National Legal Resource Center for Child Advocacy and Protection
American Bar Association

Recommendations for Improving
Legal Intervention in

Intrafamily Child Sexual Abuse Cases

"The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."
New York v. Ferber
United States Supreme Court
July 2, 1982

RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES

National Legal Resource Center for
Child Advocacy and Protection
Young Lawyers Division
American Bar Association

Reporter
Josephine Bulkley

October, 1982

National Legal Resource Center for Child Advocacy and Protection

American Bar Association
1800 M Street, NW, S-200
Washington, DC 20036
(202) 331-2250

This publication was made possible by Grant No. 90-C-1690 from the National Center on Child Abuse and Neglect, Children's Bureau, Administration for Children, Youth and Families, Office of Human Development Services, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES. The contents should not be construed as official policy of the American Bar Association, the National Center on Child Abuse and Neglect or any other agency of the Federal Government.

TABLE OF CONTENTS

EXPERT REVIEW PANEL

Douglas Besharov, J.D.
Professor of Law
Osgoode Hall Law School
Toronto, Canada
Former Director
National Center on Child Abuse and Neglect

Anne Cohn, M.A., D.P.H.
Executive Director
National Committee for Prevention of Child Abuse
Chicago, Illinois

Vincent DeFrancis, J.D.
Former Director
Children's Division
American Humane Association
Denver, Colorado

A. Nicholas Groth, Ph.D.
Director
Sex Offender Program
Connecticut Correctional Institution
Somers, Connecticut

Robert Johnson, J.D.
County Attorney
Anoka, Minnesota
Former President
National District Attorneys Association

Kee MacFarlane, M.S.W.
Associate Director of Training
Children's Institute International
Los Angeles, California
Former Child Sexual Abuse Specialist
National Center on Child Abuse and Neglect

Eli Newberger, M.D.
Director
Family Development Study
Children's Hospital Medical Center
Boston, Massachusetts

Honorable Wilfred Nuernberger
Judge
Juvenile Court of Lancaster County
Lincoln, Nebraska
Former President
National Council of Juvenile and Family Court Judges

OTHER REVIEWERS

Deborah Anderson
Child Abuse Project
Hennepin County Medical Society
Minneapolis, Minnesota

Leigh Bienen, J.D.
Department of the Public Advocate
Office of the Public Defender
Trenton, New Jersey

Elizabeth Cobey, J.D.
Parents United
San Jose, California

Defense Function Committee
Section of Criminal Justice
American Bar Association
Washington, D.C.

Judianne Densen-Gerber, M.D., J.D.
Odyssey Institute
New York, New York

Honorable Leonard Edwards
Superior Court of California
San Jose, California

Martha Kendrick, M.A.
National Center on Child Abuse and Neglect
Washington, D.C.

David Lloyd, J.D.
Child Protection Center-Special Unit
Children's Hospital National Medical Center
Washington, D.C.

Michelle Minzer, J.D.
Parents United
San Jose, California

Wallace Mlyniec, J.D.
Juvenile Justice Clinic
Georgetown University Law Center
Washington, D.C.

Prosecution Function Committee
Section of Criminal Justice
American Bar Association
Washington, D.C.

Carol Schrier, M.S.W., J.D.
Support Center for Child Advocates
Philadelphia, Pennsylvania

Roland Summit, M.D.
Department of Psychiatry
Harbor-UCLA Medical Center
Torrance, California

Edwin Wenck, J.D.
Sex Offense Task Force
Baltimore State's Attorney's Office
Baltimore, Maryland

FOREWORD

These *Recommendations* provide a comprehensive blueprint for improving legal intervention to protect sexually abused children. Social workers, mental health professionals, and physicians have long recognized flaws in the justice system's response to child sexual abuse, especially where such abuse is committed by parents or caretakers. Although innovative intervention models have been identified in all systems—legal, casework, and mental health—there has been a need for written guidelines which synthesize what has been learned about how our laws, legal procedures, and courts can be more effective in dealing with this problem.

The National Center on Child Abuse and Neglect (NCCAN) and the Young Lawyers Division of the American Bar Association (ABA) are pleased to have supported the work which, under the leadership of Attorney Josephine Bulkley, resulted in these *Recommendations*. Having been carefully crafted and reviewed by an outstanding group of reviewers from a variety of professional disciplines, we believe they will be useful to legislators, court administrators, prosecutors, judges, and a host of others in the legal community. Although they are directed at the problem of intrafamily child sexual abuse, they also may serve as a guide for fashioning appropriate responses to other forms of child maltreatment, including the protection of child victims who are sexually abused by adults other than parents or caretakers.

In any set of standards, model rules, guidelines, or recommendations that are as comprehensive as these, there is bound to be disagreement on some substantive or procedural aspects. Thus, with these *Recommendations* we must mention that there was not unanimity among all reviewers on every point. The purpose of selecting outside reviewers was to procure a diversity of views which we could thoughtfully weigh before taking a particular position.

Nor should this final product be construed as having the official endorsement of NCCAN or the ABA. However, we are proud to make this material widely available for practical use, because we believe it represents the *best approach* towards the handling of these cases. We also believe the *Recommendations* are appropriate for formal endorsement by other professional organizations, including possible official consideration by the American Bar Association's House of Delegates. We would therefore welcome comments and further suggestions for their improvement. As more is discovered about the impact of this terrible offense against children and the techniques for responding to it, refinements to

the materials you have before you can surely be made. It is hoped by all who have contributed to the development of the *Recommendations* that you not only utilize them, but will share with us your ideas for their improvement.

James Harrell
Director
National Center on Child Abuse
and Neglect
Children's Bureau, Administration
for Children, Youth, and Families
Office of Human Development Services
U.S. Department of Health and Human Services

Carolyn B. Lamm
Chairperson
Young Lawyers Division
American Bar Association

PREFACE AND ACKNOWLEDGMENTS

This report of recommendations and commentary is the culmination of two years of research and analysis of the laws and legal system's involvement in intrafamily child sexual abuse cases. The term "intrafamily" is used throughout the report to describe sexual abuse of a child by a parent, caretaker, or other adult household member in a position of authority or control over the child.

The last decade has borne witness to greater awareness and increased reporting of sexual abuse of children, particularly where the perpetrator is a parent or other family member. This trend has been accompanied by the spawning of specialized treatment programs, as well as challenges to the customary legal response to the problem. In the past, the legal system often caused additional harm to children because of its insensitive procedures. In addition, sexual abuse cases traditionally have been difficult to prove because of various limitations, including the following: (1) lack of physical evidence of sexual activity because of a time lapse in the reporting of the activity or the nature of the contact; (2) lack of corroborating eyewitnesses; (3) reluctance of family members to testify; (4) the victim's retraction of the story; and (5) lack of credibility of some child victims due to limited verbal and cognitive abilities.

In May, 1980, the National Center on Child Abuse and Neglect (hereinafter NCCAN) awarded a grant to the American Bar Association's National Legal Resource Center for Child Advocacy and Protection to study the above problems and to identify and promote innovative approaches for improving legal intervention in intrafamily child sexual abuse cases. The Child Sexual Abuse Project was thus created, and became a national source of information and technical assistance to attorneys and other child welfare professionals on the legal issues and reforms relating to such abuse.

These *Recommendations* are the final product of this project, providing an eclectic synthesis of the key legal reforms in intrafamily child sexual abuse cases. They reflect a longstanding interest on the part of NCCAN, and in particular its former Child Sexual Abuse Specialist, Kee MacFarlane, in the development of model rules and procedures for better handling of these cases. The *Recommendations* underwent a lengthy review process to secure the best and widest input from distinguished experts across the country. It was intended from the outset that the *Recommendations* be critiqued by external reviewers to ensure that our positions were well-founded, rational and supportable. An *Expert Review Panel* was carefully chosen and other reviewers were asked to comment upon the *Recommendations* and supporting commentary. (All reviewers are listed on pages i and ii.) In addition, the *Recommenda-*

tions and commentary were circulated to and reviewed by the Resource Center's Advisory Board Chairman and members, who enjoy a national reputation in the field of child welfare (The Advisory Board is listed on the other side of the title page.).

The *Recommendations* grew out of three major publications of the Child Sexual Abuse Project. These are *Child Sexual Abuse -- Legal Issues and Approaches, Child Sexual Abuse and the Law* and *Innovations in the Prosecution of Child Sexual Abuse Cases*. The first is a monograph providing an overview of the legal process in these cases. *Child Sexual Abuse and the Law* contains a state-by-state breakdown of the laws and an analysis of the evidentiary issues relating to child sexual abuse legal proceedings. *Innovations in the Prosecution of Child Sexual Abuse Cases* provides a survey of innovative prosecutorial practices and descriptions of programs utilizing new legal approaches to the problem. The authors of these publications are listed in Appendix A. Throughout the footnotes to the *Commentary,* reference is made to these reports. For convenience, only the reports' chapter numbers are cited in the footnotes. The authors and titles of the chapters may be found in Appendix A.

It is hoped that the reader will secure these reports for a more comprehensive and in-depth understanding of the issues. However, the *Recommendations* represent a distillation of the major areas of concern, and by themselves should prove useful to members of the legal profession and a wide range of other professionals who handle child sexual abuse cases. They should be especially helpful to legislators, judges, prosecutors, attorneys for children and parents, and program developers.

Appendix B provides a comprehensive bibliography of legal literature on child sexual abuse. In addition, the *Recommendations* have been printed without commentary on pages one through six, in order to make it easy to read them in their entirety. A final point which should be made is that every effort was made to use "he or she" in most contexts throughout this report. However, where the person to which the pronoun refers is more often either a male or female, the appropriate pronoun was used. Thus, for example, when offenders are discussed, "he" is usually used, because most known offenders are male. Or, when discussing the other parent who did not commit the abuse, "she" was frequently employed because most reported cases involve the mother in this role.

An expression of gratitude is in order for the invaluable assistance of a number of people: Renae Liles, law clerk, for her excellent research and writing of drafts for a number of the recommendations and commentary and proofing drafts of the manuscript; Howard Davidson, Director of the Resource Center, and Robert Horowitz, Associate Director of the Resource Center, for their editing help and general advice and guidance; Linda Sutton, for her diligent coordinating and clerical assistance; Ken Shaw for his typing of the draft manuscript; Sayeeda Hodo for her patient typing of corrections during the proof-reading stage; Donna Wulkan, former law clerk, for research and drafting help; and above all, Kee MacFarlane, former Child Sexual Abuse Specialist with NCCAN, who deserves special recognition and praise for her indispensable involvement, expertise, and dedication since early 1981 in the conception, evolution, and preparation of these *Recommendations*.

Josephine Bulkley
Assistant Staff Director
National Legal Resource Center
for Child Advocacy and Protection
Young Lawyers Division
American Bar Association

RECOMMENDATIONS

PART I. GENERAL PRINCIPLES

1.1 Innovative Approaches

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.

1.2 Interdisciplinary Approach

An interdisciplinary approach should be established among agencies responsible for handling intrafamily child sexual abuse cases.

1.3. Coordinated Court Proceedings

Procedures should be developed for coordinating child protection, criminal and other judicial proceedings involving intrafamily child sexual abuse.

1.4 Reducing Trauma to the Child

Procedures should be established for reducing trauma to the child caused by legal intervention in child sexual abuse cases.

1.4.1 Providing an Advocate

In intrafamily child sexual abuse cases, a guardian *ad litem* or legal counsel should be appointed to represent the child in juvenile court proceedings. A victim/witness advocate, guardian *ad litem,* or other special advocate should be appointed to assist the child in criminal proceedings.

1.4.2 Interviewing the Child

Procedures should be developed to prevent duplicative interviews with the child and to provide a suitable environment for interviewing child sexual abuse victims.

1.4.3 Vertical Prosecution

In civil and criminal cases involving child sexual abuse, prosecutors' offices should institute "vertical prosecution," where one prosecutor is assigned to handle a case at all stages of the proceedings.

1.4.4 Child's Testimony

In criminal cases, a child sexual abuse victim should testify at preliminary hearings or grand jury proceedings only if needed. Where necessary to prevent trauma to the child, procedures should be developed to avoid the need for the child's testimony in open court in criminal and civil trials, taking into account any constitutional limitations.

1.5 Training and Specialization

All professionals who deal with intrafamily child sexual abuse cases should receive training regarding the psychological, social and legal issues of such abuse, the basic principles of child protection and development, and interviewing techniques. Where possible, agencies should establish special units responsible for handling such cases.

1.6 Specific Statutory Definitions

Criminal statutes should specifically define sexual abuse of a child. Juvenile court statutes and child abuse and neglect reporting statutes should include and specifically define sexual abuse of a child, or define such abuse by reference to the definition in the criminal statute. The following acts should constitute sexual abuse of a child:

(1) any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is the emission of semen; or

(2) any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person; or

(3) any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose, EXCEPT that, it shall not include acts intended for a valid medical purpose; or

(4) the intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of either the child or the perpetrator, EXCEPT that, it shall not include:

(a) acts which may reasonably be construed to be normal caretaker responsibilities, interactions with, or affection for a child; or

(b) acts intended for a valid medical purpose; or

(5) the intentional masturbation of the perpetrator's genitals in the presence of a child; or

(6) the intentional exposure of the perpetrator's genitals in the presence of a child, or any other sexual act, intentionally perpetrated in the presence of a child, if such exposure or sexual act is for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purpose; or

(7) sexual exploitation which includes allowing, encouraging or forcing a child to:

(a) solicit for or engage in prostitution; or

(b) engage in the filming, photographing, videotaping, posing, modeling, or performing before a live audience, where such acts involve exhibition of the child's genitals or any sexual act with the child as defined in subsections (1)-(6) of this recommendation.

1.7 Juvenile Offenders

Therapeutic dispositions should be authorized, and specialized treatment available for juvenile child sex offenders who are the subject of criminal, delinquency, status offense, or child protection proceedings.

PART II. CIVIL PROCEEDINGS

2.1 Including the Parent Who Did Not Commit the Sexual Abuse as a Party in a Child Protection Proceeding

In a child protection proceeding involving sexual abuse, the following factors should be considered in deciding whether to include the parent who did not commit the abuse as a party:

(1) whether such parent knew or had reasonable cause to believe the child had been abused and failed to take reasonable steps to prevent it;

(2) the actions such parent took to protect, support and care for the child following disclosure of the abuse; and

(3) whether such parent voluntarily agreed to participate in a specialized counseling or treatment program, and to accept other protective services.

2.2 Civil Protection Orders

Statutory provisions should be enacted to permit judicial issuance of civil protection orders in intrafamily child sexual abuse cases. Such orders should be made available in civil protection order proceedings, as well as child protection and custody actions. Statutes should specifically authorize courts to require the perpetrator to do or refrain from doing one or more of the following:

(1) Vacate the home;

(2) Limit contact or communication with the child victim, or other children in the home, or any other child;

(3) Refrain from further abuse;

(4) Obtain counseling or participate in a specialized treatment program;

(5) Stay away from the home, neighborhood, school, or other place the child frequents;

(6) Have limited or supervised visitation with the child;

(7) Pay temporary support for the child or other family members, and the costs of therapy for the perpetrator, child victim, or other family members.

The statute also should allow the court to order temporary custody of the child to the parent who did not commit the sexual abuse, or, in its discretion, any other relief it deems necessary for the protection of the child. In addition, the statute should authorize the court to recommend counseling for the non-participating parent, the

child, or other family members. Violation of a civil protection order should be a separate criminal offense.

PART III CRIMINAL PROCEEDINGS

3.1 Intrafamily Sexual Abuse of Children

Criminal child sexual abuse statutes should include a provision specifically prohibiting intrafamily sexual abuse of children. "Intrafamily sexual abuse" means sexual abuse committed by a parent, caretaker, or adult household member in a position of authority or control over the child.

3.2 Statutory Degrees of Offenses Based Upon Certain Factors

Criminal statutes should establish degrees of sexual abuse of a child based upon the following factors:

(1) the nature and duration of the abuse;
(2) the age of the child;
(3) the age of the perpetrator;
(4) the relationship of the perpetrator to the child;
(5) the use of force, threats, or other forms of coercion; and
(6) the existence of prior sexual offense convictions or juvenile court adjudications of sexual abuse.

