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# Child Sexual Abuse and the State: Applying Critical Outsider Methodologies to Legislative Policymaking

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## INTRODUCTION

Sexual assaults are punished as serious felonies, often resulting in the lengthiest terms of incarceration meted out by the state.<sup>1</sup> When the perpetrator is an adult and the victim is a child,<sup>2</sup> many states further enhance the penalty for sexual assault by increasing the minimum available sentence<sup>3</sup> and creating more stringent conditions for release. However, one group of offenders regularly escapes the strict penal regime that states provide for the sexual assault of a child.<sup>4</sup> These are perpetrators of "intrafamilial child sexual abuse";<sup>5</sup> that is, sexual offenders who are related to their child-victims by blood or affinity.

Child sexual abuse<sup>6</sup> remains, in the overwhelming majority of cases, a crime perpetrated by members of the child's family and circle of trust.<sup>7</sup>

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<sup>1</sup> The penalty for rape in many states is equal to that imposed for a conviction of noncapital murder. Rape alone, (not combined with murder,) cannot be punished as a capital crime when the victim is an adult. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (stating that death penalty for rape of adult victim constitutes cruel and unusual punishment and violates Eighth Amendment of U.S. Constitution).

<sup>2</sup> Although the age of majority in each state is 18 years or older, the threshold age for capacity to consent to sex in each state lies between 16 and 18 years.

<sup>3</sup> Examples of such enhancements can be found in the penal codes of Utah, Vermont, and Washington. UTAH CODE ANN. §§ 76-5-402.1, 402.3, 403.1 (2005); VT. STAT. ANN. tit. 13, § 3252 (2006); WASH. REV. CODE ANN. §§ 9A.44.073, .076, .079 (West 2006). The death penalty is available for child rape in Florida and Louisiana. FLA. STAT. § 794.011(2)(a) (2006) (sexual battery of victim under 12); LA. REV. STAT. ANN. § 14:42 (2006) (aggravated rape of victim under 12).

<sup>4</sup> In California, 18 is both the age of majority and the threshold age for sexual consent. However, the state specifies "under the age of 14" as the relevant victim age for many sex offenses against children. Therefore, in discussions of California law throughout this Article, the term "child" will denote a minor younger than 14 years of age.

<sup>5</sup> This Article focuses on sexual abuse of children by adults related by blood or affinity, which will be termed "intrafamilial child sexual abuse." "Intrafamilial child sexual abuse" will be used in contrast to the more general "incest", a term which includes sexual acts between related adults. See *infra* note 31 and accompanying text.

<sup>6</sup> While the study of child maltreatment also includes the topics of child neglect, emotional abuse, and physical abuse, this Article will focus on child sexual abuse in discussing the flaws of California's penal code and their impact on child protection in the state.

<sup>7</sup> See U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 2003 (2005) (reporting that approximately 90,000 cases of child sexual abuse were substantiated in 2003); U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 2000 (2002) (reporting that approximately 87,000 cases of child sexual abuse were substantiated in 2000); U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS (2000) (finding that 84% of all confirmed cases of child sexual abuse occur *in child's own home* and that 96% of all confirmed cases of child sexual abuse are perpetrated by adults related to child or within child's circle of trust).

Legislators in many states have met this growing awareness with new laws<sup>8</sup> that increase the penalties for trusted adults<sup>9</sup> who sexually victimize children. But even in states that have taken such steps, older laws still connive at protecting intrafamilial child sexual offenders.

This continuing legislative loophole works in two ways. First, the laws of many states offer a discounted criminal charge to perpetrators related to their victims.<sup>10</sup> This results in prison sentences much shorter than those given to perpetrators who sexually assault unrelated children.<sup>11</sup> Further, some states, including California, allow perpetrators who are related to their victims to escape prison altogether.<sup>12</sup>

While not alone in containing such loopholes in its criminal code, California's regime is notable for the magnitude of the disparity involved. Unrelated perpetrators of child sexual assaults receive significant prison time and civil penalties; in contrast, given the exact same fact pattern, related perpetrators regularly receive much lighter penalties. In addition, prosecutors can offer probation-only sentences and forms of judicial diversion that are exclusively available to perpetrators who can claim some familial relationship to their victims.<sup>13</sup>

This Article will examine the legal framework used in California to address child sexual abuse. Part I begins with a discussion of critical outsider jurisprudence and how OutCrit methodology<sup>14</sup> enhances an

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<sup>8</sup> An example of the "position of trust" crime is provided by the penal code of Colorado. There, sexual assault of a child under 15 years of age is a Class 4 felony (two to six years imprisonment), whereas sexual assault of a child under 15 by a person in a position of trust is a Class 3 felony (four to twelve years imprisonment). See COLO. REV. STAT. §§ 18-3-405(1), 18-3-405.3(1), 18-1.3-401(V)(A) (2005). The "position of trust" offense, section 18-3-405.3, was added to Colorado's penal code in 1990. See 1990 Colo. Sess. Laws 1028; see also DEL. CODE ANN. tit. 11, § 773(a)(6) (2005) (stating that sexual assault of child under 16 by person in position of trust constitutes first-degree rape, which is Class A felony requiring prison sentence of 15 years to life).

<sup>9</sup> A "person in a position of trust" is defined by Colorado statute as:

any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties, or responsibilities concerning a child, including a guardian or someone otherwise responsible for the general supervision of a child's welfare, or a person who is charged with any duty or responsibility for the health, education, welfare, or supervision of a child, including foster care, child care, family care, or institutional care, either independently or through another, no matter how brief, at the time of an unlawful act.

COLO. REV. STAT. § 18-3-405(3.5), (2005).

<sup>10</sup> See *infra* notes 104-06 and accompanying text.

<sup>11</sup> See *infra* notes 104-06 and accompanying text.

<sup>12</sup> See *infra* notes 107-08 and accompanying text.

<sup>13</sup> See Part IV *infra*.

<sup>14</sup> Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism*:

analysis of state child protective systems. Part II details the history of legal and political responses to child abuse and describes the growing social awareness of sexual abuse of children in their homes. Part III assesses the methods by which states punish child sexual offenders. Parts IV and V examine California law on sexual abuse of children and the variety of loopholes that exist to benefit intrafamilial sexual offenders. Finally, the Article details a legislative solution to correct the state laws that further endanger children who have already been victimized by adults in their own family.

I. OUTCRIT SCHOLARSHIP: DEVELOPING A LEGAL PROBLEM-SOLVING METHODOLOGY

When proffering new regulations to address social problems, it is common for policymakers to discuss the impact of the proposed solution upon members of specific marginalized groups who will be targets of the legislation. However, policymakers often neglect to analyze, in terms of their impact upon these marginalized groups, the institutional processes contributing to the status quo.<sup>15</sup> That is, although the output of the policymaking process is offered up for scrutiny, the data gathering and analysis that informed the proposed solution may have been less vigorous and less neutral than policymakers believe.<sup>16</sup>

This initial failure to self-challenge contributes to the incivility of policy discussions. Relevant information held by stakeholders from marginalized groups comes to the attention of the policymakers too late to affect the analysis. This phenomenon has significant consequences because, in order to justify nontrivial changes in law, the policymakers must first recognize flaws in and assumptions about the effectiveness of

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*Marking the Stirrings of Critical Legal Education*, 10 *ASIAN L.J.* 65, 66-67 (2003).

