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I. INTRODUCTION

A growing number of Americans are members of stepfamilies. According to the 1990 Census, approximately five and one-half million married-couple households included at least one stepchild under age eighteen.[1] This number constituted twenty-nine percent of the married couple households with children, and six percent of total households counted in the census.[2] A total of 7,208,000 stepchildren resided in these families.[3] Demographers predict that a high percentage of American children, perhaps one in three, can be expected to spend some childhood years in a stepfamily.[4]

To date, state lawmakers have been slow to recognize the relationships created between stepparents and their stepchildren. This result is consistent with the traditional limitation of family status in American law to married couples and to parents and their biologic or adopted children. Most of the important legal issues that affect family members, in such areas as child support, custody, inheritance, torts, workers'

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1 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. P23-180, MARRIAGE, DIVORCE AND REMARRIAGE IN THE 1990'S, tbl. L at 10 (October 1992) [hereinafter CURRENT POPULATION REPORTS].

2 *See id.* (reporting 19,598,000 married-couple households with biological and adopted children in 1990); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. 61, 1991 STATISTICAL ABSTRACT OF THE UNITED STATES: HOUSEHOLDS--STATES: 1980 AND 1990, at 48 (reporting a total of 91,947,000 households in 1990).

3 CURRENT POPULATION REPORTS, *supra* note 1, tbl. L at 10.

4 *See* Paul C. Glick, *Remarried Families, Stepfamilies and Stepchildren: A Brief Demographic Profile*, 38 FAM. REL. 24, 26 (1989) (basing projection about future number of stepchildren on statistics regarding the likelihood of parenthood, divorce, and remarriage among young married persons); *see also* Frank F. Furstenberg, Jr., *The New Extended Family: The Experience of Parents and Children after Remarriage*, *in* REMARRIAGE AND STEPPARENTING 42, 44 (Kay Pasley & Marilyn Ihinger-Tallman eds., 1987) (placing estimate at one in four children).

compensation, and criminal law, are regulated at the state level. Here, the starting premise is that stepparents and their stepchildren are legal strangers to each other. Although the state courts and legislatures have, from time to time, recognized limited exceptions to this principle, no comprehensive definition of the stepparent-child status has been formulated.

II. FORMULATING A LEGAL DEFINITION OF THE STEPFAMILY

The denial of family status to stepparents and stepchildren has produced a significant gap between legal norms and the actual family experiences of many people in our society. In recent years, many scholars have criticized the exclusion of nontraditional families, including stepfamilies, from the protection of the law.[5] This type of criticism is the first important step in evaluating the laws governing relationships within the stepfamily. The next step involves fashioning a new stepparent-child status, which would protect stepfamily members in appropriate cases while preserving a family law system that is fair, certain, predictable, and not unduly burdensome on those who must enforce the laws. In defining the stepparent-child status, two important questions must be answered. First, what constitutes a legally significant stepparent-child relationship? Second, what rights and responsibilities should be associated with stepfamily membership?

A. Identifying Legally Significant Stepparent-Child Relationships

The Census Bureau has answered the first of these questions in a very straightforward manner. For the purpose of counting the number of households with stepchildren, a stepparent-child relationship is formed whenever an individual

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5 *See, e.g.*, Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Mark A. Fine, *A Social Science Perspective on Stepfamily Law: Suggestions for Legal Reform*, 38 FAM. REL. 53 (1989); Marie Witkin Kargman, *Stepchild Support Obligations of Stepparents*, 32 FAM. REL. 231 (1983); Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917 (1989); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

marries the custodial parent of a minor child and thereafter resides with the child.[6] This same approach to identifying stepparent-child relationships is taken in some of the state laws that confer certain burdens and benefits on stepfamily members. For example, the Missouri stepparent support statute provides in a straightforward manner that "[a] stepparent shall support his or her stepchild to the same extent that a natural or adoptive parent is required to support his or her child so long as the stepchild is living in the same home as the stepparent."[7]

Many scholars and lawmakers, however, have concluded that something more than marriage and a shared residence should be required before legal consequences attach to the stepparent-child relationship; the additional criteria generally relate to the nature of the relationships actually established over time in a stepfamily. According to this analysis, legal rights and duties should exist only if the residential stepparent assumes an active custodial role; for example, by participating in the child's education, discipline, and moral training, or by making financial contributions to the child's support. Once established in this manner, the stepparent-child status may endure beyond the child's age of majority.

The courts in this country have developed a legal standard, called the "in loco parentis" doctrine, which embodies this requirement of active participation by the stepparent. "In loco parentis," which in Latin means "in the place of a parent," applies not only to stepfamilies, but in any situation where an adult informally assumes custodial responsibility for a child. The courts have applied the doctrine, however, in a selective fashion in terms of subject matter. For example, stepparents who stand in loco parentis to their stepchildren have frequently been accorded the same treatment as biologic parents in the

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6 Notably, the Census Bureau's definition of stepfamily does not include the situation where an adult marries the *noncustodial* parent of minor children; the new spouse here is not regarded as a stepparent. In a similar fashion, discussions about stepfamilies in the legal context have, for the most part, been limited in scope to residential stepparent-child relationships. *But see* Rosenberg v. Silver, 762 F.2d 255, 256 (2d Cir. 1985) (recognizing defense of parent-child tort immunity for the husband of an injured child's noncustodial mother, who did not reside with the child). Furthermore, the definitions can become blurred in families where unmarried parents share the joint legal and physical custody of their children. Arguably, upon the marriage of either parent in this situation, the new spouse would be regarded as a stepparent under the Census Bureau's definition of that term.

