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Ruth E. Felker

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Incest: The Need to Develop a Response to Intra-Family Sexual Abuse

I. INTRODUCTION

It is estimated that between 100,000¹ and 500,000² children are victims of sexual abuse annually. A large proportion of these children are sexually abused by someone living within their families.³ The term "incest"⁴ is commonly used to describe this abuse although the term may also describe similar relationships between consenting adults. The incest taboo is nearly universal; although some cultures permit a degree of fondling or sexual contact, the majority still prohibit sexual intercourse between persons of designated degrees of kinship.⁵ There are numerous statutes in the United States which define and prohibit incest between both adults and children.⁶ Statutes prohibiting incest focus on the state's interest in protecting the genetic pool, the family structure

1. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, *INTRA FAMILY SEXUAL ABUSE OF CHILDREN* (1979).

2. Sarafino, *A Nationwide Estimate of the Incidence of Sexual Offenses Against Children*, LVII CHILD WELFARE 127 (Feb. 1979). Sarafino's specific estimate was 336,200. *Id.* at 133.

3. *Id.* The National Legal Resource Center for Child Advocacy and Protection which is sponsored by the ABA, Young Lawyers Division mounted a comprehensive child sexual abuse project which sought to gather and disseminate information regarding all aspects of child sexual abuse. Various publications of this project are cited throughout this comment and the author gratefully acknowledges the vital resources the project provided. The project in *Child Sexual Abuse and the Law* defined intrafamily sexual abuse as "any contacts or interactions between a child and other family member in a position of power or control over the child where the child is being used for the sexual stimulation of the perpetrator or another person." NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, *CHILD SEXUAL ABUSE AND THE LAW* iii (1982) [hereinafter cited as CHILD SEXUAL ABUSE]. Incest may have a specific statutory definition. In this comment, incest will mean intra-family sexual abuse as defined above.

4. The word incest comes from the Latin *incestum* meaning unchaste or low. WEBSTER'S UNABRIDGED DICTIONARY (1976).

5. See MEAD, *Incest*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES (1968); WEINBERG, *INCEST BEHAVIOR* (1955). These authors suggested that incest was accepted in some cultures but noted that incest is generally prohibited. The Judaeo-Christian tradition has always forbidden incest based on the prohibitions in Leviticus, Chapter 18, verses 6-20, which begins with the statement: "No one is to approach any close relative to have sexual relations . . ." and continues with a list of prohibited relationships defined in terms of both blood and marriage. *Leviticus* 18:6-20 (New International).

6. See *infra* notes 53-101 and accompanying text.

and children.

It is commonly believed that when two persons closely related by blood bear children, their offspring face a great risk of birth defects and genetic abnormalities.⁷ This risk is a major reason for prohibiting sexual intercourse between closely related adults. Society, however, also prohibits sexual relationships between persons related only by marriage or adoption.⁸ The prohibitions against these relationships focus on the protection of the family structure. The sexual relationship is integral to the institution of marriage which is foundational to family and community structures. Incest laws are designed to deter sexual contact which may damage these family relationships.

The protection of children is another purpose of incest prohibitions. Adult-child incest often involves coercion of a child into the sexual relationship.⁹ This sexual relationship poses physical, emotional and psychological threats to the child. Physical threats include venereal disease, damage to sexual organs and pregnancy.¹⁰ Unique emotional and psychological risks are posed by the violation of the parent-child relationship. This violation threatens the child's identity, sexual development and ability to trust at particularly crucial times in the child's maturation,¹¹ as well as subjecting the child to feelings of anger, guilt and conflicting loyalties.¹² Despite strong societal prohibitions, perhaps as many as two million Americans are members of families in which incest occurs.¹³ What do we know about the incestuous family?

Collecting data which accurately describes the incestuous family

7. See *infra* note 10. Any analysis of genetic defects is hindered by the lack of accurate reports of incest. See *infra* note 14 and accompanying text.

8. Persons related by blood are related by consanguinity. Persons related by marriage or adoption are related by affinity. Relationships between relatives of affinity or distant consanguinity do not pose genetic risks.

9. See *infra* note 25 and accompanying text.

10. See SCROI, *HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE* (1981); Tilleli, Turek & Jaffe, *Sexual Abuse of Children: Clinical Findings*, 302 *NEW ENG. J. OF MED.* 319-23 (1980); GROTH, *Patterns of Sexual Assault Against Children and Adolescents*, in *SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* 3-5 (1978).

11. See BURGESS & HOLMSTROM, *Rape: Its Effect on Task Performance at Varying Stages in the Life Cycle*, in *SEXUAL ASSAULT: THE VICTIM AND THE RAPIST* 23-34 (Walker ed. 1976); Burgess & Holmstrom, *Sexual Trauma of Children and Adolescents: Pressure, Sex and Secrecy*, 10 *NURSE CLIN. N. AM.* 551-64 (1975).

12. See BURGESS, HOLMSTROM & McCausland, *Counseling the Child Rape Victim*, in *ISSUES IN COMPREHENSIVE PEDIATRIC NURSING* 45-57 (1976).

13. This figure is extremely speculative. It was arrived at by using the estimate of 500,000 victims of sexual abuse suggested by Sarafino and multiplying that number by a family size of four. See Sarafino, *supra* note 2.

is difficult.¹⁴ The data are taken only from families where the incest has been disclosed and are often collected as part of a comprehensive treatment program. As the family begins treatment, family interaction patterns change and it is difficult to describe behaviors in retrospect. In addition, the particular theoretical orientation of the researcher may affect his perception of the incestuous relationship. Finally, the data may rely heavily on the accounts of one person in the relationship which may not accurately describe the dynamics of the entire relationship.

In addition to problems in collecting data, analyzing the data is also difficult. Much of the data is correlational in that the coexistence of pairs of variables are frequently identified but causation is not established. Because correlation does not establish causation, problems are presented by the conclusion that certain personality characteristics suggest a predisposition toward incestuous behavior, or that incestuous behavior causes certain personality characteristics to emerge. Another problem is that the terms used to describe incestuous behavior are very general. The term "aggressive" may describe a wide range of both normal and abnormal behaviors and may have significance only when applied to a particular family within a particular context. In addition, the meaning of the term when used by the researcher may be different from the word's common meaning.

With these difficulties in mind, this comment will describe the incestuous family and the dynamics of the incestuous relationship. This comment will then analyze the statutory prohibitions against incest and review current statutory reforms. Finally, this comment will review changes in the judicial response and suggest additional ways in which the response to incestuous families could be improved.

II. DESCRIPTION OF THE RELATIONSHIP

A. *Characteristics of the Relationship*

It is estimated that father-daughter incest accounts for seventy-five percent of all reported incest cases.¹⁵ Accordingly, most of the research cited in this comment describes father-daughter incest.¹⁶

14. Greenland, *Research and Methodology: Incest*, 9 BRIT. J. OF DELINQ. 62-65 (1958).

15. See NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, *supra* note 1; Sarafino, *supra* note 2. Twenty-five percent of reported incest cases are predominately brother-sister incest, followed by uncle-niece incest.

