroom. Without this rather sophisticated technology,<sup>409</sup> which allows the criminal defendant and his counsel to hear and see the victim's responses, there would be serious questions about protecting defendants' rights.

The intermediary process continues to face many challenges. In one study, the intermediaries interviewed had all resigned because of secon-

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402. Media Statement, J.T. Radebe, MP, Minister of Justice and Constitutional Development, on the desirability to reintroduce sexual offences courts, Media Statement (Aug. 6, 2013). The Department has also prepared a proposed amendment to the Sexual Offences Act that specifically provides for the establishment of the Sexual Offences Courts. The lack of enabling legislation is another reason cited for the failure of the earlier Sexual Offences Courts. MINISTERIAL ADVISORY TASK TEAM, *supra* note 379, at 12.

403. Media Release, DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, *Justice in Action as Minister Radebe Launches the Butterworth Sexual Offences Court, Eastern Cape* (Aug. 23, 2013), [http://www.justice.gov.za/m\\_statements/2013/20130823-sxoc-butterworth.html](http://www.justice.gov.za/m_statements/2013/20130823-sxoc-butterworth.html).

404. Sadan, *supra* note 386, at 227.

405. Tendai Marow-Wilkerson, A Comparative Analysis of the Intermediary Systems in South Africa, Namibia, Zimbabwe, and Ethiopia (Jan. 2011) (unpublished Master's Thesis, Rhodes University) (on file with Rhodes University); Sexual Offences Act (No. 3 of 2006) (as amended to 2012) § 31 (Kenya).

406. Coughlan & Jarman, *supra* note 220, at 541; Criminal Procedure Act No. 51 (1977) (S. Afr.), as amended by the Criminal Law Amendment Act, No. 135 § 170A (1991) (S. Afr.).

407. Coughlan & Jarman, *supra* note 220, at 541-42; Rushiella Songca, *Revisiting section 170A of the Criminal Procedure Act 51 of 1977*, 73 J. OF CONTEMP. ROMAN-DUTCH L. 402, 409 (2010).

408. Coughlan & Jarman, *supra* note 220, at 542.

409. *Id.*

dary trauma effects upon them from the work as well as lack of support.<sup>410</sup> In addition, intermediaries may not be available at the time of trial, especially those with the requisite language skills; often, a translator must be used as well.<sup>411</sup> Some intermediaries are not adequately trained, lacking familiarity with court procedures and an understanding of the needs of child witnesses.<sup>412</sup> In addition, intermediaries are hired only on a contract basis, which impedes their effectiveness and ability to develop sustainable skills.<sup>413</sup> Moreover, the intermediary system is only available to child witnesses if the judge determines that in-court testimony would be traumatic, and this does not always happen.<sup>414</sup> Finally, the system requires a high-tech setting that does not exist in many regions of Africa, including much of rural South Africa.<sup>415</sup>

As with the amendment of substantive criminal law and sentences relating to child sexual offences, the procedural reforms undertaken by many African countries reflect substantial progress towards ensuring accountability for child sex abuse and protecting the victims. Specialized police units have led to better outcomes in cases involving child sex abuse and have improved the treatment of child victims.<sup>416</sup> One-stop care centers have helped to provide an integrated and victim-friendly response to the needs of child victims of abuse by enabling victims to report a case, undergo a medical examination, and receive treatment and counseling all in a single facility.<sup>417</sup> South Africa's specialized sexual offences courts, when implemented effectively, appear to result in more efficient proceedings and better rates of conviction.<sup>418</sup> The innovative intermediary systems adopted by South Africa, Namibia, and Zimbabwe have protected

410. *Id.* at 543.

411. Deborah Ewing, *Advocacy on Behalf of Sexually Abused Children: Research and Policy Issues Arising From a Case Study*, in *SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA*, *supra* note 88, at 356; Coughlan & Jarman, *supra* note 220, at 545.

412. Gert Jonker & Rika Swansen, *Intermediary Services for Child Witnesses Testifying in South African Criminal Courts*, 6 INT'L J. OF HUM. RTS. 91, 110 (2007), available at <http://www.surjournal.org/eng/index6.php>; *Director of Public Prosecutions, Transvaal v. Minister for Justice et al.* (CCT 36/08), [2009] ZACC 8, 2009 (4) SA 222 (CC) (1 April 2009), ¶¶ 195-96 (S.Afr.).

413. Marow-Wilkerson, *supra* note 405, at 178; MINISTERIAL ADVISORY TASK TEAM, *supra* note 379, at 100.

414. Van Niekerk, *supra* note 88, at 269. In *Director of Public Prosecutions, Transvaal v. Minister for Justice et al.*, which involved two cases of child rape including the rape of a 13-year-old girl by her sister's common-law husband, the Constitutional Court rejected the argument that the Constitution requires the appointment of an intermediary in every case. (CCT 36/08) [2009] ZACC 8, 2009 (4) SA 222 (CC) (1 April 2009), (S.Afr.) ¶¶ 128-29. The court explained that such a ruling would fail to treat children as individuals and disregard the rights and wishes of a child who wishes to confront her abuser in court. *Id.* ¶ 127. The Court held, however, that courts must consider whether the appointment of an intermediary is in the best interests of a child in every child sex abuse case, regardless of whether the prosecution seeks such an appointment. *Id.* ¶¶ 78-80.

415. Even where the technology exists, it is frequently missing or broken, resulting in delays or even the need to transfer proceedings to another court district. Jonker & Swansen, *supra* note 412, at 108.

