

Incest and the Legal System: Inadequacies and Alternatives

The conviction-oriented approach of the legal system fails to deal effectively with a case of father-daughter incest. This comment discusses specific shortcomings of the legal system in the investigation, adjudication and treatment stages of an incest case. The authors then propose alternatives to meet these shortcomings and assure the well-being of the child-victim.

Incest victims initially are betrayed by the adults in their families who fail to provide them with emotional, physical and sexual safety, and they are further victimized by a society that shuts its doors and its eyes at the mention of sexual abuse.¹

The true incidence of in-family child sexual abuse is unknown because the actual rate of incest exceeds the rate of detected incest.² Nonetheless, experts describe the occurrence of in-family

¹ S. BUTLER, CONSPIRACY OF SILENCE 29 (1978).

[T]he 'community response' to a child victim can mean the difference between permanent damage to the child's psyche and survival after a potentially traumatizing occurrence. By 'community' social scientists usually mean those immediately around the victim—parents, relatives, neighbors, friends and others—and also the larger society with its remote and unfamiliar institutions of law enforcement and justice. The guilt and fear that these two elements of the 'community' can induce in a child can be worse than the criminal act itself.

N. GAGER & C. SCHURR, SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA 52 (1976).

² K. MEISELMAN, INCEST 29 (1978). Statistics invariably fail to represent the true occurrence of incest. Giarretto, *Humanistic Treatment of Father-Daughter Incest*, in CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY 143, 144 (1976).

Sexual abuse of a child occurs when an adult uses the child for sexual gratification or permits another adult to so use the child. It is clearly sexual abuse if a father engages in sexual relations with his daughter before she is mature enough to consent. D. WALTERS, PHYSICAL AND SEXUAL ABUSE OF CHILDREN: CAUSES AND TREATMENT 29 (1975).

California law defines incest as "Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who inter-marry with each other, or who commit fornication or adultery. . .".

sexual activity as "epidemic."³ This assessment is based upon the thousands of cases of incest abuse of young girls that police, teachers and social workers report each year.⁴ None of these reports, however, can adequately express the confusion, bewilderment, guilt and depression that many of these victims experience.⁵

The trauma of incest is often compounded by a legal system⁶ that takes an adversary approach to cases of incest. This approach fails to deal adequately or effectively with cases of in-family child sexual abuse.⁷ The predominant concern of the legal system is the determination of the offending parent's guilt or innocence.⁸ This conviction-oriented focus often results in the complete neglect of the child victim's well-being.⁹ Consequently,

CAL. PENAL CODE § 285 (West Cum. Supp. 1979).

In this article, the term "incest" is used interchangeably with the term "in-family sexual abuse". These terms refer to any sexual activity including, but not restricted to, sexual intercourse.

³ Crawford, *A Therapist Says the Hush-Hush Scandal of Incest Occurs in 'Average, Respectable' Families*, PEOPLE, May 9, 1977, at 47, 48 (interview with Henry Giarretto, psychologist).

It is not surprising that in more than three-quarters of all reported cases of child sexual molestation, the offender is not a stranger to the child. P. ARNOLD, *HOW TO PROTECT YOUR CHILD AGAINST CRIME* 13 (1977). This is because human sexual behavior depends upon two important variables: interpersonal relationships and circumstances of opportunity. Flammang, *Interviewing Child Victims of Sex Offenders*, in RAPE VICTIMOLOGY 245, 247 (L. Schultz ed. 1975). It is evident that both of these variables are present when the child knows the offender.

⁴ See S. BUTLER, *supra* note 1, at 14-15.

⁵ See K. MEISELMAN, *supra* note 2, at 187, 188. For an excellent discussion of the long-term effects of father-daughter incest, see *id.* at 194-261.

⁶ For purposes of this article, "legal system" refers to the processes beginning with police intervention and ending when the offender and the victim are no longer under the jurisdiction of any court.

⁷ See Adler, *Child Abuse Victims: Are They Also Victims of an Adversarial and Hierarchical Court System?*, 5 PEPPERDINE L. REV. 717 (1977-78).

⁸ See Polier & McDonald, *The Family Court in an Urban Setting*, in HELPING THE BATTERED CHILD AND HIS FAMILY 208 (1972).

⁹ The typical reaction is either neglect of the victim or severe retribution against the offender. In this respect, the sexual exploitation syndrome is comparable to the battered child syndrome of thirty years ago. Schechter & Roberge, *Sexual Exploitation*, in CHILD ABUSE AND NEGLECT 127, 141 (1976).

This conviction-oriented focus is not unique to incest cases. The failure to solve the problem of child abuse generally, for example, stems from the professional and public view that the best remedy is incarceration of the offender and placement of the child in a foster home. B. JUSTICE & R. JUSTICE, *THE ABUSING FAMILY* 10 (1976). "This is a common characteristic of state interventions against parents purportedly on behalf of children—a generalized attitude of self-

the legal system causes considerable damage to the individual it should protect—the sexually abused child. While an effective system should seek to prevent the sexual abuse of the child, it should also attempt to preserve the family unit and safeguard the victim's emotional well-being.¹⁰ The present system does not meet these goals.¹¹

This article will survey the shortcomings of the adult criminal justice and juvenile court systems in the investigation, adjudication and treatment stages of a case of incest. This article will also propose alternatives to meet these shortcomings. In the investigation stage, police officers lack the training necessary to interview the sexually abused child effectively.¹² The child is then inadequately represented at subsequent court proceedings.¹³ Furthermore, communities rarely offer the incest offender and his family treatment programs designed to rehabilitate the incestuous parent, reduce the trauma to the child, and reunite the family.¹⁴ Implementation of the proposals suggested by this article will result in a heightened consideration of the emotional and physical well-being of the sexually molested child.

This article will focus on the unique problems posed by father-daughter incest¹⁵ because it is the most prevalent form of incest.¹⁶ Moreover, father-daughter incest involves complexities that may

righteousness, even punitiveness, toward 'difficult' parents that takes little account of the individual needs of the affected child." Burt, *Developing Constitutional Rights Of, In, and For Children*, 39 L. AND CONTEMP. PROB. 118, 120 (Summer 1975).

¹⁰ See Giarretto, *The Treatment of Father-Daughter Incest: A Psycho-Social Approach*, CHILDREN TODAY, July-August 1976, at 2, 34.

¹¹ "It is evident that typical community intervention in incest cases, rather than being constructive, has the effect of a knockout blow to a family already weakened by serious internal stresses." Giarretto, *supra* note 2, at 148.

¹² See notes 47-49 and accompanying text *infra*.

¹³ See notes 71 & 85 and accompanying text *infra*.

¹⁴ See notes 112 & 117 and accompanying text *infra*.

¹⁵ Throughout this article, the term "father" refers to the child's natural father.

¹⁶ Father-daughter incest is the most commonly detected sex crime within the family. GAGER & SCHURR, *supra* note 1, at 37. Three quarters of all reported incest occurs between fathers and daughters. Kinkead, *The Family Secret*, BOSTON, Oct. 1977, at 100, 172. Thus, incest victims are usually girls. DeFrancis, *Protecting the Child Victim of Sex Crimes Committed by Adults*, in LAW ENFORCEMENT AND CORRECTIONAL REHABILITATION 45, 45 (1973). Consequently, prosecutors bring charges against father-offenders more often than any other incest offender. Giarretto, *supra* note 10, at 2.

not arise in non-incestuous rape or non-sexual child abuse cases.¹⁷ Father-daughter incest, therefore, deserves critical examination.

I. CASE STUDY¹⁸

Jane is an attractive thirteen year old. Her father George is an accountant and her mother is a real estate agent.¹⁹ George initiated sexual activity with Jane when she was ten years old,²⁰ and had recently made sexual advances toward Jane's younger sister.²¹ Jane was initially frightened by her father's advances and reluctant to become involved in the relationship he had initiated.²² Jane's mother did not intervene to halt the sexual abuse because, although she suspected that George was abusing their daughter, she was unwilling to confront her own suspicions.²³

¹⁷ Sexual relations are more devastating to the daughter and likely to be more prolonged when the offender is a member of her family. Moreover, the effects that these sexual relations may have upon the child are greatly intensified by the sense of confusion and conflict that arises from the child's emotional relationship with the offender. J. POLIER, *EVERYONE'S CHILDREN, NOBODY'S CHILD* 153 (1971).

¹⁸ The following case study is a composite of the "average" incest case. There is no intent to depict the experiences of any specific family.