3.3 Alternatives to Traditional Prosecution and Sentencing

Alternatives to traditional criminal prosecution and sentencing should be statutorily authorized for intrafamily child sexual abuse cases. These should include, but not be limited to, pretrial diversion and post-conviction alternatives, conditioned upon mandatory treatment and other protection orders. Specific criteria and mechanisms should be set forth for determining whether treatment is appropriate, and if so, what type of approach should be utilized.

3.4 Sexual Psychopath Statutes

Sexual psychopath statutes should be repealed or their applicability limited in intrafamily child sexual abuse cases.

3.5 Prosecution of Participating Parent

A parent should be held criminally responsible when the other parent commits sexual abuse upon their child, only if such parent participated in committing the abuse, or had actual knowledge of the abuse and intentionally failed to take reasonable steps to prevent its commission or future occurrence. Where such parent is criminally liable, dispositions providing for specialized treatment should be authorized.

PART IV. EVIDENTIARY ISSUES

4.1 Competency

Child victims of sexual abuse should be considered competent witnesses and should be allowed to testify without prior qualification in any judicial proceeding. The trier of fact should be permitted to determine the weight and credibility to be given to the testimony.

4.2 Corroboration

Corroborative evidence of the victim's testimony should not be required to establish a *prima facie* case in any criminal or civil proceeding involving child sexual abuse.

4.3 Out-of-Court Statements of Sexual Abuse

A child victim's out-of-court statement of sexual abuse should be admissible into evidence where it does not qualify under an existing hearsay exception, as long as: (1) the child testifies; or (2) in the event the child does not testify, there is other corroborative evidence of the abuse. Before admitting such a statement into evidence, the judge should determine whether the general purposes of the evidence rules and interests of justice will best be served by admission of the statement into evidence. In addition, the court should consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, the reliability of the assertion, and the reliability of the child witness in deciding whether to admit such a statement.

A statement may only be admitted under this exception if the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it.

4.4 Marital Privilege

The marital privilege should not apply in any criminal or civil proceeding involving intrafamily child sexual abuse, and the spouse of the offending parent should be considered a compellable witness.

4.5 Expert Testimony

In intrafamily child sexual abuse cases, prosecutors should make use of expert witnesses who qualify under the rules of evidence, to aid the trier of fact in resolving issues relating to the dynamics of intrafamily child sexual abuse and principles of child development.

4.6 Prior Sexual Acts

Courts should have discretion to admit evidence of prior sexual acts between the offending parent and child to show either: (1) a depraved or lustful disposition of the parent; or (2) a plan, scheme,

design, motive or *modus operandi*. Evidence of sexual acts by the offending parent with other children also should be admissible to show plan, scheme, design, motive or *modus operandi*.

4.7 Sexually Abused Child Syndrome

Consideration should be given by the legal profession to the evidentiary viability of a "sexually abused child syndrome," which may be analogous to the "battered child syndrome."

RECOMMENDATIONS WITH COMMENTARY

PART I. GENERAL PRINCIPLES

1.1 Innovative Approaches

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.

Commentary

This recommendation establishes the underlying philosophy of the entire set of recommendations. The legal system often must intervene to protect the child from continued abuse, although sensitive procedures are essential to avoid further damage. However, debate continues as to whether and how treatment can be compatible with legal intervention; "[a] fundamental dilemma centers around professional and societal ambivalence about whether child sexual abuse should be regarded as a crime, a form of mental illness, or, particularly in cases of incest, as a major symptom of broader family dysfunction."[1]

Even if one advocates criminal prosecution or other forms of legal intervention, it has become clear that traditional legal approaches frequently lead to greater trauma to the child and family. In addition to duplicative and insensitive intervention procedures, until recently, there has been little in the way of specialized treatment available to help the child, family or offender.

A variety of treatment programs have emerged in the last decade specifically to deal with the problem of intrafamily child sexual abuse. Awareness is growing among even those who support criminal prosecution that while the offender's acts should be punished, his behavior must be treated. It is generally believed that treatment for most offenders is necessary to address the causes and effects of the abuse and to prevent its perpetuation in future generations. Of course, some offenders (some who are violent or recidivists, for example) may not be treatable and incarceration or commitment may be necessary. The relationship of treatment programs to the criminal and juvenile justice systems varies dramatically, ranging from the active involvement of the legal system in which its coercive authority is incorporated into treatment philosophy and program procedures, to the deliberate rejection of legal intervention because such external coercion is considered antithetical to the therapeutic process.[2]

Although the extreme range of innovative approaches may be frustrating to policy makers and confusing to program developers who search for the "best" model to replicate, such diversity is not wholly undesirable, given the current limited knowledge and understanding of the nature, causes, and effects of child sexual abuse and its treatment. [3] Moreover, despite philosophical and programmatic differences, the specialized approaches which have been developed share basic premises; such premises are the same as those underlying these recommendations, namely, to protect the child from further abuse, to prevent additional trauma to the child and family caused by the legal system, and to provide treatment to all family members.

1.2 Interdisciplinary Approach

An interdisciplinary approach should be established among agencies responsible for handling intrafamily child sexual abuse cases.

Commentary

It has become well-recognized that an interagency, coordinated approach is essential in handling not only sexual abuse cases, but all cases of child abuse and neglect. In fact, some state child abuse and neglect reporting laws require or permit the formation of interdisciplinary child protection teams for handling cases in the child protection system.[4] Interdisciplinary teams are usually composed of law enforcement officers, child protective services workers, prosecutors, the child's advocate, mental health professionals, medical personnel and others. According to a survey of prosecutors' offices by the ABA Resource Center's Child Sexual Abuse Project, roughly half of the responding jurisdictions had established such teams.[5]

There are many benefits to an interdisciplinary approach, including greater efficiency, coordination, expertise and shared information; improved delivery of services and treatment plans; peer support and morale boosting; and alleviation of the trauma of the intervention process. [6] Ideally, there should be written protocols providing for specific procedures for implementing such an approach.

One caveat is that an interdisciplinary approach should not serve to blur, change, or transfer the regular responsibilities or roles of agencies or professionals. It is also important to insure that such an approach does not delay the intervention process, because of the need for early judg-

ments and decisions for the well-being of the child and the family. For this reason, some believe that one person or a designated "leader" should be responsible for making sure that a decision is reached and acted upon regarding the legal action that should be taken.

1.3 Coordinated Court Proceedings

Procedures should be developed for coordinating child protection, criminal and other judicial proceedings involving intrafamily child sexual abuse.

Commentary

To the extent possible, court proceedings which are instituted simultaneously in these cases should be coordinated. Unlike other offenses which are treated solely as a criminal matter requiring prosecution of the offender, intrafamily offenses against children may involve a child protection proceeding or a civil protection order proceeding, as well as a criminal prosecution. In order to minimize the trauma to the child and family from multiple court actions, and to make more efficient use of our judicial mechanisms, it is critical that such proceedings be coordinated.

Coordination may range from minor efforts to more comprehensive approaches. Examples include conducting a single investigation and sharing information between the criminal and civil systems; establishing one prosecutorial unit to handle both the civil and criminal cases (this occurs in New Orleans, although it is probably more feasible in smaller jurisdictions); and establishing a formal policy involving a joint decision-making process between the juvenile and criminal prosecutors (with input from other professionals). The last approach is utilized in Madison, Wisconsin, where most of their cases are resolved by offering deferred criminal prosecution in exchange for a stipulation in juvenile court with an agreement by the offender and family to participate in a treatment program.[7]

Another example of coordinating court proceedings is illustrated by the D.C. Intrafamily Offense Act,[8] which generally provides for the issuance of civil protection orders when a child or spouse has been abused. In addition, the law states that when an arrest or criminal complaint is made in a case involving an intrafamily offense, the prosecutor may refer the case to the Corporation Counsel for the filing of a petition for a civil protection order, after consulting with the director of the social services department. The prosecutor may still file criminal charges after the case is referred, but *not* after evidence has begun to be received in the civil case.

1.4 Reducing Trauma to the Child

Procedures should be established for reducing trauma to the child caused by legal intervention in child sexual abuse cases.

Commentary

One issue about which there seems to be unanimity is the need to reduce the trauma the legal system can cause child victims of sex offenses. Subsections 1.4.1 - 1.4.4 represent several key areas which provide means of modifying aspects of the legal process which may be especially harmful to the child. However, they are not meant to be all-inclusive and other approaches should be encouraged. They simply constitute examples of what has been tried in various jurisdictions and proven helpful in minimizing some of the negative effects of legal intervention.[9]

1.4.1 Providing an Advocate

In intrafamily child sexual abuse cases, a guardian *ad litem* or legal counsel should be appointed to represent the child in juvenile court proceedings. A victim/witness advocate, guardian *ad litem*, or other special advocate should be appointed to assist the child in criminal proceedings.

Commentary

The child abuse and neglect reporting laws in most states require the appointment of a guardian *ad litem* or legal counsel to represent the child in juvenile court child protection proceedings.[10] Many contend that independent representation of the child in abuse and neglect proceedings is essential to insure that the child's interests are fully advocated and represented.[11] In the past, it was believed that the attorneys representing the agency or the parents, as well as the judge, could adequately represent the child's interests.

While uncertainty and disagreement remain as to the role of the child's advocate in these proceedings, most believe the child should have his or her own separate representative.[12] Generally, the child's representative has the duty to independently investigate the case to insure that all pertinent facts are before the court, by examining and cross-examining the petitioner's and parent's witnesses, by calling his or her own witnesses, and by making recommendations to the court. Care should be taken, however, to insure that the child's advocate does not add to the confusion, number of interviews with the child, or trauma to the child caused by the legal process.

Representation for the child in criminal proceedings involves somewhat different issues. Some believe an attorney for the child in criminal actions is either unnecessary or inappropriate. First, a criminal court does not have the authority of the juvenile court to order removal of the child from the home; it is this power of the juvenile court which alone justifies independent representation of the child. Further, the child is only a witness in a criminal case, and not a party. Technically, the child also is usually not a party in a juvenile court child protection proceeding; however, the interests of the child are the sole focus of such proceedings.

Moreover, a criminal action is not concerned with a disposition or outcome which is best for the child; its purpose is to punish the offender for violating the law. The nature of criminal proceedings also differs because the defendant's liberty is at stake, requiring careful attention to assuring that due process is not violated; a separate representative for the child might raise due process problems.

While it seems unlikely that attorneys would be appointed to represent child victims in criminal cases (unless it is the same attorney who represents the child in a simultaneous juvenile court action), a non-lawyer, guardian *ad litem* or special advocate (such as those involved with a Court Appointed Special Advocate, C.A.S.A. program) might be appointed. Another possibility is to have the attorney or guardian *ad litem* who represents the child in juvenile court also represent the child where a simultaneous criminal action is instituted. This procedure is utilized in Los Angeles. Or, simply a special advocate from a victim/witness program, rape crisis center, or within the prosecutor's office could be appointed to assist the child during the criminal proceeding.

The functions of the advocate in a criminal proceeding would be, for the most part, different than those in a juvenile court action. The advocate's primary role would be to minimize the trauma of the legal process, by, for example, accompanying the child during interviews and court proceedings, arranging transportation, explaining the process, preventing, where possible, harrassment or other intimidating investigative or courtroom procedures; in essence, being a "friend in court" or support person who shepherds the child through the process.[13] Unfortunately, economic limitations will make it difficult to have paid staff available to serve as victim advocates in most criminal cases. It may be necessary, therefore, to generate involvement of C.A.S.A.-type programs, or of the private sector in the recruitment of volunteers to perform this much-needed function.

A final and important point is that a special advocate for the child should receive training on the dynamics of intrafamily child sexual abuse, the legal process, and any other issue relating to their role.

1.4.2 Interviewing the Child

Procedures should be developed to prevent duplicative interviews with the child and to provide a suitable environment for interviewing child sexual abuse victims.

Commentary

Some jurisdictions have experimented with methods of reducing the number of interviews with the child during the investigative process. One method is to conduct joint interviews, in which various professionals needing information from the child can participate in one interview. Some believe, however, that joint interviews are not feasible because the

nature and goals of the interview are different for each agency. Further, the child may be overwhelmed by a group of people asking questions.

Another suggestion is to have a well-trained investigator (or two—one for the criminal and another for the child protection case), who is knowledgeable regarding the legal process and evidence, to conduct all the interviews with the child. Such interviews could be audio- or video-tape recorded for use by others.[14] While other professionals may be disadvantaged by having to work from tape recordings and reports, such sacrifices may be necessary to prevent further harm to the child. While it may be necessary to talk to the child more than once during the course of a case, these procedures at least help to reduce the total number of times the child must be questioned.

In Seattle, as well as in other jurisdictions, there is a special room (in the prosecutor's office) for interviewing young children (with toys and children's furniture). It includes a one-way mirror, enabling the child to be interviewed by one person while others observe.[15] This approach provides a comfortable environment and a means of reducing the number of interviews.

Although creating a special "child-oriented" interviewing room may not be possible in smaller communities, efforts should be made to interview children in comfortable, familiar settings. Questioning the child at the police station or in formal office settings should be avoided and attempts should be made to see the child in places where the child feels secure. This could be at the child's home, if it is not a place where the presence of other family members will inhibit or intimidate the child.

1.4.3 Vertical Prosecution

In civil and criminal cases involving child sexual abuse, prosecutors' offices should institute "vertical prosecution," where one prosecutor is assigned to handle a case at all stages of the proceedings.

Commentary

A number of prosecutors' offices, both large and small, have instituted a process known as vertical prosecution.[16] Traditionally, prosecutors are assigned to a particular stage of the proceedings, such as arraignment, grand jury, trial and sentencing. Thus, one case typically involves several different prosecutors. Vertical prosecution is an excellent way of preventing the child from having to repeat the details to several prosecutors, and also contributes to a better rapport between one prosecutor and the child.

1.4.4 Child's Testimony

In criminal cases, a child sexual abuse victim should testify at preliminary hearings or grand jury proceedings only if needed. Where necessary to prevent trauma to the child, procedures should be developed to avoid the need for the child's testimony in open court

in criminal and civil trials, taking into account any constitutional limitations.

Commentary

One of the most traumatic parts of the legal process for many children, as well as adults, is testifying in court. Thus, where possible, efforts should be made to avoid the need for a child's testimony in court. In a recent survey, a number of prosecutors' offices indicated that they avoid, where possible, putting the child on the witness stand at preliminary hearings or grand jury proceedings.[17]

In addition, some jurisdictions provide for ways to prevent the child's testimony at trial in open court. Many state statutes or court decisions allow the public to be excluded during the victim's testimony in a criminal sex offense case.[18] A few state statutes specifically provide for video-taped depositions of the child victim's testimony in a criminal sex offense case.[19]

The issue of whether taking the child's testimony outside the presence of the public or the press violates the First Amendment was decided by the United States Supreme Court in *Globe Newspaper Co.* v. *Superior Court*.[20] The press challenged a Massachusetts statute requiring closure of sex offense trials involving children. Although the Supreme Court held that mandatory exclusion of the press and public violates the First Amendment, the court stated that closing the trial during the victim's testimony may be left to the judge's discretion and decided on a case-by-case basis.

A more difficult, and perhaps insurmountable problem, at least in criminal proceedings, is whether the child may testify outside the offender's presence without violating his or her Sixth Amendment right to confront witnesses. One commentator has proposed the creation of a special "child-courtroom," which would allow the prosecutor, defense counsel, and the judge to be present during the child's testimony while the defendant observed the questioning by means of a one-way mirror.[21] The defendant would be able to use a monitoring device to communicate with his attorney. Unfortunately, one court has held in a criminal child abuse case that the right to confront witnesses means the right to physical, face-to-face confrontation,[22] thus making this type of innovation invalid.

The constitutional limitations may not be as much of an obstacle in juvenile court proceedings because there are no criminal sanctions. Moreover, the child's interests are paramount in the juvenile court. For example, one court held that the child's testimony in a juvenile court neglect proceeding may be taken outside the parent's presence in the judge's chambers, as long as the prosecutor and defense counsel were present and the child could be subjected to cross-examination.[23] The court analogized such cases to custody proceedings in which the welfare

and best interests of the child are the primary concern. However, another court held that the parent's right to confront witnesses may only be abridged in juvenile court where emotional trauma to the child can be clearly established.[24]

1.5 Training and Specialization

All professionals who deal with intrafamily child sexual abuse cases should receive training regarding the psychological, social and legal issues of such abuse, the basic principles of child protection and development, and interviewing techniques. Where possible, agencies should establish special units responsible for handling such cases.

