

CANADIAN THESES ON MICROFICHE

THÈSES CANADIENNES SUR MICROFICHE



National Library of Canada
Collections Development Branch

Canadian Theses on
Microfiche Service

Ottawa, Canada
K1A 0N4

Bibliothèque nationale du Canada
Direction du développement des collections

Service des thèses canadiennes
sur microfiche

NOTICE

The quality of this microfiche is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

Previously copyrighted materials (journal articles, published tests, etc.) are not filmed.

Reproduction in full or in part of this film is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30. Please read the authorization forms which accompany this thesis.

THIS DISSERTATION
HAS BEEN MICROFILMED
EXACTLY AS RECEIVED

AVIS

La qualité de cette microfiche dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

Les documents qui font déjà l'objet d'un droit d'auteur (articles de revue, examens publiés, etc.) ne sont pas microfilmés.

La reproduction, même partielle, de ce microfilm est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30. Veuillez prendre connaissance des formules d'autorisation qui accompagnent cette thèse.

LA THÈSE A ÉTÉ
MICROFILMÉE TELLE QUE
NOUS L'AVONS REÇUE

INCEST AND THE LAW:
The Legislation Pertaining to Children

by

Gayle Michelle Mac Donald

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

Master of Arts in Criminology

in the School

of

Graduate Studies, University of Ottawa

September, 1984



Gayle M. Mac Donald, Ottawa, Canada, 1984.



UNIVERSITÉ D'OTTAWA
UNIVERSITY OF OTTAWA

ABSTRACT

Incest is a forbidden behavior in this society. Until recently, this taboo has discouraged public discussion of the problem of incest and obscured its effects on child-victims. Legislation prohibiting incest also reflects a general reluctance to address the problem, as it has been infrequently reviewed or revised.

This study analyzes the Canadian federal legislation on incest, section 150 of the Criminal Code, and the protection provisions of the Child Welfare Act of Ontario to determine their efficiency in dealing with incest cases. The legislative and evidentiary requirements of each statute are examined. In addition, issues specific to both laws, the punitive and offender-oriented nature of criminal law, as well as the rights of the child-victim in protection hearings, are examined for their particular relevance to incest cases.

The study reveals that despite its specificity of definition, and sheer tenacity in maintaining the same clause for over 60 years, criminal law fails to adequately address the problem of incest. On the other hand, the Ontario Child Welfare Act, while lacking an explicit

reference to incest in its protection provisions, has handled cases much more effectively and humanely. However, it is concluded that both laws discussed in this study are inadequate in protecting the child-victims of incest and are badly in need of reform. Recommendations for the revision of legislation are made, with an emphasis on the protection and welfare of the child-victims of incest. Particular reference to the feasibility of reform given present financial restraints is also discussed.

CONTENTS

ABSTRACT	ii
Chapter	Page
1. INTRODUCTION	1
2. THE CANADIAN CRIMINAL LAW ON INCEST	6
The Criminal Legislation on Incest in Canada	6
The Evidentiary Requirements for Criminal Law on Incest	16
Conclusions	26
3. THE APPLICABILITY OF CRIMINAL LAW TO INCEST CASES	34
A Critical Appraisal of the Punitive Approach	34
Conclusions	40
4. THE CIVIL LAW PERTAINING TO INCEST IN THE PROVINCE OF ONTARIO	45
The Child Protection Legislation of the Province of Ontario	45
The Evidentiary Requirements for Protection Legislation	56
Conclusions	60
5. THE CHILD-VICTIM IN PROVINCIAL PROTECTION HEARINGS	67
Protection versus Participation: The Issue of Children's Rights	67
In Whose Interest: Problems with Representation	79
Disposition and the "Best interest" Principle	82
Conclusions	86
6. CONCLUSIONS	88
BIBLIOGRAPHY	94
GOVERNMENT DOCUMENTS	100

MEDIA

103

Chapter 1*

INTRODUCTION

For the purposes of this study, incest is defined as the sexual abuse of a child by a family member. Of the several types of incest listed in the Canadian Criminal Code, this thesis will focus on the most prevalent form, father-daughter incest.

Incest is an alarming social problem because a) it involves sexual exploitation of children by relatives b) while accurate statistics are difficult to uncover, it appears to be a relatively widespread problem c) it is a hidden problem d) the legislation dealing with incest is inadequate. The Advisory Council on the Status of Women reports that:

The combined incidence rate of rape and sexual assault is one in four for women living in Canada. Far from being an infrequent crime, sexual violence is a fairly common occurrence (p. 2, Report on Sexual Assault ACSW, 1981).

The report goes on to indicate that the majority of victims of these crimes are female. Statistics collected by Rape Crisis Centres for the twelve-month period of March 1, 1979 to February 29, 1980 reveal that 56 out of 558 sexual assaults (or 10%) reported were incestuous assaults (Ibid.,

p. 13). This figure is far greater than any available official statistics. Statistics on the violation of provincial protection provisions under the Child Welfare Act, (which is used to deal with incest cases), are protected under law, and are not available to researchers.

Why then, does such a frequent crime fail to be reported to the authorities? Part of the answer to that question is in the nature of the crime itself. Incest is a taboo in all cultures, although its definition may vary (Keesing, 1976). The reasons for the taboo are varied: many are based on moralistic and religious arguments (Blom-Cooper and Drewry, 1976). A taboo is a prohibition against a certain behavior or subject. People do not readily discuss taboos. But, as indicated, a taboo on incest does not prevent occurrence of the crime. It does, however, prevent people from dealing with the problem openly and effectively. A greater problem that results from this taboo is the inadequacy of legislation on incest. In fact, the legislation reviewed in this thesis reflects this taboo, as the problem of incest is rarely discussed, even by legislators. Consequently, the laws governing it are seldom revised.

The federal law in Canada does not appear to deal adequately with the problem of incest. The section on incest in the Criminal Code (section 150) is outdated,

ineffective, and seldom used. This section was excluded from a radical reform of sexual offence laws in the Criminal Code despite frequent requests for change to the provision from the the Advisory Council on the Status of Women and the Law Reform Commission of Canada (Bill C-127, House of Commons, 1981). The provincial legislation dealt with in this thesis, the protection provisions of the Child Welfare Act of Ontario (Chapter 66, section 19(b), Revised Statutes of Ontario 1980), does not have a specific reference to incest as a criterion for the finding of "in need of protection." Yet, most of the incest cases in Canada are handled by provincial Child Welfare provisions; some of which are much less specific in their protection provisions than the Ontario Act.

The crime is underreported, accurate statistics on incest are rare, and any of the generalizations made in the literature are usually based on at best what can be considered unrepresentative samples (Nasjleti, 1980). Canadian literature on incest is sparse, and difficult to find. Specific literature on the legislation pertaining to incest is practically non-existent. Most of the American literature reviewed deals with the trauma of incest, various treatment approaches to the problem, and/or case studies (Burgess et al., 1977, 1978; Finkelhor, 1979; Geiser, 1979;

Kempe and Helfer, 1980; Masters, 1963).¹ The Canadian works that are most directly related to the topic of this thesis, although valuable resources, do not specifically deal with incest nor do they contain an analysis of the problems of legislation on incest (Baxter et al., 1978; Bala et al., 1981, 1982; Dickens, 1976; Hovius, 1982; Leon, 1978; Robertshaw, 1980, 1981). Therefore, in this thesis, I will examine the Criminal Code's section 150 on incest, as well as the Ontario Child Welfare protection provisions used for incest cases. It will be demonstrated that, in terms of the definition in legislation, the application, and interpretation of that legislation in court, and in terms of the stated functions of these two laws, both fail to adequately address the problem of incest.

In Chapter 2, I will discuss the federal legislation and the evidentiary requirements on incest and recommend methods of change that are more in keeping with the nature of the crime. Chapter 3 will review the functions of criminal law to examine its relevance in dealing with the crime of incest. This chapter does not deal at length with these

¹ There is also a great deal of information on child abuse: Besharov, 1981; Cook et al., 1980; Eekelaar and Katz, 1978; Katz, 1971; Kempe and Helfer, 1980; van Stolk, 1972. However, physical abuse and sexual abuse, although similar problems, are not identical. For example, incest involving a child may not always constitute battering, or what is known as physical abuse, but will always be sexual assault.

functions as the infrequent use of the Criminal Code to deal with incest cases renders moot many issues. The trend over the years has increasingly been towards more use of provincial child protection provisions to deal with incest cases. The next two chapters will illustrate how the province of Ontario deals with incest cases. In Chapter 4, the Ontario provincial protection provisions and their corresponding evidence requirements will be examined relative to their use in incest cases and recommendations for change will be made in the Conclusions section of the chapter. Chapter 5 discusses the stated function of the protection provisions vis-a-vis some of the issues that arise from frequent use of the Act for incest cases; specifically, child-representation and the "best interest" principle. In the Conclusions I will examine the feasibility of the recommendations made given: 1) the current economic climate and 2) the delicate balance any law concerning children must maintain between the protection of the child and her/his participation in a court system influenced by an adversarial approach to law. Finally, I will, based on the findings and arguments presented herein, make suggestions for future research and reform in the area of legislation dealing with incest.

Chapter 2

THE CANADIAN CRIMINAL LAW ON INCEST

2.1 THE CRIMINAL LEGISLATION ON INCEST IN CANADA

The authority for federal legislation on incest comes from a provision in the British North America Act that gives the Parliament of Canada the right to exercise jurisdiction over criminal law in Canada. The section pertaining to incest within the Criminal Code, section 150, can be traced to the first enactment for offences against the person in 1841. This act was entitled "An Act for Consolidating and Amending the Statutes in the Province relative to Offences Against the Person" and appeared in the 4th and 5th Victoria, Chapter 27, section XVII. This section forbade, among other offences, the "unlawful carnal knowledge of girls under fourteen years of age."

The definition we now have of incest appeared initially in 1890:

Every parent and child, every brother and sister, and every grandparent and grandchild, who cohabit or have sexual intercourse with each other, shall each of them, if aware of their consanguinity be deemed to have committed incest, and be guilty of a misdemeanor, and liable to fourteen years' imprisonment, and the male person shall also be liable to be whipped; Provided that, if the court or judge is of opinion that the female accused was

a party to such intercourse only by reason of the restraint, fear or duress of the other party, the court or judge shall not be bound to impose any punishment on such person under this section. (53rd Victoria, Chapter 37, section 8)

There were no changes to this section in the 1934 Revised Statutes of Canada.

However, there have been minor modifications in wording of the clause since then:

1. Everyone commits incest, who knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person. (Statutes of Canada, 1953-54, Chapter 51, section 142)

The punishment remained the same, but a further wording change occurred in the section pertaining to the participation of the female:

2. Where a female person is convicted of an offence under this section and the court is satisfied that she committed the offence by reason only that she was under restraint, duress or fear of the person with whom she had the sexual intercourse the court is not required to impose any punishment upon her. (Ibid.)

In addition to the above, the following section was included:

3. In this section, "brother" and "sister" respectively, includes half-brother and half-sister. (Ibid.)

The next modification did not come until 1972. The punishment section was repealed to read:

4. Everyone who commits incest is guilty of an indictable offence and is liable to imprisonment for fourteen years. (section 10, chapter 13, Statutes of Canada, 1972.)

Thus the incest clause that was approved in the 1953-54 Statutes of Canada, with the modifications as stated, is the present criminal legislation on incest in Canada.

The first recommendations for major modifications to this law were voiced primarily by the Law Reform Commission of Canada in 1977. In its Working Paper #22 (May, 1976), the Commission advocated that sex between consenting related adults, although considered 'immoral' by some, should not fall within the jurisdiction of the criminal law. The Commission referred to the 1957 Wolfenden Report statement in its 1978 Report:

Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of the crime with that of sin, there must remain a realm of private morality and immorality which is in brief and crude terms, not the law's business. (Law Reform Commission of Canada, Report on Sexual Offences 1978, p.26)

The Commission was not stating that it approved of incest. Rather, it was asserting that the primary concern

of legislation on incest be the protection of young children, not punishment of consenting adults. Further, the Commission expressed concern that the present criminal law on incest did not address the exploitation of children, nor did it protect them from such exploitation:

Children must . . . be protected from sexual exploitation and corruption until they have arrived at a degree of maturity which will enable them to foresee the consequences of their acts and take important personal decisions with full and clear appreciation of the facts, or at least until they come to the age at which that degree of maturity should be presumed. (Ibid., p.7)

To this end, the Commission recommended that the following provisions deal with incest and that the present provision (section 150 of the Criminal Code) be abolished.

Section 5: Sexual Interference due to Dependency

1. Everyone who, for a sexual purpose, directly or indirectly touches a person fourteen years of age or older but under eighteen years of age, whose consent was obtained by the exercise of authority or the exploitation of dependency is guilty of an indictable offence and liable to imprisonment of five years.
2. For the purpose of subsection (1) actual or legal authority to dependency shall be presumed to exist if the accused is of the age of eighteen years or older and is, to his or her knowledge by blood relationship the parent, brother, sister, half-brother,

half-sister, grandparent, uncle or aunt of the other person. (Ibid., pp. 22,29)

(It is interesting to note that the words "uncle" and "aunt" do not appear in any other suggested revision of the Criminal Code, including Bill C-53, from which the eventually accepted amendments evolved.)

The Commission based its advocacy of a new provision for incest on the following three "principles" outlined in the preamble to its Working Paper # 22:

1. The protection of the integrity of the person,
2. The protection of children and special groups,
3. The safeguarding of public decency. (LRCC Working Paper # 22, 1976).

The first "principle" was based on a premise that consensual sexual relations between related adults do not violate the integrity of the person, but non-consensual sexual relations between relatives do, and therefore constitute exploitation. A new provision, such as the one recommended, would concentrate on this exploitation. It appears that the Commission assumed that sexual exploitation would be more likely to occur if one of the partners were a child. The second "principle" came from the Commission's concerns with the orientation of the criminal law in dealing with incest cases. It was felt that the criminal law did not offer protection to children and that the Commission's

proposed provision would address this problem. The third "principle" is somewhat vague. The Commission states that sex is a "private matter," and that it is "not legitimate to force others to witness acts which are essentially private" (LRCC, Report on Sexual Offences, 1978, pp. 7,8).