7 MO. ANN. STAT. § 453.400 (Vernon 1986).

areas of workers' compensation[8] and parent-child tort immunity,[9] but not in the areas of inheritance[10] and wrongful death.[11]

Like the common law in loco parentis doctrine, a number of state statutes that confer limited rights upon stepfamilies for specific purposes apply only if the stepparent and child are bound together by more than the stepparent's marriage to the child's parent. For example, the New Jersey inheritance tax statute establishes preferential rates and exemptions for bequests made to "any child to whom the decedent . . . stood in the mutually acknowledged relation of a parent, provided such relationship began at or before the child's fifteenth birthday and was continuous for ten years thereafter."[12] Similarly, the crime of "[s]exual abuse by a parent, guardian or custodian" in the West Virginia Code applies to "the spouse" of a parent "where such spouse . . . shares actual physical possession or care and custody of a child with the parent."[13] Each of these statutory standards, like the common law in loco parentis standard, requires the assumption of some form of responsibility by the stepparent before legal rights and responsibilities are imposed.

B. Legal Rights and Responsibilities in the Stepfamily

Once the limitations on legally significant stepparent-child relationships have been set under the in loco parentis doctrine or some other standard, the remaining questions involve the scope of legal rights and responsibilities within the stepfamily. The logical starting point in this analysis is that qualifying

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8 *See, e.g.*, ALASKA STAT. § 23.30.265(6) (Supp. 1992) (establishing eligibility of child for workers' compensation benefits when the deceased employee stood in loco parentis to the child for at least one year before the time of injury).

9 *See, e.g.*, Bricault v. Deveau, 157 A.2d 604, 605 (Conn. Super. Ct. 1960) (stating that the justifications for family immunity are "as applicable to a stepfather who stands in loco parentis to a stepson as they are to the father-son relationship").

10 *See, e.g.*, *In re* Berge's Estate, 47 N.W.2d 428, 430 (Minn. 1951) (ruling that stepdaughters were not "heirs" of their deceased stepfather, even though he stood in loco parentis toward them).

11 *See, e.g.*, Steed v. Imperial Airlines, 524 P.2d 801, 803 (Cal. 1974) (holding that stepdaughter was not a beneficiary under the wrongful death statute despite the fact that the decedent stepfather had "assumed the full obligation of father and parent" before his death). The California legislature overruled this decision with CAL. CIV. PROC. CODE § 377.60 (West Supp. 1993).

12 N.J. REV. STAT. § 54:34-2.1 (1986).

13 W. VA. CODE §§ 61-8D-1(4) to -1(5) (1992).

stepfamilies could be treated just like biologic families; that is, the same legal rights enjoyed by biologic parents and children could be extended to stepparents and their stepchildren. Indeed, a number of the existing laws dealing with stepfamilies for specific purposes put them on par with biologic families. Under the New Jersey inheritance tax statute quoted in the preceding paragraph, biologic children and qualifying stepchildren enjoy the same preferential tax rates and exemptions, as the beneficiaries of a deceased parent or stepparent. A second illustration of equivalent treatment of parent-child and stepparent-child relationships appears in the laws governing the discipline of children. In most states, stepparents who stand in loco parentis to their stepchildren are entitled to discipline them and are subject to the same limitations on the use of force as biologic parents.[14]

The biologic family is not, however, the only model for defining legal rights in the stepfamily. For example, state lawmakers have articulated entirely different child support responsibilities for parents and stepparents.[15] In most jurisdictions today, stepparents have no enforceable obligation whatsoever to support their stepchildren. But even in the eighteen states which have imposed statutory stepchild support duties,[16] they are much less significant than the corollary responsibility of biologic and adoptive parents. Most notably, the obligation of a stepparent does not survive the termination of the marriage which created the stepfamily.[17] This durational limitation

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14 *See, e.g.*, TEX. PENAL CODE ANN. § 9.61(a)(1) (West 1974) (authorizing reasonable use of force by parents, stepparents, and others standing in loco parentis).

15 *See* Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 43-45 (1984).

16 *See* DEL. CODE ANN. tit. 13, § 501(b) (1981); HAW. REV. STAT. § 577-4 (1993); IOWA CODE ANN. § 252A.2(1) (West Supp. 1993); KY. REV. STAT. ANN. § 205.310 (Baldwin 1991); MO. ANN. STAT. § 453.400 (Vernon 1986); MONT. CODE ANN. § 40-6-217 (1991); NEB. REV. STAT. § 28-706 (1989) (criminal nonsupport); NEV. REV. STAT. ANN. § 62.044 (Michie 1986); N.H. REV. STAT. ANN. §§ 546-A:1 to -A:2 (1987); N.Y. FAM. CT. ACT § 415 (McKinney 1983); N.Y. SOC. SERV. LAW § 101 (McKinney 1992); N.D. CENT. CODE § 14-09-09 (1991); OKLA. STAT. ANN. tit. 10, § 15 (West 1987); OR. REV. STAT. § 109.053 (1990); S.D. CODIFIED LAWS ANN. § 25-7-8 (1992); UTAH CODE ANN. §§ 78-45-4.1 to -4.2 (1992); VT. STAT. ANN. tit. 15, § 296 (1989); WASH. REV. CODE ANN. § 26.16.205 (West Supp. 1993); WIS. STAT. ANN. § 49.195 (West Supp. 1992).

17 *See, e.g.*, VT. STAT. ANN. tit. 15, § 296 (1989) ("A stepparent has a duty to support a stepchild if they reside in the same household . . . for so long as the marital bond creating the step relationship shall continue."). *But see* N.D. CENT. CODE § 14-09-09 (1991) (extending stepparent support duty "during the marriage

stands in stark contrast to the universal rule in the biologic family, where support obligations continue at least until children reach the age of majority. Professor David L. Chambers has pointed out that the current law of support in stepfamilies (no obligation following divorce) and in natural families (full support responsibility during every child's minority) does not exhaust the available options; for example, a post-divorce stepparent obligation could be imposed for a shorter period of time than the duty of biologic parents.[18]

In reassessing the scope of legal rights and responsibilities in the stepfamily, lawmakers need not be limited to the options of accepting or rejecting rules that apply in the biologic family. As to each legal issue, lawmakers must determine whether the family-related policies that justify regulation in the biologic family also extend to the stepfamily, and if so, what form of regulation is appropriate in this nontraditional family setting.