¹⁹ Although the family in this hypothetical is middle-class, incest occurs in families of all races, religions and socioeconomic levels. D. WALTERS, *supra* note 2, at 7. Lower-class families are often statistically over-represented in studies of incest occurrence; but that is because poor families often must turn to public facilities for help. Incest in upper-class families often goes undetected because these families may resort to private treatment. S. BUTLER, *supra* note 1, at 11.

²⁰ The average victim of incest is ten years old when her father begins the sexual abuse. Giarretto, *supra* note 10, at 2.

²¹ Incestuous fathers rarely abuse only one daughter. The offender frequently begins the abuse with the oldest sibling and subsequently transfers his attention to the next oldest. See WALTERS, *supra* note 2, at 113.

²² The father-offender often succeeds in convincing his daughter to engage in sexual activity with him by communicating his displeasure if she fails to comply with his demands and by using his authority to carry an implied threat of punishment if she refuses. DeFrancis, *supra* note 16, at 52.

²³ Mothers in incestuous families often ignore their daughter's hints that something is going on and may even leave the house at crucial times. Kinkead, *supra* note 16, at 172.

The wives in families where the father is sexually abusing his daughter often exhibit extreme dependency on their spouses which overshadows any feeling of outrage. Schechter & Roberge, *supra* note 9, at 133. The mother may not want to believe that her husband could commit such an act or she may simply feel powerless to prevent it. Weber, *Sexual Abuse Begins At Home*, Ms., April 1977, at 64. Many mothers in incestuous families were themselves sexually molested as children. S. BUTLER, *supra*, note 1, at 114.

o However, researchers do not universally agree that mothers in incestuous

Jane eventually found the situation intolerable and confided in her physical education teacher who promptly called the police.²⁴ A police officer interviewed Jane at her school that afternoon.²⁵ She underwent an embarrassing question and answer session²⁶ and the officer immediately took Jane into protective custody.²⁷ Two days later, a county probation officer filed a petition to have the court declare Jane a dependent child.²⁸ The juvenile court

families are aware of the sexual abuse. See, for example, Armstrong, *Kiss Daddy Good-Night*, COSMOPOLITAN, Feb. 1979, at 167, 179.

²⁴ The sexual abuse of the child may come to the attention of the individual who reports the abuse in a number of ways. The "trigger," in some cases, which causes the child to report the incest, is the father's refusal to permit his daughter to have friends. His repressed jealousy or fear of discovery may manifest itself in a rigid, uncompromising attitude toward his daughter's social activities. The daughter who has obediently submitted to the incest rebels against this restriction and turns her father in. DeFrancis, *supra* note 16, at 54. Conversely, the gratification of the child's love needs from her father over time may account for her refusal to report the activity. Schultz, *The Child as a Sex Victim: Socio-Legal Perspectives*, in RAPE VICTIMOLOGY 257, 261 (L. Schultz ed. 1975).

In United States history, few legislative proposals have been so widely adopted in so short a time as were reporting statutes. Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 711 (1966). CAL. PENAL CODE § 11161.5 (West Cum. Supp. 1979), for example, requires California teachers to report any instance of suspected child abuse or sexual molestation. The teacher must report by telephone and in writing, within thirty-six hours, to the local police authority and the juvenile probation department, or to either the county welfare department or health department.

²⁵ Police officers frequently interview the child at school. Interview with Carol Kirkwood, school social worker, in Whittier, California (Feb. 17, 1979).

²⁶ This is only the first in a series of such interviews. "Child trauma occurs as a result of the court's need to have the child victim repeat the details of the sexual offense several times, to police, warrant officers, prosecutors, and a jury, sometimes with the suspect present." Schultz, *supra* note 24, at 262. In a case of incest, the community response is to interrogate the child, eliciting the most minute sexual details. Schechter & Roberge, *supra* note 9, at 139.

²⁷ CAL. WELF. & INST. CODE § 305 (West Cum. Supp. 1979) provides that a peace officer may, without a warrant, take a minor into temporary custody, when the officer has reasonable cause to believe that the minor is abused or neglected. CAL. WELF. & INST. CODE § 300(d) (West Cum. Supp. 1979) provides that a child whose home is an unfit place by reason of neglect, cruelty, depravity or physical abuse by the child's parents is within the jurisdiction of the court. The court may, therefore, adjudge the minor to be a dependent child of the court. This note and notes following regarding specific juvenile court procedure refer to California law. The law in other states may vary in one or more respects.

²⁸ CAL. WELF. & INST. CODE § 313(a) (West Cum. Supp. 1979) provides that a minor taken into temporary custody must be released within forty-eight hours, excluding nonjudicial days, unless within that time a petition to declare the minor a dependent child has been filed.

conducted a detention hearing the following day. At that time, the judge found that Jane's protection was a matter of immediate and urgent necessity and ordered her detention.²⁹

Following the order for Jane's detention, the court conducted a jurisdictional hearing.³⁰ In that proceeding, the judge found that Jane was a dependent child³¹ and heard evidence on the question of whether or not to return Jane to her home.³² Once the court determined that Jane was a dependent child, it had the power to make "all reasonable orders for her care, supervision, custody, conduct, maintenance and support."³³ After considering the evidence on the question of removal, the court ordered Jane's placement in a foster care institution.³⁴ Jane will probably remain in this foster care facility for some time since evidence suggests that short term foster care is the exception, not the rule.³⁵ Jane felt

²⁹ CAL. WELF. & INST. CODE § 315 (West Cum. Supp. 1979) provides that a minor taken into custody shall be brought before a judge or referee of the juvenile court to determine whether the court should further detain the child. CAL. WELF. & INST. CODE § 319 (West Cum. Supp. 1979) directs the court to examine the minor and hear relevant evidence. The court may thereafter detain the minor if it finds that detention is a matter of immediate and urgent necessity for the protection of the minor.

³⁰ This hearing is required if the court is to make more than an emergency, temporary disposition. The court must return the child to her home unless it finds her to be a dependent child. CAL. WELF. & INST. CODE § 355 (West Cum. Supp. 1979). See also note 27 *supra*.

³¹ See note 27 *supra*.

CAL. WELF. & INST. CODE § 355.4 (West Cum. Supp. 1979) provides that where the court finds, based upon professional evidence, that the child's detrimental condition is probably the result of unreasonable acts or omissions by the child's parent(s), this evidence shall be prima facie evidence that the minor's home is an unfit place for him by reason of physical abuse. Further, this proof shall be sufficient to support a finding that the minor is a dependent child.

³² Once the court has determined that the child does come within its jurisdiction, it shall hear evidence on the proper disposition to be made of the minor. CAL. WELF. & INST. CODE § 356 (West. Cum. Supp. 1979).

³³ CAL. WELF. & INST. CODE § 362 (West Cum. Supp. 1979).

³⁴ CAL. WELF. & INST. CODE § 362 (West Cum. Supp. 1979) permits the court to commit the minor to the care of an association, society, or corporation embracing within its objects the purpose of caring for such minors, a suitable private institution, or any other public agency organized to provide care for needy or neglected children.

In a case of child abuse, foster home placement is the most frequent judicial disposition. Goodpaster & Angel, *Child Abuse and the Law: The California System*, 26 HASTINGS LAW J. 1081, 1090 (1975). For a discussion of the history of foster care, see D. ZIETZ, *CHILD WELFARE: SERVICES AND PERSPECTIVES* 81-85 (2d ed. 1969).

³⁵ Geller, *Intervention Between Parent and Child: A Reappraisal of the*

guilty, frightened, and confused by the forced separation from her family at a time when she most needed her family's love and support.³⁶

Jane's trauma continued throughout her father's prosecution for statutory rape.³⁷ Although she had already testified at her dependency hearing,³⁸ Jane was required to repeat the details of the sexual activity to the police, at her father's preliminary hearing³⁹ and again at his trial. Moreover, as Jane's mother sensed the disintegration of her family unit, she vacillated between the urge to protect her child and the desire to defend her husband. Consequently, Jane's mother was unable to offer Jane the support and guidance that she needed.⁴⁰

State's Role in Child Neglect and Abuse Cases, 63 GEO. L. REV. 705, 912 (1975). In San Francisco, the average time spent in foster care is nearly five years and only 15% to 25% of children placed in foster care ever return home. K. KENISTON, *ALL OUR CHILDREN* 188 (1977).