By "critical outsider jurisprudence" - or OutCrit theory - I mean the insights and interventions of multiple diverse scholars and activists that identify and align themselves, and their work, with outgroups in the United States and globally. The "OutCrit" denomination is an effort to conceptualize and operationalize the social justice analyses and struggles of varied and overlapping yet "different" subordinate groups in an interconnective way.

*Id.*

<sup>15</sup> For a thorough discussion of the utility of Critical Race Feminism in analyzing problems of interpersonal violence, see Adrien K. Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 *ALB. L. REV.* 943, 945-52 (1997).

<sup>16</sup> ANN SEIDMAN, ROBERT SEIDMAN & NALIN ABEYSEKERE, *ASSESSING LEGISLATION: A MANUAL FOR LEGISLATORS* 63-90 (2003).

the existing status quo. Stakeholders asked to comment too late in the process, for example, on an already-drafted proposal, become handicapped by the limits of the information used to derive the proposal. Their responses are restricted to the details of the proposal before them, unless they offer their unsolicited information at this point. But because such information comes so late in the process, and because it has not been examined using the policymakers' methodology, policymakers may discount its significance as being merely anecdotal. With their input undervalued, stakeholders' critiques are delegitimized. Further, because their input was not considered at the start of the process, their feedback, which stems from that same unevaluated input, is likely to be labeled irrelevant.

At the same time, the lack of principled analysis of the behaviors that underlie the existing situation practically guarantees that the policymakers' proposal for solution will be both incomplete and hard to justify.<sup>17</sup> As groups of stakeholders become more polarized, their counter-proposals for solution often become over-focused and address only parts of the overall problem. Such a policymaking "process" ends, not in coherent and implementable programs, but in horse-trading sessions, and the results have the same faint barnyard odor.

Legal scholars as a group are not known for their reticence in critiquing government institutions. Still, state child protective systems, comprising the constellation of prosecutors, courts, and child welfare agencies responsible for investigation and intervention in cases of child abuse and neglect, have never received the sustained scrutiny of the legal academy. And yet, few social problems have the wide-ranging impact on crime, the economy, and the health and welfare of communities that child abuse does. Successful interventionist projects in child protection, launched from within the academy, necessarily subvert the assumption that child abuse as a social problem remains too impenetrable or too arcane to be addressed by systemic pressure on the law's status quo.<sup>18</sup> Why, then, is the agenda of child protection still subject to marginalization as a feminine pursuit?<sup>19</sup> Why does the

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<sup>17</sup> *Id.* at 17-25.

<sup>18</sup> See Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1351-52 (1992) ("Reform tends to be slow and incremental; new knowledge strikes us as extreme, coercive, 'political,' or strange. Yet even if natural, this resistance proves self-defeating, depriving us of points of view that we need for a more comprehensive view of the world.").

<sup>19</sup> See generally Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61 (1988).

subordination of academics who assert the importance of child protection remain common within the legal academy,<sup>20</sup> as exemplified by the low value attached both to clinical programs and to scholarly writing that address the issue?<sup>21</sup>

As OutCrit scholars have noted, intervention for social change lies far afield from the traditional doctrinal studies that so many consider the “proper” subjects for legal scholarship.<sup>22</sup> The majority preference for “professional distance” and “reasonable man” objectivity too easily denudes legal analyses of any relevance to the experiences of subordinated individuals.<sup>23</sup> Likewise, rejecting the tools of critical race and feminist legal theories impedes the development of more valid and therefore more robust solutions.<sup>24</sup> This bias against scholarly legal analysis of child protective laws has resulted in an uncharacteristic silence within the academy.<sup>25</sup> But more importantly, it has resulted in a failure to address governmental practices that actively harm the most vulnerable people in our society: children who have already been victimized at home.<sup>26</sup>

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<sup>20</sup> See generally Nancy Levit, *Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics*, 49 KAN. L. REV. 775 (2001).

<sup>21</sup> See, e.g., Delgado, *supra* note 18, at 1368-70 (describing rhetorical mechanisms of marginalization as attempt to postpone institutional change).

<sup>22</sup> See generally Anh T. Lam, *Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 ASIAN AM. PAC. ISLANDS L.J. 49, 53-57 (1993); Dana Raigrodski, *Breaking Out of “Custody”: A Feminist Voice in Constitutional Criminal Procedure*, 36 AM. CRIM. L. REV. 1301, 1318-26 (1999).

<sup>23</sup> See generally CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (2003) (discussing how the “reasonable man” doctrine in criminal law prejudices decisions against members of subordinated groups).

<sup>24</sup> See generally Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269 (1994) (employing critical race and feminist techniques in legal analysis).

<sup>25</sup> See Valdes, *supra* note 14, at 68-69.

In the context of the United States, uncritical mainstream education teaches each generation to genuflect and maintain the cultural, economic, and social skews constructed by the elites that dominate society and control its institutions of education. The principal aim (or effect) of such education has been, and still is, to assimilate and domesticate in the name of progress and prosperity, and even in the name of equality and liberty. This effect is achieved both by what is left out, as well as what is put into, the content or substance of “education.” . . . Under this view, mainstream education, in its dominant, uncritical form, formalizes and systematizes the inculcation of cultural politics to ratify the world “as is” . . .

*Id.*

<sup>26</sup> Francisco Valdes, *Outsider Scholars, Legal Theory & OutCrit Perspective: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 831, 836-37 (2000).

In analyzing the problems of California's approach to intrafamilial child sexual abuse, this Article utilizes the problem-solving methodology developed by Robert Seidman.<sup>27</sup> The methodology addresses the problems of traditional doctrinal analysis by inquiring beyond the behaviors of the targets of a given rule.<sup>28</sup> The Seidman analysis directs the researcher to identify the relevant implementing agency behaviors.<sup>29</sup> This information allows the researcher to examine the ways in which the agency's institutional processes affect the choices available to the targets.<sup>30</sup>

## II. HISTORY OF INCEST PROHIBITIONS

This Part will address the history of the prohibition on incest.<sup>31</sup> It will then examine the public's growing awareness during the last century of the problem of child sexual abuse and its impact on society.

Societies throughout human history have placed strictures on sexual relations between related adults.<sup>32</sup> The Code of Hammurabi<sup>33</sup> specified punishments ranging from exile<sup>34</sup> to death<sup>35</sup> for acts of incest.<sup>36</sup> In Greek mythology, the story of Oedipus detailed the lifelong punishment of individuals, family, and community that would result from an

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<sup>27</sup> See generally ANN SEIDMAN, ROBERT B. SEIDMAN & NYELE MBEKESEYERE, *LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE* (2000).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 129-30.

<sup>30</sup> *Id.* at 131-39.

<sup>31</sup> "Incest" encompasses a variety of sexual contacts between persons related by blood or affinity, without regard to the age or capacity to consent of the persons involved. This Article concentrates on "intrafamilial child sexual abuse," the problem of sexual abuse of children by family members. The more general term "incest" will be used only to denote sexual behaviors between related adults, and to refer to laws penalizing the crime of "incest" in the various states. See *supra* note 5 and accompanying text.

<sup>32</sup> See generally Henry A. Kelly, *Kinship, Incest, and the Dictates of Law*, 14 AM. J. JURIS. 69 (1969).

<sup>33</sup> HAMMURABI, *THE CODE OF HAMMURABI: KING OF BABYLON 154-58* (Robert Harper trans., Univ. of Chi. Press 1904) (n.d.).

<sup>34</sup> *Id.* at 154 ("If a man have known his daughter, they shall expel that man from the city.").

<sup>35</sup> *Id.* at 157 ("If a man lie in the bosom of his mother after the death of his father, they shall burn both of them.").

