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Compensating the Adult Victim of Childhood Incest: From Criminal to Constitutional Compensation

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Summary

A. Introduction

The Israeli court system hears what seems to be an endless stream of domestic-abuse cases, including those dealing with the heinous crime of incest. While every case is shocking, the most painful are those brought by women who were abused as children and – for whatever reason – were unable to complain to the relevant authorities or file suit at the time of the events.¹ How can these women receive a just trial years later?² How can they be awarded appropriate civil damages to compensate them for the damage incurred? This article focuses on these questions, with the goal of using constitutional principles to create a new basis for the compensation of these individuals. In the last section, we propose the establishment of a new constitutional offense, based on the injury to the victim's human dignity. Today we enjoy the fruits of the constitutional revolution, and we should work to improve the lot of the adult victims of childhood incest before the High Court of Justice chooses to narrow its sphere of activity.

¹ Lubvitz, V. (2008). 'Twenty-two Years Later: Prison Sentence for a Father who Raped His Daughter' *Yediot Achronot*, March 27 [Hebrew].

² This is a complicated matter in and of itself, which we are unable to deal with here because of space limitations.

We begin with a discussion of recent developments in the status of the victim in the criminal process, both in Israel and around the world. The significant change in the perception of victim's rights is crucial for our claim that the Israeli legal system is now ready to recognize a broader basis for the compensation of adult victims of childhood incest. A broad-based approach which is divorced from the "criminal" understanding of the victim's status is liable to be disconnected from reality and to be less than successful.

It is equally important that we understand the victim's improved status in the criminal process as background for the establishment of new grounds for compensation, together with feminist arguments for victim protection. Here we review the different feminist theories (liberal, cultural, radical, and postmodern), each of which has a different perspective and each of which advocates broader recognition of the unusual damage suffered by the adult victims of childhood incest. We will see that without this crucial theoretical development, even significant measures to promote the victim's status in the criminal process would not enable us to hear the incest victim's "voice" in the legal system. It almost goes without saying that this theoretical development was critical for the recognition of a constitutional basis for victim compensation.

After laying this groundwork, we turn to the third theoretical element: human dignity. We briefly describe the effect of the constitutional revolution on human dignity and then focus our attention on the implications for incest victims. We explore how this idea, the meaning and legal consequences of which were initially difficult to predict, goes hand-in-hand with the rising status of the victim in the criminal process and the recognition of damage to incest victims. Feminist theory is used in the hope of establishing a broad constitutional basis for compensation.

Section five deals with the question of criminal compensation for the adult victim of childhood incest. Because this subject is so important, our discussion touches upon many aspects of this type of compensation and emphasizes the unusual nature of the arrangement, and especially the fact that the current compensation arrangement is oftentimes unable to properly address the harm done to the adult incest victim.

The final section builds upon the ideas presented above and proposes the creation of a new constitutional basis for awarding civil compensation to the adult victim of childhood incest. The proposal is in line with the legal principles we have discussed. It is an attempt to provide recompense for the victim in an area in which criminal compensation has thus far been inadequate. We hope that this will allow us to come full circle – from the revolution in the victim's status in the criminal process to proper civil compensation for the adult victim of childhood incest.

B. The Change in the Victim's Status in the Criminal Process

The past decade has seen a change in the criminal-law paradigm. While once it was common for criminal cases to be brought by the state against the defendant, with the former representing the public interest, now the victim is legally defined as an interested party in the criminal process. The act of giving victims and their rights a role in the

criminal framework entails a change in how criminal law balances all the relevant and often contradictory considerations.

This revolution has already begun, and accordingly it is no longer necessary to champion the importance of the victim in the process. Thanks to legal scholarship and lobbying by different groups, this topic is central in the legal system and the subject of both statutes and judicial rulings.³ Restorative justice is considered a legitimate claim, a philosophy which essentially views the crime as damaging to the victim, the community, and even the perpetrator.⁴ Following this, we now see a trend towards responses designed to redress the damages caused. The defendants are expected to recognize their responsibility towards the victim, minimize the damage to the victim, and compensate the victim.⁵

These changes in the victim's status are reflected in the willingness of the legal system to involve victims in the criminal process, whether to a greater or lesser extent. In the last several years, Israel has seen the enactment of the Crime Victims' Protection Act, 2001, the program for accompanying sexual offense victims throughout the criminal process, and the amendment of the limitation period for victims of sexual offenses. Although these developments were not specifically designed for the adult victims of childhood incest, there is little doubt that they are evidence of the improved status of these victims in the criminal process. As we will see later, this status may be transferred to the constitutional level as well, where it will serve to broaden civil compensation for victims.

That said, and despite the fact that Israel has undergone a constitutional revolution, we must ask a number of pressing questions: What is the new status of incest victims? What rights do they have? What is the relationship between the victim's rights, the defendant's rights, and the public interest? While no one claims today that the victim – and specifically the victim of domestic sexual offenses – is invisible, we must nonetheless define the status of the victim. Our specific concern is with the woman who survived childhood incest and at a relatively late stage in her life decided to submit a complaint to the police, and by doing so open a criminal procedure against her abuser.

Criminal law deals primarily with those who commit crimes; the authorities are responsible for catching, judging, and punishing the criminals. One element was long missing from this picture: the victim. In Israel as elsewhere, in recent years the place of the victim is changing in criminal law, from the traditional view that criminal law is mainly for the protection of society, focusing on society as a whole rather than the individuals who make up the society. The victims of incest now receive special attention, with growing social awareness of their condition, and in fact are considered part of the

³ Because of the wealth of literature available today, it difficult to recommended certain works and not others. For general information, see: Pogach, D. (2005) 'The Victims Revolution – The Day After, Towards a Model which Recognizes Private Sentencing Considerations?' *Shnaton HaKirya HaAcademit* (ed. Shavartz, D.) 229-236 [Hebrew].

⁴ For more on "Restorative Justice," see: Braithwaite, J. (1989) *Shame and Reintegration* Cambridge.

⁵ Dignan, J. (1999) 'The Crime and Disorder Act and the Prospects for Restorative Justice.' *Criminal Law Review* 48.

public interest.⁶ This is the principle behind the approach espoused by Feler (1984): “The criminal laws draw the line between the forbidden and the permitted, in light of the interest of the entire public, according to the conceptions of the ruler. They therefore resolve the legal relationship caused by the commission of a crime as a relationship between the state, which represents organized society, and the individual who commits the crime, not as a relationship between one person and another, although the crime causes the individual damage, but perhaps also as a civil clause for returning those damages.”⁷

In the matter before us, when the victim of incest is abused during childhood, the damage is not limited to the family unit and family dynamics. Instead, it is often difficult for the victim to recover from her injuries, and there is a realistic risk that she will unintentionally become a burden on society. One can also assume that the problems the victim incurred will play a role later in her life, for example when she has her own family, and in this way her injuries continue to reverberate.

In Israel and elsewhere, the issue of the crime victim was long accorded only secondary importance, and at most was one consideration among the many that together make up the public interest.⁸ Early Israeli legislation dedicated few statutes to crime victims, with the obvious exception of legislation concerning children’s testimonies, and some claim that this legislation was not intended to protect victims’ rights per se, but evolved from a paternalistic view of children, the desire to uphold the law, and the welfare policy characteristic of the legal and social culture in Israel in the 1950s. Another relevant statute relates to the option of forcing the defendant to pay the victim damages as part of the sentence. The payment is enforced as though the payment was a civil ruling, but does not compromise the victim’s right to compensation according to any law.⁹

In 1937 Benjamin Mendelsohn began his scientific study of crime victims, which he named victimology.¹⁰ This term is now used for the scientific field which focuses on crime victims.¹¹ In the 1970s victimology developed greatly and gained recognition both in the world of academics and as a socially relevant body of knowledge, with influence on legislation, social policy and law enforcement.¹²

⁶ Davis, G. (1992) *Making Amends: Mediation and Reparation in Criminal Justice*, chapter.1. London.

⁷ Feler, S. Z. (1984) *Essentials in Criminal Law* A 108 [Hebrew].

⁸ Sebba, L. & T. Gal (2003) ‘Victim Rights in Israel’ *Shamgar Book B* 157, 164 [Hebrew]. The authors note that in Britain the victim’s interest is given no weight when the public interest is considered. Hetherington, T. (1989) *Prosecution and the Public Interest* 14. London. For the traditional American approach, see Miller F.W. & F.J. Remington (1969) *Prosecution: The Decision to Charge a Suspect with a Crime*. Oxford.

⁹ This relates to the Penal Code from 1936, whose statutes were replaced in 1954 and later merged into the 1977 Penal Act. See the Penal Act, Article 77, 88.

¹⁰ Mendelsohn, B. (1956) ‘Une nouvelle branch de la science biopsychosocial: La victimologie’ *Review International de Criminologie et de Police Technique*, . [French].

¹¹ Doerner, W.G. & S.P. (1995) *Lab Victimology* 6-7, Cincinnati.

¹² For more on this topic, see: Ben David, S. (2003) *Victimology from the Victims’ Perspectives, Trends in Criminology: Theory, Policy and Practice* 775.

The development of the field of victimology coincided with a change in the psychological approach, from a view that recommended repression of the event to one that holds that to be freed from trauma, the victim must deal with the person who caused the injury and with the pain of the injury. This is considered especially important in the case of victims of sexual offenses, and is absolutely vital for adult victims of childhood incest. It is crucial that the victim be given proper compensation and recognition her loss of dignity as a woman (and as a girl); without this, there is no reason to open a case which will leave the victim no better off than before and likely worse off.

A number of factors contributed to the rising awareness to the unfortunate situation of victims in the criminal legal system, and especially those victims of sexual crimes and incest. Mirroring the disillusionment with traditional punishment; we now have a range of alternatives methods and strong victims-rights movements.¹³ In Israel, for example, the Coalition of Organizations for the Promotion of Crime Victims' Rights was founded in 1988 by the Council for Children's Safety, the Women's Lobby in Israel, and the Union of Organizations for the Aid of Sexual Assault Victims. Its mission is the promotion of victims' rights and the protection of the status of the victims. Other organizations later joined the coalition.¹⁴

The status of the victims is also an important concern on the international stage, with the World Victimology Foundation and the United Nations particularly active victims-rights advocates. In 1985, the United Nations adopted its Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power¹⁵ and the European Council issued recommendations regarding the role of the victim in the framework of criminal law and procedure. In the 1980s, several laws were passed for the protection of victims in the United States, Western Germany, Canada, New Zealand, and Australia.¹⁶ Equally important to the matter at hand is the international commitment to protect children from sexual abuse, as stated in the International Convention on the Rights of the Child: "State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse."¹⁷ Signatories (including Israel) are required to do all they can to protect children from sexual abuse. There obviously has consequences for the status of the victim of childhood incest, who should be helped in every way possible to deal with the damages incurred during childhood.

¹³ Shapira, R. (1996) 'Criminal Law: From Focusing on the Individual to Ruling on Inter-Group Struggles' *The Israeli Law Year Book* 629 A. Rozen Tzvi ed. [Hebrew].

¹⁴ On the coalition's influence on the court, see Shapira, *Id.*, at 629.

¹⁵ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by GA Res. 40/34 (29 November 1985). For more on the status of victims and constitutional rights, see Karp, Y. (1995) 'Criminal Law – Rape of Human Rights: Constitutionalization in Light of Basic Law: Human Dignity and Liberty' *Ha'praktit* 42 64 [Hebrew] (later: "Criminal Law"); see also Karp, Y. (1996) 'Criminal Legislation in Light of the Basic Laws' *Mechkarei Mishpat* 13 275; Sebba & Gal, *Id.*, at 158; Bassiouni, M.C. (1988) *International Protection of Victims*, Toulouse.

¹⁶ Sebba, L. (1994) 'Sentencing and Victim – The Aftermath of Payne' *International Review of Victimology* 3: 141.

¹⁷ Article 34 of the Children's Rights Treaty (which has been in effect in Israel since November 2, 1991).

These developments contributed to the change in the victim's status, along with the "constitutional revolution" that occurred during this period. One important reason for our concern with the victim's status is the recognition that human rights include the rights of the victim and not only those of the defendant. In Israel, this idea comes to the fore with the discussion of the implications of the Basic Law: Human Dignity and Liberty for crime victims and their rights. It is clear that the more heinous the crime, the louder the outcry about privileging the rights of the defendant over those of the victim. This is certainly true with regard to incest.

The 1992 Basic Law: Human Dignity and Liberty provides moral guidelines for Israeli state authorities. Approximately a decade and a half after its enactment, there is reason to claim that the Basic Law changed the face of criminal law in Israel beyond recognition, as a result of its establishing the essential rights given to every person in Israel, including the crime victim. Inter alia, the law states that a person's life, body, and honor shall not be harmed (paragraph 2), a person's belongings shall not be harmed (paragraph 3), and a person's nor liberty shall be compromised (paragraph 5). Paragraph 6 protects freedom of movement and paragraph 7 establishes the right to privacy and bodily modesty.

The Basic Law: Human Dignity and Liberty does not refer either explicitly or implicitly refer to crime victims. That being said, the law covers those hurt by criminal acts. Essential in the battle over victims' rights is a statement of Chief Justice Shamgar: "In our times it is often forgotten that human dignity is not only the dignity of the defendant but also the dignity of the plaintiff, the witness, the victim." Parallel to the victim's right to dignity and liberty is the state's obligation to protect the dignity and liberty of its citizens, crime victims included. The weaker the victims are, the greater the state's obligation to defend them, and it is difficult to find victims weaker than those girls who are sexually abused by their father or another family member.

It is commonly held that the state owes its existence to and is predicated on a social agreement, and that the individuals in the state waive their right to pursue justice and retribution on their own, and instead hand over the task of ensuring their safety to the state authorities. The commission of a crime and the harm incurred by the victim are therefore seen as a failure on the part of the state to protect the individual. The monopoly the state holds in trying the accused implies that the state is obligated to represent the public interest in the criminal procedure and to express the victim's interest as well.¹⁸

¹⁸ Arbel, E. (2003) 'The Constitutional Revolution in Criminal Law – The Balance Between the Defendant's Rights and the Rights of his Victims' *Shamgar Book B* 260 [Hebrew]. A number of Supreme Court rulings discuss the commitment of the state, and specifically the courts, to the injured individual, based on the Basic Law. In the Ganimat decision, for example, Chief Justice Shamgar writes: "The court is not only responsible for the tailoring of law; it is responsible also towards a person, potentially or really injured by crime in its different shapes and forms. Human dignity and liberty are essential rights belonging also to the injured, hurt, run over, raped and blackmailed individual." Elsewhere in this decision, Chief Justice Shamgar argued that: "Basic Law: Human Dignity and Liberty carries a constitutional statutory message for each individual in society, but this message was intended for the entire society and not only for its criminals. The actual or potential crime victim and any innocent citizen are worthy of protection of dignity and liberty before fear, terror and injury, no less than the defendant is. Granting rights by power of the basic law must apply for all, citizens and foreigners, residents and visitors, defendant and victim." Chief Justice Barak also stated that: "This fundamental approach is fully applied in criminal law."

According to another approach, the state failed in its duty to safeguard the victims and protect them from injury, and therefore has a retroactive responsibility to make amends for the harm caused them. This approach draws on the Basic Law: Human Dignity and Liberty, since it can be claimed that Chapter 4 of the Law expresses the right to such protection when it states that: “every person has the right to protection of life, body and dignity.” Indeed, the unambiguous language of the law establishes the essential right to be protected from harm.