³⁶ The incest victim will often feel responsible for any subsequent parental separation or sentencing of her father to a correctional institution. If the child feels that she helped initiate the sexual activity, she may feel guilty that only half of the criminal relationship is being punished. See Schultz, *supra* note 24, at 262. See also Chaneles, *Child Victims of Sexual Offenses*, FED. PROBATION, June 1977 at 52, 54. The child, therefore, needs her family's support at this time. Unfortunately, removal at this point in the proceedings is a common occurrence and may harm the victim. Interview with Elizabeth Cobey, Counsel to Parents United, in San Jose, California (Sept. 6, 1978).

³⁷ Statutory rape is "[a]n act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." CAL. PENAL CODE § 261.5 (West Cum. Supp. 1979). In Santa Clara county, for example, this Code Section, along with CAL. PENAL CODE § 288 (West Cum. Supp. 1979) (lewd and lascivious conduct upon the body of a child under the age of fourteen) are the code sections most often used if there has been penetration. These sections are preferable to CAL. PENAL CODE § 285 (West Cum. Supp. 1979), because an incest prosecution requires that the prosecutor prove blood lines and consanguinity in addition to the sexual act. Interview with Elizabeth Cobey, Counsel to Parents United, in San Jose, California (Sept. 6, 1978). There are a variety of other penal code sections that may cover a case of in-family child sexual abuse. See S. BUTLER, note 1 *supra*, App. A, for a compilation of applicable California Penal Code sections.

³⁸ See note 26 *supra*. "The experience of testifying and of being subjected to cross-examination may be considerably more traumatizing than was the crime itself." DeFrancis, *supra* note 16, at 47-48.

³⁹ As with other crimes, the District Attorney must demonstrate to the court at this time that there is probable cause to believe that the defendant committed the crime charged. See CAL. PENAL CODE §§ 859-870 (West Cum. Supp. 1979). The child's testimony may be crucial in establishing this probable cause.

⁴⁰ See K. MEISELMAN, *supra* note 2, at 187. The rearrangement of family relationships resulting from the disclosure of the incest often produces familial hostility toward the incest victim. *Id.* at 185. If she is forced to choose sides, a

The legal system contributed significantly to the disintegration of this family unit and to the unnecessary pain and fear that Jane suffered and will continue to suffer throughout the proceedings.⁴¹ The elimination of certain unnecessary procedures, including subjecting the sexually abused daughter to intensive questioning or removing her from her family, could ameliorate many of the harmful effects of the adversary system. Additionally, treatment programs for the entire family could hasten the rehabilitation of the father and the reunification of the entire family.

II. THE INVESTIGATION STAGE

Police typically receive the initial report of child abuse because reporting statutes often require school, medical and social service personnel to report suspected cases of child abuse to police agencies.⁴² The victim's first contact with the legal system, therefore, is usually with a police officer whose initial function is to ascertain whether the daughter is in fact a victim of in-family sexual abuse.⁴³ After the initial contact with the victim, which usually takes the form of an interview, the police officer decides whether

mother in an incestuous family will more often side with the father. H. JAMES, *THE LITTLE VICTIMS* 106 (1975).

⁴¹ See notes 9, 11 and accompanying text *supra*.

⁴² See, e.g., CAL. PENAL CODE § 11161.5 (West Cum. Supp. 1979). See also note 24 *supra*.

The effectiveness of these statutes is, however, questionable, particularly when the offender is related to the victim. For example, experts estimate that from 50% to 90% of all child sexual assaults go unreported. A report is even less likely if the abuse is incestuous. See S. BUTLER, *supra* note 1, at 13.

The success of reporting statutes rests on three assumptions: First, persons who are legally obligated to report are aware that child abuse exists and are able to identify the symptoms. Second, persons who identify suspected cases are willing to report them. Third, treatment is available once a case is identified and reported. These assumptions have proved erroneous to some extent. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 16 CAL. W. L. REV. 16, 19 (1976). Medical practitioners, teachers and social workers often doubt their suspicions and therefore ignore them. Additionally, they may not know that they are legally obligated to report the abuse or they may fear liability. V. FONTANA, *SOMEWHERE A CHILD IS CRYING*, 230 (1973). Furthermore, when the report recipient is a law enforcement agency, the criminal action that may result is generally viewed as non-therapeutic by the professionals obligated to make the report. Rosenberg, *The Law and Child Abuse*, in *CHILD ABUSE: INTERVENTION AND TREATMENT* 161, 165 (1975). The lack of comprehensive treatment for incest offenders, therefore, encourages non-reporting. See Schultz, *supra* note 24, at 263.

⁴³ See E. KAMM, D. HUNT & J. FLEMMING, *JUVENILE LAW AND PROCEDURE IN CALIFORNIA* 23 (1971).

to take the child into protective custody⁴⁴ and whether to file criminal charges against the father.⁴⁵ Thus, police officers have a crucial impact on the daughter at the outset of the incest proceedings.⁴⁶ It is therefore essential that police officers have the expertise to interview incest victims with sensitivity and to make rational judgments on whether to remove the incest victim from her home.

Most police officers, however, use an adversary approach when conducting an interview with a child-victim because it is an approach with which they are familiar.⁴⁷ The police officer also employs this approach because the child victim must convince the officer that an offense has been committed.⁴⁸ Furthermore, the officer must determine the victim's potential effectiveness as a courtroom witness.⁴⁹

This conviction-oriented approach to the interview is often psychologically damaging to the victim.⁵⁰ Because police seek suffi-

⁴⁴ See note 27 and accompanying text *supra*.

⁴⁵ See Goodpaster & Angel, *supra* note 34, at 1111.

⁴⁶ See generally Collie, *The Police Role, in CONCERNING CHILD ABUSE* 123 (A. Franklin ed. 1975).

⁴⁷ Police departments are usually ill-equipped to handle cases of in-family child sexual abuse, due in part to fear and ignorance of incest. Giarretto, *supra* note 2, at 143-44. Lack of police knowledge is due partly to the fact that 85% of police training time is spent imparting specific law enforcement expertise ("hardware approach") even though only about 15% of police time will be spent in those activities. McCoy, *Training for the New Centurions, in THE POLICE AND THE BEHAVIORAL SCIENCES* 5, 9-10 (1974). For example, one study reveals that police officers often ignore claims of child abuse victims if there are no physical injuries, especially when the offender is a member of the family. NAT'L INSTITUTE OF MENTAL HEALTH, *VICTIMS OF RAPE* 26 (1976).

⁴⁸ This questioning often exceeds what is necessary to corroborate the child's claim. The child who has sought intervention by law enforcement personnel is entitled to a presumption that she is telling the truth. K. MEISELMAN, *supra* note 2, at 336. The law enforcement agency may nonetheless require the victim to undergo a polygraph examination. D. WALTERS, *supra* note 2, at 119. One author relates an experience where the police gave four sexually abused siblings polygraph tests after interrogating them more than once. The children claimed that they were all being sexually molested by their father. H. JAMES, *supra* note 40, at 99.

⁴⁹ An officer must evaluate a witness and the information she gives in light of their "courtroom value." The officer must therefore judge the competence and credibility of the witness. See C. SWANSON, N. CHAMELIN & L. TERRITO, *CRIMINAL INVESTIGATION* 93 (1977).

⁵⁰ See notes 52-54 and accompanying text *infra*.

The conviction-oriented approach results in an interrogation rather than an interview. Interviewing is the process whereby the officer obtains information from persons having knowledge of events or circumstances. Interrogation is the

cient evidence to convict the father, an officer often will attempt to elicit from the victim every detail of the offense.⁵¹ The victim must verbalize the extremely personal details of the offense to complete strangers.⁵² Such an interview can be especially painful in a case of incest where a strong emotional bond may exist between victim and offender.⁵³ Thus, the interview can magnify the severe nature of the act and increase the child's feelings of guilt and shame.⁵⁴

A conflict exists between the necessity for fruitful questioning of the child and the need to protect her from the harm that arises from such interviews.⁵⁵ Particularly in cases of child sexual abuse, law enforcement personnel are under tremendous community pressure to develop a fool-proof case against the offender.⁵⁶ Although some conflict is inevitable, since police officers perform an essentially prosecutorial function, the protection of the child victim should be of overriding concern.

To reduce the harm that the victim suffers, police departments should implement special training programs which provide instruction for officers who interview child-victims of in-family sexual abuse.⁵⁷ A training program should seek to harmonize the need for effective questioning of the victim with a primary con-

process of obtaining information from an unwilling suspect. INTERNATIONAL ASS'N OF CHIEFS OF POLICE, CRIMINAL INVESTIGATION BASIC PROCEDURES 112 (1975).