<sup>36</sup> The Code of Hammurabi makes clear that the proscription remains valid even when the familial relation exists due to affinity, rather than blood relationship: "If a man have betrothed a bride to his son, and his son have known her, and if he (the father) afterward lie in her bosom and they take him, they shall bind that man and throw him into the water." *Id.* at 156.



incestuous marriage.<sup>37</sup> Both the Qur'an<sup>38</sup> and the Biblical chapter of Leviticus<sup>39</sup> prohibit sex between persons related by blood or marriage, specifying the familial roles at issue in exhaustive lists.

Both Emile Durkheim<sup>40</sup> and Claude Lévi-Strauss<sup>41</sup> have suggested that the utility of the incest prohibition lies in its promotion of exogamy. They theorized that, in order to ensure continued community growth,<sup>42</sup>

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<sup>37</sup> SOPHOCLES, OEDIPUS THE KING 34 (F. Storr trans., Harvard Univ. Press & William Heinemann Ltd. 1912) (n.d.).

Apollo sent me back . . .  
 But other grievous things he prophesied,  
 Woes, lamentations, mourning, portents dire;  
 To wit I should defile my mother's bed  
 And raise up seed too loathsome to behold . . . .

*Id.*

<sup>38</sup> Sura 4:23 of the Qur'an reads: "Prohibited to you [for marriage] are your mothers, daughters, sisters; father's sisters, mother's sisters; brother's daughters, sister's daughters; foster-mothers, foster-sisters; your wives' mothers; your step-daughters under your guardianship, . . . [and] wives of your sons . . . ."

<sup>39</sup> *Leviticus* 18:6-17 reads:

None of you shall approach to any that is near of kin to him, to uncover their nakedness . . . . The nakedness of thy father, or the nakedness of thy mother, shalt thou not uncover: she is thy mother; thou shalt not uncover her nakedness. The nakedness of thy father's wife shalt thou not uncover: it is thy father's nakedness. The nakedness of thy sister, the daughter of thy father, or daughter of thy mother, . . . born at home, or born abroad, . . . their nakedness thou shalt not uncover. The nakedness of thy son's daughter, or of thy daughter's daughter, . . . their nakedness thou shalt not uncover: for theirs is thine own nakedness. The nakedness of thy father's wife's daughter, begotten of thy father, she is thy sister, thou shalt not uncover her nakedness. Thou shalt not uncover the nakedness of thy father's sister: she is thy father's near kinswoman. Thou shalt not uncover the nakedness of thy mother's sister: for she is thy mother's near kinswoman. Thou shalt not uncover the nakedness of thy father's brother, thou shalt not approach to his wife: she is thine aunt. Thou shalt not uncover the nakedness of thy daughter in law: she is thy son's wife; thou shalt not uncover her nakedness. Thou shalt not uncover the nakedness of thy brother's wife: it is thy brother's nakedness. Thou shalt not uncover the nakedness of a woman and her daughter, neither shalt thou take her son's daughter, or her daughter's daughter, to uncover her nakedness; for they are her near kinswomen: it is wickedness.

<sup>40</sup> See EMILE DURKHEIM, *INCEST: THE NATURE AND ORIGIN OF THE TABOO* (Lyle Stuart, Inc. ed. 1963) (1898).

<sup>41</sup> See CLAUDE LÉVI-STRAUSS, *ELEMENTARY STRUCTURES OF KINSHIP* (Rodney Needham ed., James H. Bell et al. trans., Beacon Press 1971) (1949); see also CLAUDE LÉVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* (Claire Jacobson et al. trans., Anchor Publ'g 1967) (1958).

<sup>42</sup> Quoting Edward Tylor, Lévi-Strauss described the reasons underlying the incest taboo:

[T]he ultimate explanation is probably that mankind has understood very early

societies ban marriage between close relatives using moral<sup>43</sup> and legal strictures.<sup>44</sup> Incest prohibitions, therefore, existed to prevent inbreeding and to ease sexual competition between adults in the same family unit.<sup>45</sup>

Historically, the prohibition on incest in American law derived from political and social concerns that had nothing to do with proscribing child sexual abuse.<sup>46</sup> There was no criminal prohibition against incest in the English common law.<sup>47</sup> The first English law prohibiting incest came in 1534, when Henry VIII promulgated his Act of Succession.<sup>48</sup> The law was drafted to allow Henry to void his first marriage by the expedient of declaring it incestuous.<sup>49</sup> Its language was closely modeled on the

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that, in order to free itself from a wild struggle for existence, it was confronted with the very simple choice of "either marrying-out or being killed-out." The alternative was between biological families living in juxtaposition and endeavoring to remain closed, self-perpetuating units, over-ridden by their fears, hatreds, and ignorances, and the systematic establishment, through the incest prohibition, of links of intermarriage between them, thus succeeding to build, out of the artificial bonds of affinity, a true human society, despite, and even in contradiction with, the isolating influence of consanguinity.

Claude Lévi-Strauss, *The Family*, in *MAN, CULTURE, AND SOCIETY* 333, 350 (Harry L. Shapiro ed., revised ed. 1971).

<sup>43</sup> See *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994) (stating that incest with child "involves an act of baseness or depravity contrary to accepted moral standards"). The petitioner was convicted of first degree incest, arising from the rape of his 11 year-old stepdaughter. *Id.* at 245. The Ninth Circuit Court of Appeals ruled that incest with a child constituted a "crime of moral turpitude" and therefore could serve to trigger deportation under 8 U.S.C.S. § 1251(a)(4) (2004). *Gonzalez-Alvarado*, 39 F. 3d at 246.

<sup>44</sup> See MODEL PENAL CODE AND COMMENTARIES § 230.2 cmt. 2(d) at 406-07 (1980) (discussing state interest in promoting family unity as rationale for incest laws, and stating that such laws reinforce social norm of "general and intense hostility" toward incestuous behavior).

<sup>45</sup> See, e.g., *State v. Buck*, 757 P.2d 861, 864 (Or. Ct. App. 1988) (stating that "protection of family" constitutes legitimate government purpose, to which penal code section on incest, prohibiting, *inter alia*, consensual sexual relations between adult woman and her stepfather, is rationally related); see generally Joyce McConnell, *Incest Conundrum: Judicial Discourse on Private Wrong and Public Harm*, 1 TEX. J. WOMEN & L. 143, 146 (1992).

<sup>46</sup> Sex or marriage between related persons, because it flouted Biblical strictures, was both immoral and a crime against God. See L.G. Forer, *Incest*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* 880, 881 (S. Kadish ed. 1983). As such, incest was a crime addressed by the ecclesiastical courts, not under the common law. *Id.*

<sup>47</sup> *People v. Baker*, 69 Cal. 2d 44, 49 (1968).

<sup>48</sup> BRUCE T. BOEHRER, *MONARCHY AND INCEST IN RENAISSANCE ENGLAND: LITERATURE, CULTURE, KINSHIP, AND KINGSHIP* 1 (1992).

<sup>49</sup> Catherine of Aragon had been married to Henry's older brother, Arthur, before Arthur's death. *Id.* By declaring the union incestuous, the 1534 Act of Succession ended Catherine's marriage to Henry, and delegitimized their child, the future Mary I. *Id.* This made possible Henry's second marriage, to Anne Boleyn. *Id.*

language of Leviticus to bar marriage between close relatives.<sup>50</sup>

The English incest law, therefore, was written to regulate marital legitimacy, by a king who wanted to put aside his older wife with impunity to marry a woman whom he hoped would bear a male heir.<sup>51</sup> It placed strictures on consensual behavior between adults in order to address political considerations. The Act of Succession prohibited incest as a form of sex that would not be permitted within lawful marriage. But in prohibiting the behavior, the law did not in any way contemplate or encompass a response to the sexual abuse of children.