III. THE EXAMPLE OF INCEST REGULATION

Many of the general observations made in the preceding discussion about formulating a sound legal definition of the stepparent-child relationship can be applied to the specific topic of incest regulation. In this field, both the threshold issue of identifying legally significant stepfamily relationships and the subsequent determination about appropriate forms of regulation are complex and difficult to analyze. The summary of existing state civil and criminal incest statutes, which appears in the Appendix, reveals a striking lack of consensus about these matters. The following discussion provides an analytical framework for reconsidering the legal regulation of sexual and marital relationships between steprelatives.

A. Historical Development of the Law

The laws in every state decisively forbid marriage or sexual activity between close biologic relatives, such as siblings or parents and children.[19] Historically, the canon law of the Catholic Church, which governed this subject in England before

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and so long thereafter as the stepchildren remain in the stepparent's family").

18 David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perception of "Family" After Divorce*, *in* DIVORCE REFORM AT THE CROSSROADS 102, 127-29 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

19 *See generally* GEORGE THORMAN, INCESTUOUS FAMILIES 10-15 (1983) (defining incest in the biologic family).

the Reformation, treated steprelatives and other persons related by marriage just like blood relatives.[20] For example, marriage between brothers and sisters was forbidden; marriage between stepbrothers and stepsisters was similarly prohibited because they stood in a close relationship of affinity, created by the marriage between their parents.[21] The coverage of steprelatives was continued in subsequent acts of Parliament and in the early statutes in the United States.[22] As time passed, however, these restrictions were lifted in many of the state laws regulating marriage and sexual activity between relatives.

Currently, the ban on incestuous relationships is enforced under two types of state regulations. First, the civil laws governing marriage deny all recognition to attempted marriages between close relatives. And second, a variety of criminal laws punish attempted marriages, as well as sexual activity outside of marriage, between family members.

As to steprelatives, the civil marriage laws in just twelve states currently ban marriages between designated stepfamily members; the criminal laws in nine states outlaw attempted marriages; and twenty-nine states include certain stepfamily members within the definition of special crimes relating to nonmarital sexual activity within the family. In formulating and applying these laws, state legislatures and courts have expressed widely differing viewpoints about the strength of various public policies that justify incest regulation generally, and their application in the stepfamily.

B. The Theoretical Justifications for Regulation

Modern doctrine in this area has been influenced by the multiple theories propounded by sociologists and legal scholars to justify incest regulation.[23] Ironically, these various theories tend to point in divergent directions on the issue of stepfamily restrictions. This lack of theoretical consistency helps to explain the inconsistency among state laws.

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20 *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 21-24 (2d ed. 1988).

21 *Id.* at 23.

22 *Id.*

23 *See generally* SYBIL WOLFRAM, IN-LAWS & OUTLAWS: KINSHIP AND MARRIAGE IN ENGLAND 161-85 (1987) (discussing historical development of the various theories that explain incest regulation).

For example, one traditional justification for regulation of family relationships involves the biomedical concern that the offspring of close relatives will suffer abnormally high rates of recessive genetic abnormalities. This analysis, which is premised on the common genetic makeup of close biologic relatives, obviously has no application to persons, like steprelatives, who are not related by blood.[24] By contrast, a second explanation draws upon religious history, viewing the current laws as an extension of earlier ecclesiastical doctrines.[25] Under this analysis, the clear religious tenets that outlawed sexual and marital relationships between steprelatives in past centuries continue to have modern vitality. Thus, the genetic and religious theories of incest regulation provide inconsistent answers to the stepfamily question.

Another theory relies upon community norms as the source and rationale for laws regulating incestuous relationships.[26] For example, most people in American society would predictably disapprove of the marital or sexual relationship established between a parent and his or her adult child; the universal outright ban on such relationships reflects this viewpoint. The pertinent inquiry relating to relationships of affinity is whether the same public disapproval would extend to the union between a stepparent and his or her adult stepchild. The response to that question may well be, "it depends." If the stepparent had assumed a parenting role toward the stepchild, then the subsequent marriage or sexual relationship between the two would arguably offend community norms about incestuous behavior. On the other hand, if no real family ties had ever existed between them, then the subsequent union between an individual and the adult child of his or her former spouse would be more likely to escape criticism.

Another important model for understanding the regulation of marriage and sexual relationships between close relatives

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24 *See* ALA. CODE § 13A-13-3 commentary at 558 (1982) (noting that the "notion of 'tainting of blood' . . . does not apply to . . . stepchildren and adopted children," who are nevertheless included in this criminal incest statute); WOLFRAM, *supra* note 23, at 138-47 (discussing the relationship between this genetic theory and the decline of regulation in the stepfamily).

25 *See* MODEL PENAL CODE § 230.2 cmt. 2(a) (1980).

26 *See id.* at § 230.2 cmt. 2(d) ("Where there is a general and intense hostility to behavior, a penal law will neither be accepted nor respected if it does not seek to repress that which is universally regarded by the community as misbehavior.").

emphasizes the welfare of the family members themselves.[27] According to this theory, the incest ban strengthens and stabilizes family relationships by removing the potential for sexual unions and jealousy within the family household. As with the application of community norms, concerns about socialization would most likely be raised in stepfamilies where the members have functioned as a family unit. In other cases, the concerns about rivalries, insecurity, or insularity within the family would be less relevant.

A final justification for the regulation of sexual relationships between close relatives is the protection of weak family members from sexual overreaching by more powerful relatives, especially during childhood.[28] According to this rationale, legal regulation should extend to those stepfamilies where, by virtue of the roles assumed by the parties, the potential for overreaching exists. Numerous studies of abusive families have established that this protective concern is relevant in the stepfamily context.[29]

Thus, the various theories that explain and justify the legal prohibition of incestuous relationships emphasize the welfare of individual family members, the stability of the family unit, and the religious and moral interests of the larger society. They do not, however, provide a consistent guide for the proper treatment of stepfamily members.