⁵¹ For example, one text on criminal investigation instructs officers to elicit a detailed statement from an adult or child sexual victim. J. HORGAN, CRIMINAL INVESTIGATION 55 (1974).

⁵² See note 26 and accompanying text *supra*. The officials to whom the child may have to repeat the details of the offense are police, special officers, prosecutors, the court and its officers. The child may even have to testify before a jury in the presence of her father. N. GAGER & C. SCHURR, *supra* note 1, at 54.

⁵³ Interview with Elizabeth Cobey, Counsel to Parents United, in San Jose, California (Sept. 6, 1978).

⁵⁴ See DeFrancis, *supra* note 16, at 47. This is not meant to suggest that the incest activity is trivial or unimportant. Often, however, the full import of what has happened does not reach the child until adults have repeatedly emphasized the severe and perverted nature of the incestuous acts.

⁵⁵ Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 986 (1969).

⁵⁶ S. BUTLER, *supra* note 1, at 159.

⁵⁷ For a discussion of police training programs see THE POLICE AND THE BEHAVIORAL SCIENCES 47-113 (J. Steinberg & D. McEvoy eds. 1974). One program, which sought to train officers in family crisis intervention, consisted of intensive training activities for five to seven hours daily for a five week period. The training included presentations, films, field trips, simulations, feedback sessions and training groups. A. COFFEY, E. ELDEFONSO & W. HARTINGER, HUMAN RELATIONS 297 (2d ed. 1976).

cern for her emotional well-being. This program should educate officers regarding the crime of incest, its prevalence, and the underlying psychological dynamics that distinguish incest from other cases of child sexual abuse.⁵⁸ Additionally, the program should provide officers with guidelines to enable them to make an objective decision on whether to take the victim into protective custody.⁵⁹

Specifically, the training program should familiarize officers with the approaches that are appropriate in investigating an incest case. The officer should conduct the interview in a conversational, non-accusatory manner.⁶⁰ Throughout the interview, the officer must be sensitive to the victim's responses so that the interview does not unnecessarily traumatize the victim. The training program should emphasize the importance of officer assurances to the victim that she will be protected from any further incestuous activity.⁶¹ Additionally, the officer must learn to expect hesitancy on the part of the victim⁶² and not allow the victim's reluctance to answer questions influence the officer's perception of her credibility. The training program should emphasize that the victim's reluctance often stems from her fear of and concern for the offender. Finally, the officer must learn to antici-

⁵⁸ Police juvenile enforcement training concentrates upon delinquent offenders with little emphasis on the dependent child. C. FLAMMANG, *THE POLICE AND THE UNDERPROTECTED CHILD* 246 (1970). The same plea for special training has been made in the area of neglected children. See Swanson, *Role of the Police in the Protection of Children From Neglect and Abuse*, in *THE BATTERED CHILD* 112, 116 (J. Leavitt ed. 1974).

⁵⁹ *Id.* at 117-18.

⁶⁰ A reluctant witness is one of the most difficult problems an officer faces. A successful interview of a reluctant witness requires patience and tact on the part of the officer. The officer should make neither subtle threats nor promises during the interview. J. HORGAN, *supra* note 51, at 55.

⁶¹ It is the primary function of the police to protect the abused child. Protection of the child must take precedence from the initial police contact with the victim until the final judicial disposition. "It is evident that such an objective involves relegating the traditional police function of the identification and apprehension of the offender to a secondary responsibility." C. FLAMMANG, *supra* note 58, at 140. Further, this basic assurance of protection is the cornerstone of subsequent treatment. K. MEISELMAN, *supra* note 2, at 337. The assurance of safety is even more important in a case of incest because the threat is emanating from within the victim's family.

⁶² The incest victim will often be reluctant to tell law enforcement personnel about the sexual activity and officers may interpret this reluctance as evidence that the victim is lying. S. BUTLER, *supra* note 1, at 161.

pate non-cooperative, "collusive" behavior from members of the family.⁶³

It is not sufficient that police departments implement training programs generally oriented toward child sexual abuse.⁶⁴ As is discussed above, incest involves a complex interplay of factors which may include collusion by the family and non-cooperation on the part of the victim.⁶⁵ Since these problems most often arise in child sexual abuse cases where the offender is the victim's father, training programs which do not consider in-family sexual abuse will fail to familiarize the officer with the unique dynamics of an incest case. Therefore, a program which does not offer specialized incest training is inadequate to prepare an officer to deal with in-family sexual abuse.

III. THE ADJUDICATION STAGE

Once the police believe that sufficient evidence exists to remove the sexually abused daughter from her home and arrest her father, the parties enter the adjudication stage. In this stage, the judiciary occupies the primary role in the proceedings. This stage, like the investigation stage, fails to protect adequately the interests of the sexually abused daughter and contributes further to the destruction of the family unit.

The child-victim often becomes a pawn in the judicial proceedings, which are often more difficult for the victim than the offender.⁶⁶ This is partly due to the fact that the victim, because of

⁶³ The term "collusion" implies the intentional conspiring to frustrate intervention efforts. This is seldom the case. "The key to understanding the family's behavior is to realize that its members perceive themselves as being on the brink of disaster in the form of separation, public shame, loss of financial support and possibly severe punishment of the perpetrator of incest." K. MEISELMAN, *supra* note 2, at 338.

⁶⁴ See notes 17, 62, 63 and accompanying text *supra*.

The Los Angeles Police Department, for example, has an Abused Child Unit as well as a Child Sexual Abuse Unit. Neither of these units, however, offers specialized incest training.

Once officers undergo the training session, it is of course crucial that only they deal with incest cases. In Chicago, for example, according to the police training bulletin, the Youth Division interviews child victims. Contrary to the written rules, however, a patrolman often first approaches a child victim, even if the officer has no specialized training. It is then up to the officer to request the cooperation of either a youth officer or policewoman. Libai, *supra* note 55, at 988.

⁶⁵ See notes 62, 63 and accompanying text *supra*.

⁶⁶ See Chaneles, *supra* note 36, at 54.

her youth, may be frightened by the judicial proceedings.⁶⁷ Additionally, constitutional requirements of due process provide safeguards for the father-offender but offer little protection for the incest victim.⁶⁸ Juvenile courts, for example, often place abused children in foster homes while the offending parent remains in the family home.⁶⁹ This practice is analogous to locking up the victim of the crime and letting the criminal go free.⁷⁰

A. Lack of Counsel

The judicial system's insensitivity to the sexually abused daughter is evidenced by the fact that many jurisdictions offer no counsel to victims of child abuse.⁷¹ This lack of representation may be especially damaging to the victim of in-family sexual abuse because the nature of incest often induces the court to act hastily to remove her from the home.⁷² Without the objective input that independent counsel could provide, a court is less likely to remove the incest victim from her home only as a last resort.⁷³

There are a number of reasons why children in abuse, neglect,

⁶⁷ See N. GAGER & C. SCHURR, *supra* note 1, at 55.

⁶⁸ See Chaneles, *supra* note 36, at 54. See generally Comment, *A Recommendation For Court-Appointed Counsel in Child-Abuse Proceedings*, 46 MISS. L. J. 1072 (1975). See also Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Case*, 23 VILL. L. REV. 521 (1977-78).

The protections for the offender may even increase the child's trauma. "Few representatives of the judicial process are expert at techniques needed to interview children, but they are gentle when compared to the ingenious attorneys who defend the accused. These attorneys tend to defend the criminal by what amounts to putting the child on trial." N. GAGER & C. SCHURR, *supra* note 1, at 54.

⁶⁹ Foster home placement can be particularly tragic as it may result in further physical and emotional injury to the child. See *Panel Told of Kids in Foster Care Hell*, Sacramento Bee, Jan. 25, 1979, at A-12, col. 1. See also Dietz, *Foster Homes That are Not Too Loving*, in THE CHILDREN'S RIGHTS MOVEMENT 55 (1977) and Martin & Beezley, *Foster Placement: Therapy or Trauma*, in THE ABUSED CHILD 189 (H. Martin ed. 1976).

⁷⁰ See D. WALTERS, *supra* note 2, at 68.

⁷¹ In neglect and abuse cases, as well as in custody disputes, legal representation is limited or non-existent. WHITE HOUSE CONFERENCE ON CHILDREN, REPORT TO THE PRESIDENT 395 (1970).