Commentary

Training is essential for competent handling of sexual abuse cases, and should contribute to greater sensitivity and expertise on the part of professionals who regularly deal with these cases.

In larger communities, special units should be established in the prosecutor's office which exclusively handle child sexual abuse cases or handle all sexual assault or all child abuse cases. Some offices have special child abuse units or sex offense units, within which child sexual abuse cases are included.[25] In smaller communities, one prosecutor could be assigned to handle all the child sexual abuse cases, or several prosecutors might be assigned for a specified period of time on a rotating basis.

Where possible, other agencies also should create special units or assign one individual to handle all sexual abuse cases. Police departments have been forerunners in the area of establishing sex offense units. Hospitals and child protective service agencies also should assign one or more staff members to deal exclusively with child sexual abuse cases, again, perhaps on a rotating basis. For example, at San Francisco's General Hospital, one person is responsible for reviewing all the child sexual abuse cases, and there is a detailed written protocol which all pediatric residents must follow in examining and treating child victims. A number of hospitals around the country have such protocols for child sexual abuse cases.[26]

1.6 Specific Statutory Definitions

Criminal statutes should specifically define sexual abuse of a child. Juvenile court statutes and child abuse and neglect reporting statutes should include and specifically define sexual abuse of a child, or define such abuse by reference to the definition in the criminal statute. The following acts should constitute sexual abuse of a child:

(1) any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is the emission of semen; or

(2) any sexual contact between the genitals or anal opening of one

person and the mouth or tongue of another person; or

(3) any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose, EXCEPT that, it shall not include acts intended for a valid medical purpose; or

(4) the intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of either the child or the perpetrator, EXCEPT that, it shall not include:

(a) acts which may reasonably be construed to be normal caretaker responsibilities, interactions with, or affection for a child; or

(b) acts intended for a valid medical purpose; or

(5) the intentional masturbation of the perpetrator's genitals in the presence of a child; or

(6) the intentional exposure of the perpetrator's genitals in the presence of a child, or any other sexual act, intentionally perpetrated in the presence of a child, if such exposure or sexual act is for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purpose; or

(7) sexual exploitation, which includes allowing, encouraging or forcing a child to:

(a) solicit for or engage in prostitution; or

(b) engage in the filming, photographing, videotaping, posing, modeling, or performing before a live audience, where such acts involve exhibition of the child's genitals or any sexual act with the child as defined in sections (1)-(6) of this recommendation.

Commentary

In most jurisdictions today, criminal statutes have been revised to define explicitly unlawful sexual acts with both adults and children.[27] Although all states except one specifically include "sexual abuse" in their child abuse and neglect reporting laws, most of these statutes do not define the term; however, some refer to the definitions in the criminal sexual offense statutes.[28] Also, many juvenile court acts do not mention explicitly sexual abuse as a basis for juvenile court jurisdiction. Roughly half the states specifically include it in their jurisdictional definitions of abuse and neglect, but do not state what acts constitute "sexual abuse."[29] As with the reporting statutes, some juvenile court jurisdiction statutes define sexual abuse by reference to their criminal sexual offense provisions.

If states wish to incorporate definitions by reference, sexual abuse should be specifically defined in the criminal statutes, since precise definitions are more critical in criminal prosecutions. Older criminal sex

offense laws, including statutory rape, sodomy, or indecent liberties statutes, often employed vague or broad language, such as "carnal knowledge," "lewd and lascivious acts," or "the abominable and detestable crime against nature." The language suggested by this recommendation represents an eclectic approach, largely derived from criminal reform legislation.[30] The definitions and acts covered by this recommendation also are intended to be comprehensive, encompassing any form of intentional and explicit sexual behavior with a child or in a child's presence.

There are, however, a few areas in which problems arise in attempting to define illegal sexual acts and which are not adequately addressed by all the reform laws. First, it is important that an exception for medical acts be provided when there is a prohibition against penetration by an object, or the touching of intimate parts [Sections (3) and (4)]. Second, an exception should be made for the touching of intimate parts which may not be sexual in nature, but could involve washing, affection, or even spanking [Section (4)]. Rather than enumerate and possibly exclude certain types of contact which should not be covered under the sexual touching provision, broader language relating to typical parent-child interactions or contact has been used.

It also was decided that for acts involving sexual touching [Section (4)], the intent or purpose of the touching would not be included. One reason for this choice is that the motivation for committing sex offenses varies widely and may encompass some purpose which would not be stated. Further, it was felt that a more logical method was to include language as to what contact should be exempted from inclusion in the definition. The reasoning is that prosecutors should not have to prove as an element of the crime the perpetrator's intent or purpose when he sexually touches a child. Thus, language often used in statutes such as "for the purpose of sexual arousal or gratification," or other similar purpose is not included as an essential element of the crime.

Some reform statutes have dealt with the above problem by stating that the touching must be intentional, and "for the purpose of sexual arousal or gratification." In addition, some statutes use language that the touching must be "reasonably construed as being for the purpose of sexual arousal or gratification." One court's interpretation of the latter terminology is that it be "read as a substantial lessening of the prosecutor's burden of proof; the touching must be intentional but the actor's purpose need not be proven to the jury. On the contrary, the jury may find that the actor's actual purpose was other than sexual gratification, e.g., anger, revenge, but still find that sexual contact had taken place."[31] Indeed, one court stated that such language was included in the statute "in order to exclude from its coverage affectionate caresses of a child."[32] Since this appears to be the legislative intent in using "for the purpose of" language, it was felt that a better approach is to specifically state the exclusion, and

place the burden on the defendant to prove that the acts did not have a sexual purpose.

Sexual acts involving exposure of genitals or other sexual acts does include "for the purpose of" language. An example of the reason such language was included for this type of sexual behavior is that the prosecutor should have the burden of proving that the exposure was for a purpose other than what might be considered "normal" nudity of parents around their children.

This recommendation also specifically includes sexual exploitation of children, a severe form of sexual abuse which has been the focus of recent public and professional concern. While such exploitation is a criminal offense in all states, only a few states specifically include it in their reporting statutes. Federal legislation was passed in 1978 providing criminal penalties for producers of child pornography if they know it will be transported for commercial purposes in interstate commerce, and for parents who knowingly permit a minor to participate in producing such material. It also punishes distributors of obscene material involving children.[33]

1.7 Juvenile Offenders

Therapeutic dispositions should be authorized, and specialized treatment available for juvenile child sex offenders who are the subject of criminal, delinquency, status offense, or child protection proceedings.

Commentary

A sizable percentage of sexual offenses are believed to be committed by juveniles.[34] Many of these offenses involve child victims. Until recently, little attention has been paid to this offender population.[35] One interesting finding in an evaluation of juvenile sex offenders in Washington state was that almost half of the juveniles who committed sex offenses against children had been physically or sexually abused themselves as children.[36] Data from a sex offender program in the Connecticut prison system also suggests that 70% of the child sex offenders were sexually abused as children.[37]

Since many studies have demonstrated that abusive parents were often abused as children, it is not surprising that juveniles who were abused also abuse children, even before reaching adulthood. Indeed, juvenile offenders who have been sexually abused by a parent may in turn sexually abuse a younger sibling. What is particularly distressing, however, is that the number of reported cases of boy victims is very low (two to ten times less than the number of reported cases of girl victims).[38] Thus, a major discrepancy seems to exist between the large number of male adult offenders who have been sexually abused as children and the few number of reported cases of young male victims that come to the attention of authorities.

Clearly, detection and intervention efforts must be improved to begin to identify boy victims of sexual abuse and to stop the generational cycle of sexual abuse of children. Moreover, there is a need for longitudinal research on the psycho-social development of child victims of sexual abuse. It has been suggested that although further documentation is necessary, sexually abused female victims may become involved in prostitution or become runaways, while male victims become offenders (i.e., self-destructive vs. other-destructive behavior).[39]

While understanding the etiology of juvenile sex offenses against children is important, such understanding is only useful where it ultimately leads to improved intervention and prevention efforts. It has been noted that juveniles should not be dealt with lightly, or their behavior considered merely sexual experimentation, situational, or an expression of normal aggressiveness in a sexually maturing male.[40] This, however, does not detract from the fact that their behavior needs to be treated; as with the adult offender, the juvenile offender's crime is a "symptom-the offense may be punished, but the condition must be treated. "[41]

It is important to provide specialized treatment for juvenile offenders, whether they are tried as adults in criminal proceedings, or involved in juvenile court status offense or delinquency proceedings. Where the "offender" is a young child who is also a victim of sexual abuse by the parent, a child protection proceeding may be brought to deal with the problem.

A few programs have been developed in recent years to provide diagnostic and specialized treatment services to juvenile child sex offenders.[42] As more treatment programs are established to deal with this population, perhaps we will see increased reporting of sex offenses committed upon children by juveniles.

PART II. CIVIL PROCEEDINGS

2.1 Including the Parent Who Did Not Commit the Sexual Abuse as a Party in a Child Protection Proceeding

In a child protection proceeding involving sexual abuse, the following factors should be considered in deciding whether to include the parent who did not commit the abuse as a party:

(1) whether such parent knew or had reasonable cause to believe the child had been abused and failed to take reasonable steps to prevent it;

(2) the actions such parent took to protect, support and care for the child following disclosure of the abuse; and

(3) whether such parent voluntarily agreed to participate in a specialized counseling or treatment program, and to accept other protective services.

Commentary

Most juvenile court acts provide for jurisdiction of the juvenile court over a parent who allows his or her child to be abused, either physically or sexually by the other parent.[43] Unfortunately, such language usually is not defined. As a result, petitions are filed in many jurisdictions as a matter of course against not only the sexually abusive parent but against the other parent as well under the broad language of "allowing the sexual abuse to be committed."

In order to insure that a child is protected from further abuse and to provide services to the family, the use of broad language may be necessary to permit courts to readily assert jurisdiction. Nevertheless, not all cases necessitate the filing of a petition against the parent who did not commit the abuse. The state should not intervene where a child can be fully protected by the other parent; it is only where the child's caretaker has abused or cannot protect the child from abuse that intervention is justifiable. This recommendation takes the position that whether a parent allowed the abuse to be committed should not be the sole criterion for filing a petition against such a parent. While the second and third criteria suggested in the recommendation may not be appropriate as statutory prerequisites to filing a petition, they should at least be used as guidelines by prosecutors or agencies in deciding whether to file a petition.

The knowledge or role of the non-participating parent is a familiar topic in the mental health literature on family dynamics where a child is sexually abused by a parent. The discussion usually focuses upon the mother, in part because the most commonly reported and understood type of parental sexual abuse of a child is by the father. It has been found that some mothers unconsciously condone the abuse, primarily because they fear dissolution of the family unit if the abuse is disclosed. As one author has stated, "the mothers of incest victims are dependent on their husbands and some, unable to acknowledge that their partners have abused their children, become invested in a self-protective way in not knowing. For if they know, they will be required to act in ways that threaten the very underpinning of their lives."[44] Thus, the non-participating parent may take a defensive stance to justify her choice in spouse and to avoid an ego-challenging experience. Moreover, she may make a deliberate effort to not see what is happening even after disclosure because of her own feelings of horror and powerlessness.[45]

Whether the non-participating parent's role was conscious or unconscious, her denial of the situation may serve to provide tacit permission for the sexual relationship to continue.[46] Thus, some contend that the occurrence of the abuse is the only factor to be considered in deciding to file a petition in the juvenile court, where proceedings are brought not "against" the parent, but rather on behalf of and to protect the child. It is suggested that if a child has been harmed by one parent, juvenile court jurisdiction has been established, whether or not the non-participating

parent knew, should have known or had no knowledge of the abuse; such behavior should only be taken into account at the dispositional phase of the proceeding, after the court has assumed jurisdiction.[47] Thus, even where the non-participating parent appears supportive and able to protect and care for the child, one scenario is that there should be an adjudication of abuse, but at disposition, the child could be left in the custody of the non-participating parent under protective supervision of the court.

The counter-argument is that the knowledge of the non-participating parent, coupled with her actions following disclosure to protect the child from further abuse, should be relevant factors in deciding whether to include such a parent as a party in a child protection action. It should be noted that in terms of the knowledge requirement, the language "reasonable cause to believe the child had been abused" means facts and circumstances based upon accurate and reliable information that would justify a reasonable parent to believe her child had been sexually abused.

There are several reasons for taking the factors in subsections (2) and (3) into account. First, in sexual abuse cases, the non-participating parent, usually the mother, is especially vulnerable to scape-goating or displaced anger from the offender. This is especially unfair where the offender has involved the child in an elaborate deception to "protect" the other parent from knowledge (where the child is threatened or admonished not to tell the mother, or told that he or she will split up the family). Second, once disclosure is made, some non-participating parents are unequivocally loyal to and supportive of their child, disassociate themselves from the abuser, and agree to seek treatment for the child and themselves.[48] Thus, this recommendation does not support intervention where the mother can and will protect the child from future harm.

It should be pointed out that regardless of the non-participating parent's prior knowledge of the abuse, counseling generally is considered essential as a means of dealing with the traumatic effects of disclosure of the abuse, preventing its recurrence, and helping her protect the child. However, where the mother appears to resent being forced into therapy, it may be the strongest indicator of autonomy for both the mother and child; "counseling" can become the potential for condemning the mother for rejecting her husband or redefining the sexual abuse as a failure of the mother's marital role.[49] Thus, counseling should avoid stigmatizing diagnoses and should not be used to establish a form of co-equal responsibility for the abuse. As with treatment for the offender, the mother, therefore, should receive counseling in a specialized program or from an individual with knowledge and experience in dealing with intrafamily child sexual abuse.

As discussed in the *Commentary* to Recommendation 2.2, *Civil Protection Orders,* it might be more appropriate for the non-participating parent and child to initiate a civil protection order action where such parent appears able to protect the child. Moreover, the mere threat of

filing a juvenile court petition and the possibility of the child being removed from the mother's custody may be sufficient incentive for child protective services (CPS) workers to gain the mother's cooperation. CPS workers can work closely with the parent and child on an informal supervision basis, while being prepared to file a petition if the mother fails to cooperate with the treatment or services plan.

It is important to emphasize that some parents feel extremely ambivalent and torn between their loyalty to the child and to the offending spouse. Frequently in a state of confusion, such a parent may feel forced to choose the financial and psychological security with a spouse, rather than to protect the child. Under these circumstances, the filing of a juvenile court petition is necessary to protect the child, as well as to provide an incentive or leverage for her to obtain treatment and other services. In addition, the filing of a petition may cause the mother to persuade the offender to leave the home, or to find another place to live for herself and her children, in order to prevent the court from removing the child from her custody.

2.2 Civil Protection Orders

Statutory provisions should be enacted to permit judicial issuance of civil protection orders in intrafamily child sexual abuse cases. Such orders should be made available in civil protection order proceedings, as well as child protection and custody actions. Statutes should specifically authorize courts to require the perpetrator to do or refrain from doing one or more of the following:

(1) Vacate the home;
(2) Limit contact or communication with the child victim, other children in the home, or any other child;
(3) Refrain from further abuse;
(4) Obtain counseling or participate in a specialized treatment program;
(5) Stay away from the home, neighborhood, school, or other place the child frequents;
(6) Have limited or supervised visitation with the child;
(7) Pay temporary support for the child or other family members, and the costs of therapy for the perpetrator, child victim, or other family members.

The statute also should allow the court to order temporary custody of the child to the parent who did not commit the abuse, or, in its discretion, any other relief it deems necessary for the protection of the child. In addition, the statute should authorize the court to recommend counseling for the non-participating parent, the child, or other family members. Violation of a civil protection order should be a separate criminal offense.

Commentary

Many states have enacted domestic violence statutes which authorize civil protection orders to prevent violence by one member of a household against another.[50] The statutes vary as to what relationship must exist between the abuser and victim for protection to be available. Most of the statutes provide relief to spouses, as well as to other family household members. Some statutes specifically provide for the issuance of a civil protection order in cases involving sexually abused children or all abuse cases. The protection order laws vary in terms of what the abuser may be ordered to do or not to do. Currently, all states which provide a remedy for abused children allow one or more of the orders listed in this recommendation.