In other words, it is not sexual behavior itself or any specific type of it but rather its public exhibition which society seeks to repress, according to this third principle. (LRC Report on Sexual Offences 1978, p.8)

However, incest cannot be included in a general statement on sex as a "private matter." As stated, this principle is misleading. When applied to cases of incest, it could be interpreted to intimate that incest in private is acceptable.

The recommendations of the Commission appear to advocate decriminalization of incest by asserting that sex between consenting related adults should not fall within the jurisdiction of the criminal law, and by advocating that the present provision on incest in the Criminal Code (section 150) be abolished. The Commission states that incest is a family problem, and that the "criminal law and the criminal process are notoriously weak in dealing with family problems" (LRCC Report on Sexual Offences, 1978, p. 27). The results of these statements, and the recommendations as stated, are confusing. Criminal sanctions (see Section 5 as outlined in the text) are still recommended, and it does not

appear that anything other than judicial intervention is advocated to help deal with incest "as a family problem." In fact, what the Commission is advocating is the removal of the clause on incest in the Criminal Code and its replacement by the Section 5 clauses indicated in the foregoing. What was intended was a new focus on sexual exploitation rather than on incest. While the Commission's focus on the protection of young children from sexual exploitation is clear, the means by which the problem is to be handled as a "family matter" are not. Given the Commission's assertion that the criminal law is "notoriously weak in dealing with family matters," it is not clear why the Commission continued to include them in the criminal law. The Commission gives the appearance of decriminalizing incest with this provision and yet continues to impose criminal sanctions in the new proposal. There is no explanation, either, as to why the Commission was not prepared to leave the matter to the family court, if indeed incest is a family matter.

To complicate the issue further, the public's perception of the Commission's proposal was to equate the Commission's statement that consensual sexual activity between related adults should not fall under the jurisdiction of the criminal law, with approval of incest. The reaction was quite negative:

The Commission even received one petition signed by some three hundred people asking: "Please do not take incest out of the Criminal Code!" (Ibid., p.26)

It is not clear, however, who this "public" was, nor is it clear as to how these people obtained information regarding the proposed changes. In any event, because of public opposition, the proposed changes did not become law.

The Law Reform Commission's recommendation to abolish incest as a criminal offence when committed by consenting adults met with overwhelming opposition from the general public, and so it has been retained. (Department of Justice, "Information Paper, Sexual Offences against the Person and the Protection of Young Persons" 1980, p. 35)

The next attempt at amending the incest clause came in the form of Bill C-53, introduced January 12, 1981 into the House of Commons by the Department of Justice. (Bill C-53 was not passed by the House of Commons. It was renamed after some changes as Bill C-127, which was assented to October 27, 1982.) The section on incest read as follows:

1. 168.1 Everyone commits incest who, knowing that another person is his blood relative, has sexual intercourse with that person.
2. Everyone who commits incest is guilty of an indictable offence and is liable to imprisonment for ten years.
3. No person shall be found guilty of incest if he establishes that he acted under restraint, duress or

fear of the person with whom he had the sexual intercourse.

4. In subsection (1), "blood relative" means a parent, child, brother, sister, half-brother, half-sister, grandparent or grandchild. (p. 5, section 168.1, Bill C-53, 1982.)

These changes differ only slightly from the present provision in the Criminal Code, but radically from the other amendments included in this Bill. (See Canada Gazette. Chapter 125, section 246, subsections 1-3 for amendments to rape laws.) As one writer notes:

The section preserves the requirement for actual sexual intercourse between the victim and the offender whereas the other sections of the Bill have replaced "sexual intercourse" by "sexual misbehavior" or "sexual assault". (Cashman, 1981, p.6)

Another change, in evidentiary rather than legislative requirements, came with the addition of a new section which states that corroboration is no longer required for a conviction of incest. (op. cit. Gazette. section 246, subsection 4)

Section 168.1, as stated, presents a number of problems. The section seems to signify a reduced concern for the problem of incest, as the maximum punishment has been reduced from 14 years to 10 years. The reduction of the penalty is nowhere explained. As well, it is not clear why

the legislators retain the strict evidentiary requirement of sexual intercourse as proof of incest, if the intention of the amendments is "the protection of young persons." A strict definition of incest serves to protect the accused more than it does the complainant. Furthermore, the burden of proof in the criminal process is so onerous (beyond a reasonable doubt) that the requirement of sexual intercourse only increases the likelihood of the offender's acquittal rather than conviction. There are also claims that the requirement of sexual intercourse as proof that incest has occurred is misleading. Sexual intercourse is not always present in cases of sexual abuse in the family, and to look only to intercourse for proof of incest could narrow the net of the criminal law.

If the types of prohibited sexual behavior between family members are placed on a scale of a continuum, with sexual intercourse at the end of the continuum, we realize there is a wide variety of types of sexual behavior that can occur before reaching consummated incest. (Cooper, 1978, pp. 518-519)

There is no indication that sexual touching is any less psychologically damaging or traumatizing to a child than is intercourse (Cooper, 1978). What, then, is the justification for retaining this specific criterion for definition of incest? There appears to be none.

The tendency for government to back away from legislating changes in sexual offence laws is clearly evident in the

case of incest, for to propose relatively minor changes in legislation concerning incest is to ignore the potential that a reform could have.

2.2 THE EVIDENTIARY REQUIREMENTS FOR CRIMINAL LAW ON INCEST

The initial point of legal involvement for children victimized by incest is at the stage of reporting the offence. To whom the action is reported can very well determine which court the case will end up in. If the police are notified, the case could be held in a criminal court; if the Children's Aid Society is informed of the case, then it will in all likelihood be considered under the jurisdiction of the Child Welfare Act and, therefore, held in a civil court.

It is at this point that the problems for a child involved with the legal system begin. The first problem is related to the time it takes for a child to report incest. For example, a child may not report at all what is happening or report it a number of years after its occurrence. A child may remain silent for a number of reasons. One could be the conflicting feelings a child may experience after the incident. Incest is singularly distinct from other sexual offences because of the nature of the relationship between the victim and the assailant. The perpetrator is usually

the child's father, a figure the child is taught to trust, respect and obey.

Children are taught from an early age to be obedient to adults. They learn that if they do what the adult tells them to do, they will be rewarded by gaining the adult's approval. Not to obey an adult may result in punishment. Therefore, it is not surprising that offenders can pressure children into sexual activity by telling them it is "okay to do". (Burgess et al., 1978, p. 87)

Yet the increasing sense that 'something is wrong' with the sexual encounters, usually fostered by requests or even threats from the perpetrator not to tell, lead to a further state of anxiety and confusion for the child. The child may then experience a sense of guilt, that somehow this interaction was deserved or, even worse, the child may feel that the entire family will be disrupted and that that, too, will be the child's fault (Daugherty, 1978). As Deaton and Sandlin point out, the conflict a child experiences is evidenced by this silence:

This highly troubling situation, wherein the child has positive feelings for the parent, but negative feelings for the provocative sexual invasion and relationships, leads to a severe state of "disturbing silence", with reluctance and resistance to report what is sexually occurring to him or her. (Deaton and Sandlin, 1980, p. 312)

We are warned, however, that this silence is not to be construed as compliance, but is indicative of extreme emotional distress (Geiser, 1979; Burgess et al., 1978; Sanford, 1980). In her article "Suffering in Silence: The

Male Incest Victim," Maria Nasjleti examines the additional pressures which may inhibit a young male victim from disclosing sexual abuse. She refers to the manner in which young boys are socialized to be aggressive and fearless; thus to admit to being sexually abused is tantamount to admitting homosexuality (Nasjleti, 1980). (She does not, however, discuss what would happen in cases where the abuser is the boy's mother.)

A child may not know whom to turn to with the story. There is some evidence to suggest that many mothers do not believe, or choose to ignore, the incestuous relations within the family (Daugherty, 1978). This tendency for adults not to believe a child can also be carried into the context of a courtroom and can thus further traumatize a child (Burgess et al., 1978, p.205).² Moreover, the child may want to tell the story but may be frustrated with her/his inability to articulate or the lack of vocabulary necessary to explain the sexual interaction.

If the child does tell of the event, she/he may have to repeat the story to various officials and then possibly relive it again at a trial. This process can increase the

² Indeed, there are those who suggest that incest is not a problem to be considered in isolation, but is part of a greater family system which involves scapegoating, secrets and alliances of various family members and should be treated as such. To isolate or remove a child is to potentially reinforce the scapegoating pattern already in existence and thus further damage the child.

trauma experienced by the child instead of easing it (Burgess et al., 1978, p.205). In criminal proceedings the burden of proof is so great (beyond a reasonable doubt) that explicit and accurate details are necessary. But the manner of questioning may confuse the child and thus inhibit the very facts necessary for proof in a particular case. There are various suggestions aimed at avoiding trauma for children in court cases and yet insuring their proper representation. These include legal representation and child advocacy, and will be more fully discussed in terms of their potential problems in Chapter 5.

The differences between criminal and civil proceedings are largely those of orientation, a direct result of burden of proof requirements. In criminal proceedings, guilt must be proved beyond a reasonable doubt and thus the emphasis of the trial is on proving that the offender committed the crime. In civil proceedings, the burden of proof is on a "balance of probabilities" to justify that the child is "in need of protection" (see "Child Welfare Act, Revised Statutes of Ontario, 1980, Chapter 66).

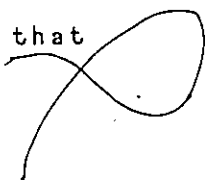
This is not to say that the criminal justice system does not concern itself with the welfare of children, but to point out that the orientation, and therefore the outcome, in criminal proceedings can be quite different from civil proceedings. The outcome in a criminal court could be the

punishment of an adult. The outcome in a civil court could be the removal of a child from her/his home.

In Canada there are two types of legislation which protect children. One type is criminal law, which primarily serves to protect children from physical and sexual abuse, though there are also offences relating to the corruption of the morality of children. This legislation provides for the punishment of people who fail to treat children in an adequate manner. . . . The other type of legislation focuses upon children who are abused or neglected and provides for the involvement of the state in their lives, this is generally known as child protection legislation. (Bala and Clarke in Hovius, 1982; p. 764: emphasis added)

Both legislative acts will be examined relative to the evidence requirements for each.

Before a child is entitled to serve as a witness in criminal proceedings, her/his competency as a witness must be determined. In order to be sworn under oath, the judge must conduct a voir dire as to the child's ability to understand the nature of an oath. The child must demonstrate a capacity to distinguish truth from falsehood and an understanding that it is wrong to lie under oath. The unsworn evidence of a child may be acceptable if "the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth" ("Canada Evidence Act", Revised Statutes of Canada, 1970, Chapter E-10, section 16, subsection 1). The section of the same Act on corroboration, however, provides that



(2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence. (Ibid., subsection 2)

Until 1982, a provision in the Criminal Code stated that even if a child was sworn under oath, her/his uncorroborated evidence would not be sufficient to convict an accused (Criminal Code, Revised Statutes of Canada 1970, Chapter 34, section 139, subsection 1). This requirement for corroboration greatly affected the outcome of certain cases in criminal law. In *R. v. Scott* (1973), a decision of the Nova Scotia Court of Appeal the accused was acquitted on an appeal when the evidence did not did not meet the statutory requirements, despite the fact that the younger sister and mother of the victim testified that the victim had told them of repeated attacks by the father. The objection in law was:

Corroboration requires some independent evidence of some "material particular" confirming the commission of the crime and that the accused committed it. The mother and sister were not able to testify to anything except what they had been told by the daughter and what they did as a result thereof. (*R. v. Scott*, N.S.C.A., 1973)

The definition of corroboration in this case was taken from an earlier decision:

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. (*R. v. Baskerville*, 1916, 12 Cr. App. R. 8)

The Law Reform Commission's "Report on Evidence", 1975, and the Federal-Provincial Task Force on Uniform Rules of Evidence, 1982 (hereafter known as the "Task Force on Evidence"), both advocated the abolition of the need for evidence to be corroborated in order to convict in incest cases. They asserted that a child's sworn evidence ought to be considered as equal to that of an adult's, and that the potential danger that a child's evidence could be weak could be alleviated by the adversarial process of cross-examination.

In light of the above argument, the following provision was introduced in Bill C-53, and passed as legislation in 1982:

264.4 Where an accused is charged with an offence under section 150 (incest) . . . no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. (Criminal Code, 1982 Statutes of Canada, Chapter 125, section 246, subsection 4)

Clearly, this provision is a breakthrough in criminal law evidence requirements for incest cases. However, only the test of time will determine whether the corroboration provisions will be interpreted to permit conviction based on non-corroborated evidence given by children. There is always the danger that the provision will be interpreted to pertain only to the deletion of the judge's warning to the jury. Thus, the elimination of a warning not to convict in

the absence of corroboration may not be the same as permitting a child to give non-corroborated evidence.

One of the greater problems with the evidence of children is the rule concerning the inadmissibility of hearsay evidence, known as the McNaughton Rule. Often children who have been victims of criminal offences will tell their story to the professional who questions them before the trial. But this evidence is inadmissible because it is considered hearsay. This rule, according to the Task Force on Evidence, "operates to exclude evidence which, without the rule, would be admissible as relevant to matters in issue. It is based on the premise that the more a statement is removed from first-hand perception, the less reliable it is"

(Federal-Provincial Task Force on the Uniform Rules of Evidence, 1982; p. 123).

But the hearsay rule is vaguely defined, and as such has been open to many interpretations in various cases, making it "at once the most characteristic and the most confusing and complex rule of our system of evidence" (Law Reform Commission of Canada Report on Evidence, 1975, p. 69). The possible exceptions to this rule occur when the witness is dead, mentally incompetent, or unable to be called to testify. The latter two exceptions could apply to incest cases if the victim is very young. However, the problem still exists for the child who is capable, but not called as

a witness, that her or his evidence may not be presented in court even when known to a professional.