In establishing their local laws, the English colonies of the new world closely followed both the Act of Succession's wording and its justificatory rationales. As an example, in New York's statutory code, the crime of incest is not (and never has been) indexed within the chapter of "Sex Offenses."<sup>52</sup> Instead, it is located under "Offenses Affecting the Marital Relationship."<sup>53</sup>

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<sup>50</sup> Act of Succession, 1534, 25 Hen. 7, c. 22 (Eng.) provides:

And furthermore, since many inconveniences have fallen, as well within this realm as in others, by reason of marrying within degrees of marriage prohibited by God's laws, that is to say, the son to marry the mother, or the stepmother, the brother the sister, the father his son's daughter, or his daughter's daughter, or the son to marry the daughter of his father procreate and born by his stepmother, or the son to marry his aunt, being his father's or mother's sister, or to marry his uncle's wife, or the father to marry his son's wife, or the brother to marry his brother's wife, or any man to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister; which marriages, although they be plainly prohibited and detested by the laws of God, yet nevertheless at some times they have proceeded under colours of dispensations by man's power, which is but usurped, and of right ought not to be granted, admitted, nor allowed; for no man, of what estate, degree, or condition soever he be, has power to dispense with God's laws . . . .

Be it therefore enacted by authority aforesaid, that no person . . . shall from henceforth marry within the said degrees . . . . And in case any person . . . has been heretofore married within this realm, . . . within any of the degrees above expressed, . . . the children proceeding and procreated under such unlawful marriage, shall not be lawful nor legitimate . . . .

*Id.* (emphasis added).

<sup>51</sup> In 1536, a subsequent Act of Succession ended Anne's marriage to Henry VIII and delegitimized their child, the future Elizabeth I. BOEHRER, *supra* note 48, at 2. This made possible Henry's third marriage, to Jane Seymour. *Id.*

<sup>52</sup> "Sex Offenses" are located in Title H, Article 130 of the Penal Code; for example, the crime of "rape" is N.Y. PENAL L. § 130.35 (McKinney 2006).

<sup>53</sup> The crime of "incest" is located in Title O, under the heading "Offenses Affecting the Marital Relationship." N.Y. PENAL LAW § 255.25 (McKinney 2006).

California enacted a statute prohibiting incest during the state assembly's first session in 1850.<sup>54</sup> It was rewritten in 1872 to conform to David Dudley Field's model penal code,<sup>55</sup> which he based on New York penal law.<sup>56</sup> Presently, the crime of incest is defined in the California penal code as follows:

Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison.<sup>57</sup>

California's Family Code voids incestuous marriages, which are defined as marriages "between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews."<sup>58</sup> Thus, California's law is very much in line with the traditional form of the incest prohibition. Its language is written in terms of the marriage relationship, and its justification is based on the state's interest in legitimizing marriage contracts.

But whether created for the purpose of regulating marriage<sup>59</sup> or of preventing inbreeding,<sup>60</sup> the incest law was never meant to deal with the harm intrafamilial sexual abuse causes children. Concerns about legitimacy of marriages must begin from the assumption that both parties are of an age to consent to marry. Concerns about genetic deformity in pregnancies presuppose that both parties are physically mature enough to bear children. In other words, the incest law simply was not created to address situations where the sexual activity at issue involves a child.<sup>61</sup>

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<sup>54</sup> California's incest law was codified at section 123 of the Crimes and Punishment Act of 1850. Crimes and Punishment Act, ch. 99, § 123, 1850 CAL. STAT. 244, (current version at CAL. PENAL CODE § 285 (Deering 2006)).

<sup>55</sup> Orrin K. McMurray, *California Jurisprudence*, 13 CAL. L. REV. 445, 461 (1925).

<sup>56</sup> The 1872 revision of California's incest law utilized Field's draft of NY CC § 342, which was based on N.Y. PENAL CODE § 302 (McKinney 1865) (proposed Field Penal Code). For a discussion of California's adoption of the Field Codes, see generally Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617 (1994).

<sup>57</sup> CAL. PENAL CODE § 285 (West 2005).

<sup>58</sup> CAL. FAM. CODE § 2200 (West 2005).

<sup>59</sup> See Forer, *supra* note 46, at 883.

<sup>60</sup> Calum Carmichael, *Incest in the Bible*, 71 CHI.-KENT L. REV. 123, 125-26 (1995) (stating that ancient sources prohibiting incest do not speak to rationale of preventing genetic defects).

<sup>61</sup> See Andrew Vachss, *The Incest Loophole*, N.Y. TIMES, Nov. 20, 2005, at 13.

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### III. RESPONSES TO CHILD ABUSE IN THE UNITED STATES

This Part reviews the history of child abuse protections. It begins with a discussion of the state of child protection in New York in the late nineteenth century. It then examines the causes of the continuing disparity in penal treatment between related and nonrelated child sexual abuse perpetrators.

#### A. *Opening the Door in New York*

In 1874, a charity worker named Etta Wheeler entered a tenement apartment and found a child beaten and chained to a bed.<sup>62</sup> She had been alerted to the situation by a bedridden woman who had regularly heard screams from the neighboring apartment.<sup>63</sup> Although Wheeler informed the police about the child's plight, they refused to act without proof of an assault.<sup>64</sup> They could gather no proof without entering the apartment, and they had no authority to do so.<sup>65</sup> No law then existed to prohibit the abuse of children, or to allow intervention and removal of children from parental custody.

No lawyer whom Wheeler approached would undertake the representation of the child.<sup>66</sup> She finally sought help from Henry Bergh, the founder of the New York Society for the Prevention of Cruelty to Animals ("NYSPCA").<sup>67</sup> In April of 1875, with the help of the NYSPCA's general counsel, the New York Society for the Prevention of Cruelty to Children was incorporated.<sup>68</sup> It was the first organization devoted to

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When they were first written, laws against incest were founded on biblical prohibitions and intended to prevent the conception of genetically impaired children. The paradigm was first cousins marrying, not parents raping their children. The New York incest statute pre-existed by decades any public recognition of child sexual abuse. It has never evolved in recognition of the unsavory but indisputable reality that the overwhelming majority of sexual crimes against children are not committed by strangers.

*Id.*

<sup>62</sup> Jacob A. Riis, *Little Mary Ellen's Legacy*, in *THE CHILDREN OF THE POOR* 142 (New York, Charles Scribner's Sons 1892).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 143.

<sup>65</sup> *Id.*

<sup>66</sup> JOSEPH M. HAWES, *THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION* 20-21 (1991).

<sup>67</sup> Mason P. Thomas, *Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix and Social Perspectives*, 50 N.C. L. REV. 293, 310-12 (1971).

<sup>68</sup> *Id.*

child protection issues in the United States.<sup>69</sup>

The establishment of the New York Society for the Prevention of Cruelty to Children constituted an early attempt to utilize the power of government to intervene in the problem of parental violence toward children. The relationship between parent and child was one that had been left mostly unregulated in the American colonies and during the early federal period.<sup>70</sup> Such laws as did affect the parent-child relationship focused on custody, apprenticeship, and inheritance — in other words, on matters concerning the ownership and transfer of property.<sup>71</sup>

### B. *Parens Patriae and the Child Savers*

As has been common throughout history, early American law treated children as property.<sup>72</sup> The male parent's ownership of his children was commonly recognized throughout the colonies.<sup>73</sup> He held the right to benefit from his children's labor and companionship, which were construed in law as protectable assets.<sup>74</sup> In return, he provided his children with room, board, and education, although it was by no means permissible for children to reject this exchange.<sup>75</sup>

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<sup>69</sup> HAWES, *supra* note 66, at 20-21.