C. The Joint Classification of Laws Regulating Sexual Activity and Marriage

An additional complication arises in the analysis of this topic because laws regulating several distinct types of behavior have generally been classified together as incest regulations. Thus, the laws in this field determine the legitimacy of the marriage contracted between a surviving spouse (stepparent) and the adult child (stepchild) of his or her deceased partner. At the same time, this system of rules must address the crimi-

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27 *See* JOSEPH SHEPHER, INCEST: A BIOSOCIAL VIEW 135-50 (1983) (discussing the theories of Sigmund Freud and the family socialization school as they relate to incest regulation).

28 *See* MODEL PENAL CODE § 230.2 cmt. 2(e) (1980) ("[Incest] laws have operated primarily against a kind of imposition on young and dependent females.").

29 *See, e.g.*, W.D. Erickson et al., *The Life Histories and Psychological Profiles of 59 Incestuous Stepfathers*, 15 BULL. AM. ACAD. PSYCHIATRY L. 349 (1987); Patricia Phelan, *The Process of Incest: Biologic Father and Stepfather Families*, 10 CHILD ABUSE & NEGLECT 531 (1986).

nal responsibility of a stepparent who engages in sexual activity with the minor stepchild with whom he or she resides. Both the marriage regulation and the criminal law, which direct the outcomes in these two situations, are classified generally as incest regulations. In the biologic family, both the attempted marriage and the sexual relationship between a parent and his or her child would easily be characterized as incestuous and unlawful under relevant state laws. A single line of analysis may not, however, produce a satisfactory outcome in the two hypothetical situations involving stepfamily members.

The Model Penal Code illustrates this problem. A single provision of the Code criminalizes marriage, cohabitation and sexual intercourse between designated family members.[30] The drafters expressly excluded steprelatives from this provision with the following explanation: "Because there are situations where persons related by affinity should be permitted to marry, it therefore follows that they should not be included within the incest prohibition."[31] Thus, the Code's monolithic approach to the topic of stepfamily relationships, emphasizing the subject of marriage eligibility, foreclosed any separate consideration of the policy concerns raised by sexual activity between stepfamily members outside of marriage.

A more refined approach, which separately addresses the issues of marriage regulation and criminal nonmarital sexual activity, has been taken in a number of recent state statutes. This approach enables lawmakers to consider relevant policies relating to religion, morality, the family institution, and the protection of children separately in the two discreet settings. Not surprisingly, among the states that have used this bifurcated model, stepfamilies have found their way most often into the laws regulating sexual activity outside of marriage.

D. Criminal Statutes that Include the Age Factor

An additional refinement, relating to the victim's age, appears in many modern criminal statutes. The traditional incest laws, like the Model Penal Code provision described in the last section, prohibit marriage and/or sexual activity without regard to the age of the parties. By contrast, statutes enacted in about one-third of the states combine the age of the victim with the

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30 MODEL PENAL CODE § 230.2 (1980).

31 *Id.* at § 230.2 cmt. 3(b).

parties' family relationship as elements of the criminal offense. Although the purposes of these statutes tend to overlap with the purposes of the "statutory rape" laws, which prohibit sexual activity with underage partners, they also protect special family-related interests.[32] Stepparent-child relationships are included in almost all of the laws that combine age and family relationship.

The factors employed in these state statutes are designed to identify situations where a power imbalance exists in the family, similar to the authority exercised by parents over their children. For example, the North Carolina "sexual offenses with certain victims" felony statute proscribes sexual activity on the part of "a defendant who has assumed the position of a parent in the home of a minor victim."[33] Similarly, West Virginia defines the term "custodian" in the "[s]exual abuse by a parent, guardian or custodian" statute to include "the spouse of a parent . . . where such spouse . . . shares actual physical possession or care and custody of a [minor] child with the parent."[34] Both statutes would apply to stepfamilies when the stepparent plays an active parenting role with respect to minor stepchildren.

E. Traditional Incest Laws that Exclude the Age Factor

Stepfamily members are included less often in the traditional incest laws, which regulate marriage and/or sexual activity between close relatives without regard to age. Currently, forty-nine states and the District of Columbia retain civil restrictions on marriage between certain biologic relatives; forty-four states have laws criminalizing marriage and/or sexual conduct without regard to age.[35] Steprelatives are included in fewer than one-half of these civil and criminal statutes. For example, the Wyoming felony incest statute provides:

> [A] person is guilty of incest if he knowingly commits sexual

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32 A study that summarizes all of the criminal laws involving sexual activity with *minor* victims, in which the element of family relationship is one of several variables noted, appears in JOSEPHINE BULKLEY & LUCY BERLINER, CHILD SEXUAL ABUSE AND THE LAW: A REPORT OF THE AMERICAN BAR ASSOCIATION NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION (2d ed. 1982).

33 N.C. GEN. STAT. § 14-27.7 (1986).

34 W. VA. CODE §§ 61-8D-1, -5 (1989 & Supp. 1992).

35 A compilation of theses statutes and related information appears in the Appendix.

> intrusion . . . or sexual contact . . . with an ancestor or descendant or a brother or sister of the whole or half blood. The relationships referred to herein include relationships of . . . [s]tepparent and stepchild.[36]

As to adult biologic relatives, this statute may still reflect all of the historical goals of incest regulation relating to genetics, religion, morality, community norms, and the family institution. The additional questions raised by extending this traditional type of regulation to adults related by marriage were highlighted in the recent case of *State v. Buck*.[37] There, an appellate court in Oregon upheld the conviction of a stepfather for incest, based on his sexual relationship with an adult stepdaughter, after rejecting the defendant's request to read an age limitation into the criminal incest statute. The ruling reflects the view that meaningful state policies continue to justify this limitation on the freedom of adults to select sexual partners outside the biologic family.