416. See Vetten, *Will Any Police Officer Do?*, *supra* note 364, at 3.

417. MINISTERIAL ADVISORY TASK TEAM, *supra* note 379, at 13.

418. *Id.* at 24.

children from the confusion and trauma of participating in formal proceedings and confronting their abuser in open court while also safeguarding the rights of the defendant.<sup>419</sup>

Yet, despite these reforms, important gaps remain. Lack of resources is the most critical gap, compromising the effectiveness of specialized police units, one-stop centers, sexual offences courts, and intermediary systems alike. Governments must ensure that these institutions are staffed by qualified personnel who receive specialized training, professional recognition, and counseling and other forms of support. The institutions must be equipped with the basic facilities necessary to carry out their mandates, and their efforts to assist victims must be coordinated with each other to the greatest extent possible. In countries with resources much more limited than those of South Africa, governments could explore other creative strategies. For example, in the absence of access to closed circuit television, judges in Kenya and Zimbabwe have used handmade screens and the position of bookshelves to protect child witnesses from having to face the accused during their testimony.<sup>420</sup> It is also important to ensure that both the public and government officials are sensitized to the special needs of child victims of sexual violence and the importance of procedures designed for the victims' protection. Increased awareness of the problem and consequences of child sex abuse may serve as a safeguard against the sort of waning commitment that led to the temporary restructuring of South Africa's FCS and demise of its Sexual Offences Courts.

Legal and procedural reforms, however, can only go so far in addressing the harms experienced by children who are sexually abused by a family member. Even if the perpetrator is convicted, his victim may not receive the care that she or he requires—counseling to treat the trauma to the mind as well as the body, and skilled intervention into the family in which incest has taken place—because of a lack of resources available to provide the necessary social services.<sup>421</sup> We discuss this inadequacy in the next section.

#### IV. The Inadequacy of the Mental Health Sector

Sexual abuse has strongly negative effects on the mental health of children who experience it; effects that are both immediate and long term.<sup>422</sup> Studies show that sexually abused children are more likely to experience depression, anxiety, difficulty sleeping, substance abuse, pregnancy com-

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419. Marow-Wilkerson, *supra* note 405, at 63.

420. AVON GLOBAL CENTER, *Conference Report from the Third Annual Women and Justice Conference: Sexual Violence Against Girls in Southern Africa* (internal version), Oct. 18–19, 2012, Ithaca, N.Y., at 13 (on file with Avon Global Center for Women and Justice at Cornell Law School).

421. Paul D. Carey et al., *Risk Indicators and Psychopathology in Traumatized Children and Adolescents with a History of Sexual Abuse*, 17 EUR. CHILD & ADOLESCENT PSYCHIATRY 93, 96–97 (2008).

422. Shanaaz Matthews, et al., *Sexual Abuse*, in CRIME, VIOLENCE, AND INJURY IN SOUTH AFRICA: 21ST CENTURY SOLUTIONS FOR CHILD SAFETY 84, 89 (Ashley van Niekerk et al., eds. 2012), available at <http://www.mrc.ac.za/crime/Chapter7.pdf>.

plications, suicidal ideation, and post-traumatic stress disorder (PTSD); conditions that often follow them into adulthood.<sup>423</sup> One longitudinal South African study with children at two sexual assault centers found that 70% of the children presented PTSD symptoms four to six months after their first visit to the center.<sup>424</sup> Child sex abuse also increases the risk that an individual will engage in high risk behaviors that increase his or her likelihood of contracting HIV, such as using drugs, having multiple sexual partners, and becoming sexually re-victimized.<sup>425</sup> Reporting sexual abuse to the police can also have mental health consequences, including emotional distress and anti-social behavior resulting from the negative experiences that many children and young people have when seeking help from the police.<sup>426</sup>

The psychological consequences of child sex abuse may be particularly acute in the case of a child who has been a victim of incest. Abuse by a father or stepfather has been found to correlate with increased mental health harm.<sup>427</sup> A South African study found that sexual violence by stepfathers caused adolescent victims significantly more emotional distress than sexual violence experienced by victims of other perpetrators.<sup>428</sup> These heightened mental health effects relate to a child's feelings of betrayal at being abused by a family member, particularly a parental figure,

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423. Rachel K. Jewkes et al., *Associations Between Childhood Adversity and Depression, Substance Abuse and HIV and HSV2 Incident Infections in Rural South African Youth*, 34 *CHILD ABUSE & NEGLECT* 833, 838 (2010) [hereinafter Jewkes et al., *Associations*]; Avid Reza, et al., *Sexual Violence and Its Health Consequences for Female Children in Swaziland: A Cluster Survey Study*, 373 *THE LANCET* 1966, 1969 (2009), available at <http://www.infocenter.mercha.org.sz/sites/default/files/SexualViolencePaper.pdf>; Carey, *supra* note 432, at 96-97; C. Gwandure, *Sexual Assault in Childhood: Risk HIV and AIDS Behaviours in Adulthood*, 19 *AIDS CARE* 1313, 1314-15 (2007). PTSD is an anxiety disorder that can occur after experiencing or witnessing a traumatic event. See Mark E. Boyes et al., *Psychometric Properties of the Child PTSD Checklist in a Community Sample of South African Children and Adolescents*, 7 *PLoS ONE* 1, 1 (2012).

424. Shanaaz Matthews, et al., *Exploring Mental Health Adjustment of Children Post Sexual Assault in South Africa* 22 *J. OF CHILD SEXUAL ABUSE* 639, 646-47 (2013); see also Debra Kaminer et al., *Gender Patterns in the Contribution of Different Types of Violence to Posttraumatic Stress Symptoms Among South African Urban Youth*, 37 *CHILD ABUSE AND NEGLECT* 320, 327-28 (2013) (finding, in a study of 230 Xhosa-speaking high school students in a low-income community in South Africa, that sexual violence contributed to the severity of PTSD symptoms in girls, and that this effect was heightened by exposure to violence in the community), available at <http://eric.ed.gov/?id=EJ1001118>.

425. Jewkes et al., *Associations*, *supra* note 423, at 838; Kevin Lalor, *Child Sexual Abuse and HIV Transmission in Sub-Saharan Africa*, 17 *CHILD ABUSE REVIEW* 94, 102-03 (2008); C. Gwandure, *supra* note 434, at 1314-15.