This recommendation reflects the view that in some cases of intrafamily child sexual abuse, an action for a civil protection order or a custody proceeding may provide an alternative to juvenile court intervention or criminal prosecution. For example, as discussed in the previous recommendation's commentary, juvenile court action may not be necessary because the non-participating parent is able to care for and protect the child. Where the parents have separated or divorced, a custody or protection order proceeding might be appropriate as a means by which the non-participating parent can prevent further abuse or contact by the offending parent. Or, protection orders could be sought under some statutes against an unrelated household member, such as the mother's boyfriend. In addition, the non-offending parent and child may not wish to press criminal charges, although they want to prevent further abuse of the child by the offending parent.

When child protection proceedings are initiated, juvenile court statutes should specifically authorize the issuance of protection orders. A primary benefit of such orders is that they often obviate the need for removal of the child from the home by authorizing courts to order the abuser to vacate the home. This has become one of the major reform goals in terms of the legal system's involvement in intrafamily child sexual abuse cases. In general, statutory authorization of protection orders in juvenile court proceedings should permit courts to order a wide variety of dispositional alternatives which both protect the child, as well as require treatment for the abuser and the rest of the family.

Some domestic violence statutes allowing protection orders for sexually abused children authorize a parent to file a petition on behalf of the child victim; some also allow an adult member of the household to file a petition for a minor. In addition, a guardian *ad litem,* child protective services worker, or the child's attorney should be permitted to file a petition for a protection order on behalf of the sexually abused child.

Experience with protection order laws reveals that they are most effective when statutes spell out specific procedures by which courts and law enforcement agencies should issue and enforce orders, and when the

laws make violation of a protection order a criminal offense.[51] Currently, violation of a protection order is a separate misdemeanor in only a few family violence laws that authorize the order in child sexual abuse cases. In several states, the abuser may be held in contempt of court for violating an order. Other statutes specifically set forth maximum jail sentences or fines.

Perhaps more important to the enforcement of protection orders are the arrest and other powers granted police in handling protection order violations. The domestic violence laws often give police discretionary power to make a warrantless arrest if there is probable cause that: (1) a misdemeanor or an offense was committed, or (2) a protection order was violated. Statutes providing for protection orders for sexually abused children also should include specific enforcement mechanisms.

PART III. CRIMINAL PROCEEDINGS

3.1. Intrafamily Sexual Abuse of Children

Criminal child sexual abuse statutes should include a provision specifically prohibiting intrafamily sexual abuse of children. "Intrafamily sexual abuse" means sexual abuse committed by a parent, caretaker, or adult household member in a position of authority or control over the child.

Commentary

A special provision should be included within criminal sex offense statutes prohibiting sexual abuse of a child by a parent, caretaker, or adult household member in a position of authority or control over the child. The term "intrafamily" is used to describe sexual abuse by the aforementioned perpetrators, here as well as throughout the recommendations. The purpose of specifically including an intrafamily provision is to give legislative recognition in the criminal code to the serious problem of sexual abuse of children by parents or parental figures. A number of state laws provide explicit prohibition against this type of abuse or abuse by a perpetrator who has some relationship with the child. The perpetrator is defined variously as a parent, legal guardian, person in *loco parentis*, custodian, blood or affinity relation, household member, or any person in a position of authority. As noted, some statutes go beyond the intrafamily designation in our recommendation, by covering all persons in a position of authority, while others are more limited by covering only blood relatives.[52]

This recommendation specifically limits the offender to an adult person in a caretaker position in the home. Thus, older siblings who are minors are not intended to be covered here, nor are adult relatives who do not reside in the home. Offenses by juvenile siblings may be covered under other criminal sex offense provisions and should be handled in a different way.[53] Grandparents, other adult relatives, or unrelated adults

or other juvenile offenders not living in the home also may be prosecuted under other provisions. On the other hand, step-parents or boyfriends of the mother who live in the home and assume the role of a parent would be covered by this recommendation.

Most statutes provide for higher penalties when there is a relationship between the perpetrator and victim. This issue is covered under Recommendation 3.2, *Statutory Degrees of Offenses Based on Certain Factors*. In the past, sexual abuse of a child which occurred within the family was often viewed by the judicial system as a "family" problem, and the sentences imposed were usually light. While higher penalties for intrafamily child sexual abuse evinces recognition of its seriousness and the potential for greater psychological harm to the child than abuse by a non-family member, there is also a need for therapeutic dispositions in such cases (see *Commentary* to Recommendation 3.3, *Special Dispositions*).

3.2 Statutory Degrees of Offenses Based Upon Certain Factors

Criminal statutes should establish degrees of sexual abuse of a child based upon the following factors:

(1) the nature and duration of the abuse;
(2) the age of the child;
(3) the age of the perpetrator;
(4) the relationship of the perpetrator to the child;
(5) the use of force, threats, or other forms of coercion; and
(6) the existence of prior sexual offense convictions or juvenile court adjudications of sexual abuse.

Commentary

In addition to defining the prohibited acts with specificity, the other major reform of sexual assault laws has been to establish a hierarchy of offenses with corresponding penalties based upon the factors set forth above.[54] Generally, penalties are higher when: there is sexual intercourse or genital-oral sexual activity, rather than sexual touching; a young child is the victim; the perpetrator is a certain number of years older than the child (an age differential is more often used with older children); there is a relationship between the perpetrator and child (see Recommendation 3.1, *Intrafamily Prohibition*); force or threats are used; or it is a repeated offense. This recommendation endorses the basic idea that a sexual offense is aggravated by these factors, for which higher penalties should be attached.

Perhaps the greatest difficulty in these reforms has been drafting the provisions relating to an age difference between the child and perpetrator. Many laws provide that sexual acts with a young child (under 10, 11 or 12) is prohibited regardless of the perpetrator's age. With older chil-

dren, however, statutes often provide that sexual acts are prohibited only when the child is two, three, or four years younger than the perpetrator. The intent of these provisions is to protect teenage victims from sexual abuse by older persons, while not punishing voluntary sexual activity between peers. The theory is that when teenagers are close in age, the sexual activity is likely to be voluntary, whereas if the perpetrator is older, the sexual activity is more likely to constitute abuse. The new laws, therefore, use the age difference as a means to distinguish between forced and voluntary sexual activity. Under the older statutory rape or indecent liberties laws, sexual behavior with a minor, whether voluntary or coerced, was a crime, carrying one severe penalty. Indeed, all minors below a certain age (usually 16 or 18) were considered incapable of consenting.

While the new statutes providing for an age difference between the perpetrator and an older child treat sexual abuse as a crime against bodily security, and not against morality, there are gaps in their coverage. One problem is that there may be situations in which a perpetrator is younger than the age specified in the statute. This could occur, for example, by an older sibling or neighbor. One way of dealing with this problem is to use the age differential, but to provide that when the perpetrator is less than the specified age, or there are less than the specified number of years between their ages, there must be proof that the child was pressured, coerced, bribed, or physically threatened or forced to engage in sexual acts. Force, or the threat of force, has always been an element of the crime of rape in adult victim cases. However, in cases involving child victims, proof of force traditionally has not been required. Such proof here would be limited to those situations in which the child is close in age to the offender and the child is over a specified age. This may be the best method of protecting the older child or teenager, without providing criminal penalties for voluntary sexual activity.

3.3 Alternatives to Traditional Prosecution and Sentencing

Alternatives to traditional criminal prosecution and sentencing should be statutorily authorized for intrafamily child sexual abuse cases. These should include, but not be limited to, pretrial diversion and post-conviction alternatives, conditioned upon mandatory treatment and other protective orders. Specific criteria and mechanisms should be set forth for determining whether treatment is appropriate, and if so, what type of approach should be utilized.

Commentary

In addition to civil remedies, some domestic violence laws provide criminal penalties for spouse abuse or other types of intrafamily violence. These criminal laws also include detailed procedures providing

for special dispositions.[55] Although a few criminal domestic violence laws may be construed to cover sexual abuse of children, the focus has primarily been on physical spouse abuse. The alternative dispositions available under these statutes evince recognition of the need to deal with intrafamily crimes differently than crimes perpetrated by strangers. Such laws provide models for developing alternatives within the criminal justice system for sexual abuse of a child by a family member.

Some statutes allow the court to impose various conditions on the abuser's pretrial release. Of particular interest are statutes which authorize deferred prosecution or pretrial diversion, for which conditions of a protection order and counseling may be imposed. Further, some statutes provide for post-conviction alternatives, including probation conditioned upon counseling and compliance with protection orders. The types of protection orders which should be made available are fully set out and described in the *Commentary* to Recommendation 2.2, *Civil Protection Orders*.

In a number of jurisdictions across the country, pretrial diversion programs have been specifically established for offenders in intrafamily child sexual abuse cases; some programs operate pursuant to statutory authority.[56] Pretrial diversion, a criminal justice reform begun in the 1960s, is typically defined as the suspension of criminal proceedings, conditioned upon the performance of specified obligations by the defendant; the case will be dismissed upon successful completion or compliance with the conditions of diversion. Pretrial diversion does not mean de-criminalization of the offense. The offender remains under the continuing control of the criminal justice system, subject to the conditions of the diversion agreement, and fully subject to further criminal prosecution and sanctions if the terms of the agreement are violated.

The major emphasis of a pretrial diversion program is the rehabilitation of the defendant.[57] The use of diversion is premised on the theory that punishment for certain offenders is not a deterrent, and that treatment can change the behavior patterns which led to and may again lead to criminal activity. Treatment also may be more effective as a condition of pretrial diversion than of probation after conviction, because defendants are likely to be more motivated to cooperate to avoid the anxieties of prosecution and a possible jail sentence and criminal record. However, avoidance of conviction is not an end in itself, but is considered a tool or incentive to facilitate treatment.

The responsibility for determining an offender's eligibility usually rests with the prosecutor. Pretrial diversion programs for intrafamily sex offenders generally limit eligibility to non-violent, first offenders. Other factors are also taken into consideration, such as whether the offender will cooperate with and benefit from a treatment program.[58] Perhaps the most critical factor in determining the feasibility of a diversion program is the availability of specialized treatment in the community.

If state statutes permit, the record of participation in the diversion program and the arrest record may be sealed or expunged. Without these provisions, the offender may subsequently face problems common to a convicted defendant. When adopting pretrial diversion programs, there also are several sensitive legal issues that must be addressed.[59] For example, most legal commentators believe diversion should not be conditioned upon a guilty plea or acknowledgment of responsibility, despite the fact that it serves to safeguard the prosecutor's case.[60] However, many diversion programs, including those established for intrafamily child sexual abuse cases, require an admission, believing that it is the first step toward successful rehabilitation.

Equal protection and due process considerations also should be built into the diversion guidelines. Offenders should be represented by counsel at any hearing to determine eligibility, as well as when the decision to divert is made. The offender should also be represented by an attorney before any waiver of his constitutional rights, including the right to a speedy indictment and trial, to insure that the waiver was voluntary. Additionally, the diversion program should insure confidentiality of the offender's statements during application for diversion, as well as during the course of treatment, by not permitting their use in a resumed prosecution. This confidentiality is often provided for by statute or court rule, or as formal policy of the diversion program.

In addition to providing for pretrial diversion programs, statutes should also authorize post-conviction alternatives. Especially in cases where offenders plead guilty, probation and work-release should be made available, conditioned upon participation in a treatment program and compliance with various protection orders. Some jurisdictions have developed programs for handling intrafamily child sexual abuse cases that include these alternatives.[61] As further conditions of probation, the defendant may be required to pay court costs and costs of treatment for the victim. He may also be required to participate in other community programs. Successful completion of the conditions of probation may result in the termination of probation and modification of protection orders and treatment requirements. However, if the defendant fails to cooperate with treatment, or violates any other term of the disposition, probation may be revoked and the full sentence imposed.

3.4 Sexual Psychopath Statutes

Sexual psychopath statutes should be repealed or their applicability limited in intrafamily child sexual abuse cases.

Commentary

The public's uproar over the commission of brutal sex crimes by sex offenders accounted, in part, for the enactment of sexual psychopath

statutes.[62] A number of states passed statutes which provide for commitment of sexual psychopaths to mental health facilities instead of to prisons.[63] A "sexual psychopath" (also called by other terms such as psychopathic personality, sexually dangerous person, mentally abnormal sex offender, or criminal sexual psychopath) is typically defined as a person, not insane, who by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his sexual impulses as to be dangerous to other persons. The types of sexual offenses for which an offender may be committed vary from state to state, although all statutes cover sex offenses involving children.

Sexual psychopath statutes appear to be predicated on the view that prison sentences are not a deterrent to sexual psychopaths, and that with proper treatment, these offenders may become useful citizens again. Further, because commitment is for an indeterminate period of time, society is adequately protected, perhaps more so than if the offender were sentenced to prison.

While the purposes behind these laws may be laudable, the practical effect has been disillusioning. Persistent criticism of sexual psychopath laws has led to the repeal of these statutes in a number of states.[64] First, there have been constitutional challenges to sexual psychopath laws which primarily relate to the right to and nature of a hearing before commitment as a sexual psychopath. Even though commitment to a mental hospital under these statutes is purportedly for treatment and not punishment, the United States Supreme Court held in *Specht* v. *Patterson,* that sexual psychopathy proceedings, whether denominated civil or criminal, are subject to the due process clause.[65] Sexual psychopath statutes also have been challenged for violating equal protection, by providing fewer procedural protections than are available in civil mental health commitment proceedings.[66]

In addition to constitutional infirmities, the underlying purpose and effects of sexual psychopath laws have been criticized. According to a prominent commentator, one questionable assumption which gave rise to these laws is that sex offenders are more dangerous than other criminals.[67] Even assuming this is valid, it has been said that psychopath laws are not used in many states for the violent sex offender; it is the "passive ... morally offensive" perpetrator who is often the subject of sexual psychopath proceedings, while more violent offenders are subjected to the regular criminal process.[68]

Another problem encountered has been identifying the class of persons to whom sexual psychopath statutes apply. According to a report of the Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry, "[s]ex psychopathy is a questionable category from a legal standpoint and a meaningless grouping from a diagnostic and treatment standpoint."[69] In fact, there appears to be no medical-diagnostic personality equivalent for the legal term "sexual psychopath." In addition, the

lack of adequate definition has raised the constitutional problem of vagueness.

The most serious problem with sexual psychopath laws relates to the availability of effective treatment. A New Jersey report on habitual sex offenders indicated that "an underlying difficulty is the lack of psychiatric knowledge of methods that can be employed effectively to deal with psychopathic offenders."[70] The lack of treatment available in mental institutions constitutes a basic condemnation of the psychopathy laws, since the justification for such legislation is that sex offenders should be treated rather than punished. In terms of the application of these statutes in child sexual abuse cases, a recent report on treatment programs for sex offenders notes that child molestation is one of the most common offenses resulting in commitment under sexual psychopath statutes.[71]

Based upon the above reasons, it seems clear that at a minimum, sexual psychopath laws should not apply to most intrafamily child sex offenders. Indeed, current understanding and knowledge suggests that these offenders do quite well in outpatient treatment programs, many of which actively involve the legal system.[72] Most in-patient mental health facilities do not provide the type of treatment necessary to deal with the particular behavioral problems of these offenders. For example, a family treatment approach, which has had encouraging results in various parts of the country, may not be a viable approach in mental hospitals.[73]

Evidence also suggests that many intrafamily child sex offenders do not pose a danger to society at large. A basic premise of many treatment programs is that most incestuous behavior is a result of severely dysfunctional family dynamics, and that the offender is extremely amenable to treatment and change, if the proper approach is taken.[74] For these reasons, community programs have emerged across the country which provide treatment as a condition of disposition in criminal or juvenile court proceedings.[75] As discussed previously, the coercive authority of the legal system is employed with treatment as a condition of probation or work-release (jail-time at night and weekends with release to work and for attendance at therapy), or, pretrial diversion. Moreover, in these programs, the child victim is adequately protected through the use of protection orders.

3.5 Prosecution of Participating Parent

A parent should be held criminally responsible when the other parent commits sexual abuse upon their child, only if such parent participated in committing the abuse, or had actual knowledge of the abuse and intentionally failed to take reasonable steps to prevent its commission or future occurrence. Where such parent is criminally liable, dispositions providing for specialized treatment should be authorized.

Commentary

Prosecution of a parent in a case involving sexual abuse of a child by the other parent appears to be relatively rare. However, since it does occur, it was felt a position should be taken as to how it should be treated. Virtually all states have statutes providing criminal sanctions (usually misdemeanors) for child abuse and neglect which is intentionally, knowingly or willfully committed or allowed to be committed by a person having custody of a child.[76] The language varies from state to state, but in essence, it establishes criminal liability whenever the non-offending parent knowingly fails to prevent harm to the child. Thus, in a sexual abuse case, if a parent in fact knew about the abuse, and made no effort to prevent its continuation, she would be subject to criminal prosecution.