Yet another problem with evidence requirements is the inadmissibility of opinion evidence, except when the witness is considered an expert by the court (see Revised Statutes of Canada, Chapter E-10, section 7, 1970). Again, however, there is a problem of meaning. Originally the rule meant that someone who did not have firsthand knowledge of an event could not make statements about it. But opinion has come to mean that a witness can only testify as to facts personally observed, and cannot make "deductions, inferences or conclusions drawn from the facts" (Task Force on Evidence, 1982, p.117). This distinction gives rise to the apparent difficulty inherent in any attempt to distinguish fact from opinion. For example, is a person's knowledge of a child's distressed emotional state a fact or an opinion? If considered an opinion by the court, such evidence may be inadmissible. Yet, such evidence could help to establish the truth of a charge of incest.

The suggestions for remedying this situation are divided. The Task Force on Evidence recommends that a special provision concerning evidence be created which would allow lay evidence, or evidence presented by those other than expert witnesses, to be admissible in court (Task Force on Evidence, 1982, p.122). In turn, the Law Reform Commission

recommends that opinion evidence be given only by an expert witness:

A witness other than one testifying as an expert, may not give an opinion or draw an inference unless it is based on facts perceived by him and is helpful to the witness in giving a clear statement or to the trier of fact in determining an issue. (Law Reform Commission, Report on Evidence 1975, section 67)

This provision presently exists only in common law.

In criminal proceedings, medical evidence with respect to sexual offences is often given to prove penetration. However, some authors suggest that diseases can also be proof of sexual assault (see Sgroi, 1977), and it is not always the case that medical evidence can provide proof that incest occurred. In *R. v. Scott* (Nova Scotia Court of Appeal, 1973), for example, a doctor gave medical evidence that the victim in question was not a virgin, but he could not corroborate the evidence in order to implicate the accused as the person responsible for the loss of virginity. Moreover, it often happens with incest that the actual reporting of the offence occurs long after the sexual interaction took place. As a consequence, all medical evidence relevant to proof of penetration has long since disappeared.

2.3 CONCLUSIONS

The reluctance of legislators to reform incest laws is evident by the retention of the old section on incest in the Criminal Code. What confirms this reluctance is the fact that other sexual offence laws have been radically altered. Amendments to the Criminal Code as found in Bill C-127, 1982 (originally Bill C-53) removed the word "rape" from the Code and classified sexual attacks under the new heading of "sexual assault."³ The new provision also changed the definition of sexual penetration (interpreted in the old law as only done by a penis) to include fingers or foreign objects.

If the incest clause were amended in a similar fashion to the new provisions on rape, then the most crucial aspect of incest could be better addressed. The criminal law fails to deal with incest on a human level. The nature of the crime of incest has to be more clearly reflected in criminal law. The present law which covers both consensual and exploitative relationships cannot be defended. The exclusion of incestuous relations between consenting adults from the scope of the criminal law would help to clarify the concept of harm on which the prohibition of incest should rest. In my opinion, the crime of incest should not just be

³ See Bill C-127 for more detailed information on these and other amendments to sexual offence clauses within the Criminal Code.

viewed as sexual intercourse between relatives, it should be defined instead as an exploitative act whereby one member of the family exploits sexually another member using his/her authority or status within the family to do so. In this sense, incest, just like rape, is a violent act since it violates the sexual autonomy and integrity of a person. What the new provisions on sexual assault have done is to change the focus of the act and, thus the nature of the offence. A comparable change in the incest clause could achieve the same end. A focus on exploitation rather than intercourse would not only incorporate a human element into the law, it could also help to alleviate the strict evidential requirements of the present law which, by and large, inhibit conviction of offenders.

Lack of amendment concerning incest law reflects an age-old reluctance of society to deal openly with the incest problem. This reluctance originates with early religious and moral condemnation of the act. Christianity specifically condemns incestuous relationships, evident in this passage by Leviticus:

The nakedness of thy father's wife shalt thou not uncover: it is thy father's nakedness. The nakedness of thy sister, the daughter of thy mother, whether she be born at home or born abroad, even their nakedness thou shalt not uncover. (Leviticus 18:8-9, King James Version)

Leviticus goes on to name various other family ties that should not be violated by incest and ends the chapter stating the consequences for those who disobey.

For whosoever shall commit any of these abominations, even the souls that commit them shall be cut off from among their people. (Ibid., verse 29)

The incest taboo was reinforced by these and other religious justifications on the basis that it was a sin. Equally as damned were the effects of incest on marriage and the family. The sanctity of both the marriage union and the family were considered violated when incest occurred. However, the question has often risen, what occurs first in the scenario, i.e. is incest the cause of marital breakdown or the result of it? Evidence appears to support the latter, as studies have indicated that breakdown of communication and sexual relations between a couple can result in a parent seeking sexual gratification in his children (Herman, 1981; Cook and Howells, 1981). It is the possibility of family breakdown that seems to be of greatest concern to those formulating the laws on incest: as it is associated in a "domino effect" way with disruption of social order. This belief in the preservation of the "status quo" regarding family is apparent with the preservation of a criminal law on incest. Some authors argue that the retention of laws such as the criminal provision on incest

is usually justified by fears of social disintegration (Blom-Cooper and Drawry, 1976).

Although the criminal law on incest has been retained in its original form in the Criminal Code, it has not gone unchallenged. Women's groups lobbied for change in sexual assault laws for at least ten years before the present sexual assault provisions were adopted as legislation in 1982 (Advisory Council on the Status of Women, The Web of the Law: A Study of Sexual Offences In the Criminal Code, 1975). However, what is defined as sexual assault by the Council, and assumed to be included in provisions on sexual assault in law may not actually be part of the legislation. The Council recommended in 1976 that incest, as well as other sexual offences (which are listed in the Report) could be deleted from the Criminal Code if their recommendations concerning sexual assault were adopted. The rationale was that incest would be covered by the new sexual assault provisions (ACSW, Rationalization of Sexual Offences in the Criminal Code, 1976). In a 1981 report responding to the then Minister of Justice Jean Chretien's "Information Paper on Sexual Offences," made public earlier the same year, the Council defined sexual assault as the following: "Sexual assault describes an assault with a sexual component: rape, indecent assault and incest" (Advisory Council on the Status of Women, Report on Sexual Assault 1981, p. 1). On a

closer examination of the new legislation, however, one hardly finds an adequate definition of sexual assault. The inclusion of incest cases thus may depend solely upon a court's interpretation of the statute, rather than on specific definition in law.

There are those who would probably argue that the provisions of the sexual assault clause are sufficient to define abusive sexual activity, thereby rendering unnecessary a separate clause on incest. I would take issue with this point. At the time of this writing, incest was not included in the new provisions on sexual assault, thus leaving incest cases still under the jurisdiction of the antiquated Criminal Code provision. Admittedly, incest cases covered by the new sexual assault legislation would be far more efficiently handled than under the present incest provision, as convictions would be much easier to obtain and evidence requirements would not be as strict. However, simply including incest under the sexual assault provisions does not solve the problem. Incest, although a similar crime to rape, is not an identical one and requires special considerations not always necessary in rape cases. The manner in which incest differs from rape is implicit in its definition: incest is a sexual relationship between relatives, usually a parent and child. The relationship usually extends over a long period of time, rather than the

isolated event of a rape, and involves a complex series of interactions among the entire family: One child is often unconsciously scapegoated by the family, and through a complicated web of secrecy, sexual breakdown between the parents, and total lack of communication in the family, incest occurs. In addition to these factors is the unavoidable issue of the blood relationship. Usually between a father and daughter, incestuous relationships have elements of loyalty, emotional, and financial dependence not always found in rape cases. As a result of these bonds, the child-victim, as well as the entire family, could be severely affected by the punishment of the offender, a factor that is not often a consideration in rape cases. (An exception to this would, of course, include cases of marital rape). Thus the conventional connotations in criminal law of "offender" and "victim" do not apply readily to cases of incest. In light of these special circumstances, and the resulting incredible vulnerability of a child-victim, I see neither a conventional provision on incest nor a new one on sexual assault as adequate responses to the complex problem of incest.⁴

⁴ (For further information on sexual assault clause changes, see Canada Gazette, Dec. 31, 1982. Chapter 125, section 246, subsections 1,2)

Unfortunately, the evidence requirements of criminal law on incest fare no better in achieving the prosecution of the offender than does the actual clause in the Code. If anything, evidence requirements are so strict and the burden of proof so onerous that a conviction of an incest offender is exceedingly difficult, if not impossible, to obtain. The child is rarely permitted to testify, and any information told to anyone else is inadmissible as it constitutes hearsay evidence. Further, the medical evidence required to prove sexual intercourse is usually nearly impossible to obtain. In addition, intercourse may not always occur in cases of sexual abuse.

Thus, this law that sets out both to punish the offenders and protect the victims of incest against further abuse fails on both counts. It becomes apparent that incest cases need remedies that go beyond the scope of present criminal sanctions, and to this end I propose the following recommendations for change to the criminal law on incest:

1. Incest between consenting adults should be excluded from the definition in criminal law.
2. Delete the word "incest," and replace it with the phrase "sexual exploitation," a term more suited to the nature of the crime. This change in wording reflects a change in focus similar to the one created by changing of the "rape" law to "sexual assault."

3. The evidentiary requirement of sexual intercourse as proof of incest should be abolished.
4. The regulations regarding the testimony of child-witnesses should be clarified according to present information on child psychology.
5. Sentencing of offenders should include family counselling sessions organized by professional counsellors to determine the extent of damage the incestuous relationship has created.⁵
6. The present provisions rendering hearsay evidence inadmissible should be abolished.
- 7.7 Finally, as an overall recommendation, more public education on the nature of incest is desperately needed. This could help reduce the irrational moral stigma associated with incest which affects both the offender and the victim. An understanding of incest would focus attention on the fact that the harm done by an incestuous relationship affects the entire family.

⁵ The implications for family unity, psychological support for the victim, the prevention of further scapegoating of the child, and the counselling of the offender to help him understand the reasons for, and consequences of his behavior could all be part of an agenda for these sessions.

Chapter 3

THE APPLICABILITY OF CRIMINAL LAW TO INCEST CASES

3.1 A CRITICAL APPRAISAL OF THE PUNITIVE APPROACH

There is an inherent inconsistency between the functions of criminal law and their application to incest. The stated functions of criminal law are the protection of society, retribution for offences committed, rehabilitation of offenders, deterrence of future crime, and reinforcement of certain values. Given this mandate, it would be fair to state that the intent of criminal law is to preserve law and order in Canadian society, and to punish law-violators. However, regarding incest cases, the mandates of protection and punishment are contradictory. To explore this argument further, a discussion is needed on how punishment, a principle of criminal law, is expected to work.

Retribution as a mandate of criminal law is deeply entrenched in the justice system of this country. There are many arguments as to why criminal offenders should be punished. Followers of Immanuel Kant would argue that regardless of extenuating circumstances, society has a

"duty" to punish guilty offenders (*mens rea*).⁶ A current common belief consistent with Kant, is that in order for an offender to be found deserving of punishment, blame has to be established: hence the present-day focus on "just deserts" and culpability. In order to ensure that blame be absolute in criminal law, the burden of proof for guilt to be established is "beyond a reasonable doubt." In cases of incest, a strict definition in legislation and rigid evidentiary requirements reflect this need to prove guilt absolutely. This serves to protect a person from being falsely accused of committing a crime. However, this focus on blame and punishment completely ignores an essential aspect of the crime of incest, the impact on the victim.

In incest cases, the child-victim can be just as much a recipient of the punishment sentence as the offender, due to the complex nature of the crime. The offender and the victim in incest cases are closely related, often a father and daughter. Any sentence removing an offender from the family home can affect the financial security of an entire family. As well, it can also serve to reinforce the child-victim's perception of her/his "guilt" for involvement in the incestuous relationship. Thus, conventional concepts

⁶ For a further discussion of these points and other views on punishment, see Martin P. Golding, *The Philosophy of Law*, Chapter 5, Prentice-Hall Inc: Englewood Cliffs, New Jersey, 1975.

of punishment cannot be applied to incest. The familial nature of the crime, the intense emotional involvement of the offender and the victim, cannot be adequately addressed by the present criminal law, if the sole intent of that law is to establish guilt and ensure punishment.

To further the argument that a traditional concept of punishment does not apply to the criminal law on incest, one need only examine the deterrence function of the criminal law.

The present rate of conviction for offenders of incest points to the inadequacy of the criminal law on incest regarding the degree of deterrence ensuing from the imposition of criminal sanctions. The evidence obtained in various criminological studies regarding deterrence should be applied to incest. It has been suggested that increased certainty of conviction is more likely to serve as a deterrent to future crime than would increased punishment of the offender (as discussed in Andenaes, 1975). In incest cases the certainty of conviction could be achieved more easily if the rate of detectability of incest were increased. There are compulsory reporting provisions on the suspicion of abuse, for example, under most provincial Child Welfare Acts; however, these provisions are very difficult to enforce with any degree of consistency. What is urgently needed to increase detectability is increased

information/support concerning incest specifically targeted at child-victims, to encourage them to come forth with evidence.⁷

Presumably, if detection were increased, conviction rates would increase. However, conviction of an offender can include more than just a punitive action. Presently, there are no rehabilitative programs for the incest offender. However, a new law focusing on the nature of the act need not neglect the offender. As proposed in Chapter 2, a law on sexual exploitation would concentrate on the involvement of the entire family with the crime, rather than a continued concentration on only the victim and the offender. However, despite any reform, a criminal trial would inevitably decide the question of guilt or innocence, and determine penalty. The difficulty with establishing a penalty for a new law on incest is to reconcile the inconsistency of an emphasis on sexual exploitation and family unity with the concept of punishment. A disposition that would correspond with the new focus on the child as victim could be the present option of removing the offender from the familial home. The removal of the offender is consistent with a mandate of law

⁷ Canadians could well afford to adopt programs like the incest crisis lines for children which exist presently in the United States. Examples of such programs include: Seattle Sexual Assault Centre and the Child Protective Services, Seattle, Washington; Child Protective Services Hotline, Norfolk Police Department Family Sexual Assault Trauma Team, Norfolk, Virginia.

made in the child's interest, as the punishment would be dealt to the offender, not the child. However, this penalty need not only be prison, it could also include options that are in keeping with the rehabilitation function of criminal law.