426. Mary Sibongile Mkhize, *An Investigation of the Relationship Between Childhood Sexual Abuse Experiences and Psychosocial Adjustment in a Sample of Black South African Adolescents*, 106 (2010), (Master's Thesis, University of KwaZulu-Natal), available at <http://researchspace.ukzn.ac.za/xmlui/bitstream/handle/10413/514/Microsoft%20Word%20-%20Thesis%20Final%20for%20Binding.pdf?sequence=1>.

427. Joseph Beitchman et al., *A Review of Short-Term Effects of Child Sexual Abuse*, 15 *CHILD ABUSE AND NEGLECT* 537, 548 (1991).

428. Mkhize, *supra* note 426, at 103-04. The study did not find heightened emotional distress among adolescents who were sexually abused by a biological father, which its author suggests may relate to the feeling among those participants that their fathers treated them well despite the abuse. *Id.* at 104.

who had occupied a position of trust.<sup>429</sup> Incest may also interfere with the support that a child receives from her family, which plays an important role in a child's ability to heal and adjust in the aftermath of abuse.<sup>430</sup>

The psychological harms that child survivors of incest experience can be especially difficult to identify and treat.<sup>431</sup> In its 1999 report, the SALC described how the emotional scars caused by sexual abuse by a trusted family member can impede effective treatment and rehabilitation.<sup>432</sup> Medical personnel seeing incest survivors in one Zimbabwean hospital reported that eight out of ten survivors displayed symptoms of anxiety and depression—but also that it was difficult to determine and treat their psychological injuries because children in the Matabeleland region were so quiet and passive in the presence of adults, especially authority figures.<sup>433</sup>

The need for high quality and sustained mental health treatment for incest survivors in Sub-Saharan Africa is enormous, yet for many survivors, such treatment is unavailable.<sup>434</sup> Trained staff is scarce in many areas, and those professionals who are there are overburdened.<sup>435</sup> Outside of South Africa, social work education is not readily available.<sup>436</sup> There is only one training institution in Zimbabwe, at the University of Zimbabwe.<sup>437</sup> In West Africa, only Ghana, Nigeria, and the Ivory Coast have university-based training programs in social work.<sup>438</sup>

The child protection system in South Africa, the system that is considered to be the most developed, is reportedly in such chronic disarray that intervention by social welfare authorities may present increased danger to victims rather than a place of safety.<sup>439</sup> The child welfare system is overloaded: residential care centers lack vacancies, and those with vacancies are often dangerous and rarely therapeutic.<sup>440</sup> If an incest victim receives appropriate therapy, it will come from the private sector, if at all.<sup>441</sup>

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429. *Id.*

430. Matthews, *supra* note 422, at 89 (“Factors such as parent-child relationship and family functioning also play an important role in how a child adjusts post-rape, as this directly affects the support the child receives post-disclosure”).

431. SOUTH AFRICAN LAW COMM’N DISCUSSION PAPER 85, *supra* note 22, § 3.6.7.4.

432. *Id.*

433. Meursing et al., *supra* note 49, at 1700-01.

434. Alice Sikwese et al., *Human Resource Challenges Facing Zambia’s Mental Health Care System and Possible Solutions: Results from a Combined Quantitative and Qualitative Study*, 22 INT’L REV. OF PSYCHIATRY 550, 552 (2010).

435. *Id.*

436. See Cris Chogugudza, *Social Work Education, Training and Employment in Africa: The Case of Zimbabwe*, 35 UFAHAMU: A J. OF AFR. STUD. 1, 1-2 (2009).

437. Chitereka, *supra* note 75, at 35.

438. Sossou & Yotiba, *supra* note 36, at 1228; Ayodele Ogundipe & Patrick A. Edewor, *Sociology and Social Work in Nigeria: Characteristics, Collaborations*, 16 AFR. SOC. REV. 40, 52 (2012).

439. Loffell, *supra* note 105, at 253. This is also the case in many areas in the United States. See, e.g., *Marisol v. Giuliani*, 929 F. Supp. 662, 669-70 (S.D.N.Y. 1996) (detailing chaos and gross deficiencies in the New York City child welfare system).

440. Rosalind English, *Child Abuse Tort Claims Against Public Bodies in South Africa*, in CHILD ABUSE TORT CLAIMS AGAINST PUBLIC BODIES: A COMPARATIVE LAW VIEW 71, 75, 78 (Duncan Fairgrieve & Sarah Green eds., 2004).

441. See *id.* at 75-76.

In South Africa, many social welfare functions are officially delegated to the private sector, in part as a matter of policy and in part as a result of inadequate resources in the public sector.<sup>442</sup> A policy dating back to the 1930s assigns responsibility in the area of child protection to the community; the government is to subsidize private groups rather than perform the functions itself.<sup>443</sup> Lack of resources, however, leads to underfunding, which then forces these groups to compete for donor funds.<sup>444</sup> The result is fragmentation and lack of coordination in the provision of services for children in general.<sup>445</sup> Thus, whether services will be available for an incest victim will depend both on whether private groups have organized with respect to this issue in the locality where he or she lives and whether these groups have been able to obtain sufficient public or private support.<sup>446</sup> Fortunately, in South Africa there are many civil society organizations active in the areas of sexual assault, child protection, and women's and children's rights.<sup>447</sup> This may not be so in every country.