16. Mother-son incest is relatively rare. For an explanation see Nasjleti, *Suffering in*

Father-daughter incest typically follows a pattern of: a progression from fondling or exhibitionism to more intrusive forms of sexual behavior; a duration of many years; a lack of overt force; a delay in disclosure; and a retraction or inconsistent statement by the daughter.¹⁷ There are a variety of explanations for these characteristics and the implications for treatment are numerous.

1. *Progression*

Incest may be characterized by a progression from fondling to more sexually intrusive contact because the relationship extends over many years and the perpetrator must engage in more sexually intrusive contact to attain satisfaction. Another hypothesis is that the young age of the child originally makes sexual intercourse impossible. A third explanation is that the perpetrator denies the abusiveness of the relationship by rationalizing that contact short of intercourse is merely a normal expression of affection.¹⁸ The progression of the incestuous relationship suggests that early intervention is appropriate.

2. *Duration*

The long duration of the incestuous relationship can be explained by the fact that the incest may begin when the child is young and continue until the child leaves home.¹⁹ Often the child hastens her departure through truancy or running away.²⁰

The extended duration of the relationship suggests that family members are aware of the incest and have developed patterns of behavior which perpetuate its occurrence. Because an incestuous relationship reflects well-established patterns of behavior, after one child runs away, sexual abuse may be repeated with a younger child.²¹ This suggests that an effective response must include the entire family.

Silence: The Male Incest Victim, 1980 CHILD WELFARE 269 (May 1980). The author reasons that male victims are less likely to report incest because our society does not permit males to express vulnerability and helplessness. *Id.*

17. See *supra* note 10.

18. *Id.*

19. *Id.* See also Herman & Hirschman, *Father-Daughter Incest: Signs*, 1977 JOURNAL OF WOMEN IN CULTURE AND SOCIETY 735-56.

20. See *supra* note 10. Lukianowicz, *Incest: I Paternal Incest*, 120 BRIT. J. OF PSYCHIATRY 301-13 (1972).

21. Lukianowicz, *supra* note 20.

3. *Lack of Overt Force*

The lack of overt force in incestuous relationships has led some researchers to suggest that the child consents to the incestuous relationship and some even suggest that the child's role in the relationship is an initiating or seductive one.²² One problem with this finding is that it is often based on the father's account of the relationship.²³ Second, the researchers may have incorrectly perceived the dynamics of the incestuous relationship. Rather than assuming that the child has played an initiating role, one can assume that the child is making normal requests for affection.²⁴ As the incest progresses the child leans a more seductive pattern of response in requests for affection. In this way the child's behavior is not viewed as initiating but as a learned pseudo-seductive pattern of response.

The victims themselves report that they were coerced into the incestuous relationship.²⁵ The coercion may be subtle and may be based on the nature of the parent-child relationship.²⁶ The parent is in a position of authority and although a young child may feel uncomfortable about the relationship, she may consent because of a reluctance to disobey or a desire to please the parent.²⁷ In addition, the parent may forbid the child to tell anyone so that the child is unable to confirm that the parent's sexual advances are improper.²⁸

Fear provides another explanation for the child's acquiescence.²⁹ This fear may have a firm basis as many victims of sexual abuse

22. See Bender & Blau, *The Reactions of Children to Sexual Relations with Adults*, 7 AM. J. ORTHOPSYCHIATRY 500 (1937).

23. Gruber, *The Child Victim's Role in Sexual Assault by Adults*, LX CHILD WELFARE 305 (May 1981).

24. *Id.*

25. KINSEY, POMEROY, MARTIN & GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953). (1953) reported that, of 33 children interviewed under 13 who had sex with an adult, less than 10% admitted to a collaborating role. *Id.* In a study of 45 incestuous families, 54% of the victims with alcoholic fathers and 30% of the victims of non-alcoholic fathers stated that they complied because of fear. Virkkunen, *Incest Offenses and Alcoholism*, 14 MEDICINE, SCIENCE AND THE LAW 124-28 (1974).

26. Because the child is legally incapable of consenting to sexual abuse, the question of consent is a social, not a legal issue.

27. See DeFrancis, *Protecting the Child Victim of Sex Crimes*, in FINAL REPORT, THE AMERICAN HUMANE ASSOCIATION, Denver (1969). DeFrancis reported that 15% of the children studied were bribed and that a desire to please the parent was often present. *Id.*

28. McCarty, *Investigation of Incest: Opportunity to Motivate Families to Seek Help*, LX CHILD WELFARE 679 (Dec. 1981).

29. *Id.* See also *supra* note 11.

are also victims of physical abuse.³⁰ The child may also fear that she will be blamed for the relationship and that she will be punished by the perpetrator and rejected by the passive parent. Another fear, often reinforced by the perpetrator, is that adults will accuse the child of fantasizing or lying.³¹ All of these fears may be allayed by a response to incest which protects the child after investigating all allegations of sexual abuse.

4. *Delay in Disclosure*

The delay in the disclosure which characterizes father-daughter incest poses problems to both the therapist and the prosecutor. The delay makes it difficult to reconstruct events and a therapist may struggle to determine the origins of a relationship or to understand the family's response. The delay may also make criminal prosecution difficult because valuable evidence is lost. If the act does not coincide with a medical examination, there may no longer be evidence of trauma, and important medical documentation is not available to the prosecution.³² Valuable non-medical evidence may also be lost. The child's ability to testify about the incestuous act may decrease with time due to lapses in memory or to the tendency to deny or repress these memories.³³ Other corroborating evidence such as semen-stained clothing and bedcovers, or the presence of the perpetrator's hair and skin samples in suspicious places may also be unavailable.³⁴

5. *Inconsistent Statements*

There are several explanations for the high incidence of recants or inconsistent statements made by incest victims. A primary explanation is that the child may want to deny the existence of the relationship or may be reacting to family resentment and pres-

30. See Virkkunen, *supra* note 25. See also NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, *supra* note 1.

31. See McCarty, *supra* note 28. See also *supra* note 11.

32. See Tilleli, Turek & Jaffe, *supra* note 10.

33. The author does not suggest that the child's ability to testify is influenced by a lapse in memory or the emotional nature of the event to a greater extent than an adult's ability in a similar situation.

34. The detection of the evidence requires careful laboratory analysis. See LLOYD, *The Corroboration of Sexual Victimization of Children*, in CHILD SEXUAL ABUSE, *supra* note 3, at 108. Other corroborating evidence includes a third party's account of the child's report which may be permitted at trial under the "excited utterance" exception to the hearsay rule. *Id.* at 109.

sure.³⁵ Further, the child may retract her statement when she realizes that she will be removed from her home and that her father will be incarcerated.³⁶ If other indicators of incest are present, the therapist will often tell the child that she believes that the incest occurred and reassure the child that decisions concerning criminal prosecution are not the responsibility of the child.³⁷

The retraction poses thorny problems in a criminal prosecution. The fact-finder may be wary of returning a guilty verdict when the prosecutor's case relies heavily on inconsistent statements made by a child.³⁸ On the other hand, the high incidence of recants by incest victims suggests that a retraction does not insure that an incestuous relationship did not exist. Because of the inherent difficulties posed by a retraction, a response to incest must identify those victims who are strong witnesses and marshal prosecutorial resources to these cases. Further, criminal prosecution must be only one part of a comprehensive response to incest.