What are the legal implications of this? Should the state compensate the incest victim? Is it obligated to grant her legal, psychological and/or financial aid? Should the state pass new legislation which expresses its obligation to the victim, and if so, how broad should the basis for compensation be? Before we turn to these questions, we must deal with a more general one, namely what is the theoretical foundation for the damage caused to the incest victim. Is this incest victim much like other victims or a unique case, requiring a unique legal arrangement? As we will see in the next section, the second option is the more likely, as a result of the “feminist” damage to the victim of childhood incest.

C. “Feminist” Damage to the Adult Victim of Childhood Incest

The feminist movement contributed greatly to raising social awareness of incest and to our conception of the protected social value through the ban on incest. All feminist movements embrace the idea that “feminism is the ideology of women’s liberation. Intrinsic in all approaches is the belief that women suffer injustice because of sex.”¹⁹ Law is a meaningful part of the patriarchal organization of human society.²⁰ It was created by men and as such reinforces the social order in which the man and the masculine perception of the world determine, rule, and dictate the direction society takes.²¹ The feminist legal approach takes aim at this bias, which relegates women, along with their values and life experiences, to a corner of society. The feminist approach aspires to uncover and address the male-oriented bias, with the aim of improving the status of women.

Incest is not considered a social phenomenon worthy of public attention. Much of the credit for this should be given to the feminist movement, which devotes the tremendous attention to explicitly female topics, including domestic violence towards women.²² The

This legal position is naturally closely tied to human rights. It protects each person’s right to dignity, wholeness of body and possessions. It often requires a delicate balance between the individual’s and the public’s interest; between the victim’s right and the defendant’s right” (page 629).

¹⁹ Humm, M. (1995) *The Dictionary of Feminist Theory* 1994 2nd edition.

²⁰ See for example (1995) ‘Note: Patriarchy is Such a Drag: The Strategic Possibility of a Postmodern Account of Gender’ *Harvard Law Review* 108: 1973, 1975. The prominent feminist author Carol Gilligan underscored the male-oriented patriarchal nature of human society. See, for example, Gilligan, C. (1993) *In a Different Voice*.

²¹ See Keren, H. (2005) *Contract Law from a Feminist Perspective* 4 [Hebrew]; see also Pertson, C.B. (1995) ‘This Old House: A Blueprint for Constructive Feminism’ *Geo L.J* 83: 2271, 2281.

²² Radai, F. ‘On Equality’ in Radai, F., Shalev, C. & M. Liben-Coby (2005) *Woman’s Status in Society and in Law* 19-63 [Hebrew]. This was the first time an Israeli academic work defined sexual

feminists claimed, for example, that women can be undervalued even when the system of norms is ostensibly neutral. This is because society is constructed from essentially male building blocks, basic views that are more natural to men than to women, and assumptions that primarily characterize the male life experience and male values.²³ As a result, the legal system which aims to protect the victims of rape and incest by prohibiting these crimes, will continue to do a disservice to women because of its male bias.

Here we present the feminist movement's contribution to raising our awareness of incest and the protected social value via the ban on incest. Feminists played an instrumental role in the design of this modern protected value and its new content. We will later focus on the extent to which the criminal and civil legal systems reinforce the status of women survivors of childhood incest and the application of the protected social value through the ban on incest.

Although some view the feminist movement as espousing a single ideology, in reality different feminist approaches offer different analyses of domestic sexual abuse and different solutions to the problem. A basic understanding of these approaches is necessary to appreciate the contribution of the feminist movement to shaping the protected social value. It is also important that we recognize the contribution of the individual approaches to the campaign in support of incest victims as well as contemporary stances regarding the criminal and civil protection of those women who wait years before reporting that they were sexual abused.

Our focus on the main feminist approaches should not be seen to imply that one approach made a more important contribution than another to the protection of incest victims or the shape of the modern protected social value. We will therefore discuss their common ground as it relates to survivors of childhood incest, and analyze the contribution of each to the general feminist approach to incest.²⁴ Our goal is to present the protected social value via the ban on incest as expressed by the feminist movement at large.²⁵ The different approaches all make use of the same two methods to present feminist ideas,

violence as a women's rights issue. The writer emphasizes that although women are not the only victims of sexual violence, this phenomenon cannot be divorced from gender because violence towards women is an expression of their submission to men. See the argument on pages 56, 61. On the development of legal feminist academic theory and legal feminist activism in Israel, see Radai's article 'Legal Theory, Legislation and Feminist Dialogue in Israel-Retrospective' (to be published in *Feminist Matters* D. Barak-Erez, ed.) [Hebrew].

²³ Radai, 'On Equality,' at 19-63, 19-20.

²⁴ This contrasts with the approach that views radical feminism as the most appropriate way to deal with sexual offenses. See: Shachar, A. (1994) 'Laws' Sexuality: The Legal Debate on Rape' *Iyunei Mishpat* 18:159 [Hebrew]. See also the critique of Shachar in: Shamir, R. (1994) 'On Law and Social Change, Comments on Ayelet Shahar's Article, Law's Sexuality: The Legal Debate on Rape' *Iyunei Mishpat* 18: 631 [Hebrew].

²⁵ This critique may be identical to the one formulated by the essentialists, who claim there is one female essence. While feminist anti-essentialists hold that feminist theory should not assume that there is one correct view of the female essence, I wish to give voice to different opinions, and by doing so, to clearly identify the value that should be protected. It is not my intention to present women as a one-dimensional, but rather to use feminist theory to define the social value worthy that can be used to safeguard women from incest. For more on the essentialist problem see Daily, A. C. (1993) 'Feminism's Return to Liberalism' *Yale Law Journal* 102: 1265, 1267-1273.

namely consciousness raising²⁶ and what is known as “the female question.”²⁷ These methods helped engender a new attitude towards sexual offenses in traditional societies, and in doing so, promoted a new understanding of the crime and appreciation of the unique nature of the female experience.

Scholars generally speak about four feminist theories: liberal, cultural, radical, and postmodern. Each contributed in its own way to raising public awareness of sexual abuse and our understanding of the protected value through the ban on incest. These four approaches, which differ in their stance towards the issue of equality, the central topic in the feminist agenda,²⁸ all played a role in shaping of the modern protected value relating to women who were incest victims as children. Although incest is not an item on the agenda of all these theories, all four made a valuable contribution to the contemporary conception of the modern protected value.²⁹

²⁶ Women’s groups use biography and autobiography to shed light on the restrictions placed upon women by law and society. This technique is similar to that used by Marxists, who tried to raise awareness of society’s role in shaping the individual’s status. Conscious raising employs various stories of domestic sexual abuse, usually at the hands of the father, to help free women from feelings of loneliness and seclusion, to underscore their commonalities, and to enable the victim to recognize the damage caused her and point her finger in the right direction. The phenomenon of sexual abuse becomes social/political/legal rather than personal. A case in point is the booklet recently published in Israel by the Coalition of Aid to Sexual Abuse Victims in Israel, which clearly and boldly presents the personal stories of women who abused as children. See: *Can You Hear Me – Testimonies of Incest Victims* 2005. See also: MacKinnon, C. A. (1989) *Toward a Feminist Theory of the State*, which defines the method of raising awareness as Marxist (page 83). Also of interest is Kamir’s approach to self examination in: Kamir, O. (2002) *Feminism, Rights and Law* 34 [Hebrew].

²⁷ This method sees legal social practices as discriminating against women in cases where there is no obvious discrimination in the traditional sense and asks questions which point to the male role in incest and its aftermath. The questions we ask here include: To what extent does the criminal procedure suit the special needs of incest victims? What attributes characterize adult women who were victims of incest? What barriers are placed before them in the criminal and civil systems? Is the legal norm well-suited to these women? How can the legal system be changed in their favor? For more on this methodology, see: Wishik, H.R. (1993) ‘To Question Everything: The Inquiries of Feminist Jurisprudence’ *Feminist Legal Theory: Foundations*, Weisberg, D. Kelly ed, 1, 13-16.

²⁸ Today we hear a new feminist voice, one which see the value of human dignity as providing a more efficient theoretical framework for the discussion of women’s social situation. This is especially true in the Israeli legal system, which has provisions for dealing separately with women and does not necessarily compare women to men. See Kamir’s theory of the value of human dignity as an essential legal value which can usher in the type of reforms required to promote women’s social status, *Feminism, Rights and Law*, footnote 158, at 61-71. See also Kamir, O. (1998) ‘What Kind of Harassment: Is Sexual Harassment an Injury to Equality or to Human Dignity?’ *Misphatim* 29:317 (later: What Kind of Harassment) [Hebrew]. For a response to Kamir, see: Rimlat, N. (2004) ‘Israeli Legal Feminism: From Where and to Where? Thoughts on Difference, Dignity and Equality between the Sexes Following Orit Kamir’s Book “Feminism, Rights and Law”’ *Iyunei Misphat* 227: 884-857 [Hebrew].

²⁹ For an analysis of the first and second waves of feminism in Israel, see: Fogal-Bizau, S. ‘Feminism, Nationalism and Social Change: Women in Israel 1882-2003’ to be published in *Encyclopedia of Jewish Culture in an Age of Modernization and Secularism*, Y. Yuval et al., eds. [Hebrew].

C.1. Liberal Feminism

The liberal feminist approach was influenced by general liberal approaches which had gained popularity in the West by the nineteenth century.³⁰ The basic principle which underlies the liberal approach is the desire for equality, liberty, and justice. As a result of the liberal bent which is part and parcel of liberal feminism, liberal feminists place great importance on concepts such as personal autonomy, individualism, freedom of choice, and liberty from state intervention. Liberal feminists aim to achieve equality for women within a liberal ideology, one which includes the recognition of a woman's right, as a person, to determine what happens to her own body. The liberal approach places great emphasis on individualism, self-fulfillment, autonomy, and personal freedom.³¹

Liberal feminism dedicated itself to changing society and the law in order to change the fact that women do not enjoy equal rights and are often discriminated against.³² A woman's gender should not prevent her from achieving her aspirations and from fulfilling herself as an autonomous human being. Liberal feminists claimed that liberal tracts which address men apply to women as well. Women are intelligent human beings, deserving of freedom, equality, and the right to self-definition and self-fulfillment.

Liberal feminists would argue that a woman who was abused as a child is entitled to recognition: of her rights as a person and as an autonomous being, of her rights over her own body, of her right to object when a family member forces himself upon her sexually. These rights hold even when the victim delays reporting the fact that she was abused, whether because of the emotional hardship involved or because she is loath to destroy the family unit.

The liberal approach also holds that gender is largely irrelevant and this is true in our particular context as well. Liberal feminists made an effort to blur the differences between men and women and emphasize their commonalities, on the grounds that the more a woman is seen to be like a man, the more equal her rights will be to his. This blurring of gender lines attracted a great deal of criticism,³³ but nonetheless offers a number of advantages for incest survivors. A liberal worldview helps us to better understand domestic sexual abuse and portrays the victim as a person whose autonomy has been breached and who has been denied the basic human right of determining what should happen to her body and (most important in this case) what should not. This

³⁰ For more on this approach, see Donovan, J. (1985) *Feminist Theory: The Intellectual Traditions of American Feminism* New York, 1-19; Jagger, A. (1983) *Feminist Politics and Human Nature*. Ottawa.

³¹ Rhode, D.L. (1990) 'Feminist Critical Theories' *Stanford Law Review* 42:617-627.

³² See, for example: Rhode, D.L. (1989) *Justice and Gender: Sex Discrimination and the Law* Cambridge 63-80.

³³ Much of the criticism came from the radical feminist Catharine MacKinnon, who claimed that with this line of reasoning, women will always be seen as being similar or different from men. See: MacKinnon, C.A. (1987) *Feminism Unmodified: Discourses on Life and Law* 32-33 (later: *Feminism Unmodified*). Also of interest is: Barnett, H. (1998) *Introduction to Feminist Jurisprudence* London, 125-126. For additional criticism of this approach, see: Olsen, F. (1984) 'Statutory Rape: A Feminist Critique of Rights Analysis' *Texas Law Review* 63:387; Minow, M. (1987) 'The Supreme Court 1986 Term, Foreword: Justice Engendered' *Harvard Law Review*. 101:10 39-44; Olsen, F. (1990) *The Sex of Law: A Progressive Critique* 459 New York; Biton, Y. (2004) *A New Reading of Torts Law from a Feminist Social Perspective* (Doctoral dissertation, Hebrew University School of Law, Jerusalem) [Hebrew].

contribution is fundamental to the appropriate modern protected social value, as we will see later. As we broaden the definition of the protected social value, we realize that the governmental authorities must adopt a systematic legal approach that will be of service to women who do not report sexual abuse at the time it occurs, rather than serving other conflicting interests.

C.2. Cultural Feminism

The psychological approach to feminism, cultural feminism, highlights cultural differences between women and men. In her landmark volume *In a Different Voice*, Carol Gilligan argues that women and men speak in a “different voice” when they relate to basic ideas of life and morality. Men are concerned with justice and the relative merits of different rights, and see themselves at the top of the hierarchy; women approach life from the perspective of caring for others and are most concerned with values such as caring and responsibility.³⁴ Women are more likely to think of life as a web of connections and contexts, and often place themselves at the center, connected to as many people as possible.³⁵ This perspective is what Gilligan terms the “female voice,” a voice which was not heard for a very long time. According to cultural feminists, the silencing of the female voice led to a perception of female culture as inferior and the development of a “male scale,” which held that male values are preferable to female values.³⁶ It follows, then, that this approach is interested in allowing the strong female voice to speak.³⁷

Although this approach was widely criticized³⁸ and did not address the issue of incest per se, it made an invaluable contribution to raising awareness of the difficulties faced by adult victims of childhood incest and towards recognizing the protected social value through the ban on incest. Even without dealing specifically with incest, cultural feminism advanced women to the forefront of public awareness and gave voice to long-

³⁴ In her book, Gilligan presents the well-known example of Amy’s and Jack’s different takes on the following moral dilemma: Mr. Heinz’s wife is very ill and needs expensive medication, which Mr. Heinz cannot afford. Should he steal the medication from the pharmacist? The children’s answers were seen as evidence of boys’ tendency to reach a single clear truth (one should not steal), as opposed to girls, who saw the situation in more emotional terms and responded in a “female voice.” Gilligan suggested a psychological/feminist analysis of the responses to the moral dilemma. According to the author, women examine a problem in its specific human context, and are sensitive to human relations, communications difficulties, and misunderstandings. Women will typically find a solution which will take into account as many of the people involved as possible and as many of their needs as possible. Women will view justice in context and appreciate that there are no absolutes – sometimes a conversation can improve the situation (one of the girls, for example, suggested that Mr. Heinz have a heart-to-heart with the pharmacist).

³⁵ For this reason there are those who prefer to call this feminist approach “relational feminism” and not “cultural feminism.” See, for example, Offen, K. (1988) ‘Defining Feminism: A Comparative Historical Approach’ *Signs: Journal of Women in Culture & Society* 14:119, 135.

³⁶ Gilligan, see footnote 24, at 14. For additional feminist writing on the woman’s “voice,” see: Bilski, L. (2000) ‘Silence’s Violence: The Legal Process Between Division and Voice’ *Iyunei Mishpat* 23(2): 421-472, 425 [Hebrew].

³⁷ There are important differences between the strong and weak forms of cultural feminism. The strong form emphasizes what distinguishes women from men and posits that only women can declare their cultural values; the weak form defines female culture as preferable to male culture, but suggests that men be included in those social values. For more, see: Evans, J. (1995) *Feminist Theory Today – An Introduction to Second Wave Feminism* 76-77.