The result is that the mental health care that is so necessary for the treatment of incest survivors is difficult to procure. The SALC recognized this problem in its 1997 Issue Paper, reporting that existing services were "fragmented, under-resourced or non-existent," that large parts of the country, especially rural areas, were underserved, that there was a shortage of qualified and trained personnel, and that organizations dealing with these problems were experiencing serious financial difficulties.<sup>448</sup> Nonetheless, in its later report the Commission concluded that developing a system that depended heavily on the state was unwise, presumably because of a lack of resources. Instead, it proposed a national strategy to develop protocols for the multidisciplinary management of child abuse in order to coordinate the efforts of state bodies and the various private organizations.<sup>449</sup>

Healing requires long-term counseling both for the victim and her family, as well as social and family support. Yet the coordinator of a YWCA Crisis Center observed that there is a stigma attached to receiving psychological treatment in Zambia, which discourages families from seeking counseling for children who are sexually abused.<sup>450</sup> This is compounded

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442. For a history of child protection policy in South Africa, starting from its segregated and highly unequal beginning to its current lack of funding for many essential services, see Rose L. September, *The Progress of Child Protection in South Africa*, 15 INT'L. J. SOC. WELFARE 565, 566-568 (2006).

443. English, *supra* note 440, at 75.

444. SAVE THE CHILDREN, *supra* note 57, at 35.

445. English, *supra* note 440, at 75-76.

446. *Id.* at 76.

447. See COMMUNITY AGENCY FOR SOCIAL ENQUIRY PLANACT AFRICA SKILLS DEVELOPMENT, *Review of the State of Civil Society Organisations in South Africa*, 19, 22-46 (2008), available at [http://www.nda.org.za/docs/\\_\\_\\_CaseReport.pdf](http://www.nda.org.za/docs/___CaseReport.pdf).

448. SOUTH AFRICAN LAW COMM'N ISSUE PAPER 10, *supra* note 25, § 3.1.

449. SOUTH AFRICAN LAW COMM'N DISCUSSION PAPER 102, *supra* note 215, §§ 4.1-4.6; SOUTH AFRICAN LAW COMM'N PROJECT 107, SEXUAL OFFENCES REPORT, §§ 9.2.1, 9.3.1, 9.4 (2002).

450. Interview with Brenda Mwiinga, Coordinator of Youth Activities and Child Crisis Center, YWCA (May 25, 2012).



by the fact that Zambia's limited mental health services are primarily concentrated in the country's only psychiatric hospital, which is further stigmatized as a place for people with severe mental illness.<sup>451</sup>

Similarly, one observer noted in 1997 that private counseling was available in Zimbabwe but was unaffordable and that other resources were available from NGOs, but that many more community-based and accessible long-term counseling services were necessary to meet the level of need.<sup>452</sup> Given the economic problems that have plagued Zimbabwe and many other African countries since that time,<sup>453</sup> the need has undoubtedly skyrocketed and the resources for therapy have become even scarcer. Doctors working with incest survivors in a rural hospital in KwaZulu-Natal, South Africa, bluntly stated:

We lack the resources to manage the emotional and family scars these events leave behind them. We also lack the resources adequately to protect children from renewed abuse. As in most hospitals in developing countries, we do not have full-time hospital social workers and access to the services of child psychologists is extremely limited.<sup>454</sup>

The roles of legal and mental health personnel intersect in this area. Psychologists, however, are often reluctant to involve the police soon after an incident of child sex abuse for fear that this will interfere with the child's psychological needs, even though not doing so makes successful prosecution of the offender very difficult.<sup>455</sup> The goals of mental health practitioners and of the legal system may be at odds in this respect.<sup>456</sup> Yet magistrates and judges experienced with the specialized reporting centers and courts in South Africa report that when a child sex abuse victim has received counseling, she or he is a more effective witness, and they rue the fact that not all victims have access to counseling services.<sup>457</sup>

In most circumstances, long-term individual therapy for incest victims is simply unavailable in Africa; if available at all, it is too costly.<sup>458</sup> As a result, alternative therapeutic programs need to be developed—not only for victims but also for their caregivers, who are critically important both to their children's recovery and the prevention of further abuse.<sup>459</sup> Some promising models for reaching out to mothers or other caregivers already

451. *Id.*; see also Alice Sikwese et al., *Human Resource Challenges Facing Zambia's Mental Health Care System and Possible Solutions: Results from a Combined Quantitative and Qualitative Study*, 22 INT'L REV. OF PSYCHIATRY 550, 552 (2010); Lonia Mwape, *Integrating Mental Health into Primary Health Care in Zambia: A Care Provider's Perspective*, 4 INT'L J. OF MENTAL HEALTH SYS. 1, 4-5, 7-8 (2010), available at <http://www.ijmhs.com/content/4/1/21>.

452. Loewenson et al., *supra* note 148, at 32.

453. See Chogugudza, *supra* note 436, at 5.

454. J.V. Larsen et al., *Child Sexual Abuse in KwaZulu-Natal, South Africa*, 92 TRANSACTIONS OF THE ROYAL SOCIETY OF TROPICAL MEDICINE & HYGIENE 262, 263 (1998).

455. SOUTH AFRICAN LAW COMM'N ISSUE PAPER 10, *supra* note 25, § 5.4.1.

456. Levett, *Contradictions and Confusions in Child Sexual Abuse*, *supra* note 107, at 14.

457. Sadan, *supra* note 386, at 246.

458. *Id.*

459. Kistner et al., *supra* note 77, at 44.

exist, in the form of peer group counseling—that is, groups of mothers of children who have been sexually abused.<sup>460</sup>

Existing counseling organizations and therapists need to disseminate their skills both by giving training workshops to members of the community who may themselves be able to teach others, and by developing and training community support groups.<sup>461</sup> For example, the Teddy Bear Clinic, an NGO based in Johannesburg, South Africa, not only provides counseling, therapy, and other services to child victims of abuse, but also regularly conducts trainings of teachers, caregivers, students, and community members.<sup>462</sup> Other types of creative programs need to be developed in the relevant communities—sensitization programs that help the community identify vulnerable children and offer them support, for example, and wider educational work about the problem of incest and child sex abuse, using role-playing, psychodrama, small group discussions, and the like.<sup>463</sup>