⁷² The sexual abuse of children by their guardians may evoke extreme public, institutional and judicial reactions. Dickens, *Legal Responses to Child Abuse*, 12 FAM. L. Q. 1, 7 (1978). Professionals exhibit judgmental attitudes when confronting a case of in-family sexual abuse. S. BUTLER, *supra* note 1, at 149.

⁷³ Removal from the home may be psychologically damaging to the child. See note 86 and accompanying text *infra*.

and custody proceedings traditionally have received no legal representation. The primary justification for the failure to provide legal representation is that juvenile proceedings are non-adversary and it is the duty of the court, as "parens patriae,"⁷⁴ to protect the interests of the child.⁷⁵ Additionally, the appointment of independent counsel in juvenile court proceedings arguably would increase the complexity as well as the cost to the state of these proceedings.⁷⁶ Other justifications for the denial of counsel include a child's lack of contractual capacity to enter into a lawyer-client relationship, inability to determine her proper grievances and to secure appropriate representation for those grievances, and potential ability, upon retaining counsel, to sue her parents and destroy the family unit.⁷⁷

None of these arguments is persuasive in light of modern day juvenile court practice. Due in part to a lack of resources and personnel, the court alone cannot possibly discover and consider all data relevant to a determination that protects the child's well-being. This is true even where the court is sincerely interested in

⁷⁴ This literally means "father of the country." Under this doctrine, the court presumably performs a protective function. The parens patriae doctrine is invoked primarily for children and the mentally ill. Comment, *Limitations on Individual Rights in California Incompetency Proceedings*, 7 U.C. DAVIS L. REV. 457, 460 (1974).

One criticism of this doctrine is that courts may use it to deny children their due process rights. For a discussion of the criticism, see Fraser, *The Child and His Parents: A Delicate Balance of Rights*, in CHILD ABUSE AND NEGLECT 315, 326 (1976).

⁷⁵ Note, *Due Process for Children: A Right to Counsel in Custody Proceedings*, 4 N.Y.U. REV. OF L. & SOC. CHANGE 177, 186 (1974).

There is a dilemma in procedural thinking because experts favor the informality of a non-adversary system yet also favor the better protection and representation that an adversary system offers. Dickens, *supra* note 72, at 30. However, the "informality" and "non-adversary" nature of the juvenile court system may be a fiction.

Although the juvenile court system had its genesis in the desire to provide a distinctive procedure and setting to deal with the problems of youth, including those manifested by anti-social conduct, our decisions in recent years have recognized that there is a gap between the originally benign conception of the system and its realities.

Breed v. Jones, 421 U.S. 519, 529 (1975) (The Superior Court of California violated the double jeopardy clause of the fifth amendment when it tried a minor for robbery after the minor had already been tried for the crime as a juvenile).

⁷⁶ Note, *supra* note 75, at 185.

⁷⁷ Fraser, *supra* note 42, at 27.

the child's welfare. The appointment of counsel would not necessarily increase the cost to the state of juvenile court proceedings because the child's parents could be required to pay counsel's fees to the extent they are able to pay.⁷⁸ Rather than complicate proceedings, appointment of counsel would simplify the process by focusing the issues before the court.⁷⁹ This would decrease the likelihood of relitigation⁸⁰ and thus lower the costs to the parents and the judicial system. Moreover, the child's contractual capacity is irrelevant since counsel for the child would be appointed by the court. Furthermore, the child's inability to determine her grievances strengthens the argument in favor of appointed counsel. If a child is unable to determine her interests, it is unlikely that that child will be able to present those interests cogently to the court. Finally, the child's right to representation should override any judicial interest in discouraging intra-familial law suits. It is not necessary for courts to deny the sexually abused daughter representation to discourage intra-familial law suits since courts, through traditional common law tort principles, may directly create intra-familial immunities.⁸¹

The appointment of counsel in itself does not ensure adequate representation for the child; it is essential that the court appoint only *independent* counsel to represent the child. For example, while California law⁸² directs juvenile courts to appoint counsel to represent a minor who is allegedly the victim of parental abuse, neglect, cruelty or depravity, it permits the court to appoint the

⁷⁸ See, e.g., CAL. WELF. & INST. CODE § 318.5 (West Cum. Supp. 1979) regarding the appointment of counsel in a demonstration county. This statute provides that the court may appoint representation for the minor at the expense of the parent or guardian if the court determines that the parent or guardian has the ability to pay for counsel. One commentator argues in favor of appointment of a guardian ad litem at parental expense to represent the child in divorce cases where custody is at issue. Where the value of property is in dispute, parties expect to pay for the services of a court-appointed real estate appraiser. Where the sanity of a party is at issue, the parties expect to pay for the services of a court-appointed psychiatrist. Thus, the writer argues, where custody is at issue, the parties should be expected to pay for a court-appointed guardian ad litem. Hansen, *Guardians Ad Litem in Divorce and Custody Cases*, in *THE RIGHTS OF CHILDREN* 239, 243 (1973).

⁷⁹ Note, *supra* note 75, at 185.

⁸⁰ *Id.*

⁸¹ In any event, courts have not always found the arguments in favor of intra-familial tort immunity convincing. See, for example, *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (N.Y., 1969) (abolishing defense of intra-familial tort immunity for non-wilful torts).

⁸² CAL. WELF. & INST. CODE § 318 (West Cum. Supp. 1979).

District Attorney to represent the child.⁸³ The law then directs the District Attorney to represent the minor "in the interests of the state" where the state charges the parent with the commission of unlawful acts upon the minor.⁸⁴ This representation may be ineffective because the interests of the child and those of the District Attorney do not necessarily coincide.⁸⁵

A conflict of interest between the child and the District Attorney arises when the District Attorney determines whether to request that the juvenile court remove the child from her home. It is usually in the child's best interest to remain in her home throughout the proceedings.⁸⁶ The District Attorney nonetheless will often recommend that the court remove the child from her home. For example, if the child does not offer strong testimony against her father at her dependency hearing, the District Attorney may fear that the family will pressure her to retract her story.

⁸³ CAL. WELF. & INST. CODE § 318(a) (West Cum. Supp. 1979).

⁸⁴ CAL. WELF. & INST. CODE § 351 (West Cum. Supp. 1979).

⁸⁵ See the discussion in Formal Opinion No. 1977-45, adopted by the Committee on Professional Ethics of the State Bar of California.

⁸⁶ Lengthy foster home placement and separation from the family may have severe psychological effects on the child and may create identity problems and increase the child's confusion. See Goodpaster & Angel, *supra* note 34, at 1100 (citing an interview with Professor Morris, Ph.D., Dept. of Psychiatry, UCLA Medical Center in Los Angeles, California, May 23, 1974). Community support, with attendant protection for the child, is more helpful to abusive families than automatic removal of the child. See ADVISORY COMMITTEE ON CHILD DEVELOPMENT, ASSEMBLY OF BEHAVIORAL AND SOCIAL SCIENCES, NATIONAL RESEARCH COUNCIL, TOWARD A NATIONAL POLICY FOR CHILDREN AND FAMILIES 84 (1976).

Looking at the child who has been separated, we see a grieving child, grieving not only for his lost parents, but for the whole familiar environment and family structure that is all he has known; grieving for a part of himself. Loss is so painful for any of us, even as adults. Loss by death is perhaps the most grievous, but even a change in location or job can precipitate a sense of loss. Imagine the child, whose whole image of the world is based upon his parents and environment, having to lose these. He does not perceive that he is safer away from this situation, not neglected or abused in this new home. He knows only that he has lost a part of himself. The emotions triggered in the child are sadness, grief, and an overwhelming sense of detachment. He feels abandoned. He shows regression and also angry behavior. All of these things might remain with him to a pathological degree throughout most of his life.

Arvanian, *Dynamics of Separation and Placement*, in CHILD ABUSE: INTERVENTION AND TREATMENT 117, 119 (1975).

Courts should require a showing that there is no possibility of preserving the child's social relationships before the child is removed and placed in an unfamiliar environment. Dickens, *supra* note 72, at 27.