B. *Participants in the Incestuous Relationship*

In addition to describing incestuous relationships, efforts have been made to identify characteristics of the individual participants. The mothers of incest victims are described as passive, ill or incapacitated and sexually unresponsive to the father.³⁹ Other researchers suggest a high level of dependency on the father.⁴⁰ Researchers theorize that because the mother is ill or incapacitated, she permits her daughter to assume the "mother role." This role may include heavy household responsibilities as well as sexual relations with the father.⁴¹

Characteristics of incestuous fathers include high levels of aggression, a desire to dominate and a lack of inhibitions, coupled with a strong sex drive.⁴² Similar to fathers who physically abuse their children, incestuous fathers may exhibit low self-esteem, poor coping skills and a history of emotional and physical neglect as

35. See McCarty, *supra* note 28.

36. *Id.*

37. *Id.*

38. See LLOYD, *supra* note 34 for a discussion of historic reasons for corroboration requirements which included the perception that a child was more likely to fantasize or lie.

39. See *supra* note 10.

40. See WEINBERG, *supra* note 5. The mother may be reluctant to object to abuse because of economic and emotional dependency on the father.

41. See Hersko, *Incest: A Three Way Process*, 7 JOURNAL OF SOCIAL THERAPY 16-28 (1961).

42. See *supra* note 10.

children.⁴³ The fathers often exhibit a character disorder and commonly are abusers of alcohol.⁴⁴ Incestuous fathers often rationalize or deny the abusiveness of the relationship⁴⁵ with statements such as "girls need to learn about sex," or "she's promiscuous anyway." Such statements are indicators that incest may be occurring.⁴⁶

The child in an incestuous relationship may exhibit behavior which indicate that incest is occurring. Behavioral indicators include neurasthenia,⁴⁷ clinical depression, social isolation, truancy, running away, drug or alcohol abuse, pseudo-seductive behavior, fear of men and other phobias, nightmares, heavy household responsibilities and prostitution or promiscuity.⁴⁸ Many of these behaviors are common to children facing crises, but the emergence of inappropriate sexual responses and the assumption of heavy household responsibilities are more unique to sexual abuse. Medical indicators of incest include pregnancy, venereal disease, vaginitis and bleeding or bruising of the genitalia.⁴⁹

Researchers have also attempted to isolate social factors common to incestuous families. Overcrowding has been identified as a factor in several studies;⁵⁰ overcrowding may be the result of both large family size and financial strains. Another factor is social isolation,⁵¹ which is also common to physically abusive parents,⁵² isolation may be caused by poor social skills or may result from the family's fear of disclosure.

III. STATUTORY ANALYSIS

There are many theories of why incest occurs and what treat-

43. See PRACTICING LAW INSTITUTE, *THE ABSURD AND NEGLECTED CHILD MULTIDISCIPLINARY COURT PRACTICE* (1978).

44. See Virkkunen, *supra* note 25.

45. See Pacht, Halleck & Ehrmann, *Diagnosis and Treatment of the Sexual Offender: A Nine Year Study*, 118 AM. J. OF PSYCHIATRY 802 (1962). See also MCCAGHY, *Child Molesters: A Study of Their Careers as Deviants*, in CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY 75 (Clinard & Quinney eds. 1967).

46. These examples are taken from the sexually abused child syndrome discussed *infra* note 107.

47. *Neurasthenia* refers to symptoms with no physiological basis, such as fatigue, weakness, headache, bedwetting and frequent urination.

48. See SGR01, *supra* note 10.

49. See Tillelli, Turek & Jaffe, *supra* note 10.

50. See BRITISH ASSOCIATION FOR THE STUDY AND PREVENTION OF CHILD ABUSE AND NEGLECT, *CHILD SEXUAL ABUSE* (1981). See also NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, *supra* note 1.

51. See *supra* note 50.

52. See Blehar & Kent, *Helping Abused Children and Their Parents*, 2 FAMILIES TODAY 626 (1979).

ment will be helpful to incestuous families. Some therapists view the emergence of incest as a result of poor marital relationships.⁵³ The therapist may work with the couple on their marriage to eliminate the father's need to approach his daughter. Another therapist may focus on the father's deviant sexual appetites and use behavioral modification techniques, such as aversion therapy, to eliminate these desires.⁵⁴ A third may view incest as evidence of extreme family breakdown in response to stress. This therapist may work to alleviate stressors such as overcrowding and financial problems and to teach family members coping skills.⁵⁵ Although a discussion of treatment approaches is beyond the scope of this comment, the lack of agreement concerning the dynamics, causes and treatment of incest suggests that the judicial response to incest must be flexible enough to incorporate a variety of responses to the incestuous family.⁵⁶ While the response of therapists is based on a variety of theoretical models, the judicial response to incest is firmly grounded in statutes which prohibit incest.

According to the ABA National Legal Resource Center for Child Advocacy and Protection, there are four types of statutes in the United States which prohibit incest: child sexual abuse statutes; incest statutes; child protection statutes; and statutes relating to domestic violence and sexual psychopaths.⁵⁷

A. *Child Sexual Abuse Statutes*

Statutes which prohibit child sexual abuse⁵⁸ forbid statutory

53. See, e.g., WALTERS, *PHYSICAL AND SEXUAL ABUSE OF CHILDREN: CAUSES AND TREATMENT* 111-54 (1975).

54. See Hawton, *Behavioral Approaches to the Management of Sexual Deviations*, 143 *BRIT. J. PSYCHIATRY* 248 (1983).

55. Campbell, O'Brien, Buckett & Lutzker, *An Ecobehavioral Approach to Prevent Child Abuse*, 14 *J. OF BEHAVIOR THERAPY AND EXPERIMENTAL PSYCHIATRY* 147 (1983) provides an example of this approach with physically abusive families.

56. See, e.g., NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, *RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRA-FAMILY CHILD SEXUAL ABUSE CASES* (1982) [hereinafter cited as *RECOMMENDATIONS*]. Principle 1.1 reads: "Innovative approaches in the legal system's handling of intrafamily child sexual abuse cases should be adopted which protect the child from further abuse, prevent additional trauma to the child and family, and provide treatment for the child, the family and where appropriate, the offender." *Id.* at 6.