³⁸ Evans, *Id.*, at 101-103.

silenced incest victims, whether young girls, adolescents, or women. Cultural feminism shed light on the difficulties these individuals typically faced by incest victims; highlighted the similarity between men and women; and worked to combat repression and to ensure that women who were abused at children would receive proper legal attention. These goals were accomplished by ensuring that women would be given the same status and the same credence as men.

C.3. Radical Feminism

Under the stewardship of Catharine MacKinnon, radical feminism adopted a unique approach to equality and feminist thought. While liberal feminism waved the flag of “sameness” (“women are like men,”) and cultural feminism endorsed the idea of “difference,” (“women are different than men”), radical feminism rejected any comparison to masculine criteria. Radical feminists expressed the opinion that women are neither like nor unlike men, but rather victims of male power.³⁹ They emphasize sexuality⁴⁰ as a key concept for decoding the phenomenon of male dominance and female inferiority, which radical feminists considered to be universal. In turn, radical feminists see the law and its statutes as patriarchal means to grant and preserve male power. This becomes obvious, they believe, when the law is examined from the point of view of the weak, the victim, the woman. From this perspective, the social structure is hierarchical, with the strong man at the top and the weak woman at the bottom. Expressions of the hierarchy include rape, domestic violence towards women, and incestuous relationships with girls. Some see female inferiority as rooted in women being considered the property of men, and specifically their fathers.⁴¹

Radical feminism, which focused on the social and political relations between men and women, based on the assumption of systematic inequality of power, contributed greatly to the understanding of the protected social value through the ban on incest. According to radical feminism, the lion’s share of male control over women results from their control over women’s sexuality, whether through rape or through sexual stereotypes of women which are implemented in the legal system as natural, obvious, and therefore true. Following this, incest, rape, and sexual violence towards women are not isolated matters but rather aspects of a comprehensive hierarchical system which preserves women’s

³⁹ D. Barak-Erez ed. The basic radical-feminist assumption that society systematically and hierarchically divides power was the subject of a great deal of discussion. See, for example, *Feminism Unmodified, Id.*, at 3; Bartlett, K. T. & R. Kennedy (1991) “Introduction” *Feminist Legal Theory: Reading in Law and Gender* see: Lacey, N. (1989) ‘Feminist Legal Theory’ *Oxford Journal of Legal Studies* 9:383; Eisenstein, H. (1984) *Contemporary Feminist Thought* London.

⁴⁰ For example, the starting point for MacKinnon’s radical feminist analysis was that there is a biological difference between men and women. According to MacKinnon, the sexual difference itself does not necessitate male supremacy, for “Men are different from women as women are from men.” See *Feminism Unmodified, Id.*, at 42. The author argues that the biological difference between the sexes receives significant import, and by identifying as a man or a woman, an individual becomes part of a group, a gender with defined social and sexual roles. Here MacKinnon draws on de Beauvoir’s idea that the term “woman” is not only biological, but also social, as in her familiar saying “One is not born a woman, but becomes one.” See: de Beauvoir, S. (1976) *The Second Sex* New York, 249. In MacKinnon’s opinion, the definition of gender in and of itself expresses a hierarchal division of power in society and “sexuality” is a social construct. A woman’s gender shapes her life.

⁴¹ See Brownmiller, S. (1976) *Against Our Will* New York, chapters 1-2.

social and economic inequality.⁴² Incest is a crime of sexually oriented control, sexual assault, and sexually based injury. The motivation is social rather than biological, and stems from gender and the male-dominated hierarchy.

In the framework of radical feminism, we can see incest as a behavioral pattern which serves the ruling class (men) by suppression of the ruled class (women) and which perpetuates women's status as "different" and as "sexual objects" in a patriarchal world.⁴³ Incest paints girls and therefore all women as sexual objects, which are defined by and for men. Incest and its long-term effects on the victim serve to prevent women from presenting themselves as free and autonomous human beings, independent of stereotypes, prejudices, and the male patriarchal system. The injury to the incest victim remains even after she reaches adulthood, affecting her personal development and familial status as well.

When we see incest as a phenomenon which is part of a hierarchal social structure in which strong men control, oppress, and subordinate weak women, we can then refine the protected social value via the ban on incest. We will make every effort to protect these women from humiliation, mortification, objectification, and loss of autonomy over their bodies. Through the ban on incest and proper, systematic legal care, we can protect and preserve a women's dignity, wholeness of body and soul, and proper place in society.

C.4. Postmodern Feminism

An outgrowth of French postmodern philosophy, postmodern feminism challenges the feminist theories which rely on clear-cut phrases such as "femininity," "masculinity," and "gender." Postmodern feminists believe that these terms are not objective; instead they emphasize the pluralistic nature of the female experience and redefine and expand the idea of femininity. Those who espouse this approach are interested in drawing attention to the interests of particular groups as well as to the flaws of older feminist movements.⁴⁴ Of note is the Race Critical Studies movement,⁴⁵ a postmodern approach which is concerned with the lack of attention generally given to ethnic, racial, and class oppression, accompanied by gender-based oppression.⁴⁶ Members of this movement believe that female pluralism is ignored by the feminist majority⁴⁷ and sees this as additional oppression. They claim that when the women who belong to the dominant (white) group fought for equality within the dominant group, they ignored the complex

⁴² Rimlat, N. (2005) 'On Sex, Sexuality and Dignity: The Sexual Harassment Act in Light of Feminist Theory and Legal Reality' *Mishpatim* 35:601, 611 [Hebrew].

⁴³ See, for example, Rimlat, N. (2001) *Similarity, Difference and Equality between the Sexes in Light of American and Israeli Law*. Ph.D. Dissertation. , Rimlat analyzes the relationship between the sexes based on three central themes, namely sex, sexuality and power.

⁴⁴ Kamir, see footnote 30, at 59. Kamir argues that postmodern feminism began in the 19 90's together with other feminist approaches, such as black feminism and lesbian feminism.

⁴⁵ For the essentials of this approach, see: Cain, P. A. (1993) 'Feminism and the Limits of Equality' *Feminist Legal Theory – Foundations* 122-162, Weisberg, Kelly D. ed.. See also: Williams, P.J. (1991) *The Alchemy of Race and Rights: A Diary of a Law Professor* Boston.

⁴⁶ Cain, *Id.*, at 122-162.

⁴⁷ A similar outcry was heard in Israel among feminists from oriental backgrounds. See Dahan-Clab, H. (1999) 'Feminism between Eastern and Ashkenazi' in Izraeli, D., Fridman, A., Dahan-Caleb, H. Herzog, H., Hassan, M. Naveh, H. & S. Fogel-Bizau *Sex Gender and Politics* 217.

life experience of other women, thus creating a language of white dominance that in turn contributed to other forms of oppression.⁴⁸ The unity projected by the feminist movement is seen to be hypocritical and unworthy, leaving many women worse off than they were before.⁴⁹

Although the Race Critical Studies movement has been widely criticized,⁵⁰ it raises a question relevant to our interests, namely whether the girls who are victims of sexual oppression, in the form of incest, are also subject to ethnic oppression, as in the case of Arab society,⁵¹ or class oppression, as with girls at risk.⁵² If this is so, we can conclude that there is a desperate need for systematic legal services for women survivors of childhood incest, on the grounds that the additional ethnic or class oppression makes it even less likely that acts of incest will be reported to the authorities. This begs the question of how the legal system should deal with a woman who has been subject to more than one type of oppression. . In other words, does ethnic or class oppression justify the imposition of a harsher punishment or can they constitute exceptional circumstances at the time the crime took place?

The feminist movement made an important contribution to raising public awareness of incest and to influencing the protected social value as it appears in contemporary legislation. The different feminist approaches work side-by-side and complement one another. Together they demonstrate the anachronistic nature of the traditional protected value and create a modern protected value for incest. Although not all feminist theories speak directly about incest, together they made a significant contribution to the establishment of the modern protected social value via the ban on incest as well as to raising public and social awareness about how prevalent incest actually is.

⁴⁸ *Critical Race Feminism* (Katherine Wing ed., 1996). See also Crenshaw Williams, K. (1989) 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' *University of Chicago Legal Forum* 139; Lister, R. (1997) *University of Chicago Legal Forum* 74 New York; Harris, A. P. (1990) 'Race and Essentialism in Feminist Legal Theory' *Stanford Law Review* 42:581. Harris neatly summarizes this approach: "In feminist legal theory, the pull of the second voice, the voice of the abstract categorization, is still powerfully strong: 'we the people' seems in danger of being replaced by 'we the women.' And in feminist legal theory, as in the dominant culture, it is mostly white, straight, and socioeconomically privileged people who claim to speak for all of us. Not surprisingly, the story they tell about 'women,' despite its claim to universality, seems to black women to be peculiar to women who are white, straight, and socioeconomically privileged..."

⁴⁹ See Kline, M. (1993) 'Race, Racism, and Feminism' *Feminist Legal Theory – Foundation* 371 Weisberg, Kelly D., ed. The author argues that silencing other women's voices is meant to present one homogeneous, unified feminist voice, a goal she considers to be problematic.

⁵⁰ See Nusbaum, M.C. (1999) 'The Professor of Parody' *The New Republic* 38, 42-45.

⁵¹ See Shalhuv- Kiborkian, N. (1998) 'Reaction to a Case of Sexual Abuse of a Girl in Palestinian Society: Protection, Silencing, Deterrence or Punishment' *Plilim* 7: 161-195 [Hebrew]. Shalhuv- Kiborkian examines a case of sexual abuse of a three-year-old girl and analyzes female victims in light of their historical inferiority in Arab society. The author describes a situation in which social structures that serve to regulate and manipulate women operate in consort with tradition, religion, and social policy. See also: Jabarin, H. (2000) 'Towards Critical Approaches of the Palestinian Minority: Citizenship, Nationalism and Feminism in Israeli Law' *Plilim* 9:53-65 [Hebrew].

⁵² For example, see Tana, D. (1987) *Incest among Distressed Youths* [Hebrew].

Feminist theories place the woman front and center on the social stage. They all put forth a vision of a woman with a social standing and a place in society; a woman who needs not be subject to oppression, deprivation, or the control of others; an autonomous and free woman with full rights over her body and future; a woman whose voice is heard, who is the object of respect, and who is guaranteed wholeness of body and soul. It is thanks in part to the feminist movement that today those suspected of incest can be brought to trial and the victims compensated, even when the case is brought many years after the abuse occurred. This is the essence of the theoretical basis for the claim that the central value threatened by abuse is the human dignity of the adult victim of incest, as discussed in depth below.

D. Human Dignity as the Central Value Threatened by Acts of Incest

The purpose of a criminal ban is to protect those values that society sees as vital for its existence and future development. Many of these values relate to preserving human dignity, including the dignity of a woman who was abused as a child. What exactly is “human dignity”? What is our right to human dignity? What is the scope of this right as regards women who were abused as children and what is the right intended to protect? Below we discuss the protected value of human dignity in the context of incest, and specifically adult victims, and address the question of whether current criminal and civil law do in effect contribute to the protection of this social value.

It is not a simple matter to understand the function of “human dignity” in the context of adult incest survivors. This protected value has been the subject of a great deal of academic and judicial writing, both in Israel and elsewhere. Human dignity is one of the most fundamental factors affecting the individual’s life and development, and is crucial for an individual to be able fulfill him or herself socially. Dignity is not only an objective criterion which serves as a guideline for the legislator, but also a subjective right, one which allows a person to demand that he or she be treated with respect. The reverse perspective led to the idea that each person must also respect others and not compromise their dignity.⁵³ We now ask whether the dignity of female incest victims should be protected in the criminal system, the civil system, or a combination of the two.

Some maintain that the criminal system is not the appropriate venue to resolve issues of dignity.⁵⁴ We reject this argument in the case of women survivors of childhood incest, for the simple reason that criminal law is intended to protect a person’s basic rights in society and the right to dignity is a basic right worthy of protection. In addition, the tools used in criminal procedure are an effective vehicle for guaranteeing a protected value as important as human dignity. We acknowledge that the elements of retaliation and

⁵³ We see this from the indirect application of basic rights in the private realm. See Barak, A. (1993) ‘The Basic Rights Protected in Private Law’ *The Klig hopper Book on Public Law* 163, Zamir, Y. ed. [Hebrew].

⁵⁴ Ganaim, H., Kremnitzer, M. & B. Shnor (2005) *Libel: Current and Advisable Law* 25 [Hebrew]. The writers raise an argument similar to that raised with regard to the ban on libel: honor is an idyllic, spiritual value.

restorative justice, important in incest cases, do not disappear when we choose to defend human dignity in the criminal framework.

The criminal trial should not be seen as the only framework which can safeguard this essential right; civil trials can do so as well. For example, one way to promote deterrence is to establish tort damages not only for physical or emotional harm, but also for pain and suffering. At the same time, compensation can be increased. Civil-law remedies may complement the criminal remedies to properly safeguard the value of human dignity. Each system has a different purpose and different means of achieving that purpose: criminal law uses deterrence, penal sanctions, and retaliation to ensure that free people can live together in harmony; civil law employs deterrence and education to redress wrongs. Neither system can replace the other. Civil law cannot properly defend human dignity and criminal law cannot by itself protect this value in the case of women incest survivors. The two must work in concert to properly protect this social value.

Human dignity is a social value that should receive protection from both criminal and civil law. We now explore the relevance, scope, and components of human dignity in the case of women survivors of childhood incest

D.1. What is Human Dignity?

Human dignity is recognized in Israel as an essential judicial right. Since the enactment of the Basic Law: Human Dignity and Liberty human dignity is a constitutional extra-legal right.⁵⁵ The dignity of the incest victim has long been a subject of inquiry for scholars and philosophers.⁵⁶ Despite the fact that human dignity is discussed in traditional

⁵⁵ Barak, A. (1993) 'Human Dignity as a Constitutional Right' *Hapraklit* 41: 271-272 [Hebrew]. See also *Kadisha v. Kastanbaum* CA 294/91, page 512: "The legislation of article 1 of Basic Law: Human Dignity and Liberty brought with it an essential change concerning both the source of the stated basic rights' legality, and concerning the clarification of the source and the legality of the purpose of the mentioned values. Until the legislation of this purpose article, the source of the legality and the purpose mentioned, came from, as stated above, the declaration of independence which expresses the people's vision and beliefs. When Basic Law: Human Dignity and Liberty came into effect, and mostly its' purpose article, these basic rights turned into written writes" (from the writings of Deputy Chief Justice Alon); Alon, M. (1993) 'The Way of Law in Constitution: The Values of a Jewish and Democratic State in light of Basic Law: Human Dignity and Liberty' *Iyunei Mishpat* 17:659 [Hebrew].

⁵⁶ For a historical review of the evolvement of the term "human dignity," see (1970) *Human Dignity: This Century and the Next* 3-65 Gotesky and Laszlo, E. – eds., Gordon and Breach; Feldman, D. (1999) 'Human Dignity as a Legal Value – Part 1' *Public Law* 682; England, I. (2000) 'Human Dignity: From Antiquity to Modern Israel's Constitutional Framework' *Cardozo Law Review* 21:1903; Schachter, O. (1983) 'Human Dignity as a Normative Concept' *American Journal of International Law* 77:849; Paust, J.J. (1984) 'Human Dignity a Constitutional Right: A Junsprudential Based Inquiry into Criteria and Content' *Howard Law Journa* 127:145; (1992) *Human Dignity and American Values* Michael J. Meyer and Parent, William A., eds., Cornell University Press; Pitt- Rivers, J. (1966) 'Honor and Social Status' *Honor and Shame: the Values of Mediterranean Society* 45 Peristiany J.G, ed., Chicago University Press Pitt-Rivers conducted a wide-scale, multi-cultural study of dignity and offers important insights into female dignity. See also: Kamir, O. (2005) *A Question of Dignity: Israeliness and Human Dignity (Society, Gender, Law)* [Hebrew] (later: A Question of Dignity); Kamir, O. (2004) 'At the Crossroads: Israel between Four Terms of Dignity' *Democratic Culture* 9 [Hebrew] (later: At the Crossroads); Kamir, O. (2004) 'A Princess' Will – Her Honor: An Invitation to Israeli Feminism' *Democratic Culture* 10 [Hebrew]; Farush, A. (1997) 'Moral Responsibility, Criminal Responsibility and the Value of Human Dignity: On Developments in Israeli Legislation and Case Law' *Mechkerai Mishpat* 13:87 [Hebrew].