The essential starting point is that the community itself must begin to own this problem and decide to attack it.<sup>464</sup> The activities of the Bara/Soweto Group in South Africa present a particularly inspiring example of this process.<sup>465</sup> After pediatrics staff at Witwatersrand Pediatric Hospital noted large numbers of child sex abuse cases in 1982, the Bara/Soweto Group was formed, with counseling as a key component of its activities.<sup>466</sup> The group grew from 90 to 300 members by 2003 and succeeded in raising community awareness to an extent that more children disclosed their abuse.<sup>467</sup> Most relevantly, the Bara/Soweto Group set up counseling courses; after the first such course, demand grew and the group ultimately ran a total of three.<sup>468</sup> Due to a shortage of funds, however, the courses ceased in 2001.<sup>469</sup> In short, with community cooperation, it is possible to accomplish a great deal, but only if resources can be made available.

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460. See Gaboipolelwe Margaret Masilo, *Support Program to Mothers of Sexually Abused Children in North West Province in South Africa; A Literature Review*, 36 J. HUM. ECOL. 13, 14-17 (2011).

461. Rene Loewenson & Naira Khan, *Initiatives and the Future*, in *SEXUAL ABUSE OF CHILDREN IN ZIMBABWE*, *supra* note 148, at 37.

462. Alicia Davids et al., *Sexual Violence and HIV*, in *CRIME, VIOLENCE, AND INJURY IN SOUTH AFRICA: 21ST CENTURY SOLUTIONS FOR CHILD SAFETY*, *supra* note 424, at 97,108 ; THE TEDDY BEAR CLINIC, <http://ttbc.org.za/> (last visited Oct. 11, 2013).

463. Beverley Killian & Jonathan Brakarsh, *Therapeutic Approaches to Sexually Abused Children*, in *SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA*, *supra* note 88, at 367, 388-89.

464. *Id.* at 389.

465. Chrissie Mkhasibe & René Brandt, *Doing Something: The Initiation of Sexual Abuse Services in Soweto*, in *SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA*, *supra* note 88, at 356, 356-66.

466. *Id.*

467. *Id.* at 366.

468. *Id.* at 361.

469. *Id.*

## V. What is to Be Done?

There are obviously enormous constraints on what the disciplines of law and mental health can do about the problem of intra-familial child sex abuse in Africa. Neither field is adequate to meet this challenge; a much broader response is necessary. Clearly, any approach must be interdisciplinary, intersectoral, and coordinated, involving the efforts of state and non-state actors, different professions, and the community at large.<sup>470</sup> Each strategy and program must also be consciously multidimensional, for there is no one “fix.” The key, of course, is to focus on prevention, while not taking away the resources devoted to identification, intervention, and treatment of those who have already become victims of incest—a tall order. We nonetheless suggest a few guidelines about preventive measures tailored to the various risk factors described in Part II above.

### A. Think Local

First, the efforts of groups located in national capitals can obviously only be of limited effect. Services of all sorts—preventive, medical, police, therapy, and the like—must be accessible locally and must involve the local community, including its leaders.<sup>471</sup> Reports and articles all refer to the need for “community-based” planning and implementation of strategies for protection of children against sexual abuse.<sup>472</sup> However, the concept of “community” must be operationalized in the African context to be effective; simply borrowing from strategies that have worked in non-African contexts is unlikely to be effective.<sup>473</sup> In Africa, community is more likely to be defined in terms of kinship and other social group affiliations—in Kenya, for example, by tribal culture.<sup>474</sup>

One commentator points out that local government structures—grass-roots political groupings—in Mozambique, Tanzania, and Uganda are particularly well-suited to these efforts.<sup>475</sup> Unlike the formal legal structure, local groups such as churches and political party councils have the capacity to deliver “quick and effective solutions.”<sup>476</sup> Alice Armstrong has described one case of incest handled in Zimbabwe by a local political party branch chairman.<sup>477</sup> After a grandfather raped his granddaughter, the

470. WLSA BOTSWANA, NO SAFE PLACE, *supra* note 61, at 90; Rwezaura, *supra* note 12, at 311.

471. Dawes, Sexual Offences, *supra* note 153; Rwezaura, *supra* note 12, at 311.

472. See, e.g., September, *supra* note 442, at S68; Johnsto E. Osagie & Adebowale Akande, *Perspectives on a New Strategy for Child Protection in Africa*, 166 EARLY CHILD DEV. & CARE 135, 137-39 (2001).

473. See Plummer & Njuguna, *supra* note 93, at 526, 530; Osagie & Akande, *supra* note 472, at 137.

474. Plummer & Njuguna, *supra* note 93, at 526.

475. Rwezaura, *supra* note 12, at 313. *But cf.* Opobo & Wandega, *supra* note 20, at 25 (observing that, on the other hand, there are reports that the Local Councils in Uganda sometimes enter into negotiations with child abuse offenders, that they bring pressure on families of victims to accept compensation rather than pursue a criminal case, and that they sometimes even accept bribes).

476. Armstrong, *Consent and Compensation*, *supra* note 74, at 141.

477. *Id.* at 139-41.

local official intervened and stopped the abuse, which the girl's mother had been reluctant to report to the police.<sup>478</sup> Had the mother done so, any remedial action would have taken months.<sup>479</sup> Armstrong notes that "[c]ommunity-based solutions are more attractive to many families because they incorporate traditional values and also because they are often more effective and immediate."<sup>480</sup>

## B. Build Upon Traditional Remedies When Possible

It is particularly important to involve tribal chiefs and councils in whatever outreach and education is done locally, because incest is more likely to be reported to them than to other authorities.<sup>481</sup> A report on incest in Botswana, for example, found that women who discovered that their husbands were sexually abusing their children were secretly reporting the abuse to tribal authorities and asking them to talk to the perpetrator and get him to stop, rather than to punish him or risk the marriage upon which the family is financially dependent.<sup>482</sup> Therefore, it is critical to involve the chiefs to whom incest is in fact being reported in outreach, education, and prevention programs.