57. See generally, *CHILD SEXUAL ABUSE*, *supra* note 3.

58. All jurisdictions have some sort of statute prohibiting child sexual abuse. See, e.g., 18 PA. CONS. STAT. ANN. §§ 3122-3126 (Purdon 1983); OHIO REV. CODE ANN. §§ 2907.01-2907.07 (Page 1982); N.Y. PENAL LAW §§ 130.20-130.65 (McKinney 1975); W. VA. CODE §§ 61-8B-1 to 9 (1977).

rape and sexual contact.⁵⁹ The elements of the crime of sexual abuse are participation in prohibited sexual activity, even if consensual, with a person protected by the statute. Few jurisdictions require corroboration to establish a *prima facie* case of abuse in the prosecution of all sex offenders,⁶⁰ while some states require corroboration in special circumstances.⁶¹

Penalties vary widely, but generally penalties for intercourse are much higher than penalties for sexual contact. Most states provide a maximum sentence of ten to twenty years for sexual intercourse,⁶² with the most common sentence being ten years, while some penalties are significantly lower.⁶³ Higher penalties for sexual abuse by family members and persons in authority often exist.⁶⁴ The sexual abuse statutes include a variety of non-blood relationships, and generally the scope of relationships covered by the statute is broad. Stiffer penalties may also be provided if the perpetra-

59. The statutes vary widely in their terminology. See, e.g., D.C. CODE ANN. § 22-2801 (1981) which uses the term "carnal knowledge". Pennsylvania uses the terms "sexual intercourse" and "deviant sexual intercourse" to include vaginal intercourse as well as anal and oral sex. 18 PA. CONS. STAT. ANN. § 3101 (Purdon 1982). Ohio defines "sexual conduct" and "sexual contact" to include vaginal, oral and anal sex. OHIO REV. CODE ANN. § 2907.01 (Page 1982). Ohio laws also prohibit the insertion of objects into orifices. *Id.* § 2907.12. California uses the term "sexual intercourse" and requires penetration however slight. CAL. PENAL CODE §§ 261.5, 263 (West Supp. 1984). Sodomy, however, is defined as contact between the penis and anus. *Id.* § 286.

60. Some states have corroboration requirements only for certain offenses such as sexual contact. See, e.g., OHIO REV. CODE ANN. § 2907.06(B) (Page 1982). See also N.Y. PENAL CODE § 130.16 (McKinney 1975) which requires corroboration if the lack of consent is the result of the victim's age.

61. See *supra* note 60. Judicial decisions concerning corroboration of the child's testimony relate to the weight of evidence necessary to sustain a conviction and do not necessarily establish corroboration requirements. Historically, the corroboration requirement was viewed as a necessity in child sexual abuse cases because of perceived problems in complainant credibility which are magnified if the complainant is a child. The perceived problems are: (1) the likelihood of false reports; (2) the prejudice to defendant because of the nature of the crime; (3) the difficulty in preparing a defense. In the case of children, these problems are purportedly exacerbated by: (1) children's vulnerability to suggestion; (2) their tendency to fantasize; and (3) children's natural curiosity about sexual matters. See LLOYD, *supra* note 34.

62. The maximum penalties for sexual contact are generally between five and fifteen years. See KOCEN & BULKLEY, *Analysis of Criminal Child Sex Offense Statutes*, in CHILD SEXUAL ABUSE, *supra* note 3, at 1.

63. *Id.*

64. Several states have special provisions where the perpetrator is (1) a parent or legal guardian; (2) in loco parentis; (3) a custodian charged with the care, custody or supervision of the child; (4) foster parents; (5) a blood or affinity relationship; (6) a household member; (7) a person in authority such as a teacher. *Id.* See, e.g., OHIO REV. CODE ANN. § 2907.03(5) (Page 1982).

tor uses force upon the child.⁶⁵

Reforms in sexual abuse legislation include developing specific definitions of prohibited sexual acts and replacing a single sexual contact offense with several degrees of offenses. Some jurisdictions have developed a tiered structure of offense categories based on variables such as the age of the victim,⁶⁶ and the age differential⁶⁷ and relationship⁶⁸ between the victim and the defendant. These particular reforms were necessitated in part by the use of sexual abuse statutes to control consensual sexual relations between teenagers. The reforms seek to avoid punishing teenagers close in age while continuing to protect adolescents from older perpetrators.⁶⁹

B. *Incest Statutes*

Incest statutes⁷⁰ prohibit marriage or sexual activity between close relatives. In most states the incest laws do not differentiate on the basis of age, so incest with a minor is covered by these statutes. Often incest statutes only prohibit actual sexual intercourse and cannot be invoked against a perpetrator guilty only of sexual contact.⁷¹ The statutes vary widely in their definitions of relationships covered by the statute.⁷² The relationship of the parties is defined in terms of degrees of consanguinity.⁷³ Incest is universally

65. See KOCEN & BULKLEY, *supra* note 62.

66. Many states provide a tiered structure based on the age of the victim. *Id.* See, e.g., N.J. STAT. ANN. § 2C:14-2a.1 and .2 (West 1982).

67. The perpetrator's age in conjunction with the child's age is a variable in 25 states. See KOCEN & BULKLEY, *supra* note 62. See, e.g., N.Y. PENAL CODE §§ 130.30, 130.35 (McKinney 1975). An affirmative defense may be provided if the age differential is low. See, e.g., N.Y. PENAL CODE § 130.55 (McKinney 1975).

68. The relationship between the perpetrator and the victim is a variable in 15 states. See KOCEN & BULKLEY, *supra* note 62. See, e.g., N.J. STAT. ANN. § 2C:14-2a.2(c) (West 1982).

69. Nine states provide low penalties if a teenage victim and teenage defendant are involved or the participants are close in age. See KOCEN & BULKLEY, *supra* note 62. See, e.g., OHIO REV. CODE ANN. § 2907.4(B) (Page 1982).

70. Incest statutes may prohibit sexual intercourse or may relate to the validity of incestuous marriages. See, e.g., 18 PA. CONS. STAT. ANN. § 4302 (Purdon 1983); 48 PA. CONS. STAT. ANN. §§ 1-5 (Purdon 1983-1984).

71. Only six jurisdictions include deviant sexual intercourse within the scope of prohibited behaviors and sexual contact is not prohibited in any jurisdiction's incest statutes. See WULKAN & BULKLEY, *Analysis of Incest Statutes*, in CHILD SEXUAL ABUSE, *supra* note 3, at 52.

72. Fifteen states define incest only as a crime between blood relatives. *Id.* Stepchildren are protected in 24 states. *Id.* Only fifteen jurisdictions specifically include adopted children. See *id.*

73. The first degree is parent-child, the second degree includes grandparents, siblings and half-siblings. The third degree includes aunts and uncles and the fourth degree is first

prohibited in the first degree and nearly all states prohibit incest in second or third degree relationships.⁷⁴ A few states extend the prohibitions to first cousins.⁷⁵

The elements of the crime of incest are a relationship between the parties which is covered by the statute, the defendant's knowledge of the prohibited relationship and participation in an activity prohibited by the statute. Independent corroboration of the relationship is generally not required and a verdict may rely solely on the victim's testimony.⁷⁶ This is important in prosecuting incest cases because of the lack of eyewitnesses and the unavailability of corroborating evidence due to the delay in disclosure.⁷⁷

The penalties for incest vary widely. Nineteen jurisdictions impose a penalty of less than seven years imprisonment⁷⁸ while twenty-eight states impose penalties of ten years or more.⁷⁹ Four states impose a maximum penalty of twenty years.⁸⁰

Reforms in incest legislation have included decriminalizing incest between consenting adults, while incest with a minor may be specially prohibited or covered by criminal sexual abuse provisions.⁸¹ Other reforms include developing a tiered structure of offense categories using variables such as the age and relationship of the parties.⁸² The reforms in incest legislation have been related to

cousins.