Numerous policy interests are implicated for stepfamilies in the broader type of regulation applied in *Buck*. First, the vulnerability of stepchildren in the family may continue beyond their age of majority, thereby justifying the ban on adult relationships. Second, stability and harmony in the stepfamily may be enhanced by the restriction on sexual relationships between consenting adults. Third, the broad application of criminal prohibitions on sexual activity without regard to age may, in fact, vindicate the views of the community, past and present, regarding moral behavior in the stepfamily. A contrary view about the proper weight to be assigned to these considerations is reflected in the laws in the majority of states, where sexual activity between adult stepfamily members is not regulated.

F. Stepfamilies and the Freedom to Marry

Additional considerations enter into the analysis when the state seeks to restrict the freedom to select a marriage partner. First, personal freedom in this area is entitled to protection in the absence of compelling reasons to limit individual choice.[38]

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36 WYO. STAT. § 6-4-402 (1988).

37 State v. Buck, 757 P.2d 861 (Or. Ct. App. 1988).

38 *See* Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257 (1984); Leonard P. Strickman, *Marriage, Divorce and the Constitution*, 15 FAM. L.Q. 259, 279-97 (1982); Note, *The Constitution and the Family*, 93 HARV. L. REV. 1159, 1248-70 (1980).

Furthermore, the enforcement of marriage restrictions frequently results in serious hardship for the parties of de facto unions. Of course, compelling justifications have nevertheless been found for the universal ban on marriages between close biologic relatives. By way of contrast, the laws in only nineteen states currently extend the civil and/or criminal ban on marriage between close relatives to stepfamily members.

The decision of the Tennessee Supreme Court in *Rhodes v. McAfee*[39] provides a focal point for analyzing the laws that prohibit marriage between steprelatives. In *Rhodes*, the court invalidated the fourteen year union between B.E. Plunk and Gladys Griggs under a state statute banning stepparent-child marriages. The stepfather, B.E. Plunk, first married Gladys' mother, Tula Griggs; thereafter, Gladys resided for a number of years in the household created by her mother and stepfather. Five children were born during the marriage of B.E. Plunk and Tula Griggs, which ended in divorce in 1943. Regrettably, the *Rhodes* opinion does not indicate the parties' ages nor the duration of this first marriage. In 1944, B.E. Plunk married his stepdaughter Gladys Griggs, and the couple subsequently had three children. The *Rhodes* case involved Gladys Griggs' claim to the economic rights of a surviving wife, particularly homestead and dower rights in B.E. Plunk's property, following his death in 1958.

The opinion of the Tennessee Supreme Court emphasized the public policies involved in the regulation of marriage between close relatives, including the moral standards of the community and the harmony and stability of the family. According to the court, these policies were embodied in the Tennessee statutes that prohibited marriage between stepparents and stepchildren and were properly applied to the relationship between Gladys Griggs and B.E. Plunk:

> [T]he statutes here at issue . . . are expressive of settled public policy in this State regarding public morals and good order in society . . . . This case is a good example of why such marriages are prohibited. The stepdaughter lived in the home with the mother and stepfather . . . [and her] status in this family would be closely akin to the natural children of a mother and stepfather . . . . If there were no statutes prohibiting such marriages, there not only could but very likely would

39 Rhodes v. McAfee, 457 S.W.2d 522 (Tenn. 1970).

> [be] discord and disharmony in the family.[40]

From the court's viewpoint, the family first created by the marriage of B.E. Plunk and Gladys Griggs' mother, Tula Griggs, was analogous to the biologic family for these purposes.

The *Rhodes* opinion failed to address a countervailing consideration, namely, the serious hardship imposed upon Gladys Griggs and her children under Tennessee law. Of course, this is the inevitable burden imposed by any rule of law that invalidates de facto marriage unions. The law of Tennessee still reflects the view that this type of burden is justified in the stepparent-child setting by the public policy concerns identified in the *Rhodes* opinion.[41] In contrast, the legislatures in most states have assigned greater weight to the interests of individuals like Gladys Griggs and eliminated all civil and criminal restrictions on marriages between stepparents and stepchildren after the prior marriage of the stepparent to the child's parent has come to an end.

In 1986, Parliament amended the English Marriage Act in an effort to balance the competing policies involved in this situation. The Marriage Act, which previously banned all marriages between stepparents and stepchildren and certain other persons related by affinity, now provides that the marriage between stepparent and stepchild, or between stepgrandparent and stepgrandchild,

> ". . . shall not be void by reason only of that relationship if both the parties have attained the age of twenty one at the time of the marriage and the younger party has not at any time before attaining the age of eighteen been a child of the family in relation to the other party."[42]

The Marriage Act defines "child of the family" to mean "a child who has lived in the same household as [the steprelative] and been treated by that person as a child of his family."[43]

The result for Gladys Griggs under this provision would likely be the same as under the Tennessee statute applied in the *Rhodes* case. Because she resided as a child in the home of her mother and stepfather, the subsequent marriage between

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40 *Id.* at 524.

41 *See* TENN. CODE ANN. § 36-3-101 (1991).

42 Marriage (Prohibited Degrees of Relationship) Act 1986, § 1, *reprinted in* 27 HALSBURY'S STATUTES OF ENGLAND 562 (4th ed. 1987).

43 *Id.*

Gladys Griggs and her stepfather would remain unlawful under the reformed English law. Still, the Marriage Act is a thoughtful attempt to limit the prohibition on marriage between stepparents and stepchildren in order to avoid undue interference with their individual rights. No similar reform of the marriage laws has occurred in the United States.

IV. Conclusion

In summary, the current laws regulating sexual activity and marriage between stepfamily members reveal a wide variety in the legislative treatment of these issues. A comparative analysis of the various statutory approaches to stepfamily regulation raises several questions. First, do family-related policies exist in this context that justify legal limitations on the behavior of stepfamily members? If so, what restrictions are appropriate? And finally, how should the stepparent-child relationship be defined for the purpose of regulating sexual activity and marriage between the parties?

Several insights, derived from the analysis of existing laws, are helpful in answering these questions. First, the needs of children deserve special consideration in the formulation of laws regulating sexual behavior within the stepfamily. Second, the separate treatment of marriage regulations and the restrictions on nonmarital sexual conduct makes sense in the context of stepfamilies. Finally, the definition of the legal stepparent-child status can be limited for these purposes to cases where family ties have been established between the parties. The recent reform of the English marriage law embodies this approach, as do the state criminal laws that require an in loco parentis relationship between defendants and their minor victims.