Another important group to involve in prevention programs consists of traditional healers.<sup>483</sup> Traditional remedies may bring about a quick cessation of the abuse through physical punishment, humiliation, or ostracism of the offender; they may also offer therapeutic processes to children for whom other types of therapy are not available. African observers repeatedly remark upon the power of ritual cleansing ceremonies traditionally used for this purpose.<sup>484</sup>

On the other hand, there is a potential downside to an uncritical reliance upon traditional leaders and remedies. Alice Armstrong reports another case in Zimbabwe in which a child was raped by her grandfather, but when her mother asked the chief and her father's brothers to talk to the offender, the headman told her that she and her daughter could not expect to stay with the grandfather for nothing—that is, they could not expect to be supported by him without giving him something in return, such as sex.<sup>485</sup> The family did, however, move the child to another dwelling to keep her away from the abusive grandfather.<sup>486</sup>

Armstrong believes, sensibly, that developing solutions that enable communities to handle sexual abuse cases at the local level is necessary,

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478. *Id.* at 140.

479. *Id.*

480. *Id.* at 146.

481. Kistner et al., *supra* note 77, at 55.

482. WLSA BOTSWANA, NO SAFE PLACE, *supra* note 61, at 43.

483. Rose September, *The Report of the Parliamentary Task Group on the Sexual Abuse of Children 2002: A Commentary*, in *SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA*, *supra* note 88, at 304, 307.

484. Nyandiy-Bundy & Bundy, *supra* note 56, at 10; Loewenson et al., *supra* note 148, at 32.

485. Armstrong, *Consent and Compensation*, *supra* note 74, at 141.

486. *Id.* at 140-42.

but that customary and state law must be linked in such a way that state law can monitor these solutions to ensure that victims' interests are not sacrificed.<sup>487</sup> Holding initial hearings on child sex abuse cases locally, without a great deal of legal formality, and including family members and perhaps local traditional authorities in these hearings could prove effective in this respect, while still reserving the right to appeal to the civil courts if necessary.<sup>488</sup> Another suggestion is to establish Village Rape Criminal Courts for this purpose, which could punish and deter by publicizing the abuse and embarrassing the perpetrator.<sup>489</sup> These institutions could be particularly useful in light of the delays in seeking justice from the state court system; if victim friendly courts do not exist or fail to fast track incest cases, the cases could be returned to the Village Rape Criminal Courts for a different type of justice.<sup>490</sup> In this or other ways, the key is to build on the strength of the culture and be sensitive to the local setting without sacrificing justice for the victim and prevention of abuse.

### C. Establish Mass Education Programs

As our discussion of the factors contributing to intra-familial child sex abuse makes clear, any effort to address this problem requires a large measure of attitude change. Almost every commentator suggests mass public awareness campaigns as one preventive strategy.<sup>491</sup> Although large numbers of parents warn their children about "stranger danger,"<sup>492</sup> they also need to prepare them for the more familiar sources from which abuse may come. The message needs to get out that incest is in fact a large problem, that it exists in every community, and that the physical and psychological consequences for its victims are severe.<sup>493</sup> Thus, incest is not a private matter, but a public and societal detriment; a crime.<sup>494</sup> Workshops, popular theater, videos, music, posters, television and radio, cartoons, and easy-to-read pamphlets are all good ways to get this information out, and have been used in some areas.<sup>495</sup> The contents of this education not only should include consciousness-raising and sensitization to the issue of child sex abuse but also should focus on how to identify the effects of this abuse and how to respond, including a description of legal information in simple

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487. *Id.* at 146-47.

488. *Id.* at 147.

489. Girl Child Network, *Gravity of Girl Child Sexual Abuse in Zimbabwe: "Towards Creating A Culture of Prevention,"* 23, 25, 27-28, (2005), [http://www.kubatana.net/docs/sexual/gcn\\_sexual\\_abuse\\_zim\\_050517.pdf](http://www.kubatana.net/docs/sexual/gcn_sexual_abuse_zim_050517.pdf).

490. *Id.*

491. See, e.g., Loewenson et al., *supra* note 148, at 21; SAVE THE CHILDREN, *supra* note 57, at 53-54.

492. Grobler & van den Heever, *supra* note 45, at 63 (76% of parents teach preschoolers about stranger danger); Olusimbo K. Ige, *Preventing Child Sexual Abuse: Parents' Perceptions and Practices in Urban Nigeria*, 20 J. CHILD SEXUAL ABUSE 695, 700 (2011) (virtually all parents in Nigeria tell children about stranger danger).

493. Hendricks, *supra* note 69, at 73.

494. Kistner et al., *supra* note 77, at 31.

495. Rwezaura, *supra* note 12, at 313.

language that the public can understand.<sup>496</sup>

Schools are a good point of access, both for reaching children about this issue (as has been done in Zimbabwe with dramas and role-playing) and for training teachers to identify abuse and counsel its victims.<sup>497</sup> Research in other countries has shown that school-based programs can in fact be effective.<sup>498</sup> A particularly innovative example has been tried in South Africa, and the results have been evaluated for effectiveness.<sup>499</sup> This program was designed to equip children with self-protection skills by broadening their concepts of sexual abuse and of the persons who may be abusers, as well as teaching them about actions to protect themselves.<sup>500</sup> With younger children, the program used coloring books; a video for grades 3 to 5; and a board game for grade 4, which was based on answering questions about appropriate and inappropriate touching of the body.<sup>501</sup> To the group that used the board game and also to a control group, the researchers then administered the Children's Knowledge of Abuse Questionnaire on three occasions—once before the game; once after the game, which the control group did not play; and then again to both groups six weeks later.<sup>502</sup> The two groups did not differ on the results of the test administered prior to the game, but the experimental group experienced significant increases in knowledge relative to the control group after having played the game.<sup>503</sup> The experimental group's knowledge, however, decreased after six weeks, leading the authors to conclude that the board game should be played on a frequent basis.<sup>504</sup>

Mass education campaigns must also target men, educate them about the severe damage sexual abuse to children causes, and challenge them, in the words of one author, to be “responsible for channeling their sexuality within legal and ethical boundaries.”<sup>505</sup> These campaigns must challenge the myths about male sexuality as “uncontrollable” and engage the community in this conversation.<sup>506</sup> As we have seen, increased media coverage about child sex abuse has raised parental awareness of the problem.<sup>507</sup> Confronting the silence about incest is key to preventing this crime.