The removal of the offender need not be permanent, nor need it nullify the concept of family unity. An emphasis on family unity can be maintained if compulsory counselling sessions serve to decrease the length of time an offender is away from his family. He would be given special consideration in order to help him understand the reasons for his incestuous behavior within the family, and the family could serve as a support group in the exploration of that problem. However, he would have to earn his right to be part of his family again, and this would have to be made explicit to the family. It is imperative that the family understand this transaction as there is a real danger that the child-victim could continue to interpret the removal as her/his "fault," especially if the scapegoating and blaming by the entire family is allowed to continue. The aim of the counselling sessions is to remedy the incest problem, not prolong it. However, if family breakdown is imminent, then the proposed "conciliation" sessions (as found in the "Conclusions" section of Chapter 2), can be employed to help the family deal with its crisis in a healthy manner.

Another issue that arises in the use of criminal law to deal with incest cases is the mandate of protection. One of the purposes of the criminal law is to protect innocent victims. An argument could easily be made for the removal of the offender from the home as satisfying the protection mandate. However, as with all of the stated functions of the criminal law: none can be met unless offenders are prosecuted. Yet, most perpetrators of incest are never prosecuted. Furthermore, the strict requirements for proof of incest serve to protect the offender rather than the victim. The focus of a new law, if formulated in the interest of the child-victim rather than in the interest of the offender or in the name of an abstract taboo, could effectively meet the protection and punishment mandates of criminal law.

A revised law can address adequately the protection function of the criminal law on incest just as a revised penalty can meet both the punishment and rehabilitative requirements of the criminal law, if both are focusing on the nature of the crime. For example, emphasis on the entire family would decrease the constant questioning of the child's credibility that happens in criminal court. By focusing on the nature of the crime, and more on the rights of the child rather than on the protection of the offender, reform could serve better the protection mandate of the law.

3.2 CONCLUSIONS

As established earlier in this thesis, the Canadian criminal law on incest is outdated. It fails on many counts. Erratic apprehension and conviction of offenders does little to rehabilitate the offender, and even less to deter future occurrence of the crime.

One criticism of the criminal law on incest is that the law is inadequate in meeting its mandate.

The criminal law concerning incest, as defined in the present Criminal Code, is a blunt, inexact instrument which misses the majority of cases. Those it does touch are handled inadequately, with no sensitivity to the psychological factors involved. The law is moralistic rather than practical and the present system neither prevents nor ameliorates it once it occurs. (Cooper, 1978, p.522)

The question immediately surfaces, why does a law that has remained relatively unchanged for over 60 years fail so dismally? It is ironic that this law is retained to ensure punishment of incest offenders, yet these offenders seem to should go virtually unchecked. The rigid definition of incest in the law, although certainly a hindering factor in the successful prosecution of offenders, is but a symptom. The disease is the failure of criminal law to deal with the complex nature of incest. Incest is a crime of sexual deviance in the family. For too many years, even the subject of what was considered "normal" sexual relations within families was taboo. In addition to a taboo, there was also a

belief that a man's home was his "castle", his family was his property, and whatever he did with either was his business. The man, as breadwinner, was the most important person in the family; he had the final word of authority and this was rarely interfered with, either from within the family or from the community in which the family existed. His authority certainly covered the area of sexual relations—more often than not, he determined whether they would be normal or deviant. Given this situation, it is little wonder that sexual deviance was not "discussed" within the family. What is unusual is that little has changed in present-day incest cases. Reactions towards incest are still quite strong. Incest is viewed as disgusting and is condemned on moral grounds as behavior that is not acceptable to society. Incest is a subject that is just recently being discussed openly by the media (refer to Bibliography section "Media"). The reasons for such a lengthy public silence on the topic of incest seem to be rooted in fear. Subjects that are taboo, such as incest, remain so largely because of fear. It is fear that prevents people from talking openly about incest and dealing honestly with its consequences. Fear also prevents change, as most people are more comfortable with what they know. The existence of a Criminal Code provision against incest is a "known." What is not known is how ineffectively the incest

clause operates. But, as documented in Chapter 2, proposals of the Law Reform Commission of Canada to amend the incest clause have been successfully opposed. Any attempt to change the law is equated with approval of the crime. Thus, fear of change results in the maintenance of the status quo: the retention of an antiquated law on incest that does little more than console a public's uneasy moral conscience.

{Incest law} is . . . preserved more to appease public morality than to provide convictions for offenders who would otherwise go unpunished.
(Cashman, 1981; p.7)

Despite public reluctance to deal openly with the problems of incest and to change the antiquated laws regarding it, there are a few strong arguments for reform. The criminal law on incest is not working. It apprehends few offenders and convicts even fewer. There seems to be no basis for retention of such a law in the Criminal Code, yet it remains.

In keeping with the recommendations made in Chapter 2, a focus on sexual exploitation of the child-victim could remedy some of the many problems of the criminal provisions on incest. For example, although the fact that sexual relations took place would still have to be established, the focus on sexual exploitation could be included as a line of questioning. Some questions could be: is the sexual act discussed by the entire family, is the child scapegoated or

completely disbelieved, does the child exhibit fear, withdrawal, or a refusal to be with a particular parent, and/or has the child been threatened not to "tell" of the episodes. A changed emphasis could also be reflected in increased efforts at detectability of incest. More public information regarding the nature of the crime, and increased support for children as victims are possible avenues to be explored. An emphasis on the child-victim need not neglect the rehabilitative needs of the offender, or his right to return to society. In addition, the present criminal law does little to reinforce any values inherent in our society regarding protecting children from incest. In fact, it does more to reinforce ideas of paternalism, by its protection of offenders. Thus, in light of just how badly the criminal law fails at its task to apprehend, convict or rehabilitate incest offenders, or protect young children, one can only wonder why the charade of a "criminal law dealing with incest cases" should be permitted to continue.

The recommendations based on the failure of function of the criminal law are:

1. Change the line of questioning in a criminal trial to reflect sexual exploitation.
2. Provide increased information/support services for children.

3. Punish the offender, not the victim. If any family member is to be removed from the home as a result of the incestuous behavior, it should be the offender.
4. Maintain family unity if possible, with rehabilitative counselling for all members. If breakdown occurs, provide family conciliation sessions to help ease the trauma of the crisis.

Chapter 4

THE CIVIL LAW PERTAINING TO INCEST IN THE PROVINCE OF ONTARIO

4.1 THE CHILD PROTECTION LEGISLATION OF THE PROVINCE OF ONTARIO.

The first child protection efforts in the province of Ontario originated from the problem of homeless, orphaned and deserted children. Child Labour provisions, in the form of apprenticeship, had existed until the early 1870's. Citizens raised some concern that apprenticed children were being abused and mistreated. As a result of the action taken, there emerged a system that led to the present-day handling of abused children in Ontario.

In 1874 charitable societies were given the legal authority to intervene to prevent the maltreatment of apprentices. Adoption and institutional care then began to emerge as alternatives to apprenticeship for children. (Ministry of Community and Social Services, Child Welfare in Ontario: Past, Present, and Future 1979, p. 10)

The institutionalization of mistreated children continued in the form of private agencies, known as Children's Aid Societies, founded in Toronto in 1891 by J.J. Kelso. These Societies, coupled with the 1893 provincial legislation entitled The Child Protection Act, emerged

gradually over the years into the system of child protection that exists today in Ontario. The provincial government, originally only responsible for the legislation protecting children, has gradually increased its intervention into the operation of Children's Aid Societies, to such a degree that very few agencies are still considered "privately" run. However, the division of labour between the government and the Societies has remained basically unchanged. The Societies are still responsible for the delivery of child care and most of its related services. If a child is declared a ward of the state, being "in need of protection", and is removed from the home, it is to the Children's Aid Society that the care and well-being of the child is entrusted.

The Child Welfare Act defines a "child in need of protection" and the judicial dispositions that may be made after such a finding. The original Act, passed in 1954, was revised in 1978, and it is this revision that serves as the present Child Welfare Act (Chapter 85, Section 19(b), i-xi, "An Act to Revise the Child Welfare Act", Statutes of Ontario 1978). Although, there have been fairly frequent amendments to the Act, not all are relevant to this thesis. The most important section for this discussion is the definition section, namely Chapter 66, section 19 (b), subsections i-xi, of the "Child Welfare Act", Revised

Statutes of Ontario: 1980. A "child in need of protection" is defined as follows:

1. a child who is brought, with the consent of the person in whose charge the child is, before a court to be dealt with under this Part,
2. a child who is deserted by the person in whose charge the child is,
3. a child where the person, in whose charge the child is, cannot for any reason care properly for the child, or where that person has died and there is no suitable person to care for the child,
4. a child who is living in an unfit or improper place,
5. a child found associating with an unfit or improper person,
6. a child found begging or receiving charity in a public place,
7. a child where the person in whose charge the child is is unable to control the child,
8. a child who without sufficient cause is habitually absent from home or school,
9. a child where the person in whose charge the child is neglects or refuses to provide or obtain proper medical, surgical or other recognized remedial care or treatment necessary for the child's health or well-being, or refuses to permit such care or

treatment to be supplied to the child when it is recommended by a legally qualified medical practitioner, or otherwise fails to protect the child adequately.

10. a child whose emotional or mental development is endangered because of emotional rejection or deprivation of affection by the person in whose charge the child is.

11. a child whose life, health or morals may be endangered by the conduct of the person in whose charge the child is (Chapter 66, section 19(b), subsections i-ix, Part II, Protection and Care of Children, "Child Welfare Act", Revised Statutes of Ontario, 1980).

The provisions of this section specifically designate categories under which a child can be found in need of protection. A protection hearing is held, at which all interested parties can testify as to their knowledge of the child's situation. The court determines whether or not the evidence given warrants the declaration of 'in need of protection' for the child in question. At this hearing, the parents of the child are usually "parties to the action", but only under certain circumstances can a child be such a participant, and this decision is made by the court. If the child has legal counsel, then she/he may be entitled to give

evidence, but these two factors are not inter-dependent. In addition, there are only certain conditions under which a child can have legal representation. They are found in the Child Welfare Act as the following:

1. Section 20 (1) A child may have legal representation at any stage in proceedings under this Part.
2. Where on an application under this Part a child does not have legal representation, the court shall, as soon as practicable in the proceedings, determine whether legal representation is desirable to protect the interests of the child and if at that or any later stage in the proceedings the court determines that legal representation is desirable the court shall direct that legal representation be provided for the child.
3. In determining whether legal representation is desirable to protect the interests of the child under subsection (2) where,
 - a) the court is of the opinion that there is a difference in the views of the child and
 - i) the views of the society, or
 - ii) the views of a parent of the child,
4. and the society intends that the child be removed from the care of his or her parent or any other person or remain in the care of the society pursuant

to an order under paragraph 2 or 3 of subsection 30(1), as the case may be;

- a) the child is in the care of the society and a parent is not present at any stage of the proceedings;
- b) the child is in the care of the society and is alleged to be a child upon whom abuse, as defined in subsection 47 has been inflicted; or
- c) an order under section 33 excluding the child from the hearing is made or is likely to be made

5. the court shall direct that legal representation be provided for the child unless, having regard to the views and preferences can be reasonably ascertained, the court is satisfied that the interests of the child are otherwise adequately protected. (Chapter 66, section 20, Revised Statutes of Ontario 1980.)

If the child is found "in need of protection" under any of the designated categories, the disposition of the judge may be to send the child home under supervision of child welfare authorities or to make the child a temporary or permanent ward of the court. If the latter decision is reached, the parent relinquishes all rights and responsibilities for the rearing of that child to the state (In the Best Interests of the Child, National Council of Welfare, 1979). The following passage is the enactment in law of the authority of the state:

1. Section 30(1) Where a court finds a child to be a child in need of protection pursuant to section 28, the court shall make the one of the following orders that the court considers to be in the best interests of the child, namely:
 2. That the child be placed with or returned to the child's parent or other person, subject to a supervision by the society having jurisdiction in the area where the judge hearing the case presides at the time of the hearing, for a period of not less than six months and not more than twelve months as in the circumstances of the case the court considers advisable.
 3. That the child be made a ward of and committed to the care and custody of the society having jurisdiction in the area where the judge hearing the case presides at the time of the hearing, for such period, not exceeding twelve months, as in the circumstances of the case the court considers advisable.
 4. That the child be made a ward of the Crown until the wardship is terminated under section 38 or expires under section 42 and that the child be committed to the care of the society having jurisdiction in the area where the judge hearing the case presides at the time of the hearing. (Ibid.)

The limitations of these dispositions in child protection hearings will be discussed more fully in Chapter 5, section 3.

The problems with provincial legislation in dealing with incest begin at this point. There was no reference to sexual abuse in the Child Welfare Act until 1977. In other words, incest was not a criterion for the finding of "in need of protection". In fact, there was no reference of any kind to sexually related assaults in any part of the Act. The provision that was used to deal with cases of sexual abuse was the provision for physical abuse and neglect. A revision in 1977 attempted to address this lack of specificity for cases of sexual abuse, but is still not satisfactory as it is included in the reporting, not the protection, section of the Act. To illustrate, the legal criteria for reporting suspected abuse are as follows:

1. Section 47(1) For the purposes of this section and sections 49, 50, 51 and 52 "abuse" means a condition of:
 - a) physical harm
 - b) malnutrition or mental ill-health of a degree that if not immediately remedied could seriously impair growth and development or result in permanent injury or death; or
 - c) sexual molestation (Statutes of Ontario 1983).