Thus, the District Attorney may recommend that the court remove the child from her family's influence to prevent any further weakening of her testimony.⁸⁷

The juvenile court judge often supports the District Attorney's recommendation of removal. Such a decision protects the judge from public criticism, largely because it is certain to protect the child from immediate physical harm if the father remains in the home.⁸⁸ Moreover, the removal of the child from her home, rather than resulting from an objective consideration of the child's needs, may function as a judicial weapon to force parental compliance with juvenile court orders.⁸⁹ Ultimately, then, the disposition urged by the District Attorney and ordered by the juvenile court judge may harm rather than protect the child.⁹⁰ To offset the state-encouraged judicial tendency to remove the incest victim from her home, it is necessary for an independent legal representative to present an objective recommendation.

An analysis of the due process clause of the Fourteenth Amendment further supports the right of the victim to court-appointed counsel⁹¹ in cases of in-family child sexual abuse.⁹² This analysis

⁸⁷ The District Attorney, of course, has a legitimate interest in strengthening the state's case against the father-offender. If the charges against the father cannot be substantiated, they will be dropped. The father may then return home and, if the daughter is also at home, the sexual abuse may continue. Thus, it is important to preserve the strength of the victim's testimony. It is, however, desirable to do so using means which are less damaging to the child than removal from her home.

⁸⁸ See Goodpaster & Angel, *supra* note 34, at 1119.

⁸⁹ *Id.* at 1120. The juvenile court has control over the parents to the extent it can use the possible removal of the daughter as leverage. In a case of child abuse, the juvenile court assumes no direct jurisdiction over the parents. See Adler, *supra* note 7, at 731.

⁹⁰ See note 86 *supra*.

⁹¹ The fourteenth amendment states that "nor shall any person be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. XIV.

Children *are* persons within the meaning of the fourteenth amendment. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975). (Due process is violated when students are suspended without the opportunity to characterize their conduct and put it into the proper context.)

⁹² The trend may be toward judicial acceptance of this argument. Several recent Supreme Court cases, for example, have addressed the rights of parents and children when the state assumes substitute parenting activities. While lacking a clear rationale, "[t]aken together, these decisions appear to vest constitutional rights in both parents and children against state interventions and increasingly to curtail state authority to intervene against parental wishes on behalf of children." Burt, *supra* note 9, at 118.

must initially focus on whether there is an interest at stake that the government may not infringe upon without complying with due process requirements.⁹³ The Constitution broadly defines these interests as "life, liberty, or property."⁹⁴ Physically restraining or incarcerating an individual is the clearest deprivation of liberty.⁹⁵ The possible institutionalization of the abused child, such as her commitment to a foster care facility, creates the risk of a deprivation of liberty and therefore satisfies the first step in the analysis.⁹⁶

The court must then weigh the safeguard (right to counsel) against the state's interest in maintaining existing procedures to determine whether that procedure affords due process within the meaning of the Fourteenth Amendment.⁹⁷ On one hand, the child's interest in the appointment of counsel is significant, providing important protection for the child.⁹⁸ On the other hand, the state's interest in denying legal representation to the child is less

⁹³ See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 476-514 (1978) [hereinafter cited as NOWAK, ROTUNDA & YOUNG]. For a collection of Supreme Court opinions addressing due process claims, see E. BARRETT, CONSTITUTIONAL LAW CASES AND MATERIALS 618-757 (5th ed. 1977).

⁹⁴ See Note, *supra* note 75, at 177 for an interesting argument that the court should appoint counsel to represent children in divorce proceedings on the additional ground of deprivation of property without due process.

⁹⁵ "The protection of physical liberty is the oldest and most widely recognized part of the guarantee." NOWAK, ROTUNDA & YOUNG, *supra* note 93, at 483. "We conclude that personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitution." *People v. Olivas*, 17 Cal.3d 236, 251, 551 P.2d 375, 384, 131 Cal. Rptr. 55, 64 (1976).

⁹⁶ "Civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts. . . ." *In re Winship*, 397 U.S. 358, 365-66 (1970). "It is settled that a minor is entitled to the protections of due process whenever the state itself initiates action, whether civil or quasi-criminal, to deprive a minor of his liberty." *In re Roger S.*, 19 Cal. 3d 921, 928, 569 P.2d 1286, 1290, 141 Cal. Rptr. 298, 302 (1977) (A minor's parent cannot constitutionally waive that minor's right to procedural due process before committing the minor to a state mental hospital).

⁹⁷ "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss' [citing *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)] and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970). "The justices determine the scope of the trial type procedures required for any particular deprivation by balancing the worth of the procedure to the individual against its cost to society as a whole." NOWAK, ROTUNDA & YOUNG, *supra* note 93, at 499.

⁹⁸ See notes 72 & 73 and accompanying text *supra*.

significant, consisting of possible revenue savings and judicial simplicity.⁹⁹ The weighing process, then, must ultimately tip in favor of protecting the child's liberty interest by appointing counsel in all cases where the child incest victim may be removed from her home.¹⁰⁰

The landmark case of *In re Gault*,¹⁰¹ supports this contention. In *Gault*, the Supreme Court held that children have the right to representation by counsel in delinquency proceedings which can result in the child's confinement. The Court pointed out that a name given to an institution is constitutionally insignificant, stating, ". . . [H]owever euphemistic the title, a receiving home or an industrial school for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time."¹⁰² The Court further observed that failure to accord the fundamental requirements of due process may result in unfairness, inaccurate findings of fact and unfortunate prescriptions of remedy.¹⁰³

The fact that *Gault* was a "defendant" and the sexually abused child a "victim" should not blur the critical similarity—both defendant and victim stand before the court for a determination of whether they will remain in their homes or be institutionalized. The child who may have broken the law has no inherently greater right to independent representation than the sexually abused child when both face the risk of state-initiated institutionalization. If the sexually abused daughter is confined to a foster care facility, she becomes the subject of a state-imposed, regi-

⁹⁹ See notes 76-81 and accompanying text *supra*.

¹⁰⁰ It is claimed that juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process. As we shall discuss, the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process. *In re Gault*, 387 U.S. 1, 21 (1966). "The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice." *Kent v. United States*, 383 U.S. 541, 561 (1966). (A juvenile court hearing waiving jurisdiction over a minor is invalid when that minor has not been afforded the basic requirements of due process and fairness).

¹⁰¹ 387 U.S. 1 (1967) (Due process is violated when a minor is charged as a delinquent and faces commitment to a state institution, if that minor is not afforded due process rights, including representation by counsel, the right against self-incrimination and the right to confrontation of witnesses).

¹⁰² *Id.* at 27.

¹⁰³ *Id.* at 19.

mented environment, as was Gault.¹⁰⁴ Thus, the potential for harm to the child remains the same regardless of the nature of the proceeding. The interest in protecting the sexually abused daughter from unnecessary removal, therefore, is significant and merits constitutional protection.¹⁰⁵

B. *The Function of Counsel*

The appointed counsel should be an investigator, advocate, and counsel.¹⁰⁶ In the role of investigator, the counsel should discover all facts relevant to the sexual abuse of the daughter and the proper juvenile court disposition of her case. This role would entail conducting extensive interviews with family members as well as with the incest victim.¹⁰⁷ In the role of advocate, the counsel should make a recommendation to the court based on the investigation conducted. The recommendation should result from a considered evaluation of whether the father poses a sufficient threat to his daughter to necessitate her removal from the home. The daughter's counsel should also advise the court of potential dispositional options so that, in the event that the court does not accept the disposition advocated by the counsel, it will be aware

¹⁰⁴ Judicial opinions suggest that the mere difference in name between two institutions, or a variance in their precise goals, does not mandate a different due process result. See note 102 and accompanying text *supra*.

The state's argument that the purpose of the commitment is rehabilitative and not punitive does not change its nature. No authority need be cited for the proposition that a court should look past the labels to the substance of an action. Regardless of the purposes for which the incarceration is imposed, the fact remains that it is incarceration. The rehabilitative goals of the system are admirable, but they do not change the drastic nature of the action taken.

Fain v. Duff, 488 F.2d 218, 225 (5th Cir. 1973).

¹⁰⁵ There should be a clear showing—in a due process hearing where the child has counsel—that the child is in immediate danger of serious physical harm or of extreme psychological harm before the court removes the child from her home for anything beyond the briefest period. K. KENISTON, *supra* note 35, at 189 (1977).

¹⁰⁶ Fraser, *supra* note 42, at 28.