This recommendation therefore does not vary from the majority of existing statutes, except for the provision of treatment as part of the disposition. It represents the view that if the parent knew about the abuse, she should be liable for failing to protect the child. Some may be concerned about punishing a parent who did not actively encourage or overtly participate in the abuse; that is, creating liability based on simply a failure to act. However, a recent case of first impression in North Carolina involving physical abuse of a child by a third party in the presence of the child's mother suggests that this is not a problem.[77] The court stated that a parent has an affirmative legal duty to protect his or her child, and may be held liable as an aider and abettor if he or she is present when the child is assaulted and fails to make reasonable efforts to prevent it. The court specifically rejected the claim by the parent that criminal liability may not attach unless an affirmative act is taken. The court stated the general rule that mere presence of a person at the scene of a crime does not trigger liability. However, it noted that there is an exception where the law imposes a duty upon persons standing in certain relationships to others, including the duty of parents to care for their children. In such a case, the parent may be criminally liable for a failure to act or by an act of omission.

The above case involved a parent who was present when the abuse occurred, and it involved physical, not sexual abuse. This recommendation would impose liability where the parent had "actual knowledge." Possessing actual knowledge would include those situations in which the parent was present, but also would encompass those in which the parent learned of the abuse by some other means. The fact that a child has been sexually as opposed to physically abused should make no difference, since in both cases the child has been harmed. The key, therefore, is the parent's knowledge. In sexual abuse cases, as described in detail in the commentary to Recommendation 2.1, *Including the Parent Who Did Not Commit the Abuse as a Party in a Child Protection Proceeding*, the mother may not know the abuse is occuring; in addition to efforts by the offending parent and child to keep the mother from knowing, sexual

abuse cases also lack the physical evidence more readily apparent when a child is physically abused. Thus, knowledge often may be difficult to prove, and as a result, few parents prosecuted.

PART IV. EVIDENTIARY ISSUES

4.1 Competency

Child victims of sexual abuse should be considered competent witnesses and should be allowed to testify without prior qualification in any judicial proceeding. The trier of fact should be permitted to determine the weight and credibility to be given to the testimony.

Commentary

The need for the child victim's testimony in a sexual abuse case may be critical since the availability of other admissible evidence is often scarce, if not non-existent. The child, therefore, becomes the prosecutor's most valuable resource.[78] A trend is developing in state statutes to abolish the competency requirement for children by adopting Rule 601 of the Federal Rules of Evidence. The adoption of Rule 601 should make it possible for more children to be qualifed as witnesses. Rule 601 provides that "every person is competent to be a witness except as otherwise provided in these rules." The rule effectively limits all grounds of incompetency, including age, as well as religious belief, conviction of crime, or mental incapacity. The Practice Comment to Rule 601 explains that "the facts that formerly constituted incompetency may be introduced as matters of weight and credibility for the trier of fact."

The majority of states by statute or common law still prescribe an age above which a child is presumed competent to testify.[79] Below the specified age, courts generally determine a child's testimonial capacity based upon the following four factors:

(1) Present understanding of the difference between truth and falsity and an appreciation of the obligation or responsibility to speak the truth (sometimes phrased as an understanding of the nature and obligation of an oath);
(2) Mental capacity at the time of the occurrence in question to observe or receive accurate impressions of the occurrence;
(3) Memory sufficient to retain an independent recollection of the observation; and
(4) Capacity to communicate or translate into words the memory of such observation and the capacity to understand simple questions about the occurrence.[80]

In order to evaluate a child based on these factors, courts have traditionally subjected the child to *voir dire*. The purpose of the questioning is

to determine if the child will be allowed to testify at all; weight, credibility, or significance of his or her testimony are not at issue at this stage of the proceeding.[81] The judge has sole discretion to make a decision concerning the child's competency based on an analysis of the above four factors. Other observable factors such as demeanor and the level of maturity are also assessed by the judge. The decision of the trial judge as to the competency of a child is subject to appellate review, but will not be set aside in the absence of clear abuse.[82]

Since all of the standard competency tests are evaluated subjectively by a judge, a child found to be competent in one court may be deemed incompetent in another court. Professor McCormick indicates that the broad discretion allowed courts in deciding if a child can testify is primarily a function of judges' distrust of a jury's ability to objectively evaluate a child's testimony. He advocates allowing the testimony to come in for what it is worth with cautionary instructions to the jury, since the child may be the only person available who knows the facts.[83]

If the competency requirement for children is liberalized, the child's testimony would still be subject to judicial review for sufficiency of the evidence.[84] Further, as noted above, the judge is empowered to give the jury cautionary instructions regarding the same factors which would have been considered in a competency determination, which now would be matters of weight and credibiity. As with any other evidence, the jury can then weigh the testimony and disregard it entirely if desired.

Moreover, although very young children, usually under four years, may not have sufficient perception, memory, or narration abilities, these deficiencies simply affect the credibility of the child's testimony. For this reason, in fact, many children under four are unlikely to be called as witnesses. Unless there is no other evidence, or the child is extremely mature, a very young child probably would not help the prosecutor's case. Despite the truthfulness of the child's story, the child's inability to be a credible witness would reduce the chances of a successful prosecution.

Professor Wigmore best expresses the position taken by this recommendation:

> A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure *a priori* the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire some degree of credibility, is futile and unprofitable. . . . Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let the story come out for what it may be worth.[85]

4.2 Corroboration

Corroborative evidence of the victim's testimony should not be required to establish a *prima facie* case in any criminal or civil proceeding involving child sexual abuse.

Commentary

In child sexual abuse cases, to require corroboration means to require evidence which strengthens, supports, or confirms the child's testimony with respect to the main fact or *corpus delecti*.[86] In other words, the word of a child victim must be supplemented by testimony of other witnesses or by circumstantial evidence in order to sustain a prosecutor's case. In the past, a special legal requirement of corroboration was adopted in most states for sex offense crimes against both adults and children. Today, however, only three jurisdictions require corroboration as *prima facie* evidence in *all* sex offense cases involving children, although it is required in special or limited circumstances in some states; all states except one have abolished the corroboration requirement for adult victims.[87]

There are two premises which traditionally justified requiring corroboration for sex offenses against children. The first premise relates to the credibility of sex offense complainants, both adults and children. The second is that children have special problems of testimonial credibility. However, both of these premises are based on the following questionable assumptions.

The first assumption is that complainants of sexual offenses frequently make false reports.[88] However, a "false" report may mean that no crime was committed because the complainant lied, that no crime was committed because the activity was investigated and deemed non-criminal, or that the complainant simply refused to press charges. Further, existing statistics indicate that the frequency of false reports for sex offenses approximates the frequency of false reports for other crimes. Moreover, it is estimated that most sexual offenses are never reported to the authorities, perhaps because of the belief by victims that their complaints will be dismissed for insufficient corroboration in light of the corroboration requirement.[89]

The second questionable assumption is that the factfinder is biased toward the complainant and prejudiced against the defendant. However, existing data indicates that convictions at trial for sexual offenses occur at a lower rate than for other felonies.[90] This suggests that the actual bias and prejudice is reversed: the fact-finder is biased toward the defendant and views the complainant with suspicion.

The third assumption is that a falsely accused defendant will have difficulty in defending himself. Lord Chief Justice Hale stated in 1680 that "[r]ape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."[91]

This premise is based on the unique evidentiary factors of the crime of child sexual abuse "where the criminal issue often turns solely on the conflicting testimony of an unsupported complainant and the defendant. The corroboration requirement, in effect, is a prior determination that if the prosecutor's case stands solely on the testimony of the complainant, the defendant shall win."[92] As a result, prosecutors frequently refuse to bring uncorroborated cases even in jurisdictions without the corroboration requirement. Thus, it would seem that the difficulty of defending against an uncorroborated child sexual abuse accusation is far less than the difficulty of successfully prosecuting this type of case.

An assumption often made regarding children is that they are susceptible to overt or covert influences. While this may be true, there is evidence that children are no more likely to be influenced than adults.[93] Another questionable assumption relating to children is that they are prone to fantasize. Although children do fantasize, these fantasies are based on their daily experiences. Children are unlikely to fantasize about sexual activity using adult terms because sexual matters are not generally discussed between parents and their children in an informative way. Also, children usually fantasize in play situations and are unlikely to initiate a fantasy as a means to communicate seriously with an adult.[94]

Finally, Freud's theory that patients' reports of childhood sexual abuse by a parent were attributable to infantile sexual fantasies (leading to the formulation of his famous Oedipus complex) increasingly has come under attack. As one renowned psychiatrist stated, ". . . both cultural and personal factors combined to cause everyone . . . to welcome the idea that reports of childhood sexual victimization could be regarded as fantasies . . . because this position relieved the guilt of adults"; current psychiatric and psychological theory and clinical experience reveals that many of Freud's followers were too quick to misinterpret or discount incidents of sexual assault upon children.[95]

The corroboration rule is an undesirable feature of prosecutions for sexual offenses committed upon a child. There are several protections existent in the criminal justice system which obviate the need for a corroboration requirement as an extra safeguard for defendants. As witnesses, children traditionally are tested for competency before they testify. In some jurisdictions, a special cautionary instruction is given to the jury regarding the care with which it should assess the credibility of child witnesses. Further, the government is required to prove one charged with a criminal sex offense guilty beyond a reasonable doubt, a very high standard of proof. The use of corroboration should be viewed as persuasive evidence in addition to the case in chief, not as an indispensable part of it. This will result in more prosecutions and convictions in cases of child sexual abuse.

4.3 Out-of-Court Statements of Sexual Abuse

A child victim's out-of-court statement of sexual abuse should be admissible into evidence where it does not qualify under an existing hearsay exception, as long as: (1) the child testifies; or (2) in the event the child does not testify, there is other corroborative evidence of the abuse. Before admitting such a statement into evidence, the judge should determine whether the general purposes of the evidence rules and interests of justice will best be served by admission of the statement into evidence. In addition, the court should consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, the reliability of the assertion, and the reliability of the child witness in deciding whether to admit such a statement.

A statement may only be admitted under this exception if the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it.

Commentary

A child victim's out-of-court statements of sexual abuse are normally considered hearsay, and thereby inadmissible under traditional rules of evidence. Hearsay evidence is usually defined as testimony in court of a statement made out of court, offered to prove the truth of the matter asserted, its value resting upon the declarant's credibility. These statements are criticized because: (1) there is no opportunity to cross-examine the declarant whose statement is offered by the witness; and (2) the statement was not made under oath.

However, there are several methods by which a child's statements involving sex offenses may be received into evidence. One is the "complaint of rape" theory, which permits the admission of a rape complaint as corroboration to rebut a presumption of silence inconsistent with the occurrence of the act. Another is the hearsay exception for declaration of present bodily feelings, symptoms, and conditions. Finally, there is the "excited utterances" exception (within the broader category of *res gestae* or spontaneous declarations) to the hearsay rule which includes spontaneous statements made while under the influence of a startling event.

Perhaps the most frequent hearsay exception under which courts have admitted statements of child sexual abuse victims is the excited utterances exception. Courts usually measure the spontaneity of the statement by the time lapse between the event and the statement. In many jurisdictions, the spontaneity requirement has specifically been relaxed for statements of child sexual abuse victims, allowing into evidence statements made one or two days later, or, in one case, three months after the sexual assault.[96]

For several reasons, the existing hearsay exceptions are inadequate and do not permit most statements of child sexual abuse to be admitted into evidence. A special hearsay exception as set forth here should be created for admitting these statements, or in the alternative, a "residual" exception should be adopted (as is found in the Federal Rules of Evidence) which often would apply to such statements. As discussed later, a residual exception simply refers to a catch-all exception, under which statements may be admitted which do not fit into existing exceptions. In at least two states, Kansas and Washington, legislation has been proposed or enacted creating a special exception specifically for the admission of children's statements of sexual abuse.[97]

It may be more sensible to adopt a broader, residual exception than a special exception. Some commentators believe that the proliferation of exceptions has led to a confusing array of specific rules, some limited to narrow fact patterns, and to an overly categorical and superficial approach to hearsay.[98] It is contended that many out-of-court statements which do not fit within the existing exceptions are trustworthy and necessary, and that such statements are generally excluded by conservative courts or admitted by liberal courts who strain to fit the statement into an existing exception.[99] Statements of child sex offense victims represent one example of this problem; courts have often stretched the time between the event and a child's statement of sexual abuse beyond a point at which the statement can truly be considered spontaneous under the excited utterances exception.

In part, it is this type of tortured interpretation of the hearsay exceptions that has led to the adoption of a "residual" hearsay exception in the Federal Rules of Evidence, as well by almost one-third of the states.[100] In fact, in Wisconsin, the legislative history to the residual exception suggests that a case which admitted a child's statement of sexual abuse (not under a particular theory) may reflect an example of a judicially carved out special hearsay exception contemplated by the residual exception.[101] Such an exception allows into evidence statements which possess comparable circumstantial degrees of trustworthiness to the existing exceptions. This and other elements of the residual exception are incorporated in subsections (1) - (3) of this recommendation. These subsections reflect the two essential requirements for admissibility under the residual exception, namely, trustworthiness and necessity.

Courts seem to consider a child's statement of sexual abuse as very trustworthy, since they often justify its admission on grounds other than spontaneity, while technically admitting the statement under the excited utterances exception. They have indicated that young children usually do not make immediate complaints because of fear of reprisals, threats, or admonishments to secrecy. Courts also have pointed out that children are not adept at reasoned reflection and at concoction of false stories under such circumstances.[102]

The necessity of this type of evidence also justifies admission of a child's statement of sexual abuse. In child sexual abuse cases, there are rarely eyewitnesses or medical evidence, and much of the evidence may be circumstantial or hearsay. Further, the child may not be a competent witness and thus be unable to testify. Another important reason for admitting such statements is that if the child retracts the story on the witness stand, the prior inconsistent statement may be admitted substantively; this is significant, since children are often pressured to recant, and the prior statement may otherwise be used to impeach the child witness. Again, courts have relaxed the spontaneity requirement to admit statements under the excited utterances exception because of the special needs and limitations of child witnesses and because of "the possibility of miscarriages of justice [w]hich] assumes the character of a public danger."[103]

In order to assure fairness to the defendant, a number of other factors have been included. A child's statement can only be admitted if the child testifies, or if he or she does not testify, only where there is other evidence of the abuse. This is the approach taken by New York's Family Court Act and the Washington legislation. Also included to protect the defendant are specific factors which must be considered by the judge in deciding if the statement should be admitted. Finally, the last paragraph is designed to provide additional procedural fairness to defendants.

4.4 Marital Privilege

The marital privilege should not apply in any criminal or civil proceeding involving intrafamily child sexual abuse, and the spouse of the offending parent should be considered a compellable witness.

Commentary

The common law marital privilege consisted of two separate privileges: the privilege against disclosure of confidential communications, and the testimonial privilege, which involved the disqualification of a spouse as a witness either for or against the other spouse. Today, however, statutory provisions in most states have modified or abolished these common law privileges. Even before this legislative movement, however, exceptions had been made in cases involving crimes against one's spouse or parental child abuse.[104]

The long-standing justification for the marital privilege is the preservation of family peace and harmony. As one commentator has stated, however, family harmony is nearly always past saving when the spouse is willing to assist the prosecution.[105] Further, even if family harmony might be preserved, when a child has been sexually abused, society's interest in the protection of children overrides its interest in protecting the marital relationship. One court stated that a key reason for eliminating the privilege is to protect children from abuse which "could otherwise be practiced without fear of retribution."[106]

Lastly, as previously noted, child sexual abuse cases often lack physical and medical evidence. Again, only circumstantial or hearsay evidence may be available and the child may not be considered a competent witness. For these reasons, the privilege should not apply, since "any rule that impedes the discovery of truth in a court of law also impedes as well the doing of justice."[107]

It was not until 1980 that the United States Supreme Court decided that a defendant may not prevent adverse testimony from his or her spouse in federal, criminal proceedings.[108] The Court also noted that the trend in state statutes is to abolish the privilege against adverse testimony. Indeed, as of the end of 1981, Utah was the only state in which the defendant could invoke the adverse testimonial privilege in criminal child abuse cases; only a few states permit the defendant to assert the privilege in civil cases involving child abuse.[109] While the Supreme Court has continued to uphold the confidential communications privilege in federal cases, the vast majority of states no longer permit the privilege to be invoked in criminal or civil child abuse cases.[110]

Generally, there are two types of statutes in which the marital privilege has been abolished: statutes relating to competency of witnesses and the child abuse and neglect reporting laws. In most witness competency provisions, spouses are considered competent, but cannot be compelled to testify. Thus, the defendant cannot prevent the testimony of his or her spouse, although the spouse may choose whether or not to testify. In the reporting laws, however, most of the provisions abrogating the privilege may be reasonably construed to compel the testimony of the non-offending spouse.[111]

4.5 Expert Testimony

In intrafamily child sexual abuse cases, prosecutors should make use of expert witnesses who qualify under the rules of evidence, to aid the trier of fact in resolving issues relating to the dynamics of intrafamily child sexual abuse and principles of child development.