Jewish sources,⁵⁷ there seems to be no common model for what the term implies. Our intention, therefore, is to develop a conceptual model to define human dignity in the case of women survivors of childhood incest. We prefer the approach that sees human dignity as embodying numerous rights, even those not explicitly mentioned in the Basic Law: Human Dignity and Liberty, over the narrow interpretation which claims that the Basic Law relates only to the rights explicitly mentioned in it.

What is the protected value that safeguards the dignity of the female victim of incest? Should the value of human dignity spare women the experience of being treated in a degrading manner?⁵⁸ In other words, are incest and the degradation it causes a violation of the value of human dignity? What exactly is that degrading experience? Does it come from the act itself, is it the result of society's view of the incest survivor as a pitiful person because she was sexually abused as a child, or is it a feeling that results from having been used as an object?⁵⁹

D.2. The Dignity of Women Abused during Childhood

A woman who was abused as a child requires that her dignity be safeguarded through moral treatment and moral behavior. She has special value as a person. In Kantian terms,⁶⁰ as a rational and free being, this woman is priceless, with her value objective and absolute, and not subject to random human will.⁶¹ She is a person, an intelligent being, and part of the natural world, and therefore deserving of respect. According to Kant, the special dignity of human beings serves as a basis for moral claims, e.g. that people be treated as purposes rather than merely as tools.⁶² Kant maintained that we are also obligated to promote the happiness of other people.⁶³ Although the theory of dignity as

⁵⁷ On the interpretation given to the term by Judaism and its importance as a central value in the Jewish world, see: Cohen, H. H. (1994) 'The Values of a Jewish Democratic State: Studies of Basic Law: Human Dignity and Liberty' *Hapraklit – The Fiftieth Anniversary Book* 9 Gavrieli, A. & M. Doitch eds. [Hebrew]; Rakover, N. (1999) *Human Dignity is Greater* William A. *Human Dignity as a Supreme Value* [Hebrew]; Rakover, N. (1978) 'The Protection of Human Dignity' *A Series of Studies and Summaries of Jewish Law* [Hebrew]; (1999)

⁵⁸ Many scholars, both in law and academics, believe that the term "human dignity" is essentially a demand for treatment that is not humiliating. See Stetman, D. (2001) 'Two Terms of Dignity' *Iyunei Mishpat* 24:541 [Hebrew]. Stetman presents the view that human dignity is generally understood as the desire to be treated in a fashion that is not humiliating. This is in large part based on the understanding that people are insulted by acts they perceive as humiliating. Stetman describes this as a "permanent phenomenon of the reality of human psychology." See page 562.

⁵⁹ See Kamir, O. (2005) '“There is Another Sex – Bring it Here”: The Crime of Rape between Honor and Human Equality and Dignity and a Suggestion for New Legislation in the Spirit of the Human Dignity Value' *Mishpat Vemimshal* 7:669 [Hebrew]. Kamir argues that rape impinges upon the value of human dignity. The victim is treated as being less than human and an object to be brutalized.

⁶⁰ This is according to Kant's Ethics, which are based upon the categorical imperative telling us what to do, irrespective of our desires or coincidental goals. Kant's doctrine is a source of inspiration for claims concerning human dignity.

⁶¹ Kant, E. (1785) *Grundlegung zur Metaphysik der Sitten* 106-107 [German].

⁶² According to the second rule found in *Grundlegung zur Metaphysik der Sitten*, page 95. This rule was applied in the German constitutional court, which stated that, *inter alia*, 'human dignity' means that a person is not merely a method. See Kommers, D.P. (1989) *The Constitutional Jurisprudence of the Federal Republic of Germany* 306.

⁶³ Kant, *Id.*, at 96-99.

moral treatment has received its fair share of criticism, Kantian terms shed light on the protected value of the dignity of female incest victims. Protection of human dignity, which includes the definition of dignity as moral treatment, extends to the protection of the incest victim because of the immoral treatment she received at the hands of her father when she was a girl. Sexual abuse, indecent assault, and sodomy are all types of immoral behavior which rob the girl of the dignified treatment she deserves. A man who sexually abuses his daughter treats her as a tool with only external and coincidental value, and ignores his daughter's independent and irreplaceable internal value. His daughter has dignity, and is part of the human community, "the moral community."⁶⁴ Recognition of the value of human dignity qua moral attitude will allow us to protect the social value via the ban on incest – itself based upon the desire to shield the woman from harm and to appreciate her as a rational, intelligent, valuable, and free woman, rather than as merely a rape victim or a minor who should be compensated only for the physical and emotional damage caused her.

When the dignity of the incest victim is compromised, she is degraded, humiliated, and devalued both in her own eyes and in those of others. From this definition of dignity, we conclude that the state must protect its citizens from those acts which cause humiliation⁶⁵ or emotional damage.⁶⁶ The principle that human dignity means the lack of humiliation is rooted in the recognition that humiliation in and of itself is a type of damage, one which does not necessarily entail an injury to the victim's autonomy or body.⁶⁷ Humiliation creates a sense of social exclusion. Incestuous acts humiliate the victim and send her the message that she does not belong and is not worthy of belonging to her family, when belonging is essential to her self-esteem.⁶⁸

⁶⁴ See Reichman, A. (2005) 'Human Dignity Fills the World: The Right to Human Dignity as Membership in the Moral Community' *Mishpat Vemimshal* 7:472, 475 [Hebrew]. Reichman maintains that the term 'human dignity' expresses membership in the human community, which Reichman dubs the "moral community." Reichman says that each member of the community has the right to treatment which reflects a certain relationship and role and which allows for interpersonal communication (page 475). In the case of the sexual abuse of children, the victim is entitled to treatment suitable for the relationship between parents and children. Incest expresses a lack of respect both to the victim and to the institution of membership in the community.

⁶⁵ The court often associates injury to dignity with degradation. See, for example, Justice Dorner's decision in *Miller v. Minister of Defense* HCJ 4541/94, where she writes: "It is unarguable that the point of the basic law is to protect the mother from degradation. Degradation of a human injures his dignity. There is no reasonable way to interpret the right to dignity, as mentioned in the basic law, so that a person's degradation injures his dignity" (page 133).

⁶⁶ Some argue that the interpretation of the term dignity as meaning treatment that is not degrading creates a bond between injury to dignity and emotional injury, on the grounds that an injury to dignity evokes emotions such as humiliation, which is an injury to self-dignity. See Statman, footnote 66, at 584.

⁶⁷ This thesis was expanded upon by scholars, philosophers, and even jurists. See Reichman, footnote 73, at 479, and Margalti, A. (1996) *The Decent Society* 28-29, 52. Margalti examines the term humiliation from an objective perspective, in contrast with the subjective perspective found in Statman.

⁶⁸ See the Leary & Downs' psychological study of reports of rape victims, which found that humiliation affected self-esteem value and engendered a feeling of social exclusion: Leary, M.R. & D.L. Downs (1995) 'Interpersonal Functions of the Self-Esteem Motive – The Self Esteem as a Sociometer' *Efficacy, Agency and Self Esteem* Kernis, M.H., ed. New York, 123.

Humiliation creates a feeling of helplessness for the victim, who is dependant upon her father in her day-to-day life, and relies on him to guide her in her personal development. Her inability to control her life and her dependence upon her father and his every whim are a source of humiliation.⁶⁹ Defining human dignity as the lack of humiliation provides another dimension for assessing the damage incest causes, because it ties the incest victim's humiliation, degradation, and pain to the term "human dignity." The dehumanization typical of incest is proof positive of the need for a ban on incest.

Although some doubt the merits of the definition of dignity as being treated in a manner that does not involve humiliation,⁷⁰ this definition is germane with regard to women who were sexually abused as children, for several reasons:

- By its very nature, incest involves humiliation.
- Adopting this definition of dignity will lead to a broader-based mechanism for the protection of women.
- These women underwent an experience which was humiliating both objectively and subjectively.
- The humiliation they experienced was rational and therefore should be protected.⁷¹

Recognizing the connection between dignity and the absence of humiliation focuses the discussion on the victim, which is both natural and appropriate when dealing with incest cases, and especially cases brought by women who were abused as children.⁷² Dignity is a protected value, and a person who is humiliated loses all sense of dignity. The trauma of incest can be so humiliating that incest victims can feel that their lives have become meaningless.

Human dignity, also referred to as 'unique dignity,' is a basic component of what we term 'personal dignity.' A woman's dignity is a basic value, guaranteed in the First Article of the 1948 Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and in rights."⁷³ Its purpose is to safeguard human dignity and to set minimal acceptable standards for human behavior. A woman who was abused as a child deserves to have her dignity protected, for dignity is a natural human value essential to every woman. Any injury to the woman is an injury to her human dignity and therefore to society in general.

⁶⁹ See Silver, M., Conte, R., Miceli, M. & I. Poggi (1986) 'Humiliation: Feeling, Social Control and the Construction of Identity' *Journal for the Theory of Social Behavior* 16:269. The authors discuss the helplessness and humiliation of the prisoners in the Nazi extermination camps. I see a parallel between these prisoners and the helplessness and humiliation of incest victims.

⁷⁰ See Reichman, footnote 72, at 469, 479-492.

⁷¹ See Reichman's criticism, footnote 72, at 489. Reichman maintains that there are situations in which the feeling of humiliation is not rational, such as in the case of xenophobia. I believe that the humiliation felt by the incest victim is always rational.

⁷² On the criticism of humiliation as focusing on the victim, see Reichman, footnote 72, at 484.

⁷³ The preamble to the Universal Declaration of Human Rights says: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace."

Those who view women's dignity as human dignity see incest as a threat to the fundamental quality of being human, which is protected by human dignity. Incest diminishes, degrades, and dehumanizes the victim by turning an autonomous person into a sexual object, subject to her father's aggression. Incest denies the victim the basic rights that are part of being human, which include autonomy of her body and freedom from sexual harassment. In Kantian terms, with incest the father does not see his daughter as a human being in and of herself but as a tool for the fulfillment of his own needs. This is akin to the "targeted killing" of a girl's/teenager's/woman's human dignity.

Since our primary concern is the adult female incest victim and since most acts of incest are committed by fathers upon their daughters, we can not ignore the fact that two groups of people are involved, women and men. Our effort to safeguard the female incest victim's dignity must acknowledge that women are people with a unique gender status and unique value.

Incest robs the victim of her humanity, her dignity, her self-confidence, her liberty, and any sense of privacy. It humiliates, shames, and objectifies her⁷⁴ by treating her as a sexual object to be used at will, as if she were a body with no soul.

D.3. Dignity and Personal Autonomy

More than once, the Supreme Court has expressed its opinion on the connection between human dignity and autonomy. Former Chief Justice Barak ruled that: "Human dignity is expressed in the individual's freedom of choice, his ability to develop his personality and determine his fate,"⁷⁵ and elsewhere, "at the core of this concept [human dignity] stands the recognition that man is an autonomous being, who develops his body and soul according to his will within the social framework he is tied to and dependant upon."⁷⁶

How can we understand the connection between human dignity and autonomy as regards f women who were abused as children? Etymologically speaking, "autonomy" is composed of two Greek words: auto (self) and nymus (rule or law). Following this, the original meaning of the term is the right to create the rules that apply to oneself,⁷⁷ what we would refer to today as personal autonomy. In accordance with the modern definition of autonomy, the female incest victim is a spiritual being who has the freedom to develop herself.⁷⁸ Her dignity comes from her ability to lead an autonomous life; when something impinges on her personal autonomy, it impinges on her ability to fulfill herself, to develop into the person she wishes to be.

⁷⁴ There is a certain overlap between the different objectives of dignity, e.g. human dignity aims to protect a person from degradation or immoral treatment. This said, every interpretation of dignity holds in the case of adult survivors of childhood incest.

⁷⁵ Barak, A. (1994) *Interpretation and Law* 3, at 429 [Hebrew].

⁷⁶ The Vichselbaum case, footnote 74, at 827.

⁷⁷ (1949) *Hebrew Encyclopedia* 1:79 [Hebrew]; (1989) *The Oxford English Dictionary* 1:493 2d edition; Lapidot, R. (1992) 'Autonomy' *Mishpat Vemimshal* 1:37 49 [Hebrew].

⁷⁸ This is the source of the view that the autonomy of individual desire stands at the foundation of human dignity . See Cohen, footnote 64, at 38.

A precise definition of what autonomy means in incest cases helps us to better understand the injury to the victim's personal autonomy⁷⁹ and to find the appropriate means to insure her autonomy. The incest victim's autonomy is compromised when her privacy is, and the lack of privacy in itself compromises her dignity.⁸⁰ No one asks an incest victim if she wants to have sexual contact with her father; on the contrary, her father forces himself upon her and she is completely unable to object. This takes away from her ability to be free to shape her life, to be in control, and to take the path she wishes. She is unable to be an equal partner in the moral/civil community, which implies that her right to human dignity has been compromised.⁸¹

While former Chief Justice Barak and other justices argue that autonomy derives from human dignity, in Kant's opinion dignity derives from autonomy. In the case of adult victims of childhood incest, autonomy and dignity are inextricably linked: a woman's dignity requires that her freedom not be compromised, and a woman's personal autonomy is dependant on her dignity not being compromised through damage to her free will. The question of whether dignity or autonomy came first is irrelevant, much like the question of the chicken and the egg. Society must protect both through the ban on incest.

D.4. Dignity as a Constitutional Right

As previously mentioned, since the enactment of Basic Law: Human Dignity and Liberty the normative status of human dignity in Israel has changed to become a constitutional right. Article 1 states: "This basic law's purpose is to protect human dignity and liberty, to anchor in a basic law the values of the state of Israel as a Jewish and democratic state."⁸² This influences the understanding of the value of dignity of women who were the victims of childhood incest.

Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation played an instrumental role in the constitutional revolution. In Israel today, human rights and the right to dignity are legal norms at a constitutional level.⁸³ We are particularly interested in the operative meaning of these rights for the dignity of female incest victims and the protected value at the root of the ban on incest.

The Basic Law: Human Dignity and Liberty states that no harm should come to a person's body or dignity, as a person. From this we conclude that female incest victim is deserving of especial protection. The recognition of 'dignity' as a constitutional right

⁷⁹ This way we will not fall into the "hornets' nest" as Professor Ganz defines autonomy, see Ganz, H. (1995) 'The Nahmani Couple's Frozen Fetuses: A Response to Andrei Marmor' *Iyunei Mishpat* 19:453 455, note 7 [In Hebrew]

⁸⁰ Again one can find a substantial overlap between the meanings of dignity in incest cases in the sense that there is injury to autonomy, injury to privacy, which causes degradation- dignity as un-degrading treatment- and wakens in the victim a feeling that she is a subject and not an object- an injury to human dignity.

⁸¹ Reichman, footnote 72, at 504.

⁸² Article 1 of Basic Law: Human Dignity and Liberty, published on March 25, 1992.