<sup>70</sup> MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 9 (1994).

In labor-scarce America the services or wages of a child over ten was one of the most valuable assets a man could have. Thus fathers, without dispute, had almost unlimited authority of custody and control over their natural, legitimate children . . . . For example, a father's right to custody was firmly established in English common law as the right to the association and services of his legitimate children. Association was defined as physical custody as against all parties, including the mother, and services included not only the labor of the children for his own use, but their wages, if they worked for another. A father had the right to maintain an action for the seduction of his daughter or the enticement of a son who left home, since this deprived him of services or earnings.

*Id.*

<sup>71</sup> *Id.*

<sup>72</sup> FLORENCE RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 16-55 (1980) (discussing children's legal status as property under both Greek law and early Judeo-Christian law).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See Barbara B. Woodhouse, "Who Owns the Child?" *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1038 (1992) ("That paternal rights were paired with duties does not mean the relationship was one of freedom or equality. Children could hardly decline the invitation into this system of 'paternalistic dominance,' in which as natural dependents they owed submission in exchange for support and protection.").

Although the government's role in ensuring child welfare expanded greatly during the nineteenth century, this transformation was not framed in terms of the personal rights of children. Instead, changes were justified through *parens patriae*.<sup>76</sup> the state's authority to stand in the parent's place when the parent would not or could not discharge his duties toward his child.<sup>77</sup> Exercises of *parens patriae* were glossed as a collectivist duty to preserve an asset — the child — for the benefit of society.<sup>78</sup> Toward that goal, private philanthropic and government agencies began funding a variety of institutions that promoted assimilation and support for poor and immigrant children. But whether by requiring English-only classes for children attending newly-mandatory public schools,<sup>79</sup> or by intervening to remove children from

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<sup>76</sup> Natalie L. Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 382 (2000) ("*Parens patriae*, literally 'parent of the country,' is the government's power and responsibility, beyond its police power over all citizens, to protect, care for, and control citizens who cannot take care of themselves . . . and 'who have no other protector.'").

<sup>77</sup> *Id.* at 390-91 ("[P]arents are seen as primary protectors and nurturers of their children, but the state may interfere by assisting them in these tasks or by supplanting them as mandated by rules made with majority consent and limited by built-in safeguards against governmental injustice. *Parens patriae* in such a system is a recognition that the child's incapacity for self-care and self-protection demands special solicitude from governmental authority when parents fail both to provide the necessary care themselves and also to find others who provide it.").

<sup>78</sup> See MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 236-37 (G. Edward White ed., 1985).

The development of *parens patriae* into a means of challenging paternal custody rights . . . capped a larger change in the legal standing of children and parental rights. Gradually a father's custody evolved from a property right to a trust tied to his responsibilities as a guardian; his title as father thus became more transferable. . . Armed with the authority of *parens patriae*, the courts could, and did, circumvent the common law's traditional paternal biases.

*Id.*

<sup>79</sup> The nascent governmental interest in child welfare during this period has been presented as a reflex of the humanitarian ethos espoused by the ruling elite; however, the politics underlying this development were less philanthropic. A remarkable synergy existed between Child Saver arguments and the anti-immigrant politics that swept through the United States between the mid-1800s and the nation's entry into the First World War. Contemporary pundits perceived the country as having been flooded with immigrants who had no skills or assets to transfer to their children. Unless the immigrants were fully assimilated, it was argued, the inevitable result would be a society crippled by people who were unable to contribute to society, but ready to demand its benefits. See ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 69-72 (1987) (noting that progressive welfare policies were championed by "a wealthy, urban elite, fearful of social disorder and dismayed by the poverty, disease, and lawlessness of urban life," and that humanitarian concerns sincerely held by reformers were bankrolled by rich for less altruistic reasons).

their parents' homes, these institutions, which based their actions on the philosophy of *parens patriae*, did little to redefine children's status under the law. By justifying their works with the contention that children were valuable assets of the state, rather than paternal private property, many child welfare advocates were merely arguing for a change of the locks on the cage.

### C. Child Abuse Emerges from the Shadows

For generations, the common assumption was that sexual abuse of children was primarily a crime of the lurking stranger.<sup>80</sup> Freud's assertions in scholarly papers of the widespread incidence of childhood sexual abuse by parents or adult caretakers did not come until the last decade of the nineteenth century;<sup>81</sup> and, within weeks, he began to repudiate his findings.<sup>82</sup> However, legal scholars studying social work records have concluded that intrafamilial sexual abuse was well - recognized by helping professionals even as Freud recanted.<sup>83</sup> What was lacking, therefore, was not reliable information on the existence of intrafamilial child sexual abuse. Instead, the difficulty existed in the lack

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Opposition to this position was fought out in the arena of child's rights. See Woodhouse, *supra* note 75, at 1050-85 (describing *Meyer v. Nebraska* and *Pierce v. Society of Sisters* as reactionary responses to state's incursion into sphere of parental authority, and noting role of "family privacy" advocate William Guthrie in overturning both Oregon's compulsory schooling law and language laws in *Meyer*). For an examination of the reactionary forces that typically drive the imposition of an official language, see Ruby Andrew, *Sign Language: Colonialism and the Battle over Text* 17 LOY. L.A. ENT. L.J. 625, 636-41 (1997) [under author's former name] (discussing phenomenon of linguistic colonialism, which imposes official language on subordinated population for purpose of enforcing allegiance to new homeland and submission to its ruling elite, through examination of 1990s laws that enforced English-only requirement on Korean-owned businesses in New Jersey). See also B.N. Lawrance, *Most Obedient Servants: The Politics of Language in German Colonial Togo*, 159 CAHIERS D'ÉTUDES AFRICAINES 489 (2000) (discussing colonial laws requiring Togolese children to attend schools taught only in the official language, while prohibiting use of the children's native language).

<sup>80</sup> See, e.g., LOUISE JACKSON, *CHILD SEXUAL ABUSE IN VICTORIAN ENGLAND* 120 (2000) (contrasting legal treatment of adult intimate physical contact with children, depending upon whether adult was acquaintance or stranger).

<sup>81</sup> See SIGMUND FREUD, *Further Remarks on the Neuro-Psychoses of Defense*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 162 (James Strachey trans., The Hogarth Press and The Inst. of Psycho-Analysis 1974) (1896); SIGMUND FREUD, *Heredity & the Etiology of the Neuroses*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, *supra*, at 151.

<sup>82</sup> Letter from Sigmund Freud to Wilhelm Fliess (Aug. 14 1897), in THE COMPLETE LETTERS OF SIGMUND FREUD TO WILHELM FLIESS 1887-1904 261 (Jeffrey M. Masson ed. & trans., 1985).

<sup>83</sup> See Linda Gordon and Paul O'Keefe, *Incest as a Form of Family Violence: Evidence from Historical Case Records*, 46 J. MARRIAGE & FAM. 27, 28 (1984).



of data validated through empirical study, and the lack of dissemination of the resulting information to the public.