The problem with this revision is that incest may not be synonymous with "sexual molestation" by the person who has the "care, custody, control or charge" of the child. For example, this clause makes no reference to relatives of the child as potential perpetrators of "sexual molestation". Incest, therefore, is not defined in civil law. While it is plausible that the sexual molestation clause could be used as evidence that incest occurred, it may be more likely that the lack of a specific reference to incest in civil law results in this section being used to handle cases of sexual molestation of children by offenders who are not relatives. To this end, despite the original mandate of the clause, to care for orphaned, neglected or abused children, it is important in present-day situations to create a distinction between an act that may occur between a stranger and a child, and one that occurs between a parent or a relative and a child. Also, since the majority of incest cases in Canada are handled by provincial protection legislation, it is imperative that a distinction be made at this level of law.

Yet another problem inherent in the nebulous categorizations of section 19 is the confusion of two issues: "in need of protection" and "in need of treatment." The "in need of protection" category can be misrepresented if used to mean "in need of treatment" (Legislation Related

to the Needs of Children Canadian Council on Children and Youth, 1982, p. 62; and Robertshaw, 1981). In other words, a child requiring treatment for a particular problem need not be designated in the same legislative fashion as abused children. This quandary is a result of provincial stipulations concerning financial support to parents of children who need expensive life-support systems and who cannot afford them; the province will help if the child is in court custody. In order to be in the custody of the courts, a child has to be declared "in need of protection." Conceivably, then, parents who may be loving and non-abusive but not able to afford expensive equipment or drugs necessary for the sustenance of their child may find that their child is given the stigma of being declared "in need of protection." Surely a distinction between this situation and one in which a child is abused ought to exist in the legislation dealing with the welfare of children.

This issue points to the difficulty of defining what is "in need of protection." Bala and Clarke indicate the various interpretations in their article "The Child and the Law":

The newborn child of an unwed mother who does not want to raise the child is a child in need of protection. Young infants who are the subject of physical and sexual abuse are children in need of protection. The adolescent child who is having behavioral problems and whose parents cannot control him is a child in need of protection. The sexually promiscuous child, particularly if

female, is apt to be treated as a child in need of protection. (Bala and Clarke, 1982; p. 765)

Although interpreted narrowly by the court, the criteria for finding a child in need of protection are vague. As in criminal law, inadequacy of definition poses a problem for incest cases. The criminal law's criteria for incest are too narrow, the civil law's criteria, as exemplified in the "in need of treatment" issue and in the lack of a specific provision on incest, are too broad. A law that is too broad presents two problems:

1. The law can serve to "widen the net" of its application and include cases which need not necessarily be within the purview of the law: an example of this is the "in need of treatment" cases;
2. A law that is broad in definition is usually vague. As Dickens points out, this creates the possibility of arbitrary and inconsistent interpretations, and thus results in the greater issue of jeopardizing justice. Further, he states that "vague legal definitions accomodating differential enforcement and only ad hoc adjudication jeopardize the normative quality of law that furnishes its potential for achieving justice" (Dickens, 1976, p. 7).

4.2 THE EVIDENTIARY REQUIREMENTS FOR PROTECTION LEGISLATION

In a civil case, the problems of evidence are similar to those in a criminal proceeding, but as indicated previously, the burden of proof is not as great. The mandate of civil cases revolves around the parens patriae doctrine, the right of the state to act as a parent for the protection of a child. This is interpreted in civil law as a determination of whether or not the child is to be found "in need of protection". The intention of protection hearings was to create a setting in which cases concerning children could be heard in a fashion more suitable for dealing with children than a criminal trial. Unfortunately, this procedure has been influenced by the adversarial system to a greater degree than was originally intended (Robertshaw, 1980). Accordingly, the protection hearing is subject to rules of evidence just as if it were an adversarial trial. Thus, admissibility of evidence as well as a child's ability to testify are again at issue.

It is apparent that the adversarial system was not designed to govern the conduct of a trial in which the subject of the hearing is a child; the child is not a party to the action; the child's health and safety is the issue in question; the child does not usually give evidence; and there are rarely any adult witnesses willing or able to give evidence relating to the question of abuse. (Robertshaw, 1980, p. 11)

The evidence of children in a protection hearing is governed by the same regulation on competency used in criminal cases concerning a child of tender years ("Canada Evidence Act", Revised Statutes of Canada, Chapter E-10, section 16, subsections 1,2). This regulation states that a child may give evidence, unsworn, if the requirements of "understanding the duty of speaking the truth" and "is of sufficient intelligence to justify the reception of the evidence" are met.

The Ontario Law Reform Commission recommends that the section requiring competency provisions (section 18 of the aforementioned Evidence Act) be abolished, and that an affirmation to "promise to tell the truth" should be sufficient to satisfy requirements for unsworn evidence. They do explicitly state, however, that this evidence must still be corroborated (Ontario Law Reform Commission, Report on Evidence 1976, p. 131). If the child is not permitted to testify, for whatever reason, the rules of admissibility of evidence may again come into play.

The rule of hearsay evidence, as outlined for criminal trials, may surface in civil protection hearings. Any evidence given by the child to a social worker or other professional who is "not a party to the action", or who is not bringing charges against someone, or is otherwise involved in the case, will be admissible if its purpose "is

not to establish the truth of the statement," but is given for some other reason (Robertshaw, 1980, p. 18).

The complications of this rule soon become apparent. Although a protection hearing is supposed to establish whether or not a child "is in need of protection", obviously the truth of the charge must be substantiated. Yet, a statement to the effect of proving that truth, if given by a professional dealing with the child, is inadmissible. The case becomes even more confusing if opinion evidence is offered, for, as in criminal proceedings, the evidence is inadmissible unless given by a person deemed an expert by the court.

The Ontario Law Reform Commission notes that what is considered opinion evidence is not consistent and that, at times, some non-expert witnesses have been allowed to testify. It recommends a remedy with the following proposed amendment to the Evidence Act:

Where a witness in a proceeding is testifying in a capacity other than as a person qualified to give opinion evidence and a question is put to him to elicit a fact that he personally perceived, his answer is admissible as evidence of the fact even though given in the form of an expression of his opinion upon a matter of issue in the proceeding (Ontario Law Reform Commission, Report on Evidence, 1976, "Draft Evidence Act" section 14).

Past criminal records are not admissible in civil proceedings. There is a provision excepting these records if the issue is to return the child to the custody of

his/her parents (Section 48(4), Chapter 66, "Child Welfare Act" Revised Statutes of Ontario, 1980). However, it is possible that in the determination of whether or not a child is in "need of protection" there could be benefits from the inclusion of these records as evidence. The rule in Canadian law (Hollington v. Hawthorne, 1943, K.B., 587, C.A.) states that:

Evidence of a criminal conviction is not admissible on the truth of its finding when contended in a civil action . . . Accordingly, under this rule, evidence of a parent's criminal conviction for assault of his child is not admissible at a protection hearing regarding that child when conducted in another court. (Dickens, 1976, pp. 39,40)

Siblings of an abused child may not be found "in need of protection", if information on past parental behavior is only available for custody decisions. If, for example, a disposition other than a custody decision were made, then past criminal records of an abusive parent could be considered admissible, and this type of situation could be avoided.

The need to connect quality of parenting with court action regarding the child presents other problems for a protection hearing. Indeed, the need to establish parental guilt in child rearing may result in the creation of an adversarial approach; which is usually a feature of criminal courts rather than protection hearings. But as indicated by

Corrine Robertshaw, a child in a protection hearing, unlike the adversarial system, cannot be a "party to the action". Thus the strongest feature of the criminal law, the fact that an individual can have her/his interests represented in court, may not be available to a child in a protection hearing.

The disadvantages of the adversarial system as used in a child protection hearing are basically threefold. Firstly, the adversarial system leaves it to the parties to present the evidence and argument that supports their position, with the judge playing essentially a passive role as umpire. But in a protection hearing the child is not automatically a party to the proceedings. Those who are the parties-the parents and the authorities-have their own viewpoint to present to the court. Therefore an essential aspect of the adversarial system does not operate for the benefit of the child in that his interests may not always be represented. (Robertshaw, 1980, p.9)

4.3 CONCLUSIONS

For the most part, it has been assumed that provincial legislation has protected children from incest for many years. However, the provincial provisions for child protection have not directly addressed the problem of incest at all. When compared to the criminal law on incest, the protection provisions seem much broader in application, not as narrow in definition, and much more in keeping with the nature of the crime: focusing on the protection of the child-victim and the unity of the family. However, as

indicated by the present examination of the protection provisions, unlike the criminal law, there is no specific definition of incest in the provincial statutes. Incest has been included under these provisions as a result of broad interpretation of the provisions, not because of a mandate in law. As indicated earlier in this chapter, the provision of "sexual molestation" was only recently added to the legislation, and even this amendment does not ensure the inclusion of incest cases under the Child Welfare Act.

A related problem with the provincial protection provisions has been the disposition of cases. Protection hearings have a limited range of disposition options for a child declared "in need of protection". Despite a fairly consistent demonstration by the court of concern for family unity in dealings with children at the hearing stage of the proceedings, there seems to be an inconsistency at the stage of disposition. There are very few counselling sessions offered to the family and practically no further contact by the court if the child is taken from the parents. Very few services are offered in the interest of the child, other than removal. Thus one can only wonder how truly "protected" children are if the only option for a child when declared "in need of protection" is the removal of the child from the parental home with little or no help in aiding either the child or the family adjust to the family breakdown.

In addition to the disposition problems, there may also be a focus on blaming the parents in the determination of "in need of protection". Although it is necessary to evaluate the kind of parenting the child had, it is not imperative to lay blame or find guilt in order to remedy the situation. To reiterate an earlier point, the focus on blame that appears in protection hearings is indicative of the adversarial influence of criminal law on civil procedure. Another example of this influence surfaces in other situations of family breakdown, such as divorce. In divorce hearings, as in protection hearings, it seems, despite a provision stating otherwise, that fault has to be found with, and blame attached to, someone in order for the court to come to a decision on the case. (The provision referred to is the "no-fault divorce" section 4(1)(e)(i) of the Divorce Act.) Contemporary reformers of divorce law would rather see attention paid to ways of securing a peaceful divorce and rendering necessary counselling and assistance than to a continued emphasis on guilt. In a Department of Justice paper, recommendations on conciliation counselling were advocated (Department of Justice, "Attempting to Restructure Family Law", 1983). These recommendations were taken from an earlier Law Reform Commission report written by Julien Payne (Payne, 1973). Conciliation counselling could be available when total

family breakdown is imminent, to enable the family to adjust in a peaceful and healthy manner to the painful process of separation (from comments by Julien Payne, as quoted in "Attempting to Restructure Family Law", a report by the Dept. of Justice, 1983). Similarly, in protection hearings, if this type of counselling were advocated, the direction of protection proceedings could change. The hearings could focus more on the nature and consequences of the incestuous relationship and less on the behaviour and guilt of the parents. For, removing a child from the home may not do anything to alleviate the problem, as there may be future victims in the same family. Further, although the child's removal from the home may increase her/his safety, it may also serve to perpetuate the child's feelings of guilt and "deserved" punishment through the withdrawal of love and the sense of belonging by the entire family.

Evidence requirements can also be found lacking in civil law, but not in the same fashion as criminal law. Although incest is not defined in civil law, the law is still used to deal with incest cases, and is therefore subject to the same evidence requirements, and the same problems, as all of the protection provisions. The burden of proof in protection proceedings, a "balance of probabilities," is not as stringent as the "beyond a reasonable doubt" of criminal law, and does not require the same strict proof. For

example, intercourse is not required evidence in civil proceedings. However, some of the problems that evidence requirements of civil law present for cases of incest are similar to those presented for criminal cases. The question of a child's competency is an issue in protection hearings. If a child is found incompetent to testify, but reveals her/his testimony to a professional, this evidence may be inadmissible according to the restriction on hearsay evidence. As a result, there is the danger that a child's evidence may not reach the court. Similar to criminal law, there is great debate in civil law as to the inadmissibility of opinion evidence, and the definition of what is an opinion. However, one of the greatest problems in civil law evidentiary requirements is the admissibility of past criminal records of the parents in the protection proceedings only in decisions of custody. In cases of incest, as often happens in abuse cases, there may have been other children of the same family victimized, and the parents charged. In order for this criminal record to be presented in court for the protection of siblings of a sexually abused child, the range of disposition within civil proceedings would have to remain unchanged. If the range of dispositions in protection hearings are expanded to include decisions in addition to custody, then past criminal records of abuse will be inadmissible, thus rendering any recommendations for change on this basis futile.

As the previous discussion indicates, the provincial protection provisions have many problems in dealing with incest cases. To remedy some of the quandaries indicated in the foregoing, I recommend the following:

1. An explicit definition of incest in the "in need of protection" criteria. The definition could be "any child who is a victim of sexually exploitative behavior by a parent or relative is a child in need of protection".
2. The range of disposition in protection cases be expanded to include family conciliation sessions, much the same as those outlined by in the Department of Justice's paper "Attempting to Restructure Family Law" (1983).
3. The provision including past criminal records in civil proceedings only for decisions of custody would necessarily be altered to be congruent with changes in disposition.
4. The requirement for competency be amended to reflect the Ontario Law Reform Commission's proposal for change.
5. The stipulation regarding hearsay evidence be abolished.
6. As a general recommendation, more focus on remedy in protection hearings rather than on blame. The

concept of blame belongs in a criminal law, not in provincial protection provisions.