After accounting for the age factor, the distinction between marriage and sexual activity outside of marriage, and the importance of de facto family ties in the stepfamily, the evaluation of stepfamily regulations still requires a careful balancing of competing policy considerations. The interests of individuals in freely selecting sexual and marriage partners must be balanced against the interests of the state in protecting the family institution and the mores of the community. A reasonable scheme of regulation, like that embodied in the English Marriage Act, might permit marriage and sexual activity outside of marriage between stepparent and stepchild in situations where family-related policies are likely to be weakest. For example,

personal freedom may be protected in cases where no de facto ties were established between the parties while the child was a minor or resided as a family member in the stepparent's household. On the other hand, upon revisiting these issues, lawmakers might decide to strike the balance in favor of greater, or lesser, protection of personal freedom for stepfamily members. A comprehensive legal definition of the stepfamily is an important goal for the family law system of the Twenty-first Century. Reassessment of family-related policies, as they apply to nontraditional families in the field of incest regulation and in many other areas of the law, is an important step toward achieving this goal.

Appendix

Family Relationship as a Factor in Marriage Statutes and in Criminal Statutes

Abbreviations

SP Stepparent	SCH Stepchild	SGP Stepgrandparent	SGCH Stepgrandchild	SSIB Stepsibling

State	Marriage Statute	Steps Included	Criminal Statute	Steps Included	Special Features
Alabama	--	--	ALA. CODE § 13A-13-3 (1992) (marriage & sex)	SP, SCH	--
Alaska	ALASKA STAT. § 25.05.021 (1991)	No	ALASKA STAT. § 11.41.450 (Supp. 1989) (incest/sex) ALASKA STAT. § 11.41.434 (Supp. 1992) (sex/sexual abuse of a minor)	No SCH	-- Victim is member of household under 16 years, or minor stepchild
Arizona	ARIZ. REV. STAT. ANN. § 25-101 (1991)	No	ARIZ. REV. STAT. ANN. § 13-3608 (1989) (marriage & sex)	No	--
Arkansas	ARK. CODE ANN. § 9-11-106 (Michie 1991)	No	ARK. CODE ANN. § 5-26-202 (Michie 1991) (marriage & sex)	SCH, SGCH	--

Appendix

Family Relationship as a Factor in Marriage Statutes and in Criminal Statutes

Abbreviations

SP Stepparent	SCH Stepchild	SGP Stepgrandparent	SGCH Stepgrandchild	SSIB Stepsibling

State	Marriage Statute	Steps Included	Criminal Statute	Steps Included	Special Features
California	CAL. CIV. CODE § 4400 (West 1983)	No	CAL. PENAL CODE § 285 (West 1988) (marriage & sex)	No	--
Colorado	COLO. REV. STAT. § 14-2-110 (1987)	No	COLO. REV. STAT. § 18-6-301 (1986 & Supp. 1992) (incest/marriage & sex)	SCH	Marriage to stepchild 21 years or older is defense
			COLO. REV. STAT. § 18-6-302 (1986 & Supp. 1992) (aggravated incest, marriage & sex)	SCH	Victim under 21 years of age; marriage to stepchild is defense
Connecticut	CONN. GEN STAT. ANN. § 46b-21 (West 1986)	SP, SCH	CONN. GEN. STAT. ANN. § 53a-191 (West Supp. 1993) (marriage)	SP, SCH	--
Delaware	DEL. CODE ANN. tit. 13, § 101 (1981 & Supp. 1992)	No	DEL. CODE ANN. tit. 11, § 766 (1987 & Supp. 1992) (sex)	SP, SCH, SGCH	--

Appendix

Family Relationship as a Factor in Marriage Statutes and in Criminal Statutes

Abbreviations

SP Stepparent	SCH Stepchild	SGP Stepgrandparent	SGCH Stepgrandchild	SSIB Stepsibling

State	Marriage Statute	Steps Included	Criminal Statute	Steps Included	Special Features
District of Columbia	D.C. CODE ANN. § 30-101 (1988)	SP, SCH, SGP, SGCH	D.C. CODE ANN. § 22-1901 (1989) (marriage & sex)	No	--
Florida	FLA. STAT. ANN. § 741.21 (West 1986)	No	FLA. STAT. ANN. § 826.04 (West 1976) (marriage & sex)	No	--
Georgia	GA. CODE ANN. § 19-3-3 (1991)	SCH	GA. CODE ANN. § 16-6-22 (1992) (sex)	SCH	--
Hawaii	HAW. REV. STAT. § 572-1 (1985)	No	HAW. REV. STAT. § 707-741 (Supp. 1988) (sex)	No	--
Idaho	IDAHO CODE § 32-205 (1983)	No	IDAHO CODE § 18-6602 (1987) (marriage & sex)	No	--

Appendix

Family Relationship as a Factor in Marriage Statutes and in Criminal Statutes

Abbreviations

SP Stepparent	SCH Stepchild	SGP Stepgrandparent	SGCH Stepgrandchild	SSIB Stepsibling

State	Marriage Statute	Steps Included	Criminal Statute	Steps Included	Special Features
Illinois	ILL. ANN. STAT. ch. 40, para. 212 (Smith-Hurd Supp. 1992)	No	ILL. ANN. STAT. ch. 38, para. 11-11 (Smith-Hurd Supp. 1992) (sexual relations within families)	SP	Victim over 18
			ILL. ANN. STAT. ch. 38, para. 12-13 (Smith-Hurd Supp. 1992) (sexual assault & sex)	SP, SCH, SGP	Victim under 18
Indiana	IND. CODE ANN. § 31-7-1-3 (Burns 1987)	No	IND. CODE ANN. § 35-46-1-3 (Burns Supp. 1992) (sex)	Steps deleted in 1987	--