In the last decades of the twentieth century, the ignorance and silence about child abuse began to dissipate in America. Journalists began to write articles about parents arrested for assaulting their children, while medical studies offered solid statistics on the incidence of child abuse.<sup>84</sup> Both the popular media and the scientific studies made clear that the overwhelming majority of incidents of child sexual abuse were perpetrated by family members and other caretakers.<sup>85</sup> Realizing the impact that maltreatment of children had on American life, Congress first held hearings on the incidence and consequences of child abuse in 1973.<sup>86</sup>

By the time of the congressional hearings, several states had established agencies and procedures to investigate reports of child abuse and take custody of abused children. The state of New York, for example, had instituted child protective services within its welfare department<sup>87</sup> to investigate reports of child abuse and maltreatment by family members. In addition, New York assigned attorneys to serve as law guardians for children whose families were suspected of child abuse.<sup>88</sup>

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<sup>84</sup> See C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS'N 1, (1962).

<sup>85</sup> Kempe's conclusions have been further substantiated in the years since, and present government studies make clear the statistics involved, with respect to reported cases. See *supra* note 7 and accompanying text.

<sup>86</sup> *The Child Abuse Prevention Act of 1973: Hearing on S. 1191 Before the S. Subcomm. on Children and Youth of the Comm. on Labor and Pub. Welfare*, 93d Cong. 2 (1973) [hereinafter *Mondale Hearings*].

<sup>87</sup> At the time of the *Mondale Hearings*, *supra* note 86, the New York Department of Social Services handled investigations and interventions in child abuse. *Id.* In 1997, restructuring resulted in the creation of the Office of Children and Family Services ("OCFS"), which is the state agency now responsible for child protective services in New York. See THE URBAN INST.: ASSESSING THE NEW FEDERALISM: RECENT CHANGES IN NEW YORK WELFARE AND WORK, CHILD CARE, AND CHILD WELFARE SYSTEMS 7-8 (2002).

<sup>88</sup> In New York, parents in child abuse/neglect cases either hire or are assigned an attorney to protect their interests, while OCFS presents its position and protects its agency interests through its own attorneys. See *In re Ella B.*, 285 N.E.2d 288, 290 (N.Y. 1972) (finding that New York state constitution mandates right to counsel for indigent parent facing loss of custody as result of child abuse/neglect proceedings).

In contrast, the law guardian is charged with representing the child alone, even against the parents' wishes or the state agency's preferences for "family reunification." See N.Y. FAM. CT. ACT § 241 (McKinney 2005) (establishing law guardian system for minors, "who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court"). Thus, the law guardian's role is that of a lawyer whose sole client in the matter is the child-victim. *Id.*

In November of 1974, Congress passed the Child Abuse Prevention and Treatment Act ("CAPTA").<sup>89</sup> It required states to establish mandatory child abuse-reporting laws and described new procedures for investigating reports of child abuse.<sup>90</sup> It also appropriated federal funding for legal representation of child abuse victims and specifically defined sexual abuse as a form of maltreatment.<sup>91</sup>

The medical experts testifying before Congress were able to offer information on the incidence and nature of child abuse. In the decades since, studies have thoroughly documented the social impact of child maltreatment,<sup>92</sup> including sexual abuse. United States Department of Justice studies have provided exhaustive evidence showing that adults

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<sup>89</sup> Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (most recently amended and reauthorized by Pub. L. No. 108-36, 117 Stat. 800 (2003)).

<sup>90</sup> *Id.* at subchapter I (codified as amended at 42 U.S.C.S. §§ 5101-5106 (LexisNexis 2005)).

<sup>91</sup> *Id.* While the topic lies beyond the scope of this Article, it must be noted that the one of the continuing failures of the CAPTA legislation arose from a drafting ambiguity. The legislative history embodied in the *Mondale Hearings* makes clear that the federal money provided through CAPTA was intended to support states in funding legal representation of the type provided through New York's law guardian program, which engages only practicing lawyers.

However, the initial legislation failed to include specific qualifications for guardians, such as a law degree or certification to practice before the state's bar, in defining which guardian ad litem programs would qualify for CAPTA funding. This error continued in subsequent reauthorizations of the legislation. As a result, states have always been able to sidestep Congress' intent to provide lawyers to children in court proceedings in cases of abuse or neglect, since the inception of CAPTA over 30 years ago. Indeed, some states receive CAPTA funding despite offering only *non-lawyer volunteers* to "represent" children in abuse/neglect proceedings.

One example of a state that receives CAPTA funds while refusing to provide lawyers for abused and neglected children is Florida, whose infamous Department of Children and Families offers many illustrations of the disastrous consequences of such a policy. See, e.g., Dana Canedy, *Miami 5-Year-Old Missing for Year Before Fact Noted*, N.Y. TIMES, May 1, 2002, at 16; *Judge Says State Worker Lied in Court About 5-Year-Old Girl Who Vanished*, N.Y. TIMES, May 7, 2002, at 24; *Two Years After Girl Disappeared, Little Has Changed in Florida Agency*, N.Y. TIMES, Jan. 19, 2003, at 20; *Under Fire, Florida Chief of Child Welfare Resigns*, N.Y. TIMES, Aug. 14, 2002, at 14.

<sup>92</sup> See Penelope K. Trickett & Frank W. Putnam, *Developmental Consequences of Child Sexual Abuse*, in VIOLENCE AGAINST CHILDREN IN THE FAMILY AND THE COMMUNITY 39, 50-51 (Penelope K. Trickett et al. eds., 1998) (discussing longitudinal studies of sexually abused children that showed high incidence of abnormalities in development and in functioning which resulted in greater levels of emotional stress, greater risk for later behavioral and psychological problems, poorer educational achievement, and poorer career achievement, in comparison to control group of nonabused children); see also DAVID FINKELHOR, A SOURCEBOOK ON CHILD SEXUAL ABUSE 143-52 (1986) (stating that sexually abused children react immediately with fear, anger, hostility, guilt, and shame, and that long-term effects include anxiety disorders, inappropriate sexual behavior, and delinquency).

who suffered abuse as children are both more likely to become involved in criminal behavior, (particularly drug abuse,) and more likely to suffer as crime victims than those who have not suffered such abuse.<sup>93</sup> Abuse or neglect during childhood puts people at a higher risk of being victims of crime in adulthood.<sup>94</sup> Adults sexually assaulted during childhood are at higher risk of criminal arrest, compared with those who were not sexually assaulted.<sup>95</sup> These consequences point toward the high cost of child abuse. Long-term fiscal impacts are not limited to the cost of treatment and care for victimized children. Any calculation of long-term costs must also include consideration of the increased need for welfare, drug rehabilitation, incarceration, and crime victim services for some former victims of child abuse who have become adults, as well as the cost of their lost productivity.<sup>96</sup>

#### IV. ADDRESSING INTRAFAMILIAL CHILD SEXUAL ABUSE

This Part considers the framework of criminal legislation and judicial process used to address interfamilial sexual abuse. It begins with a discussion of California laws on child sexual assault, and of the loopholes that allow intrafamilial offenders to escape many of the penalties for this crime. It then examines arguments supporting differential treatment for intrafamilial offenders and how these arguments have contributed to the establishment of the existing system.

##### A. Penal Laws on Sexual Assault of Children

Perpetrators of intrafamilial child sexual abuse do not differ, either in their criminal acts or in their psychopathology, from sexual predators of nonrelated children.<sup>97</sup> In spite of this, prosecutors in many states, including California, give significantly shorter prison terms to intrafamilial child sexual offenders. Clearly, this leniency was not the

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<sup>93</sup> See D. ENGLISH ET AL., CHILDHOOD VICTIMIZATION AND DELINQUENCY, ADULT CRIMINALITY, AND VIOLENT CRIMINAL BEHAVIOR, FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE (2001).