⁸³ See Barak, A. (1992) 'The Constitutional Revolution: Protected Essential Rights' *Misphat Vemimshal* 1:9 [Hebrew] (later: The Constitutional Revolution).

raises the concept to a higher level, that of a basic human right. The profound change is not in the content of the right but rather in its scope.⁸⁴

From this point, any injury to the incest victim's dignity had broader legal implications. Incest is a case in point, since this crime humiliates the victim and impinges upon the victim's personal autonomy and free will. The legislature and the court must now ensure proper protection of this social value either by properly defining incest for adult survivors of childhood incest or through other legal means which can protect these individuals. This requires acknowledgement of the protected social value through the ban on incest, which is essentially the need for dignity. Yet another avenue is to have the court take action to prevent any injury to a woman or her right to dignity, and by so doing to prevent any injury to her.

By acknowledging a person's constitutional right to dignity, the system will recognize the incest survivor's right to sue her father as well as the authority which did not protect her as a child and, in some cases, is not willing to protect her as an adult.⁸⁵ The female incest victim's right to dignity as a constitutional right means that the right to dignity exists in rem. A woman's right to dignity does not limit her to suing her abusive father, but also gives her the option of suing the society which for years failed to protect her.⁸⁶ This is the root of the argument regarding the constitutional damage to the incest victim and the constitutional damages required to make amends. A woman who was abused as a child can sue for the injury to her dignity and autonomy, regardless of any physical or emotional injuries she incurred as a result of the acts of incest.⁸⁷ She can also claim that since a constitutional right is involved, the state must take steps to guarantee that right by providing the appropriate mechanisms to compensate her for her injuries.

In 1992, the Knesset acknowledged a value central to Israeli society and Israeli law, namely that of human dignity. Here we are less concerned with how this value came into being and the social and legal arguments it raised⁸⁸ than with the fact that in 1992 human dignity became a central social value in the Israeli legal system.⁸⁹ Its specifics are dynamic and its details are still under discussion. As Chief Justice Barak wrote:

“The content of ‘human dignity’ will be determined by the views of the enlightened public in Israel in light of Basic Law: Human Dignity and Liberty. At the heart of this term stands the recognition that man is a free being, who develops his body and spirit according to his own will, and this

⁸⁴ See *Id.*, at 12-13.

⁸⁵ This is reminiscent of Feinberg's claim: “To respect a person then, or to think of him as possessed of human dignity, simply is to think of him as a potential maker of claims.” See Feinberg, J. (1980) ‘The Nature and Value of Rights’ *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* 143, 151.

⁸⁶ On “human dignity” as a right in rem, see Reichman, footnote 72, at 501.

⁸⁷ Support for my theory can be found in the injury to autonomy in cases of rape. See Dan-Cohen, M. (2000) ‘Basic Values and the Victim's State of Mind’ *California Law Review* 88:759 764-765.

⁸⁸ Rubenstein, A. & B. Medina (1997) *The Constitutional Law of the State of Israel* B 911 [Hebrew]; Karp, Y. (1993) ‘Basic Law: Human Dignity and Liberty : A Biography of Power Struggles’ *Misphat Vemimshal* 1:323 [Hebrew].

⁸⁹ The title of the law, “Basic Law: Human Dignity and Liberty ” can be seen to mirror the values of Israeli society, including independence, freedom, and an anti-Diaspora bent. The law expresses a sense of power, pride, self-dignity and self-confidence. See “What Kind of Harassment,” footnote 32, at 317, 374.

in the social framework he is tied to and dependant upon. Human dignity extends itself upon a wide spectrum of human aspects.”⁹⁰

Incest is an affront to liberty and human dignity; to a girl’s spiritual, emotional, and physical liberty; to her self-dignity and social dignity. Incest robs the girl of her free will, her personal autonomy, and her control over her body and life. She is helpless and dependant upon the good will of the abuser. When she her father treats her as a sexual or inanimate object rather than a person, she is humiliated and degraded. The invasion of her most private space is injurious to her self-esteem and has a long-term impact on her enjoyment of life and sense of being at peace.⁹¹

The victim of these injuries should be compensated. We now turn to the question of what damages the victim should be awarded in a criminal trial and whether they are sufficient. Section E argues that criminal damages are not in fact sufficient and should be complemented by constitutional means, which will be the subject of our final section.

E. Compensation to the Incest Victim via the Criminal Process

The incest victim’s right to compensation in the criminal framework derives in part from the constitutional right currently protected by Basic Law: Human Dignity and Liberty. As mentioned above, Article Four of the Basic Law establishes that every person is entitled to the protection of life, body, and dignity. This article establishes the victim’s right to receive damages from the defendant, whether in full or in part. The Basic Law recognizes that the victim is entitled to have the damage redressed, and for the court to sentence the person who caused the damage to cover the costs as an integral part of punishment. This type of victim compensation has great importance, for two reasons: (a) it accords recognition to the victims’ status, as part of the victims’ rights movement, and (b) civil claims for criminal acts are quite rare because of the statute of limitations, which, as we have argued elsewhere, is inappropriate in the case of domestic sexual crimes.

The victim has two main avenues for winning damages: civil suits and criminal suits. Until recently, although the law allows for the criminal court to award financial compensation, this was a rare occurrence, since it was widely assumed that this was the job of the civil court. Under Article 77(a) of the Penal Act, the court may require the defendant to pay the victim up to NIS 228,000 “to compensate for the damage or the suffering caused to him.”

This gives rise to the question of whether the victim should be compensated in the penal framework, or whether this should be left in the hands of a civil procedure which the victim may initiate. This question is at the heart of the conflict between the retaliation approach and the reparative justice approach, sometimes referred to restorative justice or restitutive justice.⁹² According to the retaliation theory, the purpose of criminal law is to do justice by imposing a punishment that reflects the severity of the crime. Reparative

⁹⁰ Justice Barak in the Vichselbaum case, footnote 74, at 827.

⁹¹ On the similarity between incest and sexual harassment, see “What Kind of Harassment,” footnote 32, at 317, 375-376.

⁹² Galaway, B. & J. Hudson (1996) *Restorative Justice: International Perspectives* New York.

justice is based on the idea that the crime victim has rights and the state does not have the exclusive right to determine what happens to the criminal: the victims and their needs must be taken into consideration. This approach was very popular in the late twentieth century and was espoused by those in favor of victims' rights.

Judicial decisions often state that damages express the injury to the specific victim, rather than abstract damage to society or the risk of harm to other potential victims.⁹³ Many see damages as an inseparable part of the criminal trial. Ashworth maintains: "It is appropriate that it not only denounce a crime but also vindicate the victim's right to be compensated."⁹⁴ Damages are the court's way of evaluating, if only in a general way, the damage incurred by specific victim and can enable the victim both to speak out and to receive compensation.⁹⁵

Because of the unusual nature of incest, and specifically the fact that the victim often waits before reporting the case to the authorities or submitting a complaint, the question of compensation is of crucial importance for victims of incest. Often, civil law will disallow damages because the limitation period for civil claims has lapsed, and the criminal process provides the victim's sole opportunity to receive compensation. We note that Article 77 of the Penal Act states that "Assertion of damages will be according to the value of the damage or the suffering caused..." When serious crimes are involved – with incest as a case in point – the damage and suffering caused the victim will typically be far greater than the damages ceiling set in Article 77(a). Nonetheless, criminal damages have special import for the incest victim, thanks to the fact that society and the prosecution stand behind the victim in the criminal process.

Some view the payment of damages to the incest victim as a means of contributing to the rehabilitation of the criminal and deterring future crime.⁹⁶ In the Assaf case, Justice Heshin even mentioned that the damages contain "an element of cleansing for the criminal." This is especially true when the family is involved. Victim compensation can be seen as an elegant compromise: the victims receive at least symbolic damages for the damage caused them; the state, which runs the process, demonstrates its awareness of the suffering on the part of the victims; the criminals receive punishment from the criminal court, which expresses the public aspect of the crime.

Although the damages from a civil case are often higher than those in a criminal trial, the payments established in Article 77 of the law are considerable and it is possible the victim will be satisfied with the award and not file a civil suit. The victim will then be

⁹³ The State of Israel v. Michaeli CC 1163/00. In this case, the defendant was convicted of committing sexual acts upon a minor. During sentencing, Judge Bar-Ofir emphasized both the injury to the victim and the fact that the defendant posed a danger to other children who might come into contact with him.

⁹⁴ Ashworth, A. (1986) 'Punishment and Compensation: Victims Offenders and the State' *Oxford Journal of Legal Studies* 6:86-109.

⁹⁵ Sebba, L. (1997) 'Will the 'Victim Revolution' Trigger a Reorientation of the Criminal Justice System' *Israel Law Review* 31:379-413.

⁹⁶ Aliram, A. (2002) 'Crime Victim Compensation: A Suggestion for a New Model' *Mechkarei Mispbat* 19:205-209 [Hebrew].

spared the high cost of the civil trial and the emotional hardship involved in facing the criminal again in the courtroom, painful in an incest case, even when the plaintiff is a grown woman. Some maintain that the most important purpose of the damages is to help the victims since today damages are meant to be commensurate with the harm caused. According to this line of reasoning, if the primary purpose had been to re-educate the criminals – to cause them to understand what they had done and to feel remorseful – it would be appropriate for damages to reflect the criminals' financial ability and the type of offense committed. This type of global settlement would obviate the need for an in-depth discussion of the actual damage caused, even if the sum allocated would not be high enough to avoid a civil suit.⁹⁷

In the Assaf case, the Supreme Court discussed the nature of damages. Following a dispute between neighbors, Assaf poured boiling water down her neighbor's back, burning him so badly that he required medical attention. The court did not convict Assaf but sentenced her to community service and ordered her to pay damages to the victim. This decision is a milestone in the Supreme Court's attitude towards the victim's role in the criminal procedure: All three judges who heard the case were aware of the new status of the victim. Justice Naor, who wrote the minority opinion, argued that criminal law should take the victim's rights into account, which led her to conclude that damages are penal and cannot be imposed without a conviction.⁹⁸ In the majority opinion, Justices Heshin and Revlin, said that it was as if civil D.N.A. had been planted in the Penal Act, but that damages could be imposed without a formal conviction, as long as the court determined that the defendant had committed the crime.

Obligating the defendant to pay damages to the victim in the criminal system does not free the defendant from civil liability, and of course the criminal process may also be the basis for a civil damages suit. For example, the Family Court demanded that a man convicted of committing indecent acts upon his minor daughter pay over NIS 130,000 for the pain and suffering he caused. The court was also willing to recognize penal damages.⁹⁹

E.1. The Status of Criminal Compensation in Domestic Sexual Offenses

As we have seen, incest is an unusual type of crime, if only because of the identity of the criminal and the victim, and the traditional model – which distinguishes between civil and criminal legal law, empowering one to punish violators and the other to impose damages – is less than ideal in the case of domestic sexual offenses. The matter of compensation of the incest victim relates to both criminal and civil law. In general terms, the two fields have similar and often shared purposes, as seen in the case of trespassing law. Not only does the civil system try to treat the specific injured individual, but it strives to maximize financial efficiency, to divert behavior, to tend to the public peace and to create public and personal deterrence from wrongful deeds. So, for example, force and exploitation as reasons for cancelling contracts were intended also to direct behavior and

⁹⁷ L.P. Fletcher (1984) 'Restitution in the Criminal Process Procedures for Fixing the Offender's Liability' *Yale Law Journal* 93:505-508.

⁹⁸ The Assaf case, footnote 109, at 439.

⁹⁹ Plonit v. Almoni FC (Tel-Aviv) 60811/00

to mark wrongful moral behavior. The criminal law also touches on both the private and the public realms. Attention is not given only to the public and the need to protect it from crime but also to the individual- the felon as an individual on one hand, who should be deterred, retaliated and rehabilitated, and the victim on the other hand, who should be put back where he was before the wrongful deed as far as that is possible financially or alternatively to rehabilitate his life and ease his suffering.

Therefore, the institution of damages for incest victims is both in civil and in criminal law together since this way it seemingly achieves all its goals- punishment, deterrence, and rehabilitation and at the same time it contributes to the efficiency of the legal system. At the same time, as we will later see, damages to incest victims often do not grant the appropriate protection and there is a need for governmental financial backup, which can be received in a criminal procedure, as is accepted in many countries, of course while observing the damages' limits and preventing double damages or damages that are too high.

It is important nonetheless to understand the value of criminal damages have for the incest victim, due to the fact that civil suits for criminal misdeeds are quite rare, because the civil statute of limitations is inappropriate for domestic sexual offenses. The civil statute of limitations is discussed below; here we simply wish to emphasize that the rarity of civil claims for domestic sexual abuse one reasons for Justice Heshin's recommendation that the courts make more frequent use of Article 77 of the Penal Act ¹⁰⁰

With regard to the relationship between the statute of limitations on sexual offenses and the damages paid the victim, we would argue that when the defendants invoke the statute of limitations, the victims will not have the opportunity have their voice heard in court; will receive no public recognition of their suffering and pain or the damage caused them; will have no mechanism to ease their sense of guilt and shame; and will be unable to regain control of their lives.

E.2. Civil Compensation in General and in Domestic Sexual Offenses: Who Pays?

The Israeli legal system created a hybrid form of victim compensation. Because the court does not hear evidence and imposes global damages, its discussion does not focus on the specifics of the criminal, the victim, and the damage incurred. Although the criminal directly compensates the victim, the criminal's financial status is not taken into consideration. This method has no practical value in cases of domestic sexual crime (or, for that matter, in most sexual-offense cases), because even if the criminal is charged and convicted, he often does not have the means required to pay damages, and payment to the victim may come at the expense of the entire family. In addition, the long prison sentence typical of domestic-violence cases further limits the criminal's ability to compensate the victim. In most other countries, the state pays the damages itself or the state will pay part and the criminal part. We will now turn to the question of whether the arrangement used in Israel is suited for incest victims, or whether another arrangement would be preferable.

¹⁰⁰ The Assaf case, footnote 109, at 476.

As mentioned above, Israeli criminal law calls for the criminal to pay the damages directly. This model may not be appropriate in incest cases, since if the criminal cannot pay the victim, the victim does not receive damages, leaving her with a deep sense of disappointment in the justice system, alongside the frustration and helplessness wrought by the offense itself. In a parallel model, damages are received directly from the state and are completely independent of the criminal procedure, paid even if the offender was not caught. This model bears similarities to that used for individuals who were injured by acts of terrorism, under the 1970 Payment for Victims of Terrorism Act. In one scenario the state carries responsibility for the payments; in another all citizens will be obligated to carry insurance, with this insurance similar to health insurance or insurance for labor-related injuries.¹⁰¹

In countries which offer both this arrangement and one by which the victim can receive compensation from the offender during the criminal procedure,¹⁰² the victim can only be reimbursed by one and compensation cannot exceed the extent the damage incurred. In some countries, after the court has returned a guilty verdict, the state can ask the criminal for damages in the amount of the sum it paid to the victim.¹⁰³ This arrangement received the endorsement of the European Union committee which dealt with state compensation for victims of violent crimes.¹⁰⁴ The recommendation was adopted in 1983 and all countries in the union were asked to sign it. The most important advantage of this arrangement is that it addresses the victim's sense of injustice and disappointment in the state's law-enforcement system, emotions which are especially common among childhood-incest victims. Some proponents of the arrangement draw an analogy to contract law and claim that the state has an obligation to protect its citizens from crime – and this is one purpose of tax money – and if the state fails in this mission, the citizen has the right to state compensation. According to this theory, the individuals sign a social contract and agree to refrain from enforcing the law themselves, and instead rely on the state to provide for their security and defense. An injury constitutes a breach of contract and the individual therefore has a claim against the state.¹⁰⁵

Another justification relates to the victim's constitutional right to be compensated by the state, as expressed in the Basic Law: Human Dignity and Liberty. The very fact that this law exists is recognition of that right. Constitutional recognition is the product of basic assumptions and the central values upon which our form of government is based. As a democratic state, Israel is obligated to provide proper protection to all its citizens living inside its borders. When a citizen is injured by a crime, this is evidence that the state failed to meet its obligation. One can also argue that this model might encourage victims to report acts of violence, in order to receive damages. If more complaints are submitted

¹⁰¹ For an overview of this subject, see the Ministry of Legal Affairs Position Paper 2806 (January 1987). See also Miller, A.L. (1981) 'A Suggestion to Ensure Damages for those Injured by Crime' *Misphatim* 11:468 [Hebrew].