Chapter 5

THE CHILD-VICTIM IN PROVINCIAL PROTECTION HEARINGS

5.1 PROTECTION VERSUS PARTICIPATION: THE ISSUE OF CHILDREN'S RIGHTS

The provincial protection laws concerning children operate according to the parens patriae doctrine. Over the years, this doctrine has provided protection to hundreds of orphaned or abused children, to those without families, or those at the mercy of them:

Developed in mediaeval England, the concept extended the authority and responsibility of the crown so that it might intervene on behalf of persons like children, who could not safeguard their own interests. The parens patriae concept is invoked today as the authority of certain courts to make decisions on behalf of those who cannot act for themselves. (Admittance Restricted-The Child as Citizen in Canada, Canadian Council on Children and Youth, 1978, p.2)

Initially, family court was intended as a forum for children that would safeguard their welfare under the parens patriae doctrine, and it interpreted actions done in the name of that doctrine as in the "best interests of the child." The needs of children were seen as being different from those of adults, and as such, as requiring a more informal forum for meeting those needs than could be offered

by an adult criminal court. Thus, the protection hearings were born. Although children have been protected for many years by this doctrine, there are present-day problems with its interpretation. One of the most pressing issues of interpretation is whether or not the child's interests are reflected in the outcome. As an "alternate parent" concept, *parens patriae* simply shifts the responsibility of parenting from the family to the state. A problem inherent in this change is the possibility of "parental" interests simply becoming "state" interests. In other words, it is assumed that if parents of a child found "in need of protection" did not act in the interests of their child, then the state certainly would. However, does the state know what is "best" for a child? One author questions whether adults always know what is "best":

One sign of adult arrogance is the assumption that the adult knows what's best for the child—often without even consulting the child or teenager.
(Fernandez, 1980, p.129)

The argument of what is best for the child is an old one where protection law is concerned. An assumption implicit in any law focusing on protection of a group is that the law reflects the interest of that group. In protection cases, this assumption is translated into the phrase "in the best interests of the child". This phrase is used by child advocates, social workers, legal counsel, and child aid workers as the interpretative focus of the protection laws.

But is this concept of "in the best interests of the child" truly a guideline for all those who use it? One wonders if it is possible for all of the participants named even to agree about the definition of "best interests", given that their views on what should be done with children in the context of a protection hearing can be conflicting. The problem is that the "in the best interest" phrase is not unlike motherhood and apple pie, so much steeped in tradition that it is difficult to question its meaning. There is an assumption by authors of literature on children and the law that the phrase is understood by all, even though it is rarely defined by any of them. By the same token, because not explicit in meaning, the phrase could be used as a shield against criticism. In other words, it could mean all things to all people using it.

The only definition of best interest that I discovered in the literature was in the 1973 Beyond the Best Interests of the Child and referred to in the 1979 Before the Best Interests of the Child, both by Goldstein, Freud, and Solnit. They defined best interests as:

least detrimental alternative or . . . that specific placement which maximizes, in accord with the child's sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent. (Goldstein, Freud, and Solnit: 1979, p. 6)

A legal definition is formulated in the "Child Welfare Act", Revised Statutes of Ontario, chapter 66, 1980.

1. In this Act:

- a) 'best interests of the child' means the best interest of the child in the circumstances having regard, in addition to all other relevant considerations, to
 - i) the mental, emotional and physical needs of the child and the appropriate care or treatment, or both, to meet such needs,
 - ii) the child's opportunity to enjoy a parent-child relationship and to be a wanted and heeded member within a family structure,
 - iii) the child's mental, emotional and physical stages of development,
 - iv) the effect upon the child of any disruption of the child's sense of continuity,
 - v) the merits of any plan proposed by the agency that would be caring for the child, compared with the merits of the child returning to or remaining with his or her parents,
 - vi) the views and preferences of the child, where such views and preferences can reasonably be ascertained,

vii) the effect upon the child of any delay in the final disposition in the proceedings, any risk to the child of returning the child to or allowing the child to remain in the care of his or her parent;

b) court, unless otherwise indicated, means a provincial court (family division) or the Unified Family Court (Part II, Protection and Care of Children, Chapter 66, "Child Welfare Act" Revised Statutes of Ontario 1980).

As indicated, not having a clear consensus as to what actions are in "the best interests" of the child leads to possible confusion in the interpretation of the relevant statutory provisions. It can also lead to interpretations of law that could be in the "best interests" of the state. Understandably, those concerned with the welfare of children challenge such concepts, claiming that a "best interests" mandate could actually interfere with the rights of children. However, as in the case of varying interpretations of what constitutes "best interests," the meaning of "children's rights" is also variable.

The following instances illustrate the distinctions in meaning, which are largely a result of orientation of the individual author. Hillary Rodham, in her article "Children's Rights: A Legal Perspective," defines the legal

rights of children, and indicates that the "needs and interests" of the child should be entrenched as legislation:

A legal right is an enforceable claim to the possession of property or authority, or to the enjoyment of privileges or immunities. In the field of children's rights, we are not dealing primarily with existing legal rights but with children's needs and interests and attempts to transform these into enforceable rights. We are talking about everything from compulsory school attendance to driving privileges to nurturing requirements. (Rodham, 1979; p. 21)

She argues that children, if competent,⁸ should have some control over decisions that may radically affect their lives and gives examples of situations where choice is imperative. They include abortion, employment, and education.

Other definitions of children's rights reflect the need for legal rights for children. Some are based on the status of children in society. Marcia Lowry speaks of the powerlessness of children when they are not seen as independent legal entities and claims that the legal rights of children are recognized only up to the point of conflict between the interests of the child and those of parents (Lowry, 1979). This argument voices the concerns earlier stated herein about the "in the best interests" phrase.

⁸ Competency in legal terms usually refers to whether a child can distinguish between right and wrong. Although cited as crucial to the trials of children who have committed offences, (see Australian Law Reform Commission report, "Child Welfare-Children in Trouble", 1979), questions of competency are most prevalent in criminal trials involving children as witnesses (see Chapter 2 for a discussion on competency).

Gaffield and West, in a description of the status of children in society, criticize the assumption that legislative provisions protecting children actually realize their interests:

One of the most salient characteristics of juvenile status in education, law and the economy is "denied adulthood" . . . As with blacks, this institutionalized, often legalized, oppression is mystifying; justified by claims to be in the interests of the oppressed. (Gaffield and West, 1978; p. 11)

For those concerned with ensuring the rights of children, the problems of how to do this are as variable as the meanings of "best interests". In cases of protection hearings, judges may often rely on the testimony of expert witnesses. This testimony may not always take into account the interests of the child, and it is claimed that, not allowing a child to participate as her or his own witness is tantamount to ignoring the rights of the child (Goldstein, Freud and Solnit: 1979). According to Bala and Clarke, the child's wishes can best be expressed by legal representation and the use of expert testimony:

Frequently, in custodial disputes, a family is referred for professional assessment and a psychologist or child psychiatrist can elicit, in a meaningful sense, the child's true wishes and have them placed before the court and explained in a meaningful way. (Bala and Clarke, 1981; p. 57)

However, this strategy, although often used in protection hearings, does not guarantee that what will be determined by

a "professional assessment" will adequately address a child's interests.

The argument that a child's interests ought to be represented stems from the fact that a child's evidence may not be presented in court. Although a protection hearing is concerned with the welfare of children, often a child may have neither access to the hearing nor any guarantee that her/his evidence will be heard. A recent amendment to the Ontario Child Welfare Act attempts a remedy by recommending independent legal representation for children (This amendment is quoted in Chapter 4, section 1). It focuses on children who are "in the care of the society" and whose parents are "not present at any stage of the proceeding", or children who are victims of abuse. However, the representation provisions apply only to children whose interests conflict with their parents in custody disputes. The court determines whether or not the child's interests have been met. Nevertheless, the provisions are a significant improvement regarding representation of the interests of children in a court of law.

However, despite these provisions, the limitations on legal representation for children are substantial. If, for example, a lawyer is to represent a child-client, there are impediments to the quality of their interaction.

The position of the lawyer to the child as a client is perhaps the most tenuous among the

various helping professions. A fundamental part of the solicitor-client relationship rests on whether the client is sui juris, that is, capable of managing his own affairs while the other professions are often called upon to ameliorate this very status. (Wilson, 1978; p. 281)

Other questions deal with the child's ability to direct counsel, and the possibility that a very young child may not be capable of making decisions regarding her/his own future. It is probable that a child may be very afraid of the situation, and very guilt-ridden (as is often the case with victims of incest) or even reluctant to deal with a lawyer; especially if it is the court, not the child, who makes the decision to retain counsel.⁹ Despite these difficulties, the lawyer is still responsible for representing his or her child-client. Whether representation is in the child's "interests" or not is difficult to ascertain. A child may wish to leave the parental home, for example. Is this in the child's interests or is it the child's wish?¹⁰

Despite the lack of distinction between these two motives, the strength of legal representation for children is the possibility it gives a child to have a voice in proceedings that will determine her or his own future.

⁹ For a more in-depth discussion of the relationship of the psychological development and perception of children and the difficulty of counsel in representing child-clients, see Leon, 1978, pp. 70-80.

¹⁰ For further discussion of the quandary this presents for legal counsel representing children, see Maczko, 1979; pp. 285-286.

Further, a lawyer would not be biased in the same fashion as social workers, who are often in the position of investigating and representing the same family. Finally, for child-victims, often confused and frightened by a court process usually intended for adults, it probably helps to have the feeling that there is someone on their "side."

Legal representation is not the only mechanism by which a child's "interest" and/or evidence may be brought forth in court. One para-legal method can be that of child advocacy, a type of non-professionalized amicus curiae, or friend of the court.¹¹ Patrick Lee states that advocacy began as a concern for orphaned children and then grew into a legal principle of protection:

The 'Old Advocacy' began in 19th century America primarily out of citizen concern for orphaned and abandoned children, i.e. for those who were failed by the family and community support system. Out of this precedent of society as a back-up parent there evolved a more vigorous and intrusive brand of advocacy that defined society (or the state) as an alternate parent. Thus, the legal principle of parens patriae was affirmatively developed, creating a basis for intervening in the lives of children who were abused or received inadequate care in the family context. (p. 17, Lee, 1978)

Advocacy has evolved to include more than the legal doctrine of protection, parens patriae. The concept of advocacy differs from legal representation and the

¹¹ This title usually refers to a lawyer who calls the relevant expert evidence and cross-examines the witnesses.

"alternate parent" concept as it exists not to provide services for children, but to ensure them. A Child Advocate is not "any and everyone working with children or in children's services". . . "He/she is not necessarily the person providing direct services. Rather, the child advocate is the person acting on behalf of children to see that institutions and systems serve children's interests."

(Fernandez, 1980; p. 24) An advocate may be, depending on the terms of reference used, a volunteer, a trained child specialist, a social worker, or a lawyer. In Israel, an advocate for the child is appointed by the Court and is known as a "Youth Interrogator". The Interrogator's powers of protection are substantial. The child cannot be required to give evidence in court without the prior permission of the Interrogator, and, if permission is refused she or he "gives evidence in place of the child" to the court (New Zealand, Criminal Law Reform Committee, "Report on the Position of Young Witnesses in Cases Involving a Sexual Offence", January, 1977).

The advocate could also be an ombudsman acting on behalf of the child, or investigating situations where children's rights, however defined, are violated. A Canadian study done on the feasibility of such a position revealed that people already acting as advocates for children are sometimes placed in dual roles of investigating and

representing the same family (Blonde, et al., 1978). The authors felt that the appointment of an ombudsman would alleviate this dual role played by social workers and offer a viable solution to the problem of child representation.

A child's ombudsman, advocate, or guardian, therefore is proposed to ensure that separate legal representation of a child is available and that his interests are protected by someone whose job is solely that of representing his client - the child. (Ibid., p.336)

There are also those who assert that the child can act as her or his own advocate (Fernandez, 1980). This suggestion would be suitable for fairly articulate teenagers but could present problems in cases concerning very young children.

What requires some clarification is the question of how the role of an advocate differs from that of a lawyer. Both attempt to "ensure" that the needs of children are met, both serve their client's interest in a court of law. One article examining the role of the advocate lists the duties of an advocate as ranging from "investigating and reporting, initiating contempt proceedings" to "cause witnesses to appear. . ." and attributes confusion over the role of an advocate to "the various sources of authority, the various titles given to the child advocate and the nature of the proceeding. . ." (Mlyniec, 1977-78, pp.8,9). But the strengths of advocacy lie in its para-professional, para-legal position. An advocate need not be, and often is

not, a lawyer. It would be reasonable to assume that advocates may derive a role distinct from that of a lawyer if they do not duplicate services offered by a lawyer. For example, an advocate could act as a child-victim/witness assistant by ensuring that the child understands the court-process sufficiently to avoid further trauma in court. The advocate could continue to provide support to and advise the child throughout the court process. Thus the advocate could provide the much needed, but often neglected, function of supporting a child-victim in court.

5.2 IN WHOSE INTEREST: PROBLEMS WITH REPRESENTATION

Child-representation issues raise particular problems in family court. Although the mandate of the court is protection of the child, the family court, almost inevitably, shows signs of being influenced by the more prevalent adversarial procedure of criminal court.

Perhaps the most criticized feature of the existing family law system involves attack on its adversarial character . . . This criticism is particularly pertinent when litigation involves children because the issues are not related to a definite past event (for instance the determination of guilt or innocence) but to predicting the best future for the children involved (for instance which parent should have custody). (Bala and Clarke, 1981, p. 23)

As a result, parties are pitted against each other, family member against family member, and consequently,

questions as to whether a child should be "a party to the action" are raised. Those who support a child's right to be a "party" feel that participation of children in the proceedings will guarantee the child's rights and that that is reason enough to include them. What is not given enough critical attention is how this participation will take place: will the child be permitted to give evidence, for example, or will counsel be required to represent the child? If the latter option is chosen, as it is most often in cases of incest, then how does the lawyer approach a forum that is not supposed to be adversarial in nature?

The Australian Law Reform Commission, although discussing representation for children who have committed offences, points to the quandary this situation creates for lawyers:

If the child does have a legal representative in court should this representative approach both the adjudicative and dispositional phases of the hearing as he would in an adversarial trial?
(Australian Law Reform Commission, "Child Welfare-Children in Trouble", 1979, p.23).

However, legal representation for children in a court of law can introduce the child into the proceedings but also make her/him a means of enhancing the adversarial bent of the family law. Although the standard of proof in a civil proceeding is within a "balance of probabilities" as opposed to the criminal law's rigid standard of "beyond a reasonable doubt", to introduce yet another player "into the arena" in

the form of a child-client may further emphasize an adversarial quality of civil law that was not intended to be there in the first place.