¹⁰⁷ In performing this function, an attorney can look to the New York Family Court System for guidance. Under that system, a law guardian insures that the court receives the information necessary to best protect the interests of the child. Isaacs, *The Role of the Lawyer in Child Abuse Cases*, in *HELPING THE BATTERED CHILD AND HIS FAMILY* 222-225 (1972). The New York System would be especially beneficial to the victim of in-family sexual abuse, since a determination of the child's best interests requires a thorough understanding of the physical and psychological interrelationships of the child and her parents. See Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 J. FAM. L. 7 (1977-78).

of all possible alternatives.¹⁰⁸ Additionally, the daughter's representative should attempt to protect her from any unnecessary questioning by her father's defense attorney.¹⁰⁹

The court-appointed counsel should function in a capacity similar to that of a guardian ad litem.¹¹⁰ Traditionally, the guardian ad litem represented the minor in an adversary context, defending allegations made against the minor. Today, however, the guardian ad litem's role is to represent the child's independent interests in a variety of circumstances and proceedings.¹¹¹ Thus, a guardian ad litem need no longer be an attorney. The current sophistication of the legal system, however, necessitates the appointment of legal counsel to represent the interests of the victim of in-family sexual abuse. It is therefore essential that the child's representative have the legal expertise to function effectively in proceedings which determine the child's immediate and long-term future.

IV. THE TREATMENT STAGE

Even if the investigation and adjudication stages effectively protected the victim's interests, the legal system would be inadequate to deal with cases of in-family sexual abuse. Too often, society reacts in a punitive, retributive manner to cases of in-family sexual abuse, focusing on the father and neglecting the victim's well-being. Communities should develop adequate treatment programs for incest offenders in lieu of the traditional punishment imposed by the criminal justice system.

¹⁰⁸ These functions may help ameliorate some of the shortcomings in the juvenile court system—shortcomings that make its handling of child abuse ineffective. For example, there are often insufficient administrative, service and judicial personnel to adequately staff the juvenile court. Polier, *Problems Involving Family and Child*, 66 COLUM. L. REV. 305 (1966). Further, the juvenile court and the juvenile court judge frequently occupy a position of low status in the judicial hierarchy. *Id.* Specialization by juvenile court judges, therefore, is rare. A. SCHUCTER, *CHILD ABUSE PREVENTION* 16 (1976). Additionally, the judicial system allots a relatively small percentage of its time to juvenile and family problems. Delaney, *The Battered Child and the Law*, in *HELPING THE BATTERED CHILD AND HIS FAMILY* 187, 204 (1972). It is apparent, then, that the juvenile court system needs considerable reform before it will be recognized as an integral part of our judicial system. Until that time, the court-appointed counsel can bridge some of the gaps in the current system.

¹⁰⁹ See note 68 *supra*.

¹¹⁰ For a general discussion of the reporting requirements in cases of abuse, see Comment, *The Guardian Ad Litem and Civil Liberty in California Child Maltreatment Cases*, this issue.

¹¹¹ Fraser, *supra* note 42, at 28.

Incarceration of the father-offender is generally not an effective solution to cases of incest.¹¹² For example, the rehabilitative and deterrent effects of imprisonment are questionable.¹¹³ Society often justifies imprisonment on the theory that it must protect its members from the deviant;¹¹⁴ but the father-offender generally poses no threat to society because he is typically indifferent to children other than his own.¹¹⁵ Moreover, the incest case is unique

¹¹² The father should instead be confined close to the family's community and he and other family members should undergo treatment. BUTLER, *supra* note 1, at 167. Incarceration neither trains child abusers nor improves parenting skills. Dickens, *supra* note 75, at 21. "The present need is not for additional criminal statutes, but for the realization that criminal sanctions may well not have any important role in this area of family trouble." Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 693 (1966).

¹¹³ Marcel Frym, Director of Criminological Research for the Hacker Foundation, has stated that he does not believe that prisons can achieve rehabilitation. McGeorge, *Sexual Assaults on Children*, in 4 MEDICINE, SCIENCE, AND THE LAW 245 (1964). See also H. CHATFIELD, PRISONS UNDER SENTENCE 38-47 (1972). Moreover, the deterrent effect of imprisonment is not necessarily well-established in theory or research. Bailey & Lott, *Crime, Punishment, and Personality: An Examination of the Deterrence Question*, 67 J. OF CRIM. L. & CRIMINOLOGY 99 (1976). For example, researchers have discovered that punishment may, under some circumstances, "fix" the undesirable behavior rather than eliminate it. W. HARTINGER, E. EDELSONSO, & A. COFFEY, CORRECTIONS: A COMPONENT OF THE CRIMINAL JUSTICE SYSTEM 158 (1973).

The failure of prisons to rehabilitate offenders may be due to the fact that the overriding emphasis of most prisons is on custody and punishment, with security as the dominant purpose. G. COLE, THE AMERICAN SYSTEM OF CRIMINAL JUSTICE 393 (1975). "The reality of corrections may indicate that the highly touted goals of rehabilitation serve primarily as window dressing for a system that has deterrence, incapacitation and retribution as its functioning objectives." *Id.* at 360. See generally Roberts, *Training Correctional Treatment Specialists: A Planning Model*, in CORRECTIONAL TREATMENT OF THE OFFENDER 81 (A. Roberts ed. 1974); B. BAGDIKIAN, THE SHAME OF THE PRISONS (1972); E. MILLER & M. MONTILLA, CORRECTIONS IN THE COMMUNITY (1977); Delaney, *Towards a Human Rights Theory of Criminal Law*, 6 HOFSTRA L. REV. 831 (1978); J. SMITH & W. FRIED, THE USES OF THE AMERICAN PRISON (1974); PRISON (J. Shalleck ed. 1972). For a discussion of the history and origins of punishment, see G. NEWMAN, THE PUNISHMENT RESPONSE 13-51 (1978). See also H. OPPENHEIMER, THE RATIONALE OF PUNISHMENT (1975).

¹¹⁴ E. JOHNSON, CRIME, CORRECTION AND SOCIETY 433 (1974). For a collection of interesting essays on the justifications for and effects of punishment, see CONTEMPORARY PUNISHMENT (R. Gerber & P. McAnany eds. 1972).

¹¹⁵ Kinkead, *supra* note 16, at 172. Incestuous fathers usually have a poorly integrated social perception but generally do not exhibit severe psychological pathology or marked cognitive defects. Schechter & Roberge, *supra* note 9, at 132.

It is interesting to note that studies show that the majority of imprisoned

because imprisonment of the offender may have a detrimental impact on the victim since the father-offender is usually an integral member of her family unit.¹¹⁶ In those cases where the father remains an immediate threat to his daughter, the criminal court should remove the father from the home to preclude any further sexual abuse. Ultimately, however, treatment, rather than imprisonment, will hasten the rehabilitation of the father and the reunification of the family.¹¹⁷

A successful treatment program must focus on the family unit and attempt to prevent its disintegration. The program must, therefore, involve family-oriented therapy.¹¹⁸ Parental treatment should be group rather than individual therapy since group therapy is more successful in treating abusive parents.¹¹⁹ The treatment program should take an interdisciplinary approach toward the treatment of the victim, offender and family¹²⁰ which would

adult male sexual offenders were themselves sexually abused as children. S. BUTLER, *supra* note 1, at 67.

¹¹⁶ When abuse against the child is perpetrated by the parent, the whole family may suffer if the offender is imprisoned. Katz & Ambrosino, *Legal Research on Child Abuse and Neglect, Past and Future*, 11 FAM. L. Q. 151, 155 (1977).

¹¹⁷ For example, children in families that go through the CSATP program (*see* notes 123-128 and accompanying text *infra*) return to their homes sooner than they would under traditional approaches (90% within the first month). Furthermore, approximately 90% of marriages have been saved. PRISON RESEARCH EDUCATION PROJECT, *INSTEAD OF PRISONS* 157 (M. Morris ed. 1976).

¹¹⁸ *See* BUTLER, *supra* note 1, at 167. In a case of incest, the physician may discover that the father, mother and daughter are all seriously disturbed and need professional treatment. G. SCHULTZ, *HOW MANY MORE VICTIMS?* 118 (1975). *See also* Avery, *Viewing Child Abuse and Neglect as Symptoms of Family Dysfunctioning*, in *CHILD ABUSE: INTERVENTION AND TREATMENT* 87 (1975). Another advantage to family therapy in child abuse cases is that it prevents the identification of just one family member as the "patient." Martin & Beezeley, *Therapy for Abusive Parents: Its Effects on the Child* in *THE ABUSED CHILD* 251, 259 (H. Martin, ed. 1976). The psychopathology explanation of child abuse which posits a single cause (e.g. mental illness on the part of the abusive parent) is too narrow to account for most cases of child abuse. Gelles, *Child Abuse as Psychopathology: A Sociological Critique and Reformulation*, in *VIOLENCE IN THE FAMILY* 190, 191 (1974).