¹⁰² See Eliram, footnote 108, at 210, including the author's footnotes.

¹⁰³ *Id.*

¹⁰⁴ Willis, B.L. (1985) 'State Compensation of Victims of Violent Crimes: The Council of Europe Convention of 1983' *Virginia Journal of International Law* 25:211. The appendix includes the full version of the European Convention.

¹⁰⁵ Eliram, footnote 108, at.210.

and higher sentences are imposed, the state will find it easier to fulfill its constitutional obligation and protect other minors from incest, thus putting an end to this crime and the myriad problems it brings in its wake.

Although it is clear that some may abuse this system for financial gain, we believe that the opportunity to encourage victims to report domestic sexual offenses outweighs this risk. Domestic sexual offenses are typically met with silence on the part of the victim, the family, and the immediate environment. Instituting a compensation model could help break the code of silence and make it less difficult for victims to report crimes. It will be possible to institute certain procedural means to minimize cases of impersonation, deception and fraud, for example by making the damages dependent upon full cooperation between the victim and the police.

The main advantage of this arrangement, which receives its funding from the state treasury, is that every victim who fulfills the requirements will receive compensation, regardless of whether the criminal has been apprehended, the prosecution has proved its case, or the statute of limitation is still in effect. We recognize that the direct-compensation model is less than perfect in the case of victims of domestic sexual offenses. For example, because the government is paying damages, the courts can be more lenient than they would otherwise be. That said, some would claim that one factor that motivates the incest victim to submit a complaint to the authorities years after the events is the desire to be paid back by the person responsible. From the victim's point of view, then, although the governmental model offers almost automatic compensation, payment from the government is less satisfying than payment from the abuser.

It is doubtful whether this approach is suited to cases of domestic sexual abuse, since the money paid by the abuser, usually the father, may come at the expense of other family members. This rationale does not necessarily hold for adults, since the family unit does not require protection, but there are instances in which an elderly father will ask family members to help him pay the damages or for financial support. This is not in the interest of the victim, who already feels responsible for dissolving the family unit.

There are other models in which damages are not received directly from the criminal but rather from a general account funded by the criminals (the fines being commensurate with the severity of their crime, the damage they caused, and their personal finances) or from mandatory crime insurance.

In the United States, for example, the Mandatory Victim Restitution Act (Article A 3663) requires that victims of certain crimes be compensated, such as people who suffered bodily harm during a violent crime. The Victims of Crime Act of 1984¹⁰⁶ establishes a fund for the compensation of crime victims, which receives most of its money from fines imposed on criminals and from their ill-gotten profits. The goal of the fund is to finance state compensation programs across the United States, provided the programs fulfill certain requirements, e.g. they not discriminate between victims and provide compensation for both federal and state crimes. Crucial to our concern is the fact that

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some money is earmarked for minor victims, victims of sexual assault, and victims of domestic violence.

Some think that this arrangement is preferable to the social-security one: Since the criminals know that their money is going to compensate their victims, it achieves both educational and rehabilitative goals. The obvious disadvantage of this model, as compared to the one in which the victim receives compensation from the criminal as part of the criminal suit, is that the psychological value to the incest victim and to the criminal's re-education are presumably higher when compensation is personal rather than through a general fund. In addition, many incest victims want to be paid by the individual who hurt them, an act which restores their sense of security and control over their lives; compensation through a general fund does not bestow the same emotional satisfaction.

Another possibility is to require people to purchase insurance policies against criminal damages to body or property. This would seem to offer a logical vehicle to insure that victims receive damages, but this model is not well-suited to victims of incest. This arrangement would be irrelevant the largest group of incest victims, namely minors, because of their age, their financial dependence, and their emotional state. If people are required to purchase an insurance policy, and parents buy the policies for their children, the question of whether parents harm their children becomes irrelevant. Legal scholars have expressed little enthusiasm for this option, and it seems to be especially problematic from the practical and financial points of view.¹⁰⁷

None of the models provides a sufficient solution for the domestic sexual abuse of minors. Our discussion indicates that the only realistic option is a combination of the direct model and payments from the state treasury [below: the combined model]. The victim will initially sue the abuser for damages in either the criminal or civil system; should this effort fail (e.g. because the statute of limitations has expired or because the victim has difficulty receiving the compensation awarded by the court), the state treasury will step in. This is the only model suited to incest cases. It provides maximal protection for the victim; offers compensation to those victims who did not succeed in receiving damages from those abused them, whether because of the statute of limitations or another reason; the damages are paid by the state treasury, with its relatively deep pockets; and the fund is supported by taxes, which many scholars consider to be the citizens' general social contract with the state.¹⁰⁸ Another advantage of the national system is that it fosters a paternalistic approach towards the victim, which the victim requires because of the severity of the crime. Even when victims reach adulthood, they benefit from special care and even "motherly/fatherly" treatment from the state, to compensate for their limited ability to help themselves.

There are other reasons to prefer the combined model. The general public demonstrates sensitivity and compassion towards the victims of crime and specifically towards incest victims. This stems both from the growing awareness of the phenomenon (as discussed

¹⁰⁷ Miller, footnote 115, at 475. The author proposes and rejects the idea that each person should be obligated to purchase an insurance policy for damages to body or property caused by crime.

¹⁰⁸ *Id.*, at 478; Mansfield, M. (1971) 'Justice for the Victims of Crime' *Houston Law Review* 9:75.

above) and because the crime causes both physical and emotional harm. The public feels a sense of responsibility towards the incest victim, and therefore will quite likely favor the adoption of programs that grant incest victims proper compensation. The same is true in the United States, where the Uniform Victims of Crime Act of 1992 calls for damages to be paid both by the criminal the state. The victim can choose whether to demand damages from the criminal or the state compensation fund. This choice bolsters her status in the criminal procedure, as presented above, and provides additional affirmation that incest and the dynamics typical of the abusive home are *sui generis* .

Both the first and second models exist in England today, with the form of compensation left up to the victim. Until the establishment of the extra-legal Criminal Injuries Compensation Scheme in 1964, England had no framework for compensating crime victims. In 1973 criminal law was altered to include the possibility of the victim being compensated by the criminal, with the victim having the right to submit a request for damages to the judge.¹⁰⁹ The system in Israel differs in that it accords no official status to the victim, beyond the instructions in the Crime Victim Rights Act.. According to English law, if a convicted felon is unable to pay both damages and a fine, the court should demand damages. Israeli law is similar, as seen in Article 77(c): “A sum which was paid or collected on account of a fine which comes with mandatory damages, will first be used for damages.”¹¹⁰ In 1988, Israel enacted the Criminal Justice Act, providing the statutory basis for damages from the state treasury; in 1995, it was replaced by the Criminal Injuries Compensation Act.¹¹¹

Since domestic sexual offenses are seen as violent offenses against a person’s body, one’s first instinct is to help the incest victim cope with her physical and emotional injuries and to provide her with help during the criminal procedure, rather than expecting her to demand civil damages on her own. This is true even though as a rule the desire to receive benefits is central to the classic case for damages, for at least three reasons. First, it would be rare for a crime against property to have the same repercussions as a crime against a human body, as in the case of incest. Second, crimes against property can often be resolved when the property is returned to its rightful owners, and in the end no one is injured. Such a resolution is inconceivable in the case of domestic sexual offenses. Third, it is far more common to purchase insurance against harm to property than against bodily harm caused by crime, and especially harm caused by a person on whom the minor is dependent, such as in the case of incest. Article 77 of the Penal Act. is not limited to a certain type of offense or certain types of damages, and it therefore it can be used to compensate incest victims for the physical and emotional damages they incurred.

State compensation arrangements are able to compensate victims only when the eligible offences are clearly defined. Unlike other offences, here there is no risk that the victim

¹⁰⁹ Powers of Criminal Courts Act, 1973 Section 35-38; Eliram, footnote 109, at 216.

¹¹⁰ Article 77(c) of the Penal Act, 1977, Article 35(4) of the English law.

¹¹¹ For an exhaustive review of the development of English law on this topic, see: Duff, P. (1998) ‘The Measure of Criminal Injuries Compensation: Political Pragmatism or Dog's Dinner?’ *Oxford Journal of Legal Studies* 18:103. See also: Spencer, J. R. (1997) ‘Improving the Position of the Victim in English Criminal Procedure’ *Israel Law Review* 31:286.

will defraud the public system or receive compensation from an insurance policy or other fund One might claim, in fact, that incest is the crime most deserving of victim compensation.

Additional justification for compensation for domestic sexual offences can be found in American law, which provides compensation for physical and emotional damage but not for property damage. Under the terms of the Mandatory Victims Restitution Act, the federal government will only subsidize those state compensation programs which compensate victims for physical damage but not damage to property.¹¹²

In cases of domestic sexual offenses, the injury is especially severe and minor victims often face a hopeless situation. These individuals should receive some form of compensation, whether from the criminal or the state, for the bodily, emotional, and/or physical injury caused by this crime.

E.3. Setting the Amount of Compensation

During the sentencing phase, the prosecution may ask the court to impose damages on top of any other punishment the defendant was given. The court may also initiate payment of damages, but once it has done this, it may not demand that the defendant sit in prison instead of paying damages. One reason for this, as stated in the rulings of the Supreme Court, is that the payment is meant for the victim, who will leave empty-handed if the defendant is sent to prison.¹¹³ In terms of punishment policy, most are agreed that the damages do not constitute further punishment, since they could be enforced in a civil setting as well. For the same reason, they should not be seen as an act of charity the court demands for the victim.

Normally, the amount of damages is a reflection of the damage caused to the victim. Often, however, the victim will not testify before the judge, and so the judge is not always aware of the victim's state of mind and how severe the injury was. It is up to the prosecution to be understand the victim's condition and to ask for damages as part of a plea bargain or during sentencing. The Criminal Procedure Act is somewhat inconsistent: It allows defendants to inform the court of extenuating circumstances¹¹⁴ but does not allow victims to speak before the court.¹¹⁵

In 1995, the Knesset passed an important amendment regarding the "victim report." After the court convicts a person of a sexual offense, it can ask an appointee to "formulate and submit a report on the state of the crime victim... and the damage caused to him as a result of the crime."¹¹⁶ The author of the "victim report" is either a municipal or a state employee, appointed by the Minister of Labor and Social Affairs. While this

¹¹² Art. 3664(a)(2) Mandatory Victims Restitution Act.

¹¹³ Nissim v. The State of Israel CC 435/88.

¹¹⁴ See Kedmi, Y. (1993) *On Criminal Procedure* B 292-295 [Hebrew].

¹¹⁵ This is known in the United States as the Victim Impact Statement. See also Fletcher, G.P. (1995) *With Justice for Some: Victims' Rights in Criminal Trials*. Massachusetts.

¹¹⁶ Article 187 of the Act. This arrangement is for the victims of the sexual offenses mentioned in Chapter 10, Part 5 of the Penal Act and includes the victims of domestic sexual offenses.

person can be ordered by the court to answer questions about the report, the court cannot subpoena the victim.¹¹⁷

According to the Crime Victims Act (2001), the victim has the right to provide the police with a statement of the damages incurred and the right to demand that the prosecutor bring this “victim impact statement” before the court by when sentencing is under discussion.¹¹⁸ For the incest victim, the victim impact statement differs substantially from a “victim report.” The victim impact statement allows the crime victim to tell the court her story from her own point of view, using her own words to express her feelings, describe her pain and suffering, and elaborate on her fears. The victim’s story is not mediated in the victim impact statement, i.e. there is no public employee who processes the story and its implications into professional terms. Secondly, with the victim impact statement, the incest victim is no longer passive, but rather an active participant in the decision-making process. This is especially important in the case the incest victim, who now has an opportunity to take the initiative and deal with the abuser, rather than being subject to the abuser and his every whim. Third, like the victim report, the victim impact statement provides official recognition that the damage wrought on the victim is a legitimate consideration during sentencing, and specifically when sentencing domestic sexual offenders.

Because the victim report is written by a public employee, it offers several advantages. The opinion of an outsider may help the court form a more accurate impression, especially when the victims themselves are not fully aware of the damage done them or have difficulty properly describing their condition. The victim report can also describe the victim’s hopes and expectations with regard to the justice system, the sentence, and society in general, preferences which are not always included in a victim impact statement. Since incest victims are often unable to confront the damages caused them or the suffering that follows in the wake of the abusive relationship, they can be better served by a report written by an outsider.

These statutes give the incest victim a prominent role in the criminal procedure, in contrast to earlier times. They also allow the court to receive detailed information about the damage to the victim, and can eventually ensure that sentences will be just and damage payments commensurate with the crime.

With regard to the question of how to determine the height of the damages, the American federal¹¹⁹ and state courts adopted the Victim Impact Statement as part of the victim’s constitutional right to speak out and have a say in the matter.¹²⁰ The state entitles the

¹¹⁷ Article 191 (a), (b) and (c) of the Criminal Procedure Act [Consolidated Version] 1982.

¹¹⁸ Article 18 of the Crime Victims Act, 2001.

¹¹⁹ Fed. R. Crim. P. 32(c)(3)(E): “*Before imposing sentence, the court must:...if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.*”

¹²⁰ Abramson, S.S. (1985) ‘Redefining Roles: The Victims’ Rights Movement’ *Utah Law Review* 517, 545; Hellerstein, D.R. (1989) ‘The Victim Impact Statement: Reform or Reprisal’ *American Criminal*

victim to express an opinion during sentencing, whether by appending a statement to the sentencing report or by submitting a separate oral or written statement when sentencing us under discussion.¹²¹ The victim describes the nature of the bodily or emotional injury incurred, so that the decision-making party will have that information available. This idea was adopted by many legal systems and today almost all American states have this type of constitutional legislation. Some have ruled that the court must hear the victim's opinion before sentencing.¹²² The English legal system grants the victim the standing to ask the court for a damages injunction. If the court does not agree, it must explain its reasoning.¹²³

In the United States, England, and Israel, victims are allowed to inform the court of the damages they incurred, such that the court can better determine the height of damages. Some claim that this is good for the incest victim and leads to the desired outcome. At the same time, however, analysis of Israeli rulings shows that if the criminal court learns that the discussion of damages will be long and complex, it will often refer the matter to a civil court. This is in keeping with the claim that criminal rules and procedure are not well-suited for a discussion about damages. Even if this is true in most criminal cases, it is possible that it is inappropriate for the criminal court to insist that incest survivors turn to the civil system when their desire is to receive "criminal" damages.

E.4. Civil Procedure in the Criminal System?