Commentary

Expert testimony is routinely used in various types of legal proceedings. It differs from lay testimony in that a lay witness is qualified to testify only about firsthand knowledge and not about inferences or conclusions, which are generally the sole province of the jury; the expert, on the other hand, has the power to draw such inferences which a jury is not competent to draw.[112] To qualify as an expert, an individual must possess skills, knowledge, or learning in a field in which the average person has inadequate knowledge and which will aid the trier of fact in resolving an issue or in reaching a decision.

The area about which the expert testifies must be a recognized "state of the art" field. Experts may testify in areas about which a jury has some

general knowledge, as long as it elucidates the jury's understanding of an issue.[113] The expert's special knowledge may derive from a variety of sources, including education and practical experience. The judge has wide discretion in whether to accept testimony from a particular expert, and rejection or failure to give weight to it will rarely be grounds for a successful appeal.[114]

The use of mental health professionals as expert witnesses in intrafamily child sexual abuse cases is a growing practice around the country.[115] Expert testimony has indeed contributed to a greater understanding of the complex issues in these cases. Experts have been called to testify on a variety of issues, although there are several key areas which frequently arise and which dictate the need for an expert to provide elucidation for the jury or judge. These include the reasons why a child endures sexual abuse over a long period of time and why a child finally discloses the abuse. Another common issue is the non-offending parent's ambivalence about supporting the child because of divided loyalty between her child and spouse.

It should be noted that an analogous type of expert testimony involving the "battered wife syndrome" is gaining acceptance by some courts. This should provide additional support for the admissibility of expert testimony in intrafamily child sexual abuse cases. Some courts have permitted mental health experts to testify in murder cases where a wife is claiming self-defense. The testimony is usually offered to explain why a battered woman remains with her spouse, why she fails to tell anyone about the abuse, and why she felt her life or her children's lives were in imminent danger. It has been held that such expert testimony provides juries with an interpretation or understanding of the facts beyond that of the average lay person, and that the state of the art is such that a reasonable expert opinion is permissible.[116] Other courts, however, have disallowed this type of expert testimony, stating that the subject is within the jury's knowledge; the battered wife syndrome is not sufficiently developed as a matter of commonly accepted scientific knowledge; and its prejudicial impact outweighs the probative value.[117]

This recommendation is intended to encourage the use of expert witnesses to testify about the dynamics of intrafamily child sexual abuse and principles of child development. In cases where evidence is lacking or largely circumstantial, such expert testimony is an evidentiary method which should contribute to more successful legal actions.

4.6 Prior Sexual Acts

Courts should have discretion to admit evidence of prior sexual acts between the offending parent and child to show either: (1) a depraved or lustful disposition of the parent; or (2) a plan, scheme, design, motive or *modus operandi*. Evidence of sexual acts by the offending parent with other children should also be admissible to show plan, scheme, design, motive or *modus operandi*.

Commentary

A long-established evidentiary rule forbids the prosecution from initially introducing evidence of a defendant's bad character, unless the accused gives evidence of his good character. Although such evidence may be relevant to the crime for which the defendant is then being charged, the danger of prejudice to the defendant is considered to outweigh its probative value. Thus, the prosecution may not introduce evidence of other criminal acts of the accused to show the probability that the defendant committed the crime of which he is currently charged. Such evidence may be offered, however, if it is substantially relevant for some other purpose.

One purpose for which evidence of prior criminal acts may be admitted is "to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial."[118] Most jurisdictions have accepted this special exception in prosecutions for sexual offenses.[119] However, courts have been careful to limit the application of this exception to cases in which prior, similar offenses involved only the defendant and the prosecuting witness. Only a few jurisdictions admit alleged offenses committed against persons other than the prosecuting witness.[120] An even smaller number of courts have expanded the exception to admit offenses which are not similar to the one with which the defendant is charged.[121]

One justification for admitting prior sexual acts is that there is usually great difficulty in proving sexual offenses involving a parent and child. The offense is usually non-violent, and thus produces no physical evidence. Furthermore, it frequently occurs in a clandestine manner, with the sexually abused child and the accused parent as the only witnesses. However, difficulties of proof should not justify admitting evidence of other sexual offenses automatically; rather, the evidence should be subjected to careful scrutiny by the judge. The judge would be empowered to exclude the evidence of other sexual offenses if, in his judgment, its probative value was outweighed by "the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial. A decision clearly wrong on the question of balancing probative value against the danger of prejudice will be corrected on appeal as an abuse of discretion."[122]

In crimes such as statutory rape and incest, the majority of courts have long recognized that a sexual relationship between the defendant and the prosecuting witness, other than the particular sexual act for which the defendant is accused, is relevant in proving that the defendant committed the act.[123] Indeed, parental sexual abuse of a child usually occurs repeatedly over an extended period of time, making evidence of prior sexual

acts important in showing the existence of a course of conduct. Some states have even extended the exception to include subsequent as well as prior relations and other sexual offenses not exactly similar to the offense charged. The justification frequently asserted for the exception is that a defendant's "lustful dispostion" is highly probative and that the evidence permits corroboration of a prosecutrix's testimony.[124] Also, evidence of previous sexual incidents between the accused parent and prosecuting child witness taken together may provide a pattern which makes the alleged incident seem much more probable.

Similar sexual crimes by the defendant with persons other than the prosecuting witness are generally inadmissible to show a propensity for illicit sexual relations with the prosecutrix. However, courts have sometimes admitted other acts under theories such as *res gestae,* or to show design, intent, plan, scheme, motive or *modus operandi*.[125] Courts have held that evidence of similar independent crimes is admissible for these purposes, as the crimes are sometimes so related that proof of one tends to establish the others.[126]

When admitting evidence of sex crimes committed by the defendant on other persons, it is important to consider the prejudicial effect on the defendant. The evidence should be admissible, however, when sexual offenses against other children (for example, siblings) can be shown to be a manifestation of a general scheme, a continuing plan, or a design to commit sexual acts. It is not uncommon for an offender to sexually abuse more than one child in the family, in which he usually begins with the oldest daughter, and then moves to younger daughters. Some courts admitting such evidence have emphasized the similarity between the alleged crimes and have concluded that they showed the same "bent of mind."[127] In addition, there is justification for allowing evidence of crimes against other children when the present crime is difficult to prove. Finally, admissibility to show *modus operandi* has been justified on the theory that the greater the number of witnesses, the less the probability that all are accusing the defendant based upon fantasy.[128]

4.7 Sexually Abused Child Syndrome

Consideration should be given by the legal profession to the evidentiary viability of a "sexually abused child syndrome," which may be analogous to the "battered child syndrome."

Commentary

Expert medical testimony on the "battered child syndrome" has gained wide acceptance in the courts in both criminal and child protection proceedings.[129] In essence, the battered child syndrome is a medical diagnosis that a child has sustained certain types of injuries which were not caused by accidental means. The syndrome involves a young child with particular repeated or severe injuries (including bone or skeletal injuries at different stages of healing; subdural hematomas; and soft tissue injury) which are inconsistent with the parent's history or story of their occurrence.

A finding of the battered child syndrome is not an opinion by a doctor that a particular person inflicted the injuries. However, courts have had little trouble attributing such abuse to the parent, where the parent had exclusive control or custody of the child when the injuries occurred.[130] Some courts have applied the negligence theory of *res ipsa loquitur* when the battered child syndrome is present.[131] In addition, several state statutes have codified this theory in their juvenile court acts.[132] In essence, once the battered child syndrome has been established by expert testimony, this theory allows an inference or rebuttable presumption of negligence, which shifts the burden to the parent to show that the injuries were accidental. Where the parent fails to provide a reasonable explanation, a *prima facie* case of the parent's negligence is established supporting an adjudication of abuse, or a criminal conviction.

One author has proposed a similar type of expert testimony and *res ipsa loquitur* theory for juvenile court sexual abuse proceedings called the "sexually abused child syndrome." Where certain evidence is present, including either medical evidence or a statement of abuse by the child which constitutes an "excited utterance," combined with other circumstantial evidence (such as behavioral indicators exhibited by the child and other family dynamics), it is suggested that a "sexually abused child syndrome" has been established.[133]

The above theory differs from the battered child syndrome in that expert testimony on the sexually abused child syndrome would be used to show not that the sexual acts were accidental, but to allow an inference that they occurred. It would not indicate who committed the abuse; however, applying the *res ipsa loquitur* theory, the burden would shift to the parent who would be required to explain how the abuse occurred to avoid a finding of abuse. Failure to offer a satisfactory explanation would thus establish a *prima facie* case of sexual abuse by the parent.

The experts most qualified to testify to the "sexually abused child syndrome" would be doctors where medical evidence exists, or mental health professionals, where various behavioral indicators and family dynamics constitute circumstantial evidence of sexual abuse. This syndrome is an idea in an inchoate stage which requires much further thought and research before courts are likely to accept expert testimony, especially in a criminal case. However, its use in the future should greatly improve the legal system's involvement in these cases, by concentrating less on a frantic search for admissible evidence, and more on obtaining protection of the child and treatment for the child and family.

FOOTNOTES

[1]MacFarlane & Bulkley, *Treating Child Sexual Abuse: An Overview of Current Program Models,* in Social Work and Child Sexual Abuse, Vol. 1, No.1/2, J. Hum. Sexuality & Soc. Work (1982).

[2]*Id.*; *see also* Part III, *Innovations in the Prosecution of Child Sexual Abuse Cases;* MacFarlane, Jenstrom & Jones, *Conclusion: Aspects of Prevention and Protection,* in Sexual Abuse of Children: Selected Readings 123, National Center on Child Abuse & Neglect, U.S. Dept. of Health & Human Services (1980).

[3]MacFarlane & Bulkley, *supra* note 1.

[4]See Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect,* 23 Vill. L. Rev. 458, 499-500, n.224 (1978), for a discussion and examples of state statutes providing for the creation and operation of these teams. Colorado has the most comprehensive scheme. Colo. Rev. Stat. § 19-10-109(b)-(10) (Supp. 1976).

[5]*See* Part I, *Innovations in the Prosecution of Child Sexual Abuse Cases.*

[6]*Incest: Confronting the Silent Crime. A Manual for Educators, Law Enforcement, Medical, Human Services and Legal Personnel,* Minnesota Program for Victims of Sexual Assault, St. Paul, Minnesota (1979).

[7]*See* Part III, *Innovations in the Prosecution of Child Sexual Abuse Cases.*

[8]D.C. Code Ann. §§ 16-1001 to -1006 (1973).

[9]*See Child Sexual Abuse - Legal Issues and Approaches and* Parts II and III, *Innovations in the Prosecution of Child Sexual Abuse Cases.*

[10]M. Alderman, *Representation for the Abused and Neglected Child: the Guardian Ad Litem and Legal Counsel,* National Center on Child Abuse & Neglect, U.S. Dept. of Health & Human Services (1980); Davidson, *The Guardian Ad Litem: An Important Approach to the Protection of Children,* 10 Children Today 2 (1981).

[11]M. Alderman, *supra* note 10.

[12]*National Guardian Ad Litem Policy Conference Manual,* National Legal Resource Center for Child Advocacy & Protection, American Bar Association (rev. ed. 1982).

[13]*See* V. DeFrancis, *Protecting the Child Victim of Sex Crimes,* American Humane Association (1969); *Reducing Victim/Witness Intimidation, Part V, Recommendation 1, "Friend in Court Services,"* Criminal Justice Section, American Bar Association, Washington, D.C. (1980).

[14]Video-taped interviews with the child are utilized regularly in the Los Angeles area. Presentation on *Reducing System Induced Trauma Through Use of Video-Taped Interviews,* by D. Corwin, K. MacFarlane, R. Summit, R.P. Tyler, L. Stone, & J. Bulkley, at Second National Conference on Sexual Victimization of Children, Children's Hospital National Medical Center, Washington, D.C. (May 6-8, 1982). Such tapes often have the benefit of avoiding trial and encouraging guilty pleas because the child is seen as making a good witness, and the offender is moved by hearing his child talk about the abuse.

[15]*See* Part III, *Innovations in the Prosecution of Child Sexual Abuse Cases.*

[16]*See* Parts I and III, *Innovations in the Prosecution of Child Sexual Abuse Cases.* Examples include Baltimore, Maryland and Des Moines, Iowa, whose programs are described in *Innovations.*

[17]*See* Part I, *Innovations in the Prosecution of Child Sexual Abuse Cases.*

[18]*See* 6 Wigmore, Evidence § 1835 (1976).

[19]See Chapter 10, *Child Sexual Abuse and the Law* for a list of these statutes.

[20]50 U.S.L.W. 4759 (U.S. Jun. 23, 1982) *reversing* 423 N.E.2d 773 (Mass. 1981).

[21]*See* Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System,* 15 Wayne L. Rev. 977 (1969).

[22]A recent criminal case in California involving a child victim of physical abuse held that the right of confrontation means the "right to see one's accusers face-to-face." Herbert v. Superior Court, 117 Cal. App. 3d 66, 172 Cal. Rptr. 850 (1981). The court stated that seating the defendant so that he could hear but not see the child witness violated his right to confront witnesses. *See also* Chapter 10, *Child Sexual Abuse and the Law* 188-90.

[23]In the Interest of Brooks, 379 N.E.2d 872 (Ill. 1978).

[24]In the Matter of S. Children, 102 Misc. 1015, 424 N.Y.S. 2d 1004 (Fam. Ct. 1980).

[25]*See* Parts I and III, *Innovations in the Prosecution of Child Sexual Abuse Cases.*

[26]*See Hospital Protocols for the Diagnosis and Treatment of Child Sexual Abuse,* in Sexual Abuse of Children: Selected Readings, Appendix A, National Center on Child Abuse & Neglect, U.S. Dept. of Health & Human Services (1980).

[27]*See* Chapter 1, *Child Sexual Abuse and the Law.*

[28]*See* Chapter 3, *Child Sexual Abuse and the Law.*

[29]*Id.*

[30]*See, e.g.,* statutes in Ala., Ark., Conn., Del., Me., Md., Mont., N.H., N.D., Ohio, Or., R.I., Tenn., Wash., Wisc., Wyo., and American Sa-

moa. *See* Chapter 1, *Child Sexual Abuse and the Law*.

[31]People v. Fisher, 257 N.W.2d 250, 254 n.2 (Mich. Ct. App. 1977).

[32]Kendall v. State, 145 So.2d 924, 927 (Miss. 1962).

[33]The Protection of Children Against Sexual Exploitation Act can be found at 18 U.S.C.A. § 2251 (West Supp. 1982). *See also* Davidson, *Child Sexual Exploitation-Background and Legal Analysis* (Appendix A, IV).

[34]Wenet, Clark & Hunner, *Perspectives on the Juvenile Sex Offender*, in Exploring the Relationship Between Child Abuse & Delinquency 145 (Hunner & Walker eds. 1981).

[35]Groth, Burgess & Holmstrom, *Crisis Issues for an Adolescent-Aged Offender and His Victim*, in Sexual Assault of Children and Adolescents 43 (1978); A.N. Groth, Men Who Rape 180-85 (1979).

[36]Wenet, Clark & Hunner, *supra* note 34, at 147.

[37]Presentation by A.N. Groth, Director, Sex Offender Program, Connecticut Correctional Institution, at Meeting of Mid-Atlantic Coalition of Sexual Victimization of Children, Sept. 16, 1981, in Baltimore, Maryland.