¹¹⁹ In the group setting, abusive parents learn to trust others and to openly express their feelings. They develop friendships and begin to enhance their self-image. Group therapy can also treat more people than individual therapy and can provide support for members who are trying to change their own harmful behavior. B. JUSTICE & R. JUSTICE, *supra* note 9, at 112-113.

¹²⁰ The modern view is that a multi-disciplinary approach is essential to the successful handling of child sexual abuse cases. Telephone interview with Ann Haynes, Child Abuse Services Council, Sacramento, California (June 27, 1978).

include the participation of specially trained psychologists, social workers, and medical practitioners.¹²¹ In addition, the program should include self-help groups comprised of individuals who have also experienced the trauma of incest.¹²² Finally, a successful treatment program must work closely with local police agencies to readily identify and treat the incest victim, offender and family.

The Child Sexual Abuse Treatment Program (CSATP), in conjunction with Parents United (PU), in Santa Clara County, California is a family-oriented approach to the treatment of the incest offender.¹²³ The PU-CSATP approach finds its basis in the theory of humanistic psychology and rests on the supposition that incest is symptomatic of dysfunctional family dynamics.¹²⁴ This approach utilizes individual and family counseling in therapy designed to prevent the recurrence of sexual molestation and reduce the trauma to the child.¹²⁵

See also Steele, *Experience With an Interdisciplinary Concept*, in CHILD ABUSE AND NEGLECT 163 (1976). Effective communication among the disciplines is of course crucial to the success of this approach. *See* Newberger, *A Physician's Perspective on the Inter-disciplinary Management of Child Abuse*, in CHILD ABUSE: INTERVENTION AND TREATMENT 61-63 (1975).

¹²¹ At present, professionals such as psychologists and social workers are not adequately trained to deal with cases of incest. For example, these professionals often assume automatically that the victim seduced the offender. S. BUTLER, *supra* note 1, at 35.

¹²² For a discussion of a national self-help group for abusive parents, see Starkweather & Turner, *Parents Anonymous: Reflections on the Development of a Self-Help Group*, in CHILD ABUSE: INTERVENTION AND TREATMENT 151 (1975). *See also* B. JUSTICE & R. JUSTICE, *supra* note 9, at 204-209.

¹²³ Santa Clara County Juvenile Center, 840 Guadalupe Parkway, San Jose, California 95110. CSATP was the first successful clinic established for the treatment of incest offenders, victims, and their families in the United States. Interview with Elizabeth Cobey, Counsel to Parents United, in San Jose, California (Nov. 15, 1978). The pilot program began in 1971 with Henry Giarretto as its principal counselor. Parents United is an incorporated, non-profit organization working in conjunction with CSATP.

¹²⁴ A major premise of the PU-CSATP approach is that the family is an organic system whose members assume behavior patterns to maintain a balanced system. A distorted family system manifests psychological or physiological abnormalities. PU-CSATP seeks to alleviate the emotional stresses of the incest experience and the resulting punitive action by the community. It also seeks to enhance the self-awareness and self-management of family members, along with their feelings of family unity and growth. Interview with Elizabeth Cobey, Counsel to Parents United, in San Jose, California (Sept. 6, 1978).

¹²⁵ *See* Giarretto, *supra* note 2, at 150. The expressed goals of CSATP are: 1. To provide immediate counseling and practical assistance to sexually abused children and their families, especially victims of father-daughter incest.

The Santa Clara County Juvenile Probation Department originated CSATP after it discovered that the lack of a structured treatment format exacerbated the problems of the family in incest cases. The supervisory probation officer often referred families to a maze of agencies, many of which were ill-equipped to deal with incest cases. Moreover, the probation officer often lost touch with the therapy and was unable to manage the case properly. The Juvenile Probation Department responded by initiating this comprehensive program for sexually abused minors and their families.¹²⁶ Through this program, the offender, victim, and family may receive help from trained professionals and from other members of PU or Daughters and Sons United who have undergone similar trauma.¹²⁷

PU-CSATP is not only a more effective method of dealing with the incest offender, its existence encourages the typical offender to plead guilty¹²⁸ because he knows that a prison sentence is not the inevitable result of a conviction. A guilty plea avoids the necessity of a trial and thus saves the victim and her family the pain and trauma of prolonged intervention by the legal system,

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2. To hasten reunification of the family and marriage.
 3. To coordinate and enlist other community services.
 4. To employ a treatment model that fosters self-managed growth of individuals capable of positive contributions to society.
 5. To facilitate expansion and autonomy of Parents United and Daughters United.
 6. To inform the public and social service agencies about the existence of the program and to encourage sexually abusive families to seek out its services.
 7. To help other communities organize similar programs.
 8. To develop demographic data recording forms for future analysis.
- Giarretto, *supra* note 10, at 4.

¹²⁶ Interview with Elizabeth Cobey, Counsel to Parents United, in San Jose, California (Sept. 6, 1978).

¹²⁷ The empathy that group members can offer as a result of experiencing similar trauma is invaluable. Parents United and Daughters and Sons United are self-help groups. As of March, 1979, there are eighteen chapters of Parents United in California. These groups foster self-esteem, self-awareness and life control among members. The groups also encourage the development of responsibility to self, family and community.

¹²⁸ In addition, courts have eliminated prison sentences and are reducing jail sentences in incest cases in Santa Clara County due to the personal contacts of PU-CSATP staff members with adult probation officers, the District Attorney, and judges. Criminal justice personnel in the area are aware of the existence of PU-CSATP and depend upon the success of the clinic in treating incest offenders and their families. The police and probation departments now act as major referral sources, although 39% of the treated cases are self-referrals. Telephone interview with Elizabeth Cobey, Counsel to Parents United, San Jose, California (March 29, 1979).

accompanied by public disclosure.¹²⁹

Communities should conduct specialized programs in conjunction with the sanctions of the criminal justice system.¹³⁰ The arrest of the father remains necessary to the rehabilitation of the offender and his family. The arrest may also be imperative for the child's protection as abusers rarely seek help voluntarily. Also, it is still essential to impose the authority of the criminal justice system to serve an expiatory function in the treatment of the offender and his family.¹³¹ Treatment programs such as PU-CSATP can accelerate the offender's rehabilitation if therapy begins soon after the father's arrest.¹³² Should the father be incarcerated, the therapy would continue during and following his incarceration.

CONCLUSION

The legal system has shortcomings which render ineffective its handling of incest cases, resulting in harm to the victim. Police departments, for example, do not train officers to interview with sensitivity victims of in-family sexual abuse. Moreover, the system often fails to afford the victim effective, independent representation. Finally, the traditional punitive approach throughout the proceedings has a detrimental effect on the victim, her father, and other family members.

This article has suggested reforms that the legal system should make to improve its handling of incest cases. Police departments should specially train their officers to interview child victims of in-family sexual abuse. For example, an effective police interview

¹²⁹ Incest victims and their families are more willing to report incest and to cooperate with treatment efforts when they are assured that there will be no trial and no public consequences. K. MEISELMAN, *supra* note 2, at 339.

¹³⁰ A recurring theme of this article is that incest involves factors and problems that do not exist in cases where the sexually abusive adult does not have a close relationship with the victim. It is therefore insufficient to implement programs which treat child sexual abuse generally. Treatment programs must be specialized to deal with cases of incest.

¹³¹ The offender must realize that the community will not accept nor condone his incestuous behavior and that it will exact a punishment. Interview with Harry Giarretto, Founder and Director, CSATP, in San Jose, California (Nov. 15, 1978). Furthermore, victims and their mothers derive support from the knowledge that the community has taken a decisive stand against incestuous child abuse. Giarretto, *supra* note 10, at 35.

¹³² These programs can also provide treatment and therapy for the victim and other family members at a time when they are the most traumatized and vulnerable.

should harmonize productive questioning with the paramount concern of protecting the incest victim. Additionally, the juvenile court should appoint independent legal counsel to represent the interests of the child in all cases where it may remove her from her home. Finally, communities should implement treatment programs oriented toward the incest victim, offender and family. These reforms would alter the conviction-oriented focus of the adversary system and foster true concern for the needs of the child incest victim.

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