Similarly, the suggestion of advocacy as a means of avoiding the restrictions of legal representation can essentially pose the same problem under a different name. The advocate, though usually para-professional, could get caught in the same quandary by representing children. Further, advocates could have fewer "legal" rights and powers than those of a lawyer and as a result be themselves excluded as a party to the action. The advocate could encounter the same difficulties in determining what action is "in the best interest" of the child as do any other professionals in the same position.

The problem with acting in the child's best interests essentially rests in the possibility that action taken could be done in the name of who undertook it, rather than who it was for. Goldstein et.al. express concern with this possibility:

The child's interests are often balanced against and frequently made subordinate to adult interests and rights. (Goldstein et.al., 1979; p.54)

The authors go on to emphasize that the delicate balance between the rights and interests of parents and children is a result of the fact that children are psychologically dependent on parents and any protection scheme in the best

interest of the child must be cognizant of this. This premise becomes glaringly evident in a case of incest. The victim is usually the daughter of the accused, who is not a stranger, but one upon whom she is dependent for the very necessities of life, including emotional support. Any decision to ascertain what is in the child's best interest should be aware of these issues, and take them into consideration at the level of disposition.

5.3 DISPOSITION AND THE "BEST INTEREST" PRINCIPLE

The problem of how anyone, judge or otherwise, can make a decision "in the best interests of the child" is illustrated in the following quotation:

Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself . . . and if the judge looks to society at large, he finds neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values. (Mnookin, 1975, p. 260)

However, despite the dilemma over what decision is in "the best interests of the child", the dispositions decisions of protection hearings are surprisingly limited: to remove or not to remove the child-victim from the parental home. It is ironic that a protection provision with eleven criteria for finding a child in "need of protection" can offer but two resolutions to the problem, that a law so broad in definition can be so restricted in disposition.

The work of Howard S. Becker provides an explanation of why this is the case. In his book Outsiders (1963), he points out that seemingly contradictory rules can be derived from the same value. The questions of protection are indicative of this type of contradiction. The doctrine of parens patriae is interpreted in the best interests of the child. What is eventually done, the removal of a child from a home, may not be necessarily what is best for the child, but may be the easiest, most efficient solution to the problem.

Lon Fuller has suggested that when a judge decides about custody under the best-interests principle he is: "Not applying law or legal rules at all, but is exercising administrative discretion which by its nature cannot be rule-bound. The statutory admonitions to decide the question of custody so as to advance the welfare of the child is as remote from being a rule as an instruction to the manager of a state-owned factory that he should follow the principle of maximizing output at the least cost to the state." (as quoted in Mnookin, 1975 p. 255)

The basic value, welfare of children, is inherently the basis of both the doctrine of parens patriae and the principle of best interest. However, the best interest principle may actually contradict the protection doctrine, for the removal of a child from her/his home to ensure protection may not always be the best decision for the welfare of the child. A child may be removed from the home only to be placed in a situation of continual foster-home

transfers. Thus, actions taken in the best interests of children in order to protect them may actually prove to harm them in other ways.

But values, Becker points out, are "poor guides to action. The standards they embody are general, telling us which of several alternative lines of action would be preferable, all things being equal." (Becker, 1963, p. 130) He also indicates that things are not likely to be equal in most situations, and that we may be totally unaware of the conflict in the values we adhere to. The conflict only surfaces whenever we need to make a decision.

Values provide the major premises from which specific rules are deduced. We become aware of their inadequacy as a basis for action when, in a moment of crisis, we realize that we cannot decide which of the conflicting courses of action recommended to us we should take. (Becker, 1963, p. 131)

This dilemma is readily apparent at the disposition stage of protection hearings.

Given that there may be, theoretically, conflicts in the interpretation of protection in civil courts, the problem of what to do for endangered children persists. First, there are considerations that must be established as crucial to any child protection scheme. Protection statutes must be re-examined to determine if the interpretation and dispositions reflect accurately their mandate of protection. If the welfare of children is to be the focus of protection

hearings, then the hearings must reflect this in their proceedings. The influence of the adversarial criminal justice system has to be identified in the currently used procedure and re-examined.

If reform is desired, there are analogous legal situations to choose from: for example, divorce law. As indicated in previously in this thesis, divorce law is also plagued by the adversarial nature of the legal process. Instead of a mutually agreed on dissolution of marriage, divorce proceedings pit the parties against each other in a re-enactment of the criminal law requirement to establish guilt. In reporting on Julien Payne's findings in his study for the Law Reform Commission of Canada (Payne, 1973) the Department of Justice quotes:

The Commission also argued that despite the greater degree of informality in family courts, the substantive law administered in these courts is essentially, and in the final analysis, no different than that of superior courts since it is based on the fault or offence concept and the adversary procedures which follow from these concepts. ("Attempting to Restructure Family Law", Department of Justice, 1983, p. 15)

Protection hearings truly concerned with incest could offer child-victims and their families more than a "blaming" disposition. It has been suggested that conciliation be offered divorcing couples, in order to ensure that a peaceful and less traumatic breakdown ensue (Ibid.). Protection hearings could offer the same service to families that are threatened by a removal of one of its members.

Incest involves family liaisons, secrets, and scapegoating. To remove a child who is scapegoated may serve to reinforce the guilt that the child may be already experiencing. A further scapegoating of any of its members by finding them guilty is the last thing a family going through break-up needs. Protection hearings truly concerned with incest could offer child-victims and their families more than a "blaming" disposition.

The question of protection is still imminent. Those interested in reform must fully examine its meaning before choosing any option for improvement. For without careful consideration, the delicate concept of child protection, a worthy emphasis of law, could be lost in court procedure.

5.4 CONCLUSIONS

Given the previous discussion, it would seem that provincial protection provisions do not do an exceptional job of protecting children, and that the laws are plagued with some of the same problems as the criminal law on incest.

Nevertheless, the protection provisions, despite their flaws, are in a much better position to protect children than their criminal law counterpart ever was, as the original mandate of the provincial law is protection.

The provincial provisions are in need of change if they are to continue to carry on the work they already do in

incest cases. To this end, the following recommendations, as well as those of Chapter 4, could be incorporated into the Child Welfare Act:

1. Guarantee legal representation for the child-victim in a protection hearing.
2. Establish the role of a child advocate to provide support to a child-victim in court proceedings. The advocate could avoid repetition of a lawyer's duties if she/he concentrates on the needs of the child; explaining court procedure, and ensuring that the child understands what is happening.
3. Dispositions in protection hearings should be broadened to include options other than removal from the home. More counselling sessions could be offered to the entire family in order to emphasize the involvement of the family in the incestuous behavior and to decrease the scapegoating of the child-victim.
4. As a general recommendation, the influence of the adversarial system on family court should be recognized. Legal representation of children should be done in a particularly careful manner, as it is in this sphere that the procedure of criminal court is most likely to occur.

Chapter 6

CONCLUSIONS

In this thesis two laws, the Canadian federal legislation on incest (section 150 of the Criminal Code) and the protection provisions of Ontario's Child Welfare Act were examined relative to their definition in legislation, evidentiary requirements and stated mandates in order to determine how effectively each dealt with the problem of incest. Although the protection provisions do not contain a specific reference to incest, incest cases are still handled in a more healthy manner than the specific clause of the Criminal Code. The criminal provision on incest is badly in need of revision. The wording of the legislation as well as the evidentiary requirements for proof reflect more an antiquated view of sexuality than a response to the true nature of the crime of incest. However, when radical changes were made to other sexual offences within the Criminal Code, incest was excluded. This resulted in the retention of an outdated criminal law on incest. In reality, the maintenance of this law has practically no effect on the child-victims of incest or on the conviction of offenders, for the clause is seldom used. The trend in

reporting cases of incest is increasingly towards Children's Aid Societies rather than the police, which results in more cases being handled by family courts rather than criminal court (as revealed in interviews with members of the Ottawa Police Department, and the Ottawa Children's Aid Society).

It would be logical to assume that if governments were to reform a law on incest, then it should be the one more frequently used to deal with a crime, in this case the provincial protection provisions. However, there are always arguments towards retention of criminal prosecution powers. If this is desired, then the recommendations outlined in Chapters 2 and 3 would begin to better address the problem of incest than does the present provision in criminal law.

As with any proposed change to the status quo, questions of feasibility always surface. The recommendations made in this thesis may at first seem to be costly ventures. They need not be, but then this will depend on which laws, or which recommendations are chosen for reform. Regarding the Criminal Code proposals, changes to the wording of the legislation could be inexpensive. In fact, the greatest cost would occur if the recommendation to include counselling sessions in the sentencing procedure were implemented, as the criminal court does not presently have a program in place to handle such a demand. On the other hand, if the same recommendation were implemented in

provincial provisions, there are some mechanisms already available to cope with the demand. Most family courts already use the services of social workers to do some counselling, these roles could be expanded to include special situations such as incest. The Unified Family Court structure, already in place in several Canadian cities could serve well the concepts of family counselling and special considerations for the child-victim, as its major emphasis is a concentration on the family.¹²

Unified Family Courts represent, then, both an organizational change and an aspect of a new philosophy of family law. They offer in the Canadian constitutional, legal and cultural context, means to achieve the goals of preserving the family and strengthening family relations after dissolution and of creating better, more humane and more efficient justice (p. iv, "Attempting to Restructure Family Law: Unified Family Court Experiments in Canada" Dept. of Justice, 1983).

Understandably then, if the Unified Family Court concept were adopted throughout Canada, counselling and conciliation would be inherent in the structure. Similar to the recommendations made for the Criminal Code, the deletion or inclusion of provisions to legislative definitions would be much less costly to implement. Other recommendations to change provincial protection laws and processes, such as the development of the role of a child advocate need not involve more money. If advocates were voluntary, the only expense

¹² These cities include, Hamilton, Saskatoon, St. John's, and Fredericton. (Dept. of Justice, 1983)

that may be incurred would be in their training. Incest crisis lines could be administered in a similar fashion to other community-based crisis/help lines and staffed by volunteer workers.

Despite revisions to any law pertaining to children there is the greater problem of the use of the adversary process in family court proceedings. It only stands to reason that problems of this kind arise, for all of the legal community within the court system are trained to deal with law in an adversary system, and are not necessarily given special instruction on the specific needs of the child-victim/witness. The recommendations made herein introduce more of a family unity emphasis, by encouraging counselling and the involvement of the community through the role of the child-advocate. However, the adversarial thrust will never completely be eradicated from court structures. Nevertheless, improvements can definitely be made within the existing system.

As with any subject, further research can always be done in the area. Some recommendations for continuation of the present work could be the following:

1. It would be helpful to compare all provincial protection provisions to determine which stipulations, if any, deal best with incest in order to advocate some standard recommendations for all provinces.

2. A feasibility study, assessing programmes on incest already in place (such as those functioning in the United States), to determine their applicability to Canada.
3. An examination of the Unified Family Court structure in depth to assess it for future programs dealing with incest.

Some of these recommendations would need to be done in order to enable reforms given in this thesis to become a reality. Otherwise, the problem of incest will continue to be dealt with in a haphazard manner, with convictions of offenders repressed by strict criminal laws and protection of child-victims potentially neglected by non-specific definitions in provincial law. Court procedures in Canada dealing with the protection of children need to recognize that incest is a crime unlike many others, and that the ineffective processing of a case can have lasting effects on a family and a child-victim. Children who are already traumatized by sexual exploitation within their own family do not need to suffer the further indignities of credibility questioning and the inability to testify within a court system. Any court that deals with the delicate emotional balance of an incestuous relationship needs to be cognizant of the special problems for child-victims and their families in getting their lives back together. Otherwise, the

concept of protection, as presently applied to incest, will do little to alleviate the problem. Further, to offer child-victims of incest inconsistent protection under the law is a totally unacceptable proposition in this society.

BIBLIOGRAPHY

The Abused Child in the Family and the Community. Selected Papers from the Second International Congress on Child Abuse and Neglect. London: 1978, Volume 1.

Andenaes, Johannes. "General Prevention Revisited: Research and Policy Implications" Journal of Criminal Law and Criminology. (1975) Vol. 66, No.3, pp. 338-365.

Bala, Nicholas C. and Kenneth L. Clarke. The Child and the Law. Toronto: McGraw-Hill Ryerson Ltd., 1981, pp. 137-140.

----- H. Lilles and G. Thomson. Canadian Children's Law-Cases, Notes and Materials. Canadian Legal Casebook Series, Toronto: Butterworths, 1982.

Baxter, F.G. and Mary A. Eberts (eds.) The Child and the Courts. Toronto: The Carswell Co., Ltd., 1978.

Becker, Howard S. Outsiders: Studies in the Sociology of Deviance. New York: The Free Press, 1963.

Berkeley, Heather, Chad Gaffield and W. Gordon West (eds.) Children's Rights in the Canadian Context. Toronto: The Ontario Institute for Studies in Education, 1978.

Besharov, Douglas J. "Towards Better Research on Child Abuse and Neglect: Making Definitional Issues an Explicit Methodological Concern" Child Abuse and Neglect. (1981), Volume 5, pp. 383-390.

Bible, King James Version, Leviticus, 18:8-9; 29.

Blom-Cooper, Louis and Gavin Drewry. Law and Morality. London: Gerald Duckworth and Co. Ltd., 1976.

Blonde, Dolores J., Linda M. MacDonald, Charles Wrock, and Norris H.C. Yang. The Child's Ombudsman-A Feasibility Study. Windsor, Ontario: Legal Assistance of Windsor, 1978.