[38]*Child Sexual Abuse: Incest, Assault and Sexual Exploitation* 3, National Center on Child Abuse & Neglect, U.S. Dept. of Health & Human Services (1981). However, the Child Protection Center - Special Unit at Children's Hospital National Medical Center, Washington, D.C., has seen 25% male victims in its sexual abuse program. In addition, Illusion Theater and Bubbylonian Encounter, two plays for children on appropriate and inappropriate forms of touch, have led to increased reporting by boys.

[39]Wenet, Clark & Hunner, *supra* note 34.

[40]Groth, *Guidelines for the Assessment and Management of the Offender*, in Sexual Assault of Children and Adolescents 25, 38 (1978).

[41]Groth, Burgess & Holmstrom, *supra* note 35, at 180.

[42] For example, the Adolescent Program at the University of Washington, in Seattle, Washington and the Child Protection Center - Special Unit of Children's Hospital National Medical Center, Washington, D.C.

[43]*See* Chapter 3, *Child Sexual Abuse and the Law*. But see Doe v. County of Suffolk, 494 F. Supp. 179 (1980), a case in which a mother filed an action against a CPS worker for violating her constitutional rights under 42 U.S.C.A. § 1983 (West 1981) by maliciously filing a neglect petition against her and removing her child from her custody based upon the husband's sexual abuse of the child. The court denied the defendant's motion for summary judgment, holding that the social worker only had a qualified good faith immunity, not an absolute immunity, from damages. The court did not decide the merits of the case, namely, whether the

worker acted in good faith in filing the petition.

[44] S. Butler, Conspiracy of Silence (1978); Herman & Hirschman, *Father-Daughter Incest*, Signs: Journal of Women in Culture and Society, Vol. 2, No. 4 (Summer, 1977); *See also* Burgess, Holmstrom & McCausland, *Divided Loyalty in Incest Cases*, in Sexual Assault of Children and Adolescents 115 (1978).

[45]MacFarlane, *Sexual Abuse of Children*, in The Victimization of Women 81, Sage Yearbooks in Women's Policy Studies (J. Chapman & M. Gates eds. 1978).

[46] *Id.*

[47]Technically, in many jurisdictions, child protection cases are filed in the interest of the child, and the parents are not formal parties to the action. However, where only the perpetrator is made a formal party and the non-offending parent is not, the juvenile court still has the power or authority to remove or take any other action to protect the child. Removal should presumably not occur, however, if the child is safe in the mother's custody. This would be the case, for example, where the offender has left or has been ordered by the court to leave the home or has no contact with the child.

[48]One author believes that mothers are inappropriately blamed, that children do not tell their mothers for fear of hurting them, and that a father's sexual abuse of his child is miscast as a family problem, rather than the offender's problem. *See* L. Armstrong, Kiss Daddy Goodnight (1978).

[49]Summit, *Recognition and Treatment of Child Sexual Abuse*, in Providing for the Emotional Health of the Pediatric Patient (C. Hollingsworth ed. 1982).

[50]L. Lerman, *State Legislation on Domestic Violence*, Response, Vol. 4, No. 7, Center for Women Policy Studies, Washington, D.C., at 1 (Sept./Oct. 1981). This excellent piece also contains a state-by-state breakdown of the provisions of all the domestic violence statutes. *See also* Chapter 4, *Child Sexual Abuse and the Law*.

[51]L. Lerman, *supra* note 50.

[52]*See* Chapter 1, *Child Sexual Abuse and the Law*.

[53]*See infra* Recommendation 1.7, *Juvenile Offenders*.

[54]A state-by-state breakdown and a complete discussion and analysis of these reforms can be found in Chapter 1, *Child Sexual Abuse and the Law*.

[55]L. Lerman, *supra* note 50, at 4.

[56]*See* Parts II and III, *Innovations in the Prosecution of Child Sexual Abuse Cases*. Examples include Olathe, Kansas, Sacramento, California, and Everett, Washington.

[57]Zaloom, *Pretrial Intervention Under New Jersey Court Rule 3:28*,

Proposed Guidelines for Operation, Crim. Just. Q., Vol. 2, No.4, at 30 (1974).

[58]In some pretrial diversion programs, the recommendations of the victim and non-offending parent are considered. *See* Part II, *Innovations in the Prosecution of Child Sexual Abuse Cases*.

[59]*See Performance Standards and Goals for Pretrial Release and Diversion,* National Association of Pretrial Services Agency, Washington, D.C. (1978).

[60]*Id.;* Zaloom, *supra* note 57.

[61]*See* Part III, *Innovations in the Prosecution of Child Sexual Abuse Cases*.

[62]S. Brakel & R. Rock, The Mentally Disabled and the Law 341 (1971).

[63]As of late 1981, 17 states had sexual psychopath statutes. *See* Chapter 4, *Child Sexual Abuse and the Law*.

[64]The states that have repealed their sexual psychopath laws as of late 1981 are Cal., Ind., Iowa, Mo., Ohio, S.D., Vt., and Wis.

[65]386 U.S. 605, 608. The Court goes on to point out that confinement in a mental hospital "is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm."

[66]People v. Feagley, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975); State *ex rel.* Farrell v. Stovall, 59 Wis. 2d 148, 207 N.W.2d 809 (1973).

[67]S. Brakel & R. Rock, *supra* note 62, at 351.

[68]*Id.*

[69]*Psychiatry and Sex Psychopath Legislation: The 30s to the 80s,* Committee on Psychiatry and Law, Group for the Advancement of Psychiatry 936 (1977).

[70]*New Jersey Report of the Commission on the Habitual Sex Offender* 32 (1950).

[71]E. Brecher, *Treatment Programs for Sex Offenders,* National Institute of Law Enforcement & Criminal Justice, Law Enforcement Assistance Administration, U.S. Dep't of Justice 4 (1978).

[72]*See* Giarretto, Giarretto & Sgroi, *Coordinated Community Treatment of Incest,* in Sexual Assault of Children and Adolescents 231 (1978); *see also* Part III, *Innovations in the Prosecution of Child Sexual Abuse Cases*.

[73]But see M. Saylor, *A Guided Self-Help Approach to Treatment of the Habitual Sexual Offender,* Sex Offender Program, Western State Hospital, Fort Steilacoom, Washington, Presentation to the 12th Cropwood Conference, Cambridge, England (Dec. 7-9, 1979), in which it is said

that offenders' spouses can participate in therapy in the hospital program.

[74]*See* Groth, *Guidelines for the Assessment and Management of the Offender,* in Sexual Assault of Children and Adolescents 25 (1978); K. Meiselman, Incest, A Psychological Study of Causes and Effects with Treatment Recommendations 106-11 (1979); Giarretto, Giarretto & Sgroi, *supra* note 72.

[75]*See* Part III, *Innovations in the Prosecution of Child Sexual Abuse Cases*.

[76]*See, e.g.,* Ariz. Rev. Stat. § 13-3613(A) (Supp. 1982); Cal. Penal Code § 273A (West Supp. 1982); Del. Code tit. 11, § 1102 (1979); Ill. Ann. Stat. § 2361 (Smith-Hurd Supp. 1982); Mo. Rev. Stat. § 568.050 (1979); Tenn. Code § 39-1012 (Supp. 1981). For a state-by-state breakdown of such provisions, contact Herner and Company, 1700 N. Moore Street, Arlington, Virginia, 22209. Herner operates a research service funded by the National Center on Child Abuse and Neglect, which maintains a comprehensive library on child abuse and neglect literature and laws.

[77]State v. Walden, 293 S.E.2d 780 (N.C. 1982). The ABA Resource Center's Child Sexual Abuse Project has known only of anecdotal instances, many of which seemed inappropriately punitive, of prosecutions of mothers whose children were sexually abused by their spouses. Interviews with Louise Armstrong, author of Kiss Daddy Goodnight (1978), and Kee MacFarlane, former Child Sexual Abuse Specialist, National Center on Child Abuse & Neglect, U.S. Dept. of Health & Human Services.

However, the Center has recently learned that mothers are being prosecuted in Arizona under the criminal provision of the child abuse and neglect reporting statute for failure to report the sexual abuse. Arizona is one of three states as of 1979 requiring persons with the responsibility to care for children to report suspected child abuse or neglect. As of 1979, at least 19 states required "any person" to report. *Child Abuse and Neglect State Reporting Laws,* National Center on Child Abuse & Neglect, U.S. Dept. of Health & Human Services (1979). While technically these provisions might be used, they probably were not intended to apply to the child's caretaker, particularly since criminal provisions have been specifically enacted to deal with caretakers who abuse their children. *See* text *infra* at 29.

[78]Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System,* in Sexual Abuse of Children: Selected Readings 47, 48, National Center on Child Abuse & Neglect, U.S. Dept. of Health & Human Services (1980).

[79]For a list of competency statutes, see 8 Wigmore, Evidence § 488 (1979) and Chapter 6, *Child Sexual Abuse and the Law*.

[80]*See* 81 Am. Jur. 2d *Witnesses* § 88 (1962); 2 Wigmore, Evidence § 506 (1940); Stafford, *The Child as Witness,* 37 Wash. L. Rev. 303, 304-5 (1962).

[81]Siegel & Hurley, *The Role of the Child's Preference in Custody Proceedings,* 11 Fam. L. Q. 32, 40 (1977).

[82]97 C.J.S. *Witnesses* § 58 (1957); State v. Manlove, 441 F.2d 229, 231 (N.M. 1968).

[83]McCormick, Evidence § 62, at 140-41 (1972).

[84]2 Wigmore, Evidence §§ 501, 509 (1940); *see also* Fed. R. Evid. 601, Advisory Committee's Notes.

[85]2 Wigmore, Evidence § 509 (1940).

[86]75 C.J.S. *Rape §* 78, at 566 (1952).

[87]As of late 1981, these three jurisdictions were Nebraska, New York and the District of Columbia. Only Nebraska requires corroboration in adult victim cases. See generally Chapter 5, *Child Sexual Abuse and the Law,* for a complete discussion of state requirements for corroboration.

[88]See Note, *Corroborating Charges of Rape,* 67 Colum. L. Rev. 1137, 1138 (1967); 3A Wigmore, Evidence § 924A (1970).

[89]Chapter 5, *Child Sexual Abuse and the Law* 104, nn.5 & 9.

[90]*See* L. Holmstrom & A. Burgess, The Victim of Rape 238 (1978); K. Williams, The Prosecution of Sexual Assaults 19, 25-30 (1978).

[91]I.M. Hale, Pleas of the Crown 635 (1680).

[92]Note, *The Rape Corroboration Requirement, Repeal Not Reform,* 81 Yale L.J. 1365, 1382 (1972).

[93]*See* Chapter 5, *Child Sexual Abuse and the Law.*

[94]*Id.*

[95]D. Finkelhor, Sexually Victimized Children 8 (1979); Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders,* 30 Am. J. Psychotherapy 398 (1976); Rosenfeld, *Sexual Misuse and the Family,* 2 Criminology Int'l J. 2 (1977); Summit, *supra* note 49.

[96]*See* Annot., 19 A.L.R.2d 573 (1951); Annot., 83 A.L.R.2d 1368 (1962); People v. Gage, 62 Mich. 271, 28 N.W. 835 (1886) (3 month time lapse).

[97]1982 Kan. Sess. Laws _____ (to be codified at Kan. Stat. Ann. § 60-460); 1981 Wash. Laws_____ (to be codified at Wash. Rev. Code Ann. § 9A.44).

[98]Anderson, *Evidence - New Confusion under the Hearsay Rule: State v. Harris,* 59 Or. L. Rev. 497 (1981).

[99]*Id.;* Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961); Fed. R. Evid. 803(1), Historical Note, Notes of Committee on the Judiciary, Senate Report No. 93-1277, Note to Paragraph (24).

[100]Fed. R. Evid. 803. See Anderson, *supra* note 98, for a complete listing of state statutes and court decisions adopting the residual exception.

[101] Wis. R. Evid. 908.03, Judicial Council Committee Note (1974). *See also* State v. Posten, 302 N.W.2d 638 (Minn. 1981). *Posten* was a child sexual abuse case in which the Minnesota high court admitted under the residual exception a statement the child made about the defendant during a dream. The court stated that the child would not have concocted such a story, there was other evidence of the sexual abuse, and there were only a few days between the statement and the abuse.

[102]*See, e.g.,* Lancaster v. People, 615 P.2d 720, 723 (Colo. 1980).

[103]Commonwealth v. Bardino, 20 Pa. Dist. 473 (1911).

[104]In a federal decision, United States v. Allery, 526 F.2d 1362 (8th Cir. 1975), the court did not allow the defendant to invoke the adverse testimonial privilege in a child sexual abuse prosecution. *See also* 8 Wigmore, Evidence § 2239 (1961); McCormick, Evidence §§ 66, 84 (1972).

[105]McCormick, Evidence § 66 (1972). *See also* 8 Wigmore, Evidence § 2228 (1961).

[106]State v. Taylor, 575 P.2d 695, 703 (Mont. 1973). *See also* Chamberlain v. State, 348 P.2d 280 (Wyo. 1960); Martin v. State, 584 S.W.2d 820 (Tenn. Crim. App. 1979); State v. Walczek, 585 P.2d 797 (Wash. 1978).

[107]Hawkins v. United States, 358 U.S. 74, 81-82 (1958) (concurring, J. Stewart). *See also* Chamberlain v. State, 348 P.2d at 280, 285 (Wyo. 1960).

[108]Trammel v. United States, 445 U.S. 40 (1980).

[109]*See* statutes cited in 2 Wigmore, Evidence § 488 (1979) and Chapter 7, *Child Sexual Abuse and the Law.*

[110]*Id.*

[111] One court has construed language providing for an exception for "a crime committed by one spouse against the other," along with the reporting law's exception, as compelling the wife's testimony over her assertion of the marital privilege. *See* State v. Spaulding, 313 N.W.2d 878 (Iowa 1974). *See also* S. Johnson, *Trial Issues in Child Abuse and Neglect,* in New Emphasis in Juvenile Justice - The Child at Risk, National College of Juvenile Justice, Reno, Nevada; ABA-National Legal Resource Center for Child Advocacy & Protection, Washington, D.C.; National Association of Counsel for Children, Denver, Colorado (conference in Charleston, South Carolina, Mar. 21-25, 1982). Of course, abrogation of the marital privilege does not affect the spouse's Fifth Amendment privilege against self-incrimination.

[112]McCormick, Evidence § 13 (1976).

[113]*See* Chapter 9, *Child Sexual Abuse and the Law.*

[114]B. Caulfield, *The Legal Aspects of Protective Services for Abused and Neglected Children,* Office of Human Development Services, U.S. Dept. of Health & Human Services (1978).

[115]*See* Chapter 9, *Child Sexual Abuse and the Law.* A transcript of expert testimony by Lucy Berliner, Co-Director of the Sexual Assault Center in

[116]*See, e.g.,* Smith v. State, 7 Fam. L. Rep. (BNA) 2533 (Ga. 1981); Hawthorne v. State, 8 Fam. L. Rep. (BNA) 1054 (Fla. 1982); Ibn-Tamas

v. United States, 6 Fam. L. Rep. (BNA) 2050 (D.C. 1979); State v. Anya, 8 Fam. L. Rep. (BNA) 2172 (Me. 1981).

[117]*See* State v. Thomas, 7 Fam. L. Rep. (BNA) 2583 (Ohio 1981).

[118]McCormick, Evidence § 190, at 449 (2d ed. 1972).

[119]*See* Annot., 167 A.L.R. 565 (1947); Annot., 77 A.L.R.2d 841 (1961); Annot., 77 A.L.R.2d 841 (Later Case Service 1975).

[120]Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses,* 6 Ariz. L. Rev. 212, 215 & n.10 (1965).

[121]*Id.*

[122]McCormick, Evidence § 190, at 453-54 (2d ed. 1972).

[123]Gregg, *supra* note 120, at 218 & n.14.

[124]*Id.* at 218-19; State v. Acliesce, 403 So.2d 665, 670-71 (1981).

[125]*See, e.g.,* Staggers v. State, 120 Ga. App. 875, 172 S.E.2d 462 (1969).

[126]Calvert, *Criminal Law-Evidence-Admission of Evidence of Other Acts in Rape and Statutory Rape Trials,* 2 Ala. L. Rev. 109 (1950); Annot., 167 A.L.R.2d 841 (Later Case Service 1975).

[127]*See* State v. Finley, 85 Ariz. 327, 338 P.2d 790 (1959); Comment, 13 Vand. L. Rev. 394, 397 (1959); Note, 17 Wash. & Lee L. Rev. 83 (1960).