Appendix

Family Relationship as a Factor in Marriage Statutes and in Criminal Statutes

Abbreviations

SP Stepparent	SCH Stepchild	SGP Stepgrandparent	SGCH Stepgrandchild	SSIB Stepsibling

State	Marriage Statute	Steps Included	Criminal Statute	Steps Included	Special Features
Iowa	IOWA CODE ANN. § 595.19 (West 1981 & Supp. 1993)	Steps deleted in 1985	IOWA CODE ANN. § 709.4 (West Supp. 1993) (sexual abuse/sex)	Affinity within 4th degree	Victim 14 or 15 years of age plus affinity or household member
			IOWA CODE ANN. § 726.2 (West Supp. 1993) (incest/sex)	No	--
Kansas	KAN. STAT. ANN. § 23-102 (1988)	No	KAN. STAT. ANN. § 21-3602 (1988) (incest/marriage & sex)	No	--
			KAN. STAT. ANN. § 21-3603 (1988) (aggravated incest/marriage & sex)	SCH, SGCH, SSIB	Victim under 18

Appendix

Family Relationship as a Factor in Marriage Statutes and in Criminal Statutes

Abbreviations

SP Stepparent	SCH Stepchild	SGP Stepgrandparent	SGCH Stepgrandchild	SSIB Stepsibling

State	Marriage Statute	Steps Included	Criminal Statute	Steps Included	Special Features
Kentucky	KY. REV. STAT. ANN. § 402.010 (Baldwin 1990)	No	KY. REV. STAT. ANN. § 530-020 (Baldwin 1984) (sex)	SP, SCH	--
Louisiana	LA. CIV. CODE ANN. art. 90 (West Supp. 1992)	No	LA. CIV. CODE ANN. § 14:78 (West 1986) (marriage & sex)	No	--
Maine	ME. REV. STAT. ANN. tit. 19, § 31 (West Supp. 1992)	Steps deleted in 1981	ME. REV. STAT. ANN. tit. 17-A § 556 (West Supp. 1992) (sex)	No	--
Maryland	MD. CODE ANN., Fam. Law § 2-202 (1991)	SP, SCH, SGP, SGCH	MD. CODE ANN. art. 27 § 335 (1992) (sex)	No	--
Massachusetts	MASS. GEN. LAWS ANN. ch. 207, §§ 1, 2 (West 1987)	SP, SCH, SGP, SGCH	MASS. GEN. LAWS ANN. ch. 272 § 17 (West 1990) (marriage & sex)	No	--

Appendix

Family Relationship as a Factor in Marriage Statutes and in Criminal Statutes

Abbreviations

SP Stepparent	SCH Stepchild	SGP Stepgrandparent	SGCH Stepgrandchild	SSIB Stepsibling

State	Marriage Statute	Steps Included	Criminal Statute	Steps Included	Special Features
Michigan	MICH. COMP. LAWS ANN. § 551.3, .4 (West 1988)	SP, SCH, SGP, SGCH	MICH. COMP. LAWS ANN. §§ 750.520b, .520c (West 1991) (sex)	Affinity to 4th degree	Age 13-15 plus affinity or household member
Minnesota	MINN. STAT. ANN. § 517.03 (West 1990)	No	MINN. STAT. ANN. § 609.365 (West 1987) (sex)	No	--
Mississippi	MISS. CODE ANN. § 93-1-1 (1973)	SP, SCH, SGCH	MISS. CODE ANN. §§ 97-29-5, -27 (1973) (marriage & sex)	SP, SCH, SGCH	--
Missouri	MO. ANN. STAT. § 451.020 (Vernon 1986)	No	MO. ANN. STAT. § 568.020 (Vernon 1979) (marriage & sex)	SCH	--
Montana	MONT. CODE ANN. § 40-1-401 (1991)	No	MONT. CODE ANN § 45-5-507 (1991) (marriage & sex)	SCH	Consent of adult SCH is defense

Appendix

Family Relationship as a Factor in Marriage Statutes and in Criminal Statutes

Abbreviations

SP Stepparent	SCH Stepchild	SGP Stepgrandparent	SGCH Stepgrandchild	SSIB Stepsibling

State	Marriage Statute	Steps Included	Criminal Statute	Steps Included	Special Features
Nebraska	NEB. REV. STAT. § 42-103 (Supp. 1992)	No	NEB. REV. STAT § 28-702 (1989) (incestuous marriages, marriage) NEB. REV. STAT § 28-703 (1989) (incest, sex)	No SCH	-- Minor victim
Nevada	NEV. REV. STAT. ANN. § 125.290 (Michie 1993)	No	NEV. REV. STAT. ANN. § 201.180 (Michie 1992) (marriage & sex)	No	--

Appendix

Family Relationship as a Factor in Marriage Statutes and in Criminal Statutes

Abbreviations

SP Stepparent	SCH Stepchild	SGP Stepgrandparent	SGCH Stepgrandchild	SSIB Stepsibling

State	Marriage Statute	Steps Included	Criminal Statute	Steps Included	Special Features
New Hampshire	N.H. REV. STAT. ANN. § 457:1, :2 (1992)	Steps deleted in 1987	N.H. REV. STAT. ANN. § 639.2 (Supp. 1992) (incest, marriage & sex)	SCH	--
			N.H. REV. STAT. ANN. § 639-A:2 (1986 & Supp. 1992) (aggravated sexual assault/ sex)	Affinity	Victim age 13-15 plus affinity or living in same household
New Jersey	N.J. STAT. ANN. § 37:1-1 (West 1968)	No	N.J. STAT. ANN. § 2C:14-2 (a), (c) (West Supp. 1992) (sex)	Affinity to 3d degree	Victim 13-15 plus affinity or *in loco parentis*
New Mexico	N.M. STAT. ANN. § 40-1-7 (Michie 1989)	No	N.M. STAT. ANN. § 30-10-3 (Michie Supp. 1988) (sex)	No	--
New York	N.Y. DOM. REL. LAW § 5 (McKinney 1988)	No	N.Y. PENAL LAW § 255.25 (McKinney 1989) (marriage & sex)	No	--