Finally, various countries, including Mozambique and South Africa, have already developed and implemented educational programs aimed at

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496. WLSA BOTSWANA, NO SAFE PLACE, *supra* note 61, at 99; Ige, *supra* note 492, at 703-04.

497. Loewenson et al., *supra* note 148, at 23; WLSA BOTSWANA, NO SAFE PLACE, *supra* note 61, at 98.

498. David Finkelhor, *Prevention of Sexual Abuse Through Educational Programs Directed Toward Children*, 120 J. AM. ACAD. PEDIATRICS 640, 641 (2007).

499. Munita Dunn, *The Learning of Sexual Abuse Prevention Concepts and the Reliability of the CKAQ-RIII in the South African Context*, 47 J. SOC. WORK 155, 155 (2011).

500. *Id.* at 157.

501. *Id.* at 158.

502. *Id.* at 162.

503. *Id.* at 170.

504. *Id.* at 171.

505. Meursing et al., *supra* note 49, at 1703.

506. See Boakye, *supra* note 67, at 959, 969.

507. Ige, *supra* note 492, at 703-04.

preventing child abuse.<sup>508</sup> Information about such programs, as well as their success or failure, should be widely disseminated because these programs may be effective in other African countries; information about them should also be shared through regional and international conferences on a regular basis.

#### D. Increase Reporting and Research

Obviously we need to know more about child sex abuse within the family in Africa. The paucity of statistics could be addressed if cases were more consistently reported to the authorities, but relatively few cases are formally reported in this fashion.<sup>509</sup> As indicated above, some feel that encouraging people to report—or requiring them to do so through mandatory reporting laws—is a mistake, as these legal systems may lack the resources to adequately deal with the many cases of this nature.<sup>510</sup> Given this concern, it is important to develop other systems to gather and keep reliable statistics on the incidence of child sex abuse and the types of offenders involved; perhaps international donor organizations or governments could underwrite such research efforts. The development of standardized protocols for coding and recording information is essential to ensure that clear and consistent definitions of the abuse involved will be used and that statistics can be more fruitfully compared.<sup>511</sup>

For a number of reasons, the dissemination of information about incest is very important. It calls attention to the problem, persuades the public that it is real, and motivates the public to share information about risk factors, legal innovations, and individual and community interventions to prevent it. Initial studies were primarily of the first type—meant to verify the existence of incest and child sex abuse and the serious harms resulting from both.<sup>512</sup> Over the last eight to ten years, however, numerous articles have evaluated legal reforms and presented evidence-based assessments of therapeutic and/or preventive programs.<sup>513</sup> All of this is immensely helpful both in publicizing the problem and sharing ideas about how to combat it.

One example of the importance of studying innovations and publishing articles about them involves an experiment in training nurses in Bot-

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508. Rwezaura, *supra* note 12, at 311; *see, e.g., Child Protection*, UNICEF, <http://www.unicef.org/mozambique/protection.html> (last visited Jan. 5, 2014) (discussing child protection programs in Mozambique); *see also South African Society for the Prevention of Child Abuse and Neglect*, CHILD RIGHTS INT'L NETWORK, <http://www.crin.org/organisations/vieworg.asp?id=2216> (last updated July 14, 2004, 10:35 AM) (describing an organization committed to promoting awareness of child abuse in South Africa).

509. Andrew Dawes et al., *Measurement and Monitoring, in SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA*, *supra* note 88, at 176, 196-97.

510. Loewenson et al., *supra* note 148, at 30.

511. Dawes et al., *supra* note 509, at 197.

512. *See, e.g., Lema, supra* note 162, at 743-46.

513. *See, e.g., Dunn, supra* note 499, at 158 (discussing a child abuse prevention program as well as knowledge of sexual abuse prevention concepts in South Africa).

swana.<sup>514</sup> A group of nursing students was assigned a geographical area and instructed to identify families with whom to work.<sup>515</sup> One group found a family in which a father was sleeping with his three daughters, aged thirteen, fifteen, and eighteen.<sup>516</sup> Although the mother apparently knew about the abuse, she was described as the least powerful person in the family and was without authority to confront the father, but she told the student nurses about the abuse when they visited.<sup>517</sup> The students referred the family to social workers, who were able to work out counseling and intervention for this family.<sup>518</sup> Their supervisors then wrote a description of the case for publication in a journal about mental health nursing, suggesting that in other countries with insufficient support services, nursing or social work students could also be used to identify incestuous families and direct intervention to them.<sup>519</sup> In this way, even a relatively short descriptive article can form part of a strategy for the prevention and treatment of incest.