According to Article 77(b) of the Penal Act, the amount of damages imposed should be commensurate with the damage incurred, either on the day the crime was committed or on the day of the decision, whichever amount is higher. When the prosecution requests a damages injunction in accordance with Article 77, it generally provides evidence to prove the height of the damages. The discussion of damages often requires several sessions spread out over a long period of time. It has been ruled that the procedure of determining damages in the criminal system should not be allowed to drag on, and if the court thinks the discussion will be more complicated than predicted or will last longer than initially estimated, the court should not set damages under Article 77 and the victim should be sent to the civil court.¹²⁴ Although the court in the Assaf case ruled that these damages should be encouraged,¹²⁵ the damages injunction is intended to provide speedy resolution to the question of damages and to therefore save the time and money involved in a separate civil suit. A long and complicated hearing will place a burden on the criminal system, which – unlike the civil courts – is ill-equipped for discussions about proof of damages.

Law Review 27:391 399; LaFave and Israel (1992) *Criminal Procedure* 1117-1118 2nd edition; Sebba, L. (1996) *Third Parties – Victims and the Criminal Justice System* 15-16, 195-196 Ohio.

¹²¹ (1996) National Center for Victims of Crime, *Victims' Rights Sourcebook: A Compilation and Comparison of Victims' Rights Legislation* 231.

¹²² Ashworth, A. (1993) 'Victim Impact Statements and Sentencing' *Criminal Law Review* 500.

¹²³ Eliram, footnote 109, at 226.

¹²⁴ The State of Israel v. Kleinman CA 69/65.

¹²⁵ See footnote 109 to the Assaf case, at 465, and paragraphs 9, 10, and 40 of Justice Heshin's opinion.

There are compelling reasons to argue that the criminal court is the appropriate venue to award damages in incest cases. Although the process of determining damages in the criminal system can be lengthy and complicated, it spares the victim another confrontation with the criminal in the civil trial. Even if the victim wants to confront the abuser again in civil court, sometimes there is no such option, for example when the statute of limitations has expired. The rationale for damages, such as deterring the criminal from future crime and rehabilitating the victim, far outweighs the disadvantages of criminal damages.

We maintain that the victim should receive damages in the criminal court, and that this is especially important in incest cases. Several guidelines could expedite the setting of damages, e.g. establishing a global sum for incest close to the ceiling set in the Article, despite the risk that global damages will not reflect the harm done, or estimating the damage to each part of the body, similar to what the National Insurance Institute does for determining disability.¹²⁶

This allows us to achieve several goals. The incest victim will not leave the criminal trial she initiated empty handed. In addition, even if the damages awarded fall far short of the maximum damages allowed by law, the addition of other, simple-to-evaluate criteria, such as loss of income and payments earmarked for ongoing psychological care, will be of help to the victim and might even obviate the need for a criminal trial. This is especially true when state institutions ensure that damages are indeed paid.

Now that we have laid the theoretical foundation for granting damages to women survivors of childhood incest as part of the criminal process, we will discuss some practical issues: the types of damages to be paid, the maximal amount of damages, and the civil responsibility of a person sentenced to criminal damages.

Article 77 of the Penal Act does not specify which damages should come under the aegis of criminal law but instead speaks in general terms: "Ruling damages under this article will be according to the value of damage or suffering caused, on the day the crime was committed or on the day damages are decided on..." It is unclear whether the prosecution must bring evidence of the damage caused to the victim, even though the court seems to rule in accordance with tort criteria, which are damage and suffering caused. Article 78 of the Act echoes civil law in certain places, but deviates from it when dealing with the question of what happens when the amount of damages is appealed. In contradistinction to civil law, where damages are based on an evaluation rather than proof of harm to the victim, the Penal Act establishes a special procedure for such an appeal.

¹²⁶ In England, for example, there are official instructions relating to damages to be paid by the criminal. These include tables which list the price for each body part, indicating its value. Miers, D. (1989) 'The Criminal Justice Act 1988 – The Compensation Provisions' *Criminal Law Review* 32, 38. An example of an English ruling which used these tables is R. V. Smith [1998] 2 Cr. App. R. (s) 400. The loss of a front tooth is considered to be worth 1,000 pounds, a broken jaw 1750 pounds, and so on.

The court has ruled that we know that the victims of sexual offenses are damaged emotionally thanks to our “life experience and human intuition.”¹²⁷ In a similar vein, the court has been willing to recognize future emotional damages in sexual-offense cases, again based upon common knowledge. A relevant example is the Ploni case, where the defendant was convicted of performing indecent acts upon his stepdaughter. Here Judge Sokolov ruled that: “In his actions, the defendant caused much damage to the plaintiff, damage which can not yet be fully estimated, and which will almost certainly affect her life in the future too.”¹²⁸ The inclination of the Israeli courts is to choose a global sum which it believes reflects the damage the victim incurred, providing little detail about how the sum was determined.

The situation is different in the United States. Those who ask for state funds must precisely enumerate the expenses that resulted from the incident (medical expenses, loss of income, third-party aid, and so on) and provide receipts for each one. In addition, the American system does not recognize criminal damages for pain and suffering.¹²⁹

The rationale for awarding damages for the pain and suffering of incest victims is the fact that this is the only damage incurred and therefore the only basis for suing for damages. If the victim cannot submit a civil claim because the statute of limitations has elapsed, and if the criminal court will not order damages for pain and suffering, the victim is liable to receive no compensation whatsoever. If the court were to disregard pain and suffering, due to the difficulty in putting a figure on what it is worth, the victim might be damaged even further. It is fortunate that the Knesset recognized these risks and granted the court the power to assess damages for pain and suffering. We now ask: What is the extent of damages for pain and suffering? Do the family members who witnessed the abuse and were too afraid of the abuser to speak out also deserve damages for pain and suffering? The legislature has yet to address these questions, and the time may have come to review the existing arrangement and consider changing it for special cases.

Other difficulties include the fact that there is no objective scale for measuring suffering and the fear of fraudulent complaints. These reasons in no way justify the denial of damages for pain and suffering. Global damages may provide the solution for the difficulty in assessing the damage from incest.

Article 77 of the Penal Act limits damages to NIS 228,000, a sum which is periodically updated. It may be argued that this sum is inappropriately high or low. The ceiling is necessary because it preserves the boundaries between criminal and civil law, and enables the criminal system to operate quickly and efficiently, since it has no need for time-consuming estimates and assessments.¹³⁰ In light of the tremendous damage incest causes to victims – damage which can last a lifetime – perhaps the ceiling should be a

¹²⁷ The State of Israel v. Bogzki CC 1118/01, paragraph 5 of the sentence. In this case, because of the harm caused to the victim, both defendants were convicted of rape under severe circumstances and given a harsh sentence.

¹²⁸ The State of Israel v. Anonymus CC 1090/02.

¹²⁹ Eliram, footnote 109, at 228.

¹³⁰ See also Eliram, footnote 109 at 229, who supports a high compensation ceiling .

flexible one and judges should have the option to assess a higher sum when the evidence indicates that this is warranted. Allowing judicial discretion in incest cases would serve as official legal recognition of the unique damage borne by incest victims, something which is especially important given their difficulties in asking for help from the authorities and the ongoing difficulties they experience.

The advantage of the high ceiling in today's law is that it makes the system more efficient since high criminal damages will often obviate the need for a civil case. As described above, a civil trial can burden the victim both financially and emotionally, and can also be a dead end, when the limitation period has ended because of the delay in filing charges. On the other hand, the damage from incest is considerable, far surpassing the statutory ceiling. While setting a ceiling for damages simplifies matters, it also limits damages to several thousand shekels, while incest victims can be awarded damages in the millions in a civil suit, as will be discussed below. When an incest victim chooses to turn to the criminal system, she accomplishes a number of goals, including recognition of her suffering on the part of the legal system, the defendant, her family, and her immediate environment; educating the defendant about what he did; and punishing him for his actions. When these goals are accomplished, the victim may feel that a civil suit is unnecessary, or necessary only as a means to receive more money in damages.

Article 88 of the Penal Act determines that "Acquittal or punishment or sentencing of damages according to Article 77 do not relieve from responsibility under any other law." In other words, even if damages are assessed during in the criminal procedure, the victim may submit a civil claim. By opening the door to a civil suit, this article is especially important for incest victims. If criminal compensation is given *res judicata*, the incest victim will not have an accurate assessment the damage caused her. Preservation of civil responsibility is as an important realm for the compensation of incest victims. Even though criminal damages are periodically updated, the damage to the incest victim in terms of pain and suffering and otherwise will usually be greater than the sum of criminal damages, and only a civil court can award these higher damages.

An interesting question concerning the relationship between the two procedures – and one which does not receive enough attention in the law – is what happens when a criminal judge assesses damages in a case when the incest victim has filed a civil suit. In other words, will the judge impose lower damages, leaving the civil system to award proper damages while nonetheless burdening the criminal system?

Victims of incest require special treatment from those who sit at the trial and determine damages. Like the victims of other sexual offenses, they were profoundly injured by the crime and will carry these injuries with them throughout life. The damages assessed will not return things to the status quo ante; in the best-case scenario, they will help the victims rebuild their lives. Criminal damages essentially work together with civil damages, so that even if the victim received a generous payment in the civil system the criminal court is still able to award damages. In many incest cases, the victim is ineligible to receive civil damages because the limitation period has ended and therefore the victim can only receive criminal compensation.

Given the difficulties and shortcomings inherent to the process of suing for criminal damages, including the possibility that the damages imposed will fall far short of the actual damage to the victim and will preclude civil tort damages, we endorse the establishment of a new basis for victim compensation through the creation of a new constitutional offense.

F. Creating a New Constitutional Offense: A Worthy Addition to Criminal Compensation

Why are adult survivors of childhood incest awarded damages that are incommensurate with the damage caused them? Are the existing statutory offenses adequate to safeguard society's protected values? Does Israeli tort law address the various types of damage that incest brings in its wake? Why is it difficult to determine what compensation the victim should receive? Is it related to the fundamental principles of the legal system and the objective of damages as expressed in traditional tort law?

We begin by presenting the option of adding a new tort offense to further protect the victim. It seems obvious that this new offense will be an appropriate vehicle for determining damages for incest victims, for the reason that the multiple offenses in current law do not address the civil damage that results from the act of incest. The constitutional offense proposed below will complement those already on the books, both pragmatically and morally.

When the Basic Laws concerning human rights were given constitutional authority and the human rights included in the Basic Laws went from being unwritten to being part of the legal code, Israeli law underwent the process of constitutionalization.¹³¹ Israelis now enjoy constitutional human rights, which relate directly and indirectly to governmental institutions, public and private law, and legal norms. In the Dayan¹³² case, Justice Barak explains: "The different civil law offenses – and the different form of compensation – are nothing but an expression of the proper balance between constitutional human rights. The constitutional human rights originate from public law and the balance between them is constitutional. That said, they are given protection within private law, among other ways, and according to the accepted private law doctrines."¹³³

We now ask whether a woman who was abused as a child can accuse her father of breach of his duties towards her when he committed deeds which damaged her right to live a dignified life with autonomy over her body and soul, in accordance with the Basic Law: Human Dignity and Liberty? If she can, what precisely is this new offense?

Thanks to the Basic Laws guaranteeing human rights, and most importantly the Basic Law: Human Dignity and Liberty and the status of human rights in Israeli law has been upgraded. The Basic Laws have had a noticeable impact on Israeli law, and are used to safeguard human rights, to better understand statutes, and to serve as a foundation for

¹³¹ Radai, F. (1994) 'Constitutionalization of Labor Law' *Labor Law Yearbook* 4:151 [Hebrew].

¹³² Dayan v. The Commander of the District of Jerusalem H CJ 53/73.

¹³³ *Id.*

judicial criticism of legislation. To date, it has not been determined whether there is a constitutional offense based on the breach of the Basic Law: Human Dignity and Liberty¹³⁴ and the law does not specify what course of action should be taken in the event of illegal injury to a constitutional human right, nor does it establish a constitutional offense that will grant damages if a human right included in a Basic Law is violated. We now ask what happens when an incest victim invokes the Basic Law: Human Dignity and Liberty to complain of a breach of her most basic human right, that of autonomy. Is this an autonomous constitutional claim?

Tort laws are intended to protect the different interests that the legal system aims to defend, among them the protection of minors (including their emotional and physical wellbeing) from those who disregard their interests or wish to harm them, especially when these people are their parents. The Tort Act set general rules which then protect a range of different rights. As presented above, the offences in the Tort Act regarding negligence and the breach of a legal obligation determined the scope of responsibility for crimes such as incest. Can tort law recognize constitutional responsibility? Can the normative foundation for constitutional liability be located in the Tort Act?

In Israel, private and specifically torts law are used to demand compensation for an injury to a protected human right.¹³⁵ For example, the offenses enumerated in the Tort Act protect the individual's rights in relationships with other people and governmental authorities. The Basic Law: Human Dignity and Liberty establishes the right to not endure harm to one's body in dignity,¹³⁶ and the Tort Act protects these rights and provides for compensation when they are breached.

F.1. Negligence as a Constitutional Offense

Barak-Erez argues that the negligence offense is central for the protection of the individual's human rights before the governmental authorities. Her opinion is that once a person's constitutional right has been breached, there is obligatory conceptual caution between the offender and the offended individual. Liability will be decided upon according to the question does the offender have concrete obligatory caution, and did he stray from the degree of reasonable caution required under the circumstances. According to this approach, a new conceptual obligatory caution should be recognized-constitutional obligatory caution. In Barak-Erez's opinion, the central role of monetary compensation for the individual whose constitutional right was injured should be handed to the negligence offence. Professor Barak accepts this approach.¹³⁷ While Barak-Erez attributes constitutional offenses according to the basic laws to injury caused by the authorities, Barak-Erez adds that "human rights included in the basic laws apply not only in the relationship between the individual and the government, but also in the relationships between different individuals. This application is indirect and it uses private

¹³⁴ Daaka v. Carmel Hospital CA 2781/93.

¹³⁵ Barak-Erez, D. (1993) *Constitutional Offenses* 156 [Hebrew].

¹³⁶ "A person's life, body or dignity as a person shall not be harmed": Article 2 of Basic Law: Human Dignity and Liberty.

¹³⁷ Barak, footnote 84, at 787.

laws' legal "institutions"". ¹³⁸ Indeed, according to the basic laws themselves one individual's right is another individual's duty. ¹³⁹

It seems, therefore, that a woman who desires to sue her father for abusing her when she was child can base her claim on a constitutional offense, by virtue of the negligence offense. Today it is acceptable to consider that the human rights established in the Basic Laws apply first and foremost to the relationship between the individual and the authorities. The adult victim of childhood incest can demand compensation from the state for its long-time failure to protect her and her right to autonomy, which is a constitutional right promised in Basic Law: Human Dignity and Liberty.

Another remedy for the breach of a protected human right can be found in offenses that relate to a breach of a statutory obligation. ¹⁴⁰ These offenses are especially well-suited to breaches of the human rights established in the Basic Laws. These laws impose obligations intended to protect man, and their violation fulfills the elements of the offense concerning breach of a statutory obligation. This is the case for obligations the governmental authorities have towards the individual, and also for the obligations individuals have towards each other. ¹⁴¹ This offense does not require "negligence" (like the negligence offenses does) in order to consolidate responsibility for it. If the obligation imposed by the law is obsolete, the responsibility according to the breach of a statutory obligation offense is also obsolete. In our field, the obligation imposed in the Penal Act. for example on a father to protect his daughter, to keep her and to prevent any situation of emotional or physical harm to his daughter is an obsolete obligation which matches the obsolete statutory obligation to protect minor's emotional and physical wellbeing, all the more so where their parents are concerned. Therefore the responsibility for a breach of a statutory obligation is also obsolete, and when there was a violation of the duty to protect the girl from harm in her home by someone close to her, her parent, a protected human right has been violated, a statutory obligation has been violated, and so there is a constitutional offenses by virtue of the breach of statutory obligation offenses.