Appendix

Family Relationship as a Factor in Marriage Statutes and in Criminal Statutes

Abbreviations

SP Stepparent	SCH Stepchild	SGP Stepgrandparent	SGCH Stepgrandchild	SSIB Stepsibling

State	Marriage Statute	Steps Included	Criminal Statute	Steps Included	Special Features
North Carolina	N.C. GEN. STAT. § 51-3 (1984)	No	N.C. GEN. STAT. § 14-178 (1986) (incest/sex)	SCH	--
			N.C. GEN. STAT. § 14-27.7 (1986) (sexual offenses)	No	minor victim plus *in loco parentis*
North Dakota	N.D. CENT. CODE § 14-03-03 (1991)	No	N.D. CENT. CODE § 12.1-20-11 (Supp. 1991) (incest/marriage & sex)	No	--
			N.D. CENT. CODE § 12.1-20-07 (1985) (sexual assault/sex)	No	Victim 15-18 plus supervisory authority
Ohio	OHIO REV. CODE ANN. § 3101.01 (Baldwin 1992)	No	OHIO REV. CODE ANN. § 2907.03 (Baldwin 1992) (sex)	SP	Also person *in loco parentis*

Appendix

Family Relationship as a Factor in Marriage Statutes and in Criminal Statutes

Abbreviations

SP Stepparent	SCH Stepchild	SGP Stepgrandparent	SGCH Stepgrandchild	SSIB Stepsibling

State	Marriage Statute	Steps Included	Criminal Statute	Steps Included	Special Features
Oklahoma	OKLA. STAT. ANN. tit. 43, § 2 (West 1990)	SP, SCH	OKLA. STAT. ANN. tit. 21, § 885 (West 1983) (marriage & sex)	No	--
Oregon	OR. REV. STAT. § 106.020 (1990)	No	OR. REV. STAT. §§ 163.505(1), .525 (1990) (marriage & sex)	SCH	--
Pennsylvania	23 PA. CONS. STAT. ANN. § 1304(e) (1991)	No	18 PA. CONS. STAT. ANN. § 4302 (Supp. 1992) (marriage & sex)	No	--
Rhode Island	R.I. GEN. LAWS § 15-1-1 to - 3 (1988)	SP, SCH, SGP, SGCH	R.I. GEN. LAWS § 11-6-4 (repealed 1989)	--	--
South Carolina	S.C. CODE ANN. § 20-1-10 (Law. Co-op. 1985)	SP, SCH, SGP, SGCH	S.C. CODE ANN. § 16-15-20 (Law. Co-op. 1985) (sex)	SP, SCH, SGP, SGCH	--

Appendix

Family Relationship as a Factor in Marriage Statutes and in Criminal Statutes

Abbreviations

SP Stepparent	SCH Stepchild	SGP Stepgrandparent	SGCH Stepgrandchild	SSIB Stepsibling

State	Marriage Statute	Steps Included	Criminal Statute	Steps Included	Special Features
South Dakota	S.D. CODIFIED LAWS ANN. § 25-1-7 (1992)	SP, SCH	S.D. CODIFIED LAWS ANN. § 22-22-19.1 (Supp. 1992) (incest/sex) S.D. CODIFIED LAWS ANN. § 22-22-1(6) (Supp. 1992) (rape/sex)	SP, SCH No	Victim must be under 21 years old
Tennessee	TENN. CODE ANN. § 36-3-101 (1991)	SP, SCH	TENN. CODE ANN. § 39-15-302 (1991) (sex)	SP, SCH	--
Texas	TEX. FAM. CODE ANN. § 2.21 (West 1993)	No	TEX. PENAL CODE ANN. § 25.02 (West 1989) (sex)	SP, SCH	--
Utah	UTAH CODE ANN. § 30-1-1 (1989)	No	UTAH CODE ANN. § 76-7-102 (1990) (sex)	SP, SCH	While marriage that creates step relationship still exists

Appendix

Family Relationship as a Factor in Marriage Statutes and in Criminal Statutes

Abbreviations

SP Stepparent	SCH Stepchild	SGP Stepgrandparent	SGCH Stepgrandchild	SSIB Stepsibling

State	Marriage Statute	Steps Included	Criminal Statute	Steps Included	Special Features
			[1]		
Vermont	VT. STAT. ANN. TIT. 15, §§ 1, 2 (1989)	Steps deleted in 1975	VT. STAT. ANN. tit. 13, § 3252(a)(4), (b)(1) (Supp. 1992) (sex)	SP, SCH	Minor victim
Virginia	VA. CODE ANN. § 20-38.1 (Michie 1990)	No	VA. CODE ANN. § 18.2-366 (Michie 1988) (sex)	No	--
Washington	WASH. REV. CODE ANN. § 26.04.020 (West 1986)	No	WASH. REV. CODE ANN. § 9A.64.020 (West 1988) (sex)	SCH	Minor SCH
West Virginia	W. VA. CODE § 48-1-2, -3 (1992)	No	W. VA. CODE § 61-8-12 (1992) (incest/sex) W. VA. CODE § 61-8D-5 (1992) (sexual abuse by custodial parent)	SP, SCH SP who shares custody	-- Victim under 16 years of age

Appendix

Family Relationship as a Factor in Marriage Statutes and in Criminal Statutes

Abbreviations

SP Stepparent	SCH Stepchild	SGP Stepgrandparent	SGCH Stepgrandchild	SSIB Stepsibling

State	Marriage Statute	Steps Included	Criminal Statute	Steps Included	Special Features
Wisconsin	WIS. STAT. ANN. § 765.03 (West 1981)	No	WIS. STAT. ANN. § 944.06 (West 1982) (marriage & sex)	No	--
Wyoming	WYO. STAT. § 20-2-101 (1987)	No	WYO. STAT. § 6-4-402 (1988) (sex)	SP, SCH	