74. Incest between nieces-nephews and/or aunts-uncles is prohibited in all but 13 jurisdictions. See WULKAN & BULKLEY, *supra* note 71.

75. Eight states include first cousins. *Id.*

76. Generally the victim's uncorroborated testimony will sustain a conviction. See, e.g., *State v. Huston*, 64 Ariz. 72, 75, 166 P.2d 141, 144 (1946) ("a conviction may be had upon the uncorroborated testimony of the prosecutrix, unless her story is physically impossible, or so incredible that no reasonable man could believe it") (quoting *State v. Pollock*, 57 Ariz. 415, 416, 114 P.2d 249, 250 (1941)); *People v. Henderson*, 102 Ill. App. 2d 152, 154, 243 N.E.2d 605, 607 (1968) ("[w]here a conviction is based solely on the testimony of the complaining witness, who is a child . . . the testimony of that witness must be clear and convincing or must be corroborated by other substantial evidence").

77. See *supra* notes 32-34 and accompanying text.

78. See WULKAN & BULKLEY, *supra* note 71.

79. *Id.*

80. *Id.*

81. New Jersey's incest statute was repealed and replaced by criminal sexual abuse provisions. N.J. STAT. ANN. § 2C:14-2 (West 1983-1984). In Michigan, New Hampshire, Ohio and Vermont, only marriage, not sexual intercourse, is prohibited. See WULKAN & BULKLEY, *supra* note 71. In these five states incest with a minor is covered by criminal sexual abuse provisions. See, e.g., OHIO REV. CODE ANN. § 2907.03(5) (Page 1982). Incest with a child may also result in stiffer penalties than incest with a sibling. See, e.g., ILL. ANN. STAT. ch. 11-10 (Smith-Hurd 1983-1984).

82. See *supra* notes 67-69 and accompanying text.

the defined purpose of the statute.⁸³ A state desiring to provide greater protection to the minor child would move toward stiffer penalties when a minor is involved. Those states decriminalizing incest do not desire to control consensual sexual behavior and are presumably looking to criminal sexual abuse provisions to protect minors adequately. Those states reforming their statutes to include step-parents and adoptive parents are evidencing a greater concern for family structure.

C. *Child Protection Statutes*

Incest may also be prohibited by child protection statutes. These statutes include reporting laws⁸⁴ and juvenile and family court jurisdiction acts. The reporting laws impose a duty on parents or persons in contact with the child to report any suspected abuse to either a child protective services agency or a law enforcement official. The statutes vary in their definitions of abuse and who is charged with a duty to report abuse. Every jurisdiction has mandatory reporting provisions for physicians, and generally will also provide for social workers and teachers. Some states include both permissive and mandatory reporting provisions.⁸⁵ In addition to defining who must or may report abuse, the statutes define what acts constitute abuse. Sexual abuse is commonly viewed as a form of abuse which must be reported. After a report of abuse is made, it is quickly investigated.⁸⁶ The investigation may show that the allegations are unwarranted, or if the allegations are true, the report may become the basis of a child protection proceeding.

Juvenile and family court jurisdiction acts establish standards and procedures for a child protection proceeding in the juvenile courts.⁸⁷ A child protection proceeding may be instituted on behalf of a child who falls within a state's particular jurisdictional definition. Examples are a child who is "abused," "neglected," "lacking in parental control" or "in need of supervision." These definitions

83. See *supra* notes 6-7 and accompanying text.

84. For an analysis of reporting laws, see Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. REV. 103 (1974).

85. A permissive reporting provision establishes procedures for the reporting, investigation and intervention of abuse families. A mandatory reporting provision is similar but provides penalties for the failure to report abuse.

86. Investigation usually occurs within 72 hours of the report of abuse..

87. For a comprehensive explanation of child protection proceedings, see U.S. DEPT. OF HEALTH AND HUMAN SERVICES, *CHILD ABUSE AND NEGLECT LITIGATION: A MANUAL FOR JUDGES*, DHHS Publication No. (OHDS) 80-30268 (1981) [hereinafter cited as *MANUAL*].

may be construed to include sexual abuse.⁸⁸ Some child protection acts refer to criminal code definitions of sexual abuse. These definitions, however, may be applied less rigidly in the juvenile courts.⁸⁹

There is a determination in the juvenile courts as to whether the child meets the state's jurisdictional requirements and whether the child should be removed from the custody of the parents. While the child protection proceeding may be instituted simultaneously with criminal proceedings, the two are rarely coordinated.⁹⁰ Unique to the child protection proceeding is that an action may be initiated against a passive parent who fails to prevent abuse.⁹¹ This may be helpful in motivating the passive as well as the abusive parent to seek treatment and in preventing abuse of younger siblings.

D. *Domestic Violence and Sexual Psychopath Statutes*

Domestic violence laws protect family members from abuse by other family members.⁹² The statutes, while usually invoked by battered women to prevent further abuse by their spouses, may also protect children. Although the statutes vary in their procedures, protection is commonly effectuated through the use of orders and injunctions against the abuser.⁹³ Protective orders include orders to vacate the home, cease contact with family members, stop abuse, obtain counseling or treatment and pay support, restitution or attorney's fees.⁹⁴

Domestic violence statutes may also mandate criminal prosecution.⁹⁵ Some states allow special disposition of the criminal action and may permit pre-trial detention, protective orders and

88. Twenty-four jurisdictions specifically include sexual abuse in their jurisdictional definitions. See WULKAN & BULKLEY, *supra* note 71.

89. This is a result of the juvenile court's special duty to protect the child while criminal courts are charged with the responsibility of protecting the defendant.

90. See WULKAN & BULKLEY, *supra* note 71. For arguments for and against prosecution in cases of abuse see MANUAL, *supra* note 87.

91. Nine jurisdictions specifically refer to a parent who fails to prevent abuse. See WULKAN & BULKLEY, *supra* note 71.

92. For a complete analysis of domestic violence statutes, see LERMAN, CENTER FOR WOMEN POLICY STUDIES, STATE LEGISLATION ON DOMESTIC VIOLENCE, Response, Vol. 3, No. 12 CENTER FOR WOMEN POLICY STUDIES, Vol. 3, No. 12, at 1 (Aug.-Sept. 1980).

93. Thirty-four states provide for the use of orders and injunctions. See WULKAN & BULKLEY, *supra* note 71.

94. The Pennsylvania Protection From Abuse Act may be found at 35 PA. CONS. STAT. ANN. §§ 10181-10190 (Purdon Supp. 1983-1984).