<sup>94</sup> See Terri L. Messman-Moore & Patricia J. Long, *Child Sexual Abuse and Revictimization in the Form of Adult Sexual Abuse, Adult Physical Abuse, and Adult Psychological Maltreatment*, 15 J. INTERPERSONAL VIOLENCE 489, 490 (2000).

<sup>95</sup> See Cathy Widom & M. Ashley Ames, *Criminal Consequences of Childhood Sexual Victimization*, 18 CHILD ABUSE & NEGLECT 303, 316 (1994).

<sup>96</sup> A 2001 analysis calculated these indirect costs at more than \$69 billion annually. See SUZETTE FROMM, PREVENT CHILD ABUSE AMERICA, TOTAL ESTIMATED COST OF CHILD ABUSE AND NEGLECT IN THE UNITED STATES — STATISTICAL EVIDENCE 3 (2001).

<sup>97</sup> See *infra* notes 121-30 and accompanying text.

intent of legislators in many states, who in the past four decades have focused on enhancing criminal penalties for crimes involving abuse of children.<sup>98</sup> For example, legislators in some states have established the crime of “sexual assault of a child” as a serious felony, separate from sexual assault.<sup>99</sup> In addition, some states have increased penalties for sexual assault of children when the perpetrator holds a “position of trust” with respect to the child victim.<sup>100</sup> The position of trust category is usually defined to include parents, step-parents, and relatives, as well as some unrelated persons.<sup>101</sup> Nevertheless, even in states that specifically criminalize sexual assaults on children, prosecutors regularly charge intrafamilial child sexual abuse perpetrators with the crime of “incest.” In so doing, the prosecutors forgo the more stringent penalties that would have been available had they charged the perpetrators under the sexual assault laws.<sup>102</sup>

In California, this “incest loophole”<sup>103</sup> is readily available and can be illustrated by juxtaposing the statutes penalizing extrafamilial child sexual abuse and intrafamilial child sexual abuse. The lowest category of child sexual abuse is “lewd acts involving children,” for which a convicted perpetrator will serve between three to eight years in prison.<sup>104</sup>

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<sup>98</sup> California was an early leader in enhancing penalties for sexual assaults on children. See *People v. Scott*, 885 P.2d 1040, 1045 (Cal. 1994) (discussing legislative rationale underlying California Penal Code section 288).

Above and beyond the protection afforded to all victims of sexual assault, the Legislature has determined that children are uniquely susceptible to “outrage” [older terminology for a sexual battery] and exploitation. Hence, special laws on the subject of sex with children have been enacted. They expand the kinds of acts which may be deemed criminal sexual misconduct, and they generally operate without regard to force, fear, or consent. . . . Section 288 is a key weapon in this statutory arsenal.

*Id.*

<sup>99</sup> For example, in Colorado, a conviction for “sexual assault” requires proof of sexual intrusion or sexual penetration. See COLO. REV. STAT. § 18-3-402 (2005). In contrast, a conviction for “sexual assault on a child” only requires proof of sexual contact of any kind on a child under 15 years of age. See COLO. REV. STAT. § 18-3-405. Both crimes constitute Class 4 felonies, but clearly, prosecuting the latter crime is simpler, given its less complex elements. See *People v. Hawkins*, 728 P.2d 385, 387 (Colo. Ct. App. 1986).

<sup>100</sup> See *supra* note 8 and accompanying text.

<sup>101</sup> See *supra* note 9 and accompanying text.

<sup>102</sup> This Article uses the term “sexual assault laws” to refer to the constellation of criminal laws prohibiting non-consensual sexual conduct between adults, or between an adult and a minor child, such as rape, sexual assault, or lewd acts.

<sup>103</sup> See Vachss, *supra* note 61, at 13.

<sup>104</sup> CAL. PENAL CODE § 288(a) (West 2004) reads:

(a) Any person who willfully and lewdly commits any lewd or lascivious act, . . .

If the perpetrator repeatedly abuses the same child, the law prohibiting “continual sexual abuse of a child” applies, and the convicted perpetrator will serve between six and twelve years in prison.<sup>105</sup> However, if the perpetrator is related to the victim, instead of using the child sexual abuse law, the prosecutor may instead charge the crime under California’s incest law, which does not require an offender to serve any time in prison.<sup>106</sup> Therefore, conviction under the incest statute automatically results in a much lower penalty than would be received for child sexual abuse. This discount can be offered only because the perpetrator is related to the victim.

California law compounds this disparity in sentencing between related and nonrelated child sexual offenders with a disparity in probation eligibility. Probation is prohibited for extrafamilial perpetrators convicted of child sexual abuse.<sup>107</sup> In contrast, for intrafamilial perpetrators, legislators wrote a specific exception into the statute.<sup>108</sup>

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upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

<sup>105</sup> See CAL. PENAL CODE § 288.5 “Continual sexual abuse of a child” (imposing 6, 12, or 16 years imprisonment for three or more acts of sexual abuse of child).

<sup>106</sup> See *supra* note 57 and accompanying text.

<sup>107</sup> See CAL. PENAL CODE § 1203.066(a)(3) (Deering 2004):

(a) [P]robation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provisions of this section be stricken . . . for any of the following persons:

(3) A person who is convicted of a violation of Section 288 or 288.5 and *who was a stranger to the child victim or befriended the child victim for the purpose of committing an act in violation of Section 288 or 288.5 . . .*

(emphasis added).

<sup>108</sup> The probation loophole, which allows convicted intrafamilial child sexual offenders to escape serving any time in prison, is found in CAL. PENAL CODE § 1203.066(c) (West 2004):

(a) [P]robation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provisions of this section be stricken . . . for any of the following persons:

(7) A person who is convicted of committing a violation of Section 288 or 288.5 against more than one victim.

(8) *A person who . . . has substantial sexual conduct with a victim who is under 14 years of age.*

(9) A person who . . . used obscene matter . . .

Even if convicted under the same child sexual abuse statute, the related perpetrator, *at the sole discretion of the prosecutor*, can escape serving any time in prison. This means that the state provides a special sentencing discount for any offender who “grows his own victim,”<sup>109</sup> since no such loophole is available to the nonrelated offender.<sup>110</sup>

The discount is even larger if aggravating factors are involved. California law makes a “One Strike” sentence available for a sexual offender whose crime included certain aggravating factors, such as attacking multiple victims. The One Strike law applies to child sexual abuse<sup>111</sup> under Penal Code section 288,<sup>112</sup> and upon conviction mandates a prison term from fifteen years to life imprisonment.<sup>113</sup> However, a perpetrator who is related to the child victim can claim exemption from a One Strike sentence.<sup>114</sup>

In the area of community notification, the legislature has created yet another special exemption for related offenders. Intrafamilial child sexual offenders who have been given probation-only sentences can also petition to be kept off the online sex offender registry that California maintains for community notification purposes.<sup>115</sup> Further, after their

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(c) Paragraphs (7), (8), and (9) of subdivision (a) shall not apply when

(1) The defendant is the victim’s natural parent, adoptive parent, stepparent, relative, or is a member of the victim’s household . . . .

(emphasis added).

<sup>109</sup> See Andrew Vachss, *Our Endangered Species: A Hard Look at How We Treat Children*, PARADE MAG., Mar. 29, 1998, at 5.