- Burgess, Ann Wolbert, Lynda Lytle Holmstrom and Maureen McCausland. "Child Sexual Assault by a Family Member: Decisions Following Disclosure". Victimology. (1977), Volume II, No.2, pp. 236-250.
- , A. Nicholas Groth, Lynda Lytle Holmstrom and Suzanne M. Sgroi. Sexual Assault of Children and Adolescents. Canada and the U.S.A.: D.C. Heath and Co., 1978.
- Cashman, Marilyn. Proposed Changes in Sexual Offences Legislation (Bill C-53) - Implications for Legal and National Legal Aid. Ottawa: National Legal Aid Research Centre, 1981.
- Cook, Joanne Valient and Roy Tyler Bowles (eds.). Child Abuse: Commission and Omission. Toronto: Butterworths, 1980.
- Cook, Mark and Kevin Howells. Adult Sexual Interest in Children Personality and Psychopathology - a series of monographs, texts and treatises. New York and London: Academic Press, 1981.
- Cooper, Ingrid. "Decriminalization of Incest - New Legal-Clinical Responses". In Family Violence: An International and Interdisciplinary Study. Eds. John M. Eekelaar and Sanford N. Katz. Toronto: Butterworths, 1978, pp. 518-528
- Daugherty, Mary Katherine. "The Crime of Incest Against the Minor Child and the States' Statutory Responses". Journal of Family Law. (1978-79) Vol. 17, No.1, pp. 93-115.
- Deaton, Fae A. and D.L. Sandlin. "Sexual Victimology Within the Home: A Treatment Approach". Victimology. (1980), Volume 5, No. 2-4, pp. 311-321.
- Dickens, Bernard M. Legal Issues in Child Abuse. Toronto: Centre of Criminology, University of Toronto, 1976.
- , "Legal Responses to Child Abuse". In Family Violence: An International and Interdisciplinary Study. Eds. John M. Eekelaar and Sanford N. Katz. Toronto: Butterworths, 1978, pp. 338-362
- Duquette, Donald N. "The Expert Witness in Child Abuse and Neglect: An Interdisciplinary Process". Child Abuse and Neglect. (1981), Volume 5, pp. 325-334.

- Eekelaar, John M. and Sanford N. Katz (eds.). Family Violence: An International and Interdisciplinary Study. Toronto: Butterworths, 1978.
- Edwards, Susan. Female Sexuality and the Law. Oxford: Martin Robertson and Co. Ltd., 1981.
- Farnell, Margaret B. Screening Procedures for the Detection of Child Abuse: An Annotated Bibliography. Toronto: Centre of Criminology, University of Toronto, 1980.
- Fernandez, Happy Craven. The Child Advocacy Handbook New York: Pilgrim Press, 1980
- Finkelhor, David. Sexually Victimized Children. New York: The Free Press, MacMillan Publishing Co., 1979.
- Gaffield, Chad and W. Gordon West. "Children's Rights in the Canadian Context" In Children's Rights: Legal and Educational Issues. Eds. Heather Berkeley, Chad Gaffield and W. Gordon West. Toronto: The Ontario Institute for Studies in Education, 1978, pp.3-14
- Geiser, Robert L. Hidden Victims-The Sexual Abuse of Children. Mass., U.S.A.: Beacon Press, 1979
- Giovanni, Jeanne M. and Rosina M. Becerra. Defining Child Abuse. New York: The Free Press, Macmillan, 1979.
- Golding, Martin P. Philosophy of Law. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1975.
- Goldstein, Joseph, Anna Freud and Albert J. Solnit. Beyond the Best Interests of the Child. New York: The Free Press, 1973.
- , et al. Before the Best Interests of the Child. New York: The Free Press, 1979.
- Greene, Maxine. "Children's Rights: A Moral and Ethical Perspective". In Children's Rights: Contemporary Perspectives. Patricia A. Vardin and Ilene N. Brody, Eds. New York: Teachers College Press, Columbia University, 1979, pp.1-20.
- Gross, Beatrice and Ronald Gross (eds.) The Children's Rights Movement. New York: Anchor Press/Doubleday, 1977.
- Hagan, John. Victims Before the Law--The Organizational Domination of Criminal Law. Toronto: Butterworths and Co. (Canada) Ltd., 1983:

- Herman, Judith Lewis. Father-Daughter Incest. Cambridge, Mass. and London: Harvard University Press, 1981.
- Hills, Stuart L. Crime, Power and Morality. U.S.A.: Chandler Publishing Company, 1971.
- Hovius, Berend. Family Law-Cases, Notes and Materials. Toronto: The Carswell Co. Ltd., 1982.
- Katz, Sanford, N. When Parents Fail. Boston: Beacon Press, 1971.
- Keesing, Roger M. Cultural Anthropology: A Contemporary Perspective. U.S.A.: Holt, Rinehart & Winston, 1976.
- Kempe, Henry C. and Ray E. Helfer. The battered child. Chicago: University of Chicago Press, Third Edition, 1980.
- Lawton-Speert, Sarah. Child Sexual Abuse Project, Working Paper One. Child Sexual Abuse and Incest-An Annotated Bibliography. Vancouver, B.C.: United Way of the Lower Mainland, Second Edition, 1982.
- Lee, Patrick C. "A Status Report on Child Advocacy in the United States". In Children's Rights: Legal and Educational Issues. Eds. Heather Berkeley, Chad Gaffield and W. Gordon West. Toronto: The Ontario Institute for Studies in Education, 1978, pp. 15-32
- Leon, Jeffrey S. "Child in the City", Report #1. Legal Representation of Children in Selected Court Proceedings: the Capacity of Children to Retain Legal Counsel. Toronto: Centre for Urban and Community Studies, University of Toronto, 1978.
- Lowry, Marcia. "When the Family Breaks Down-Massive and Misapplied Intervention". In Children's Rights: Contemporary Perspectives. Patricia A. Vardin and Ilene N. Brody, Eds. New York: Teachers College Press, Columbia University, 1979, pp.53-66.
- Masters, R.E.L. Patterns of Incest-A Psycho-Social Study of Incest Based on Clinical and Historical Data. New York: The Julian Press, 1963.
- Maczko, Frank. "Some Problems with Acting for Children". Canadian Journal of Family Law. (1979)2, pp. 267-298.

- Meiselman, Karin C. Incest—a Psychological Study of Causes and Effects with Treatment Recommendations. San Francisco, Washington, London: Jossey-Bass Publishers, 1978.
- Melton, Gary B. "Psycholegal Issues in Child Victims' Interactions with the Legal System" Victimology. (1980). Volume 5, No. 2-4, pp. 274-284.
- Mlyniec, Wallace J. "The Child Advocate in Private Custody Disputes: A Role in Search of a Standard". Journal of Family Law. (1977-78) Volume 16, No. 1, pp. 1-17.
- Mnookin, Robert H. "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy". Law and Contemporary Problems. (Summer 1975), 39, pp. 226-293.
- Nasjleti, Maria. "Suffering in Silence: The Male Incest Victim". Journal of Child Welfare. (May, 1980), Volume LIX.
- Payne, Julien. A Conceptual Analysis of Unified Family Courts. Ottawa: Law Reform Commission of Canada, 1973.
- Pound, Roscoe. An Introduction to the Philosophy of Law. U.S.A.: Yale University Press, 1966.
- Quinney, Richard. Crime and Justice in Society. U.S.A.: Little, Brown and Company, Inc., 1966.
- Rawls, John. A Theory of Justice. Cambridge, Mass.: Belknap Press of Harvard University Press, 1971.
- Robertshaw, Corrine. Outline of key legislative issues relating to child abuse. Ottawa: Health and Welfare Canada, 1980.
- Child Protection in Canada. Ottawa: Health and Welfare Canada, 1981.
- Rodham, Hillary. "Children's Rights: A Legal Perspective". In Children's Rights: Contemporary Perspectives. Patricia A. Vardin and Ilene N. Brody (eds.). New York: Teachers College Press, Columbia University, 1979, pp.21-36.
- Sanford, Linda Tschirhart. The Silent Children—A Book for Parents about the Prevention of Child Sexual Abuse. New York: Anchor Press/Doubleday, 1980.

Seattle Sexual Assault Center. What if your child has been sexually molested... Seattle, Washington.

Scafer, David Lewis. Justice or Tyranny? A Critique of Rawl's "Theory of Justice". U.S.A.: Kennikat Press Corp., 1979.

Sgroi, Suzanne. "Kids with Clap: Gonorrhoea as an Indicator of Child Sexual Assault". Victimology. (1977), Volume 2, No. 2, pp. 251-267.

Summit, Roland. "Beyond Belief: Sexual Abuse of Children". Plenary Address, Proceedings of a conference entitled Sexual Abuse of Children within the Family Vancouver, B.C.: 1980.

Vardin, Patricia A. and Ilene N. Brody Eds. Children's Rights: Contemporary Perspectives. New York: Teachers College Press, Columbia University, 1980.

van Stolk, Mary. The Battered Child in Canada. Toronto: McClelland and Stewart, 1972.

Vold, George B. Theoretical Criminology. Second Edition by Thomas J. Bernard. New York: Oxford University Press, 1979.

Wilson, Jeffrey. Children and the Law. Toronto: Butterworth and Co. Ltd., 1978.

----- Up Against It: Children and the Law in Canada. Canada: House of Anansi Press, Ltd., 1980.

GOVERNMENT DOCUMENTS

Australia. Australian Law Reform Commission. "Child Welfare-Children in Trouble". Discussion Paper # 9. Sydney: The Commission, 1979.

Canada. Canadian Council on Children and Youth. Admittance Restricted-The Child as Citizen in Canada. Ottawa: The Council, 1978.

----- . A Report of the Standing Senate Committee on Health, Welfare and Science. Child at Risk. Ottawa: Ministry of Supply and Services, 1980.

----- . Law Reform Commission of Canada. Evidence-Comments on Competence and Compellability. Ottawa: The Commission, 1975.

Canada. Minister of Justice. Information Paper, "Sexual Offences Against the Person and the Protection of Young Persons". Ottawa: Department of Justice, 1980.

----- . Department of Justice, Discussion Draft. "Attempting to Restructure Family Law: Unified Family Court Experiments in Canada" Ottawa: Bureau of Programme Evaluation and Internal Audit, August, 1983.

----- . Federal Provincial Task Force on Uniform Rules of Evidence. Ottawa: 1982:

----- . A report by the National Council of Welfare on the child welfare system in Canada. In the Best Interests of the Child. Ottawa: National Council of Welfare, 1979.

----- . Law Reform Commission of Canada. Report on Evidence. Ottawa: The Commission, 1975.

----- . Law Reform Commission of Canada. Report on Family Law. Ottawa: The Commission, 1976.

----- . Advisory Council on the Status of Women. The Web of the Law: A Study of Sexual Offences in the Canadian Criminal Code. Ottawa: The Council, September, 1975.

- Advisory Council on the Status of Women. Report on Sexual Assault in Canada. Ottawa: The Council, December, 1981.
- Advisory Council on the Status of Women. Rationalization of Sexual Offences in the Criminal Code. Ottawa: The Council, 22 September, 1976.
- Law Reform Commission of Canada. Report on Sexual Offences. Ottawa: The Commission, 1978.
- "Evidence Act", Revised Statutes of Canada. Chapter 145, 1975.
- Statutes of Canada. Chapter 51, Section 142, 1953-54.
- Law Reform Commission of Canada. "Working Paper # 22, Sexual Offences". Ottawa: The Commission, May, 1976.
- Ontario. The Ministry of Community and Social Services. Child Welfare in Ontario: Past, Present and Future. Toronto: The Ministry, 1979.
- Ministry of Community and Social Services. "Consultation Paper on Case Information Disclosure". Report of the Task Force on Case Information Disclosure. Toronto: The Ministry, 1979.
- Ontario Law Reform Commission. Report on Evidence. Toronto: Ministry of the Attorney-General, 1976.
- Ontario Law Reform Commission. Report on Family Law. "Part III Children". Toronto: Ministry of the Attorney-General, 1973.
- Ontario Law Reform Commission. Report on Family Law. "Part V Family Courts". Toronto: Ministry of the Attorney-General, 1974.
- Statutes of Ontario. "An Act to Revise the Child Welfare Act", Chapter 85, Section 19(b), i-xi. Toronto: 1978.
- Revised Statutes of Ontario. "Child Welfare Act", Chapter 66, section 19(b), subsection 1, i-xi; section 20, subsection 1, 2 and 3; section 28, subsection 4; section 47, subsection 1. Toronto: 1980.

New Zealand. Criminal Law Reform Committee. "Report on the Position of Young Witnesses in Cases Involving a Sexual Offence". Wellington: January, 1977.

Canada. "An Act for Consolidating and Amending the Statutes in the Province relative to Offences Against the Person". 4th and 5th Victoriae. Chapter 27, section XVII, 1841.

----- 53rd Victoriae. Chapter 51, section 142, subsections 1-4, 1890.

----- Criminal Code of Canada. section 150, 1982.

----- "Criminal Code". Statutes of Canada. Chapter 125, section 246, subsection 4, 1982.

----- "Canada Evidence Act". Revised Statutes of Canada. Chapter E-10, section 7; section 16, subsection 1, 1970.

----- "Divorce Act" Revised Statutes of Canada. Chapter D-8, section 4(1)(e)(i), 1970.

----- Canada Gazette. Part III, Chapter 125, section 246, subsections 1-4. Ottawa: December 31, 1982.

----- Statutes of Canada. Chapter 13, section 10, 1972.

----- Minister of Justice. Bill C-53. "An Act to Amend the Criminal Code in relation to sexual offences and the protection of young persons". House of Commons, Ottawa: 1st reading, January 12, 1981; 3rd reading, August 4, 1982.

----- Minister of Justice. Bill C-127. "An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof". House of Commons, Ottawa: assented to August 4, 1982.

Ministry of Community and Social Services. You and the Abused Child. Ontario: March, 1981.

Ministry of Health, Province of British Columbia. Information for the Sexually Assaulted. Prepared by United Way of the Lower Mainland Social Planning and Research Committee on Social and Health Aspects of Rape.

MEDIA

Time. Beach, Bennett H. "Child Witnesses". 31 January, 1983, pp. 67,68.

Globe and Mail. Lipovenko, Dorothy. "Teaching a Child to say No". 14 April, 1983, p. 11.

Atlantic Insight. "Incest: New light on the hidden crime against kids". January, 1984, pp. 21,22.

Newsweek. "A Hidden Epidemic". 14 May, 1984. pp. 30-36.

The Citizen. "When to believe a child". 2 May, 1983.

Toronto Star. "Parents should teach kids to spot signs of sexual advance". 15 July, 1982.