95. These criminal provisions are generally part of the domestic violence statute.

mandatory treatment. All domestic violence statutes do not include sexual abuse, but these remedies, if available, may be more desirable than child protection proceedings because the parent, rather than the child, is removed from the home.⁹⁶

Sexual psychopath statutes permit civil commitments, rather than criminal incarceration, for persons convicted of certain sex offenses.⁹⁷ Some statutes provide community treatment alternatives which are superior to criminal penalties, but many statutes only provide indeterminate commitment to in-patient treatment centers. In the past, the use of indeterminate commitment has raised constitutional issues of due process⁹⁸ and equal protection.⁹⁹ Further, although some statutes used language concerning the effective treatment and rehabilitation of the offender, a primary motivation was the desire to see sexual deviants permanently incarcerated.¹⁰⁰ Although a parent guilty of incest would probably fall within a particular state's definition of a sexual psychopath, the constitutional infirmities and purposes of these statutes suggest that they are an ineffective response to incest.¹⁰¹

IV. THE RESPONSE TO INCESTUOUS FAMILIES

A. *The Benefits of Early Intervention*

Sexual abuse ranges from fondling or exhibitionism to actual sexual intercourse.¹⁰² In many incestuous relationships the sexual abuse becomes progressively more sexually overt with the passage of time.¹⁰³ Although it is unclear whether actual sexual intercourse is more psychologically harmful to the child, it is clearly more physically harmful.¹⁰⁴ The fact that penalties for sexual intercourse are more severe than penalties for fondling or exhibitionism sug-

96. The court in a child protection proceeding has no authority to remove a person, other than the child, from the home.

97. More than a dozen states passed sexual psychopath statutes primarily in response to public outrage concerning violent sex crimes. See WULKAN & BULKLEY, *supra* note 71.

98. For a discussion of the procedural due process issue see Comment, *Commitment of Sexual Psychopaths and the Requirements of Procedural Due Process*, 44 *FORD. L. REV.* 923 (1976).

99. The Supreme Court held in *Minnesota ex. rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940), that state legislatures may create special categories and procedures for disposition of sex offenders without violating the equal protection clause.

100. See Comment, *supra* note 98, at 924.

101. The repeal of all sexual psychopath legislation is encouraged in RECOMMENDATIONS, *supra* note 56.

102. See *supra* note 18 and accompanying text.

103. *Id.*

104. See Tilelli, Turek & Jaffe, *supra* note 10.

gests that sexual intercourse is viewed by society as more harmful and socially unacceptable.¹⁰⁵

Early intervention in sexual abuse may prevent this progression to more sexually intrusive contact. The benefits of early intervention are that the child is protected while the treatment of the family and the rehabilitation of the offender are facilitated. The treatment of the family is facilitated because the incestuous family will not have established patterns of behavior consistent with abuse. It may be easier to rehabilitate the offender and he may be able to learn acceptable sexual behaviors and develop an appropriate parent-child relationship. The offender is also likely to face less stigmatization as a sexual deviant.¹⁰⁶

Though early intervention is beneficial, the nature of the incestuous relationship makes early detection of sexual abuse difficult and uncertain. First, family members may be strongly motivated to hide the abuse. Second, it may be difficult to identify inappropriate sexual behaviors. This is especially true in cases of fondling or exhibitionism where the distinction between normal family behaviors and sexual abuse is not easy to ascertain. Third, the clearest evidence of abuse, which is medical documentation of venereal disease, pregnancy or genital trauma, may be non-existent in the early stages of abuse. However, a "sexually abused child syndrome" has been developed which may facilitate early detection.¹⁰⁷ Although this "syndrome" was developed primarily as a tool to aid in the prosecution of sexual abuse cases, the continued isolation of in-

105. See *supra* note 62 and accompanying text.

106. See McCAGHY, *supra* note 45.

107. The *battered child syndrome* is a device in physical abuse cases similar to the operation of the doctrine of *res ipsa loquitur* in tort cases. The *battered child syndrome* is a list of medical and behavioral indicators of physical abuse. In some jurisdictions the introduction of evidence that a number of indicators are present is sufficient to establish a *prima facie* case of abuse. The defendant must then overcome the presumption of abuse by offering an alternative explanation. The *sexually abused child syndrome* is:

1. Neurasthenia;
2. "Acting out" behavior such as masturbation or pseudo-seductive behavior;
3. Father denies and (a) has black-out spells (b) says girls should be prepared for sex (c) rationalizes his behavior;
4. Physical evidence such as semen, hair, and skin on bedding or clothing;
5. Allegations of sexual activity by siblings;
6. Child assumes maternal responsibilities.

For older children three more indicators are added:

7. Gender role confusion;
8. Evidence of sexual activity when the child is not active with anyone;
9. Abnormal concern by the father about the child's social life and dating practices.

The presence of any two is a strong indicator of incest. See SGROI, *supra* note 10.

dicators of abuse will facilitate early detection of sexual abuse.

Because the early detection of incest is difficult and uncertain, judicial intervention often may be inappropriate in the early stages of abuse. Judicial intervention is considered a serious intrusion into the privacy of the family and encroaches upon important rights of the accused. The common law tradition recognizes the right of the accused to be free from unwarranted accusations and, therefore, public judicial proceedings should not be instituted without a strong suspicion of abuse. The nature of the sexually abusive relationship creates a situation where the benefits of early intervention must be countered with the protection of families and individuals who are not participating in a sexually abusive relationship. If elaborate legal procedures are mandated for every case of suspected abuse, concerned persons may be reluctant to report abuse in all but those cases in which they are certain sexual abuse is present. Concerned professionals who suspect sexual abuse may prefer to institute child protection proceedings on the basis of general allegations of abuse or neglect, or may avoid any report of abuse if they fear the family will be embroiled in a complex sexual abuse proceeding which they are not certain is warranted.

The result is that sexual abuse will continue to be inaccurately reported¹⁰⁸ and effective early intervention strategies will not be shared among professionals. In addition, the absence of early reports of suspected abuse will thwart professionals who may deal with the family years later. This is not to say that a response to incestuous families should be developed apart from the legal system, but rather an early intervention strategy will necessarily include treatment for families outside of the legal procedures established for clearer cases of sexual abuse.

B. *The Need to Facilitate Family Treatment*

Any response to incest must include the entire family. The research regarding incest establishes clearly that it is a "family affair."¹⁰⁹ The acquiescence of the mother as well as the silence of the child and other siblings are necessary for incest to continue over long periods of time. The emergence of pseudo-seductive behavior in the victims of incest is one indicator of incest's deleterious effects on persons other than the perpetrator. Historically, judicial responses to incest have focused on one specific participant

108. Inaccurate reporting is a major impediment to developing a response to incest.

109. See *supra* notes 31, 39, 40 and accompanying text.

in the relationship. Criminal laws emphasize the immorality of the father and society's interest in retribution. Until recently, however, it was not uncommon for the criminal system to also blame the victims of sexual abuse. For instance, a victim of a sexual crime was often accused of promiscuity and seduction. In *Commonwealth v. Bonomo*,¹¹⁰ the defendant appealed a conviction that he had "carnal knowledge" of his fourteen year old niece. The court ruled that the trial court erred in not permitting evidence of the young girl's "bad reputation" in a city in which she had previously lived. The case exemplifies the rule, at that time, that evidence of a reputation of promiscuity in the community is admissible as a defense to the crime of statutory rape.