<sup>110</sup> Over the past 15 years, California has actually retreated from the vanguard of states pushing for increased incarceration for child sexual abuse offenders who are related to their victims. Cf. Messman-Moore & Long, *supra* note 94. California’s sexual assault laws formerly contained a provision, the former CAL. PENAL CODE § 1203.066(a)(9) (Deering 1993), which barred probation for any child sexual offender who held “a position of special trust” and then committed “substantial sexual conduct” (e.g., penetration) with that child. The “position of trust” category included “a natural parent, adoptive parent, stepparent, foster parent, relative, [or] household member.” However, this provision was stricken from the law in 1994. See Senate Bill 26, enacted by 1993-94 1st Ex. Sess., 1994 Cal. Stat. ch. 14, § 3.

<sup>111</sup> CAL. PENAL CODE § 667.61(c)(7) (Deering 2006).

<sup>112</sup> CAL. PENAL CODE § 667.61(b)(4). The One Strike law applies to a perpetrator charged with child sexual abuse, but does *not* apply to a perpetrator charged with “incest” with a child under CAL. PEN. CODE § 285.

<sup>113</sup> CAL. PENAL CODE § 667.61.

<sup>114</sup> See *People v. Wutzke*, 28 Cal. 4th 923, 925 (2002) (stating that a perpetrator who is a relative eligible under CAL. PENAL CODE § 1203.066 is exempt from mandatory sentence for crimes covered by One Strike law).

<sup>115</sup> In establishing an online sex offender registry, the California legislature exempted perpetrators of child sexual abuse from the requirement of being listed on the registry

term of probation is complete, related offenders can be exempted permanently from having to register with local law enforcement.<sup>116</sup> Such an exemption is unavailable to nonrelated offenders, and indeed, such an exemption would be political suicide for any legislator who proposed it. Finally, an intrafamilial child sexual offender can escape prosecution entirely. Under California law, the prosecutor instead may require that the offender only attend therapy,<sup>117</sup> while the prosecutor, in exchange, forgoes prosecution altogether.

*B. Examining Arguments Offered by Apologists for Intrafamilial Offenders*

Apologists for intrafamilial child sexual offenders include defense attorneys and members of the sex offender therapy industry.<sup>118</sup> Their claim is that intrafamilial child sexual offenders should be accorded differential treatment because they differ from other child molesters. For example, apologists argue that intrafamilial child sexual offenders are

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website if they had received “probation pursuant to 1203.066.” See CAL. PENAL CODE § 290.46(e)(2)(C) (Deering 2004). This means that a perpetrator convicted of child sexual assault, who has received probation through the loophole available only to those related to the victim, can also escape being identified on the online registry as a sex offender. Cf. CAL. PENAL CODE § 1203.066(c).

<sup>116</sup> See CAL. PENAL CODE § 290.5(b)(3) (Deering 2005) (permitting intrafamilial perpetrators exemption from requirement of registering as sex offender if, *inter alia*, they have completed “probation pursuant to 1203.066”). Cf. CAL. PENAL CODE § 1203.066(c) (Deering 2004).

<sup>117</sup> CAL. PENAL CODE § 1000.13 (Deering 2004) reads:

[N]o person suspected of violating any section of this code in which a minor is a victim of sexual abuse shall be referred for counseling in lieu of prosecution except upon written agreement between the prosecuting attorney and the suspected person and *unless* . . .

(1) *The person is a family member of the victim.* For the purposes of this chapter “family member” means a parent, stepparent, sibling, aunt, uncle, cousin, grandparent, or a member of the victim’s household who has developed a family relationship with the victim . . . .

(emphasis added).

<sup>118</sup> An example is the Association for the Treatment of Sexual Abusers, which describes itself as an international organization of professionals in sexual offender evaluation and treatment. Its position papers argue against sex offender registration for intrafamilial child sexual offenders and against identifying intrafamilial child sexual abuse as predatory behavior. They promote labeling intrafamilial child sexual offenders as “low-risk” and describe related offenders as less dangerous than nonrelated offenders. See Ass’n for the Treatment of Sexual Abusers, *Response to Pending Sex Offender Registry Legislation (H.R.3132, S.792 and S.1086)* (Aug. 15, 2005), available at <http://atsa.com/responseHB3132.html> (referring to letter to ranking members of House and Senate Judiciary Committees).

not sexually aroused by children and, therefore, their behavior can be altered by psychiatric interventions.<sup>119</sup> They also argue that intrafamilial perpetrators are less likely to re-offend than predatory pedophiles and are therefore less dangerous.<sup>120</sup>

Of course, these apologists directly profit from court referrals for therapy and legal monitoring that intrafamilial perpetrators accept in exchange for escaping prison. Since the probation loophole enjoyed by intrafamilial child sexual offenders likewise benefits apologists, it is not surprising that they promote the idea that these child sexual offenders can be differentiated into distinct groups and that related offenders pose a lesser danger to the community. Empirical studies, however, suggest that both of these propositions are false.<sup>121</sup>

First, perpetrators of intrafamilial child sexual abuse have the same pattern of sexual arousal<sup>122</sup> seen in predatory pedophiles.<sup>123</sup> This tends to disprove the claim that related offenders are unlike predatory pedophiles in that related offenders are more easily rehabilitated. Second, claims about lower rates of recidivism in related offenders overlook the fact that *intrafamilial child sexual abuse perpetrators are less likely to be caught a second time* in comparison to stranger offenders. After all, a victimized child who observes that the state has decided to forgo any significant penalty for the related offender (or even has decided to allow the offender to return to the child's home) will not be likely to

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<sup>119</sup> See Association for the Treatment of Sexual Abusers, Pedophiles and Child Molesters: The Differences Webpage (2001), <http://atsa.com/ppPedophiles.html>.

<sup>120</sup> See *id.*

<sup>121</sup> See Chester Britt, *Versatility*, in *THE GENERALITY OF DEVIANCE* 173, 177 (Travis Hirschi & Michael R. Gottfredson eds., 1994) (noting that clinicians studying sex offenders have tended to assume that offenders specialize in only one type of offense – for example, intrafamilial child sexual offenders are assumed to be uninterested in raping nonrelated children). “[A] double standard is used; specialization is imputed when offenders are not shown to be completely versatile in their offending, yet the reverse is not held to be true, namely, that lack of complete specialization is indicative of versatility.” *Id.*

<sup>122</sup> See Ian Barsetti et al., *The Differentiation of Intrafamilial and Extrafamilial Heterosexual Child Molesters*, 13 *J. INTERPERSONAL VIOLENCE* 275, 275-86 (1998) (studying arousal to different types of sexual stimuli in three groups: intrafamilial child sexual offenders, extrafamilial child sexual offenders who had been diagnosed as pedophiles, and control group). Resulting data showed no difference in arousal patterns between intrafamilial child sexual abuse offenders and predatory pedophiles. *Id.*

<sup>123</sup> The term “predatory pedophile” was created by author and law guardian Andrew Vachss to differentiate persons with the *psychological condition* of being sexually aroused by children (which some clinicians term “pedophilia”) from persons who choose to perform the *criminal act* of sexually assaulting children (“predatory pedophiles”). While no person should be arrested for mere feelings, a person whose acts injure others can and must be penalized in any ordered society. See Andrew Vachss, *What We Must Do to Protect Our Children*, *PARADE MAG.*, July 14, 2002, at 5.



voice a subsequent complaint of abuse.

Thus, there is no reliable basis for the argument that related perpetrators as a group