F.2. The Existence of an Independent Constitutional Offense

We have seen that it is possible to find a constitutional offense based on the human rights protected by the Tort Act. Because the offences that have to do with negligence and the breach of a statutory obligation protect the individual's constitutional rights, a woman who survived childhood incest can sue her father either with a law suit based on tort law or a suit based on those constitutional offenses protected by torts law. Is there a third avenue, namely a constitutional offense that is independent of tort law? Should the state enact a special law to grant compensation for injury to a constitutional human right?

¹³⁸ *Id.*, at 788.

¹³⁹ *Id.*

¹⁴⁰ Bar Shria, A. (1979) "*Breach of a Statutory Obligation*" in *Torts Law* 26, Tadeski, G. ed. [In Hebrew].

¹⁴¹ Barak, footnote 84, at 188.

We would answer in the affirmative.¹⁴² An injury caused a minor by her father is by definition egregious and in direct violation of those human rights that the enlightened society wishes to protect. This law would offer the plaintiff an additional avenue to receive proper compensation from the court, and will address at least some of the legal and administrative difficulties which presently stand in the way of the adult incest survivor who wishes to receive damages for her injuries. There are other advantages of tailoring torts law to reflect the constitutional revolution by awarding damages for a breach of human rights. The new vision of torts law dovetails with the new normative reality; is well-suited to the nature of the injury incurred by incest victims; and allows the incest victim to seek recourse both from her abusive father and from the state which did not properly protect her.

The central justification for recognizing an independent constitutional claim is that the current torts system has failed to protect and properly compensate the incest survivor. A father who rapes his young daughter can be sued for assault, breach of a statutory obligation, or negligence, and it is possible for the victim to receive compensation for the physical and emotional damage caused her, as well as for pain and suffering, etc. The problem is that the legal system today provides compensation only for those damages related to the injury to constitutional rights and not for the **injury to human rights in and of itself**.¹⁴³ The incest victim is not compensated for the injury to her dignity and her right to physical autonomy. Some might argue that this lack of protection is only semantic – incest victims already receive compensation under the different heads of damage – and that there is no significance to the terms constitutional offenses, constitutional damages, and constitutional compensation when compensation is awarded in the framework of torts law.

We would argue that the serious injuries borne by incest victims are evidence to the contrary. Were we to ignore the consequences of robbing a woman of her dignity and her right to autonomy over her body, we could no longer consider these rights to be legal rights. Our legal system should provide compensation not only for linked damages but also for the injury to the basic right itself, in this case the injury to the woman's dignity and autonomy from the sexual abuse she endured as a girl and adolescent. Should they so desire, these women should be entitled to sue only for constitutional damage and not for constitutional damage as linked to other damages. Alternatively, they should be allowed to sue for the emotional damage caused by the constitutional injury, based on a constitutional claim which is independent of other torts claims.

¹⁴² Barak also replies affirmatively to this question. See *Id.*, at 789.

¹⁴³ See *Id.* at 41-47. In her view in the context of the individual's rights towards the authorities there seemingly is full protection when Israeli law grants the individual's rights full and effective protection, through Supreme Court decisions or through the torts laws which protect interests related to protection of body or property. That said, despite what she calls impressive achievements, protection of rights has remained rather lacking. We will later discuss the major weakness as far as adult women who suffered incest as children. In the context of protecting the individual from the authorities, the example of the protester who was beaten with no justification highlights the existing emptiness. He can be repaid under the assault clause, but when he was prevented from protesting and so his basic right to freedom of expression was violated, it is unclear that he can sue for the violation of that right. There, at 46.

Current Israeli law provides compensation for women who were sexually abused as children, but does not express the nature of the damage they incurred. As a result, few women sue for damages in civil court, due in part to lack of incentive. In a similar vein, in the rare event that a trial ends with a compensation ruling, the court consistently fails to recognize how severely the incest victim was affected. This is expressed by the technical, laconic, and matter-of-fact tenor of the rulings, which do not touch upon the scope of the victim's injuries, the harm to her dignity, or her right to autonomy.

A constitutional offense can underscore the unique damage wrought by incest. Even if the primary contribution of this new offence is in the rhetorical/moral realm, it could have important implications for torts law in general and might serve to encourage victims to turn to the civil system. This constitutional offense will be another step towards granting proper compensation to women who survived childhood incest.

F.3. Constitutional Damage

We saw above that there are grounds for basing a constitutional offense in the violation of the human rights protected by the Tort Act. Our constitutional rights safeguard us against negligence and the breach of a statutory obligation.

Thanks to legal recognition of the personal damage caused by injury to an individual's constitutional interest, a woman who was abused as a child can now sue her father. This intangible constitutional damage is akin to damage to personal interests, as opposed to property, financial or physical interests.¹⁴⁴ As a rule, these interests have no monetary value and damage to them cannot be undone with money. Compensation is difficult to estimate, both because emotional damage has no "market value" and because classic tort law does not dictate the proper compensation for emotional damage. As a result, some claim that the plaintiffs are overcompensated¹⁴⁵ and others feel that they are under compensated.¹⁴⁶

Intangible constitutional damage falls in the category of intangible damages and can be subject to the same difficulties,¹⁴⁷ stemming from their being subjective and intangible. Biton claims that the long-term absence of discourse about this subject led to a lack of recognition of the relevant damage, or alternatively, prevented a doctrinal understanding of the constitutional damage.¹⁴⁸ Torts law deals with many kinds of damage, including

¹⁴⁴ Biton, Y. (2006) 'Pain in the Dignity Area: Damages for Injury to Constitutional Rights' *Misphat Vemimshal* 9:141 [Hebrew]. For a definition of these interests see (1960) *International Encyclopedia of Comparative Law, Torts* 65 (Volume XI, part 2, Ollier, P.-D. and J.-P. Le Gall, eds.) Mohr.

¹⁴⁵ O'Connell, J. (1981) 'A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees' *University of Illinois Law Review* 333-339.

¹⁴⁶ Biton, footnote 161, at 142.

¹⁴⁷ Intangible damages cannot be estimated or undone with money. Some claim that fictitious intangible-claims suits are flooding the courts, but this is difficult to determine, particularly because of the heightened emotions involved.

¹⁴⁸ Biton, footnote 161, at 147, the writer insists that lack of discussion, the silence concerning this damage emphasizes the banality and triviality of this damage and strengthens the feminist criticism according to which dealing with human pain and suffering are not part of the legal or the torts discourse. The writer mentions that this lack of discourse is felt on two levels. One level is the phrasing and

constitutional damage. The statutes that protect women from physical harm also protect them from emotional harm, including the humiliation and loss the dignity typical of incest.

It has been asked whether Israeli law recognizes constitutional injuries within the discussion of torts and whether damages are assessed for constitutional damages in the framework of torts law. In two different cases, the Supreme Court ruled that the technical definition of “damage” in the Tort Act can include intangible constitutional interests such as one’s dignity and autonomy. The court in the Gordon case took an important step in the creation of torts liability following damage to a constitutional interest.¹⁴⁹ It ruled that a person denied liberty because of wrongful detention should be compensated for non-financial damages. Although the verdict did not include a clear constitutional discussion, the court recognized damages having to do with a person’s dignity and reputation, and the like: “Human dignity, good name, comfort and spiritual wellbeing are important... and should receive proper protection like any property related interest.”¹⁵⁰ The description of damages in this ruling is riddled with inconsistencies, and includes terms such as “pure harassment” (apparently meaning anguish),¹⁵¹ injury to physical feelings, emotional harm with no physical expression,¹⁵² and indirect emotional injury, which is like a “shock to the nerves.”¹⁵³

Another important step was taken in the Da’aka case,¹⁵⁴ where a special panel of five judges broadened negligence liability to cover the individual’s right to autonomy. In this ruling the appellant won damages for “non-bodily injury” to her autonomy, for an operation performed upon her without informed consent and the consequent emotional damages. The basis for the verdict was that every person has the right to autonomy, to his or her own desires, and to act in a way he or she sees fit.¹⁵⁵ The right to autonomy is fundamental¹⁵⁶ and the injury to autonomy is part of the “damage” defined in Article 1 of the Tort Act as damage that should be redressed through compensation.¹⁵⁷

In the Da’aka case, the court used a legal construct to include the right to damages under the rubric of negligence. Here the court followed Gordon case in ruling that the negligence includes a duty of care that also applies to non-property damage caused those in the first circle of risk, i.e. those the action was aimed against.

recognition of the type of damage caused by harm to a constitutional interest. The other is the level of recognition of the scope of injury caused which deals with a proper damages estimate.

¹⁴⁹ Jerusalem Municipality v. Gordon, CA 243/83 (later: the Gordon case).

¹⁵⁰ *Id.*

¹⁵¹ See Arad v. Even CA 6645/00, paragraph 14, where discussion of the injury invokes the Gordon case as having relating to anguish.

¹⁵² The Gordon case, footnote 168, at 138-139.

¹⁵³ This is similar to the damage discussed in Alsoha v. the Dahan Estate LCA 444/87.

¹⁵⁴ The Da’aka case, footnote 150.

¹⁵⁵ *Id.*, at 572.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*, at 573-574.

Given the unique set of damages incest brings in its wake, it is hardly necessary to define the constitutional damage to incest victims. The court established a somewhat unwieldy legal construct which creates a causal relationship between the abnegation of responsibility and the damage caused. If the court were to recognize an infringement on autonomy as an independent claim, such that it would be a constitutional offense with a constitutional injury,¹⁵⁸ it would achieve several objectives. First, the need for unique assumptions would be obviated. In addition, this would constitute an independent head of damage, something especially important for the adult incest victim, who would be able to sue for injury to her autonomy. A constitutional head of damage in the form of injury to autonomy will likely spark a new legal debate.¹⁵⁹ Personal damages will no longer be seen as subjective and intangible but instead objective and unequivocal. Adult incest survivors, who have felt weak and emotionally vulnerable their whole lives, who believe that the courts are inaccessible (and, indeed, the law suit itself can demand Herculean emotional strength), will be able to argue that their essential human rights have been violated. By creating a new constitutional offense, and thereby recognizing a new independent constitutional head of damage, there will be no lack of dialogue.¹⁶⁰

The rhetoric of the constitutional offense will emphasize the principle that there are many types of damages. Human pain, including female suffering, must be a consideration in the discussion of torts, a factor in the public constitutional debate, and an element of social law. Recognition of this head of damage will simplify the legal process in incest cases, in both the civil and criminal systems, and will cast a harsher light on the crime and the criminal. The new legal language and new legal tools will foster a sense that the damage is not in the distant past. This head of damage will usher in a new era in which young incest victims will turn to the courts to receive the justice they deserve, and adult incest survivors will follow their lead. The public, legal, social, and constitutional realms will recognize their basic human rights to dignity and autonomy.

Recognition of the constitutional damage to incest victims will likely lead to higher damages and will make a significant contribution to recognizing and defining constitutional damage, as we will now see.

F.4. The Importance of Recognizing Constitutional Damage as an Independent Damage in Incest Cases

The discussion of constitutional damage in the Gordon decision is inconsistent and abstruse. The court invoked different definitions of “harassment”: causing anguish, physical injury, or emotional suffering; matter of human dignity, reputation, or the soul.¹⁶¹ Many rulings that followed the Gordon decision are marked by a similar conceptual confusion. In a case in which a girl sued her father for rape, the court described her hardships as including pain and suffering,¹⁶² and another case in which the authorities provided unauthorized parties with incorrect information about a youngster’s

¹⁵⁸ See Erez, footnote 151, at 147-171.

¹⁵⁹ On the lack of dialogue, see Biton, footnote 161, at 146.

¹⁶⁰ *Id.*

¹⁶¹ The Gordon case, footnote 166, at 138-141.

¹⁶² Anonymous v. Anonymous FC 60811/00

emotional health, the court spoke about “anguish” and causing “pain and suffering.”¹⁶³ In the MacDonald case, Justice Rivlin refers to the tangible injury to the right to privacy as injury to a “personal emotional interest,” one paragraph later he calls “anguish.” In other words, he treats it as an emotional injury, a constitutional injury, and emotional damage.

The Jerusalem Family Court recently heard a torts suit filed by a thirteen-year-old girl against her father for a years-long pattern of indecent acts. Judge Nili Maimon’s long and detailed ruling takes a new approach, one which gives the father additional responsibility in cases of incest and does not distinguish between damage to the plaintiff’s intangible interests and a person’s dignity and liberty. The decision speaks of the injury to liberty, autonomy, and dignity together with the victim’s anguish, pain and suffering, discomfort, and fear.

We maintain that the court should distinguish between different types of damage to the incest victim. Recognition of the constitutional head of damage as independent will constitute an important step towards conceptual consistency and will have other benefits as well, including acknowledgement that this head of damage is the most important of all. This will lead to the award of substantial damages in incest cases, consistent with the understanding that incest leaves the victim deeply and perhaps uniquely scarred, due to the fact that this crime impinges upon the most essential human rights.¹⁶⁴

Summary

The Israeli public and the Israeli legal system are unfortunately well-aware of the crime of incest and the phenomenon of delayed reporting of incest. Although we cannot claim that the society is in any way apathetic to the victim, we often get the sense that as a society, we are satisfied when an abuse case leads to criminal punishment of the abuser and minimal penal damages for the victim, on a scale with damages awarded to other crime victims. Often the victim herself is less pleased with the outcome of the trial.

It is difficult to make peace with this situation, given our knowledge of the havoc incest wreaks on the victim. Here we propose the establishment of a constitutional basis for victim compensation. Although this solution is innovative, it rests upon a well-established framework.

¹⁶³ Tzazo v. the State of Israel CA 8051/00.

¹⁶⁴ Support for this claim can be found in Radai, F. (1994) ‘Privatization of Human Rights and Misuse of Power’ *Misphatim* 23:21 [Hebrew]. The author states that “privatization of human rights” can be based upon two alternative versions of justice: (a) individual and formal justice, according to which human rights balance one another irrespective of the power relations between those with the rights, and (b) essential and group justice, which employs human rights in private law in order to prevent a misuse of socio-economic power in situations of institutionalized inequality. This concretization of the rights of incest victims according to the theory presented here indicates the importance of the privatization of human rights and of protecting the weak individual from institutional powers. For more on the implementation of human rights in private law and the difference between the formalistic and the fundamental versions of human-rights privatization, see pages 28-46 including the footnotes. See also: Barak, A. (1993) ‘Human Rights Protected in Private Law’ *Klinghoff Book on Private Law* Jerusalem 163 [Hebrew].

In light of developments in the status of the victim in the criminal procedure during the last few decades and the feminist analysis of incest, which is concerned with the concept of constitutional human dignity and the lack of proper criminal compensation, we would argue that it is necessary to use the constitutional offense as a basis for broadening the torts option. As we have indicated throughout, this development is predicted to change not only the sum of the damages, but in certain cases will offer the victim the option of suing when the abuser has no means or can not pay her the proper damages.

The constitutional revolution began some two decades ago, and at first it was limited in scope. It is only in recent years, under the stewardship of former Chief Justice Barak, and with the active cooperation of former Justice Dorner, that we realize the myriad consequences of the constitutional revolution for victims' rights. Incest victims must be entitled to be involved in the trial and to receive substantial monetary payment.

In the past one could claim that this was a moral obligation; here we have argued that the constitutional revolution has also created a legal obligation. We should not delude ourselves into thinking that the broad torts-compensation model proposed here will deter potential abusers or fully heal the wounds of the incest victim. Nonetheless, we are hopeful that if properly implemented, it will be a positive step towards restoring the dignity the incest victim lost through the aggression and cruelty of those closest to her.