In other cases, the criminal system has punished a guilty participant when the criminal prosecution seemed unwarranted. In *Commonwealth v. Doshong*,¹¹¹ the defendant was convicted of violating an incest law after she admitted that her father was the parent of her newly born illegitimate child. The defendant, who was not a minor, admitted to having engaged in intercourse with her father after her mother died. Her father was also tried and convicted but died prior to appeal. The appeal involved several issues of admissibility and sufficiency of the prosecutor's evidence. The appeal failed and the conviction was sustained. Criminal prosecution seems a harsh response to a woman who has recently faced the death of both parents and the birth of a child, even when the defendant has admitted violation of the incest statute.

This comment does not suggest that any hard and fast rules can be developed which determine when prosecution is appropriate and what prosecutorial procedures will facilitate family treatment. In a prosecutorial survey conducted by the ABA National Center for Child Advocacy and Protection, prosecutors reported a variety of approaches to incestuous families.¹¹² Some programs provide pre-trial diversion and alternatives to incarceration as an incentive for the perpetrator to seek treatment. These programs hold the perpetrator legally accountable for his crimes and institute dispositional alternatives only in those cases where the perpetrator is likely to comply successfully with treatment recommendations.

110. 396 Pa. 222, 151 A.2d 441 (1959).

111. 2 Cumberland L.J. 94 (Pa. 1951). The age of the defendant is not mentioned.

112. A report of the survey is found in NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES (1981) [hereinafter cited as INNOVATIONS] and was part of the child sexual abuse project discussed *supra* note 3.

Some prosecutors also report the use of multi-discipline sexual abuse teams.¹¹³ These teams include prosecutors, child advocates, social workers, policemen, therapists and other experts in sexual abuse. These sexual abuse teams capitalize on the resources of the entire community while facilitating the interaction of criminal prosecution and family treatment. Prosecutors also reported the use of vertical prosecution in which one prosecutor handles every stage of the criminal proceedings as opposed to the common practice of several prosecutors working on a single case. The use of one prosecutor can eliminate multiple interviews and facilitate the coordination of prosecution and family treatment.

Unlike the criminal law, child protection laws and domestic violence acts were specifically designed to incorporate comprehensive family treatment. The strength of the child protection proceeding is that it provides for legal action against the passive parent which may assure the continued treatment of the entire family.¹¹⁴ The strength of the domestic violence proceedings, when available, is the breadth of remedial orders including the removal from the home of the perpetrator rather than the child.¹¹⁵ The use of these two proceedings may be indicated in those jurisdictions which have not incorporated procedures designed to facilitate family treatment.

C. *The Need to Protect the Child From Further Abuse*

While disposition of the perpetrator and treatment of the family are important, the primary focus of any response must be the protection of the child from further abuse.

1. *Investigation of Abuse*

To prevent further abuse, allegations of sexual abuse must be adequately investigated. Loretta M. McCarty suggests the initial interview should include an assessment of whether sexual abuse has occurred, as well as a determination of the appropriateness of treatment and/or prosecution.¹¹⁶ Even though McCarty writes from a social worker's perspective and, therefore, does not address legal issues such as *Miranda* warnings, the necessity of counsel and prosecutorial problems posed by retractions and inconsistent state-

113. *Id.*

114. *See supra* note 91 and accompanying text.

115. *See supra* note 96 and accompanying text.

116. *See McCarty, supra* note 28.

ments, many of her suggestions could be incorporated into an initial investigation. In addition, awareness of interviewing goals common to social service professionals and prosecutors would perhaps permit some interviews to be combined and multiple questioning of the child could be eliminated.¹¹⁷

McCarty suggests that the interview of the child and each parent should be done separately and without warning. The interview of the child should address common fears of incest victims: the fear of blame and the fear of nonbelief.¹¹⁸ The child should be assured that responsibility for the outcome of the investigations lies with adults. The interviewer should listen carefully and avoid interruptions. Recording the interview is beneficial because the interviewer is not distracted by note-taking, evidence is accurately preserved and multiple interviews may be eliminated. In addition, a record of the interview is an invaluable treatment tool if the victim later retracts or alters her story.¹¹⁹ The child should never be expected to confront the perpetrator as she is often afraid of the perpetrator and may retract her story.

The involvement of the passive parent is viewed as the key to successful treatment. The interview must be a combination of firm confrontation coupled with support. The common response of passive parents to the interview is a mixture of anger, guilt, denial and blame. It is important to help the passive parent avoid blaming the incest victim. The interviewer should avoid giving advice, especially concerning her relationship with the perpetrator, as this may result in resentment later.

The initial interview of the father is best done by a male¹²⁰ and should occur prior to arrest.¹²¹ The interviewer should refuse all excuses for the incest such as the influence of alcohol or seductive behavior by the daughter.¹²² In addition, the perpetrator should be required to apologize¹²³ to the daughter and separate living arrangements should be instituted. If the perpetrator is cooperative,

117. The elimination of multiple interviews is suggested in RECOMMENDATIONS, *supra* note 56.

118. *Id.* See also *supra* note 11.

119. See *supra* notes 35-38 and accompanying text.

120. McCarty asserts that the perpetrator has a low opinion of women and is less likely to respect the interviewer if she is female. McCarty, *supra* note 28, at 681.

121. McCarty views the purpose of the interview with the father as obtaining a confession so prosecution can be avoided. McCarty, *supra* note 28, at 685.

122. These are common excuses. See SGROI, *supra* note 10.

123. Concepts such as apology and forgiveness are often ignored by the "legal mind" and its concern for legal rights.

dispositional alternatives should be suggested.¹²⁴ Though this methodology may not always be proper in a prosecutorial investigation, an awareness of the common response of each participant as identified by social service professionals will facilitate an investigation.

2. *Removal of the Child from the Home*

If an investigation reveals sexual abuse, the child must be protected from further abuse. The removal of the perpetrator, rather than the child, is suggested as the removal of the child denies the child the continued support of other family members and throws the already confused child into a strange new environment. These actions may be perceived by the child as punishment and increase her feelings of anger and guilt. The removal of the child may be necessary, however, because in some cases the passive parent may resent the child's accusations and subject the child to resentment and pressure to retract her story. If removal is necessary, the child should be placed in a facility staffed by professionals trained in the treatment of families victimized by incest. This could be a trained foster family, group home or institutional setting. In all cases, the placement of the child outside the home should be part of a comprehensive treatment plan and the involvement of the entire family should be planned.¹²⁵

D. *Reforming Procedures at Trial*

1. *Determination of Appropriateness of Prosecution*

The procedures following the initial interview must also be attuned to the protection of the child victim. Some researchers have suggested that the procedures which follow the discovery of incest are more traumatic than the incest itself.¹²⁶ Although procedures are being refined, criminal prosecution still involves stress to the child. Essential to any response which protects the child is an early determination of the appropriateness of prosecution. An important factor in that determination is the child's capacity to act as a witness. The prosecutor must decide whether the child has the intelligence and capacity to provide facts as well as an understanding of

124. This is consistent with *INNOVATIONS*, *supra* note 112.

125. Many residential treatment centers are designed to treat the child and are not geared to comprehensive family treatment.