#### E. Empowerment of Women is Key

Finally, the problem of child sex abuse within the family in Africa is inextricably linked to gender inequality.<sup>520</sup> Incest is overwhelmingly a male-on-female crime,<sup>521</sup> and until notions of male sexuality and women's autonomy undergo substantial change, it is likely to continue. The value of girl children must be recognized, and their mothers need to have enough power within marriage to be able to protect their daughters when circumstances demand. As one astute commentator has pointed out, "rights awareness campaigns without empowerment are unlikely to have much impact."<sup>522</sup> Women need power to be able to enforce their rights. This includes economic power and appropriate remedies upon divorce, as well as lasting change in basic structures of power and privilege, so that women are able to leave situations in which they or their children are being abused. In short, the problem of child sex abuse is part of the wider problem of violence against women in Africa and cannot be treated in isolation.<sup>523</sup> It is unsurprising that study after study of child sex abuse and incest recommend establishing gender awareness programs aimed at individual attitudinal change to alter traditional notions of masculinity.<sup>524</sup>

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514. Esther Salang Seloilwe & Gloria Thupayagale-Tshweneagae, *Sexual Abuse and Violence Among Adolescent Girls in Botswana: A Mental Health Perspective*, 30 MENTAL HEALTH NURSING 456, 456-57 (2009).

515. *Id.* at 458.

516. *Id.*

517. *Id.*

518. *Id.* at 459.

519. *Id.*

520. LaFraniere, *supra* note 1, at A16.

521. See Dawes, *Sexual Offences*, *supra* note 153, at 4.

522. Rwezaura, *supra* note 12, at 314.

523. See Dawes, *Sexual Offences*, *supra* note 153, at 9.

524. See Petersen et al., *supra* note 60, at 1234.



On the one hand, this linkage vastly broadens the remedial measures that are necessary. On the other hand, though, it means that more than one problem can be attacked with a single program. As several scholars have pointed out, intimate partner violence and child sex abuse have common roots; thus, programs to prevent domestic violence in general by building more gender-equitable relationships and better communication between men and women can help to prevent child sex abuse as well.<sup>525</sup> The same is true of programs directed at prevention of HIV/AIDS, such as Stepping Stones in South Africa.<sup>526</sup> This program to build gender equitable relationships uses participatory learning approaches like critical reflection, role play, and drama; it takes place in thirteen three-hour sessions held in schools and three peer group meetings, culminating in a community-wide meeting aimed at presenting a specific request for change.<sup>527</sup> The program appears to have been quite successful.<sup>528</sup> Such a program could not help but address the culture of male dominance underlying child sex abuse as well. In short, though the task of altering gender relations to empower women is a large one, a series of small steps—stepping stones—can amount to gradual change over time, change that will benefit men, women, and children alike in Africa.

## Conclusion

The struggle against incest in Africa takes place within enormous constraints, but this is not cause to despair. Although the story of the abused girls described in the Introduction recounted failure and trauma in their contacts with the legal system, several things were particularly impressive about the long *New York Times* article. First, it was on the front page of a weekday edition of a major newspaper, was given a great deal of space, and was extremely well-researched, containing many insights that appear in this Article. Second, the fact that the Article appeared at all means that people are noticing this issue not only in Africa but internationally; most of the previous media coverage had been limited to commercial sex trafficking and the spread of HIV/AIDS in Africa.<sup>529</sup> Both of these, of course, are integrally connected to child sex abuse, but they may eclipse abuse as a separate problem.<sup>530</sup> What was most impressive about the reporting, how-

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525. Reza et al., *supra* note 54, at 27; Breiding et al., *supra* note 114, at 203.

526. See Rachel Jewkes et al., *Evaluation of Stepping Stones: A Gender Transformative HIV Prevention Intervention*, 1 (Med. Res. Couns. S. Afr.) (2007).

527. *Id.*

528. See *id.* at 3-4.

529. See, e.g., *Ghana-Gambia: Sex Slave Children Trafficked by Ghanaian Fishermen*, IRIN (Feb. 26, 2004), <http://www.irinnews.org/report/48765/ghana-gambia-sex-slave-children-trafficked-by-ghanaian-fishermen> (discussing commercial sex trafficking in Ghana); see also Elisabeth Rosenthal, *Traditional Ways Spread AIDS in Africa*, *Experts Say*, *NEW YORK TIMES*, (Nov. 21, 2006), <http://www.nytimes.com/2006/11/21/world/africa/21cameroon.html?pagewanted=all>.

530. For example, children who are victims of sexual abuse are much more likely to be infected with HIV because the abuse is likely to tear vaginal tissue. See SYDNEY NHAMO, *SAVE THE CHILDREN, DESK STUDY ON SEXUAL BEHAVIOUR AND REPRODUCTIVE HEALTH OF CHILDREN AND YOUNG PEOPLE IN ZIMBABWE* 18 (2002).

ever, was the description of these girls' mothers, who immediately believed their daughters and went to great lengths to get them appropriate care.<sup>531</sup> They were willing to go public, using their daughters' and their own names and pictures, saying that "[e]verybody should be aware that things like this should not happen to children."<sup>532</sup> The reporter who interviewed the mothers described them as "[p]assionate about the need for justice for their daughter[s]."<sup>533</sup> Yet another sign of hope appears in the story of one Zambian woman who was repeatedly raped by her father for a decade, but grew up to write a book about her experience and to establish a foundation to help other child victims like her.<sup>534</sup>

In sum, the story of incest in Africa is not just one of bad men and passive girls. It is a story of women and men who are working to change their countries' legal and mental health systems so that these systems will respond effectively to child sex abuse and who are developing creative strategies to prevent such abuse from happening in the first place. It is also a story of women and girls who have survived terrible injuries and trauma and who are fighting back. Attention must be paid to their survival and their resistance as well as to their victimization.<sup>535</sup>

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531. See LaFraniere, *supra* note 1, at A16.

532. *Id.*

533. *Id.*

534. Masuzyo Chakwe & Dziko Mwanza, *My Father Was a Psychopath*, ZAM. POST, Sept. 12, 2012, [http://www.postzambia.com/post-read\\_article.php?articleId=28942](http://www.postzambia.com/post-read_article.php?articleId=28942).

535. See LEVETT, *Research on Child Sexual Abuse*, *supra* note 107, at 440.