[128]Gregg, *supra* note 120, at 231.

[129]*See* People v. Jackson, 18 Cal. Rptr. 919 (1971); People v. Henson, 304 N.E.2d 358 (N.Y. 1973); McCoid, *The Battered Child and Other Assaults Upon the Family: Part One,* 50 Minn. L. Rev. 1 (1965); Brown, Fox, & Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome,* 50 Chi.- Kent L. Rev. 45 (1973); Annot., 98 A.L.R.3d 306 (1980). For an excellent discussion and a list of court decisions upholding the battered child syndrome, see S. Johnson, *supra* note 111.

[130]People v. Jackson, 18 Cal. Rptr. at 921; People v. Henson, 304 N.E.2d at 364; State v. Loss, 204 N.W.2d 404, 409 (Minn. 1973).

[131]*See In re* S, 259 N.Y.S.2d 164 (Fam. Ct. 1965).

[132]*See* Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse,* 12 Am. Crim. L. Rev. 103, 117 & n.53 (1974).

[133]S. Mele-Sernovitz, *Parental Sexual Abuse of Children: The Law as a Therapeutic Tool for Families,* in Legal Representation of the Maltreated Child 70, 81-83, National Association of Counsel for Children, Denver, Colorado (1979); *see also* Chapter 5, *Child Sexual Abuse and the Law* 109-11.

APPENDIX A

Authors in Previous Publications of Child Sexual Abuse Project

I. J. Bulkley and H. Davidson, *Child Sexual Abuse - Legal Issues and Approaches* (1980)

II. *Child Sexual Abuse and the Law* (J. Bulkley 3d ed. 1982)

Chapter 1	L. Kocen and J. Bulkley, *Analysis of Criminal Child Sex Offense Statutes*
Chapter 2	D. Wulkan and J. Bulkley, *Analysis of Incest Statutes*
Chapter 3	J. Bulkley, *Analysis of Civil Child Protection Statutes Dealing With Sexual Abuse*
Chapter 4	J. Bulkley, *Other Relevant Child Sexual Abuse Statutes: Domestic Violence and Sexual Psychopath Laws*
Chapter 5	D. Lloyd, *The Corroboration of Sexual Victimization of Children*
Chapter 6	G. Melton, J. Bulkley and D. Wulkan, *Competency of Children as Witnesses*
Chapter 7	J. Bulkley, *The Marital Privilege in Child Sexual Abuse Cases*
Chapter 8	J. Bulkley, *Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial*
Chapter 9	L. Berliner, L. Blick, and J. Bulkley, *Expert Testimony on the Dynamics of Intrafamily Child Sexual Abuse and Principles of Child Development*
Chapter 10	G. Melton, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*
Chapter 11	G. Liles and J. Bulkley, *Prior Sexual Acts of the Defendant as Evidence in Prosecutions for Child Sexual Abuse*

III. *Innovations in the Prosecution of Child Sexual Abuse Cases* (J. Bulkley 2d ed. 1982)

Part I	D. Wulkan and J. Bulkley, *General Survey Findings Relating to Prosecutorial Practices and Policies*
Part II	J. Bulkley and D. Wulkan, *Pre-Trial Diversion, Juvenile/Criminal Court Coordination and Other Innovative Approaches in Legal Intervention*

Part III *Detailed Descriptions of Comprehensive Innovative Programs*

- E. Cobey and M. Minzer, "Santa Clara County Child Sexual Abuse Treatment Program, Parents United, Daughters and Sons United, and Adults Molested as Children United," San Jose, California
- H. Swann, D. Coffey, R. Courtney, D. Moore and K. Moriarity, "Johnson County Child Sexual Abuse Treatment Program: A Pretrial Diversion Model," Olathe, Kansas
- C. Dutton and J. Gazzo, "Polk County Intrafamily Sexual Abuse Program," Des Moines, Iowa
- E. Wenck and J. Server, "The Baltimore Network for Intervention, Prosecution and Treatment of Intrafamily Child Sexual Abuse Cases," Baltimore, Maryland
- S. Edelman, "Incest Diversion Program," Dayton, Ohio
- L. Berliner, "King County's Approach to Child Sexual Abuse," Seattle, Washington
- M. Tipple, L. Fox and J. Downey, "Boulder County Child Sexual Abuse Treatment Program: A Community-Based Approach to Intervention and Treatment With Incestuous Families," Boulder, Colorado
- D. Anderson, "Sexual Assault Services, Hennepin County Attorney's Office," Minneapolis, Minnesota

IV. H. Davidson, *Child Sexual Exploitation - Background and Legal Analysis* (1981)

APPENDIX B

Bibliography of Legal Literature on Child Sexual Abuse

This bibliography includes references which in whole or significant part deal with legal issues relating to child sexual abuse. For non-legal bibliographies, contact the National Center on Child Abuse and Neglect, P.O. Box 1182, Washington, D.C., 20013, (202) 245-2840, or Herner and Company, 1700 N. Moore Street, Arlington, Virginia, 22209, (703) 558-8222.

Law Journal Articles

Anderson, *Children's Out-of-Court Statements,* 1974 Wis. Bar Bull. 47 (1974).

Baker, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution,* 5 Pepperdine L. Rev. 809 (1978).

Note, *Child Pornography Legislation,* 17 J. Fam. L. 505 (1979).

Comments, *Commitment of Sexual Psychopaths and the Requirements of Procedural Due Process,* 44 Fordham L. Rev. 923 (1976).

Note, *Competency of Children as Witnesses,* 39 Va. L. Rev. 358 (1953).

Note, *Corroborating Charges of Rape,* 67 Colum. L. Rev. 1137 (1967).

Note, *First Amendment Right of Access to Sex Crime Trials,* 22 B.C.L. Rev. 361 (1981).

Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim,* 15 U. Mich. J.L. Ref. 131 (1981).

Daugherty, *The Crime of Incest Against the Minor Child and the States' Statutory Responses,* 17 J. Fam. L. 106 (1979).

Kirkwood, et al., *Incest and the Legal System: Inadequacies and Alternatives,* 12 U.C.D. L. Rev. 673 (1979).

Leahy, *U.S. v. Bear Runner: The Need for Corroboration,* 23 St. Louis L. J. 748 (1979).

Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System,* 15 Wayne L. Rev. 977 (1969).

Comment, *Nebraska's Corroboration Rule,* 54 Neb. L. Rev. 93 (1975).

Payton, *Child Pornography Legislation,* 17 J. Fam. L. 505 (1979).

Ploscowe, *Sex Offenses: The American Legal Context,* 25 Law & Contemp. Probs. 217 (1960).

Comment, *Police Discretion and the Judgment that a Crime Has Been Committed-Rape in Philadelphia,* 117 U. Pa. L. Rev. (1968)

Pratt, *The Demise of the Corroboration Requirement - Its History in Georgia Rape Law,* 26 Emory L.J. 805 (1977).

Note, *Protection of Children From Use in Pornography: Toward Constitutional and Enforceable Legislation,* 12 U. Mich. J. L. Ref. 295 (1979).

Reifen, *Protection of Children Involved in Sexual Offenses: A New Method of Investigation in Israel,* 49 J. Crim. L. C. & P.S. 222 (1958).
Note, *The Rape Corroboration Requirement: Repeal Not Reform,* 81 Yale L.J. 1365 (1972).
Wenck, *The Case Against the Child Sexual Abuser,* Case & Com., Vol. 86, No. 5 (1981).
Williams, *Corroboration - Sexual Cases,* 1962 Crim. L. Rev. 662 (1962).

Journal Articles

Berliner & Conte, *Prosecution of the Offender in Cases of Sexual Assault Against Children,* 6 Victimology 1 (1981).
Densen-Gerber, Hutchinson & Levine, *Incest and Drug Related Child Abuse: Systematic Neglect by the Medical and Legal Professions,* 6 Contemp. Drug. Probs. 135 (1977).
Graves & Francisco, *Medicolegal Aspects of Rape,* 4 Med. Aspects Hum. Sexuality 109 (1970).
Lloyd, *Medical-Legal Aspects of Sexual Abuse,* 8 Pediatric Annals 5 (1979).
MacFarlane & Bulkley, *Treating Child Abuse: An Overview of Current Program Models,* in Social Work and Child Sexual Abuse, Vol. 1, No. 1/2, J. Hum. Sexuality & Soc. Work (1982).
McGeorge, *Sexual Assaults on Children,* 4 Med., Sci., & the Law 245 (1964).
Schultz, *Child Sex Victim: Social, Psychological and Legal Perspectives,* 52 Child Welfare 147 (1973).
Sklar, *The Criminal Law and the Incest Offender: A Case for Decriminalization,* 7 Bull. Am. Acad. Psych. L. 69 (1978).

Books And Book Articles

L. Berliner & D. Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System,* in Sexual Abuse of Children: Selected Readings 47, National Center on Child Abuse & Neglect, U.S. Dept. of Health & Human Services (1980).
S. Brakel & R. Rock, *The Sexual Psychopath and the Law,* in The Mentally Disabled and the Law 341 (1971).
A. Burgess & L. Holmstrom, *The Child and Family in the Court Process,* in Sexual Assault of Children and Adolescents 205 (1978).
A. Burgess & L. Holmstrom, *Rape: The Victim Goes to Trial,* in Victimology: A New Focus (I. Drapkin & E. Viano eds. 1975).
A. Burgess & A. Laszlo, *Courtroom Use of Hospital Records in Sexual Assault Cases,* in the Sexual Victimology of Youth 257 (L. Schultz ed. 1980).

A. Burgess & A. Laszlo, *When the Prosecutrix Is a Child,* in Victims and Society 386 (E. Viano ed. 1976).
S. Butler, Conspiracy of Silence: The Trauma of Incest (1978).
J. Densen-Gerber, *Child Prostitution and Child Pornography: Medical, Legal, and Societal Aspects of the Sexual Exploitation of Children,* in Sexual Abuse of Children: Selected Readings 77, National Center on Child Abuse & Neglect, U.S. Dept. of Health & Human Services (1981).
L. Edwards, *Dealing with Parent and Child in Serious Abuse Cases,* in Protecting Children Through the Legal System 214, National Legal Resource Center for Child Advocacy & Protection, American Bar Association (1981).
C.J. Flammang, *Interviewing Child Victims of Sex Offenders,* in the Sexual Victimology of Youth 175 (L. Schultz ed. 1980).
B. Fraser, *Sexual Child Abuse: The Legislation and the Law in the United States,* in Sexually Abused Children and Their Families (P. Mrazek & H. Kempe eds. 1980).
H. Giarretto, *Humanistic Treatment of Father-Daughter Incest,* in Sexual Assault of Children: Selected Readings 39, National Center on Child Abuse & Neglect, U.S. Dept. of Health & Human Services (1980).
H. Giarretto, A. Giarretto & S. Sgroi, *Coordinated Community Treatment of Incest,* in Sexual Assault of Children and Adolescents 231 (1978).
M. Guttmacher & H. Weihofen, Psychiatry and the Law (1952).
B. Justice & R. Justice, The Broken Taboo (1979).
J. Kroth, Child Sexual Abuse (1979).
K. Leaman & N. Huhn, *Sexual Acts Against Children: Medical-Legal Aspects,* in Sexual Abuse of Children: Selected Readings 31, National Center on Child Abuse & Neglect, U.S. Dept. of Health & Human Services (1980).
R. Lloyd, Boy Prostitution in America - For Money or Love (1976).
K. MacFarlane, *Sexual Abuse of Children,* in The Sexual Victimization of Women 88 (J. Chapman & M. Gates eds. 1978).
A. Manchester, *Incest and the Law,* in Family Violence 487 (J.M. Eckelaar & S.N. Katz eds. 1978).
Psychiatry and Sex Psychopath Legislation: The 30s to 80s, Committee on Psychiatry and Law, Group for the Advancement of Psychiatry (1977).
D. Reifen, *Court Procedures in Israel to Protect Child Victims of Sexual Assault,* in Victimology: A New Focus (I. Drapkin & E. Viano eds. 1975).
L. Schultz, *Policy Recommendations on Child Pornography Control,* in The Sexual Victimology of Youth 350 (L. Schultz ed. 1980).
L. Schultz, *The Sexual Abuse of Children and Minors: A Short History of*

Legal Control Efforts, in The Sexual Victimology of Youth 3 (L. Schultz ed. 1980).

S. Sgroi, *Introduction: A National Needs Assessment for Protecting Child Victims of Sexual Assault,* in Sexual Assault of Children and Adolescents 25 (1978).

S. Sgroi, *Sexual Molestation of Children: The Last Frontier of Child Abuse,* in The Sexual Victimology of Youth 25 (L. Schultz ed. 1980).

Reports, Monographs, Pamphlets, & Newsletters

L. Bienen, *Rape III - National Developments in Rape Reform Legislation,* Women's Rights L. Rep., Vol. 6, No. 3 (1980).

J. Blose, *The Sexual Abuse of Children in Massachusetts: A Preliminary Study of System Response,* Statistical Analysis Center, Massachusetts Committee on Criminal Justice (1979).

E. Brecher, *Treatment Programs for Sex Offenders,* National Institute of Law Enforcement & Criminal Justice, Law Enforcement Assistance Administration, U.S. Dept. of Justice (1978).

J. Bulkley, *The Law and Child Sexual Abuse,* in Dealing With Sexual Child Abuse, National Committee for Prevention of Child Abuse, Chicago, Illinois (1982).

J. Bulkley & H. Davidson, *Child Sexual Abuse - Legal Issues and Approaches,* National Legal Resource Center for Child Advocacy & Protection, American Bar Association (1980).

Child Sexual Abuse and the Law, National Legal Resource Center for Child Advocacy & Protection, American Bar Association (J. Bulkley 3d ed. 1982).

Child Sexual Abuse: Incest, Assault and Exploitation, National Center on Child Abuse & Neglect, U.S. Dept. of Health & Human Services (1981).

H. Davidson, *Child Sexual Exploitation - Background and Legal Analysis,* National Legal Resource Center for Child Advocacy & Protection, American Bar Association (1981).

V. DeFrancis, *Protecting Child Victims of Sex Crimes,* American Humane Association (1969).

V. DeFrancis, *Protecting the Child Victim of Sex Crimes Committed by Adults,* Probation (1971).

Incest: Confronting the Silent Crime, Minnesota Program for Victims of Sexual Assault, St. Paul, Minnesota (1979).

Innovations in the Prosecution of Child Sexual Abuse Cases, National Legal Resource Center for Child Advocacy & Protection, American Bar Association (J. Bulkley 2d ed. 1981).

L. Lerman, *State Legislation on Domestic Violence,* Response, Vol. 3, No. 12, Center for Women Policy Studies, Washington, D.C. (1980).

L. Lerman, *Criminal Prosecution of Wife Beaters,* Response, Vol. 4, No. 3, Center for Women Policy Studies, Washington, D.C. (1981).

Offenses Included Under Sexual Psychopath Statutes, by State, As of 1975, in Sourcebook of Criminal Justice Statistics, Criminal Justice Research Center (1978).

C. Schrier & J. Ensminger, *Evidence Collection/Preparation for Court in Sexual Abuse Cases,* in How to Handle a Child Abuse Case - Vol. II, Support Center for Child Advocates, Philadelphia, Pennsylvania (1979).

K. Simrel & D. Lloyd, *Medical Corroborative Evidence in Child Sexual Abuse/Assault Cases,* Children's Hospital National Medical Center, Child Protection Center - Special Unit, Washington, D.C. (1980).

D. Whitcomb, *Assisting Child Victims of Sexual Abuse,* Abt Associates, Inc., Aspen Systems Corp. (1982).

Conference And Unpublished Papers

D. Lloyd, *Proceedings of Colloquium on Child Victims of Sex Offenses and the Criminal Justice System,* Law Enforcement Assistance Administration, U.S. Dept. of Justice (Apr. 23-25, 1980) (on file with the Child Protection Center - Special Unit, Children's Hospital National Medical Center, Washington, D.C.).

E. Rodolfa, *Legal Aspects of Incest,* in Attitudes on Incest 51 (1977) (unpublished E.D. thesis in Cal. State University Hayward, Dept. of Educ. Psych.).

S. Mele-Sernovitz, *Parental Sexual Abuse of Children: The Law as a Therapeutic Tool For Families,* in Legal Representation of the Maltreated Child 70 (1979) (on file with the National Association of Counsel for Children, Denver, Colorado).

END