126. Libai, *The Protecting of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969).

the moral duty to tell the truth.¹²⁷ In addition, the prosecutor must consider the necessity of the child's testimony compared to the attendant strain upon the child, the child's believability, the availability of supporting evidence and the existence of contradictory evidence.¹²⁸ The prosecutor must also consider the child's learning capacity and her ability to understand various aspects of the legal process, such as cross-examination.¹²⁹ The age and emotional maturity of the child must be considered and existence of family support or pressure must be taken into account.¹³⁰

The prosecutor must be aware that a legal determination of the child's desirability as a witness will often coincide with a determination based on a psychological assessment of the child. A psychological assessment includes a determination of the consistency of the child's account and the extent to which the child denies the relationship or is susceptible to perceptual and cognitive distortion.¹³¹ Another factor bearing upon the child's effectiveness as a witness is the likelihood that the child be subjected to intense loyalty conflicts.¹³² Of primary importance in both a psychological and legal analysis is articulateness and the willingness to testify.

By identifying cases in which the child is not an effective witness, prosecution of these cases can be abandoned and unnecessary strain avoided. In addition, prosecutorial resources can be marshalled to potentially successful cases. Another tactic for avoiding unnecessary litigation is the use of multiple charges against the defendant. Multiple charges increase the likelihood that a defendant will plead guilty and litigation is avoided.¹³³

2. *Confrontation Clause*

While undesirable litigation should be avoided, some sexual abuse cases will be prosecuted. Procedures during investigation

127. See ALI, MODEL CODE OF EVIDENCE (1942).

128. MELTON, BULKLEY & WULKAN, *Competency of Children as Witnesses*, in CHILD SEXUAL ABUSE, *supra* note 3, at 125. Portions of the article were reprinted from Melton, *Children's Competency to Testify*, 5 LAW AND HUMAN BEHAVIOR 73 (1981). See also Bernstein, *The Child Witness: A Model for Evaluation and Trial Preparation*, LXI CHILD WELFARE 95 (Feb. 1982).

129. Bernstein, *The Child Witness: A Model for Evaluation and Trial Preparation*, LXI CHILD WELFARE 95 (Feb. 1982).

130. *Id.*

131. *Id.* See TERR, *The Child as Witness*, in CHILD PSYCHIATRY AND THE LAW 45-51 (Shetky & Benedik eds. 1980).

132. See TERR, *supra* note 131.

133. See INNOVATIONS, *supra* note 112.

and prosecution should be designed to minimize the trauma to the child. One goal is the elimination of multiple interviews.¹³⁴ As mentioned earlier, some jurisdictions use "vertical prosecution," whereby extra questioning of the child is avoided.

There are several other changes being advocated in an attempt to protect the child in sexual abuse cases. One change is the development of an exception in sexual abuse cases to the traditional interpretation of the defendant's right to confront witnesses. Dustin Ordway advocates an interpretation of the confrontation clause of the United States Constitution which obviates the necessity of in-court testimony by the child.¹³⁵ The child is interviewed by a sexual abuse expert and a videotape of this interview is presented in court, accompanied by the presentation as a witness of the sexual abuse expert. The expert witness could testify concerning his or her judgment of the credibility of the child witness as well as answering questions within the expert's general knowledge of sexual abuse. In this way, the fact-finders would have the benefit of viewing the child's testimony and also be provided information to aid them in assessing the credibility of the child witness. The defendant would be given the opportunity to discredit the testimony of the child through cross-examination of the expert while the child would be spared in-court testimony.

The rationale for these changes rests upon the nature of the parent-child relationship and the violation of this relationship by the defendant. In addition, Ordway argues that the expert can be a superior source of information to the fact-finder. Arguments against this approach include the traditional interpretation of the confrontation clause which assures the defendant the right to cross-examine and discredit witnesses in open court. Further, there is a reluctance to rely heavily on the interpretation and opinion of experts in such a difficult and delicate area.¹³⁶

While these issues must be fully considered, simple changes can

134. See RECOMMENDATIONS, *supra* note 56.

135. Ordway, *Reforming Judicial Procedures for Handling Parent-Child Incest*, LXII CHILD WELFARE 68 (Jan.-Feb. 1983). See also, MELTON, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*, in CHILD SEXUAL ABUSE, *supra* note 3, at 184.

136. Another possibility, suggested by David Libai, is the use of "child courtrooms." The child is viewed through a one-way mirror while giving testimony. The expense of building such courtrooms may be prohibitive, but the suggestion may be more consistent with the due process clause and lessens reliance on experts to interpret the testimony. Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969).

be made which are clearly consistent with constitutional requirements. In bench trials, a judge may order testimony in chambers. The defendant may be present but the spatial layout and atmosphere of the room can be geared to the comfort of the child.¹³⁷

3. *Public Trial*

A second issue in the development of sexual abuse prosecution is whether the judge may deny entrance to the public in order to spare the child the embarrassment and avoid social stigmatization.¹³⁸ The United States Supreme Court has recently reaffirmed in *Richmond Newspapers v. Virginia*¹³⁹ the common law tradition of public trials. In *Richmond*, prior to defendant's fourth trial on murder charges, counsel for the defendant requested that the trial be closed to the public. The prosecutor made no objection, but the newspaper and two reporters sought a hearing on a motion to vacate the closure order. The motion was denied and the Virginia Supreme Court later denied the petition for appeal.¹⁴⁰ The Supreme Court granted certiorari and reversed.¹⁴¹ Although no opinion was agreed upon, seven members found that the order violated the public's right to access guaranteed by the first and fourteenth amendments. If the public's access to information is the concern, the exclusion of the public accompanied by some procedure, such as publication of the transcript, would seem to assure the public's access to the information.¹⁴²

The Court noted in *Gannet v. DePasquale*¹⁴³ that public trials are not absolutely mandated. Historically, there have always been circumstances which warranted the exclusion of the public.¹⁴⁴ Again, however, the emphasis is not on the rights of the accused but upon the public's access to the information and the defendant's right to a public trial. With the increasing visibility of victim advocacy programs, courts may become more sensitive to the necessity of protecting victims from unnecessary embarrassment and strain.

137. As pointed out to me by a colleague, the Constitution gives a right of confrontation, not intimidation.

138. See MELTON, *supra* note 135.

139. 448 U.S. 555 (1980).

140. *Id.* at 562.

141. *Id.* at 563.

142. See MELTON, *supra* note 135.

143. 443 U.S. 368 (1979).

144. *Id.* at 388 n.19.

V. CONCLUSION

As professionals continue to develop responses to families which incorporate the principles of the accountability of the perpetrator, the importance of family treatment and the protection of the child, a variety of programs will emerge. These programs will incorporate a variety of treatment models, theories of criminal responsibility and theories of child and family health. All professionals working with incestuous families must be open to the contribution of programs in other jurisdictions. In addition, the legal profession must be sensitive to the historic tension between the various service professionals. In a response to incest which involves "teams" of various professionals, this tension will be evident and must be addressed. Through open communication a response to incestuous families can be developed which incorporates the strengths of all persons who desire to help these troubled families.

Ruth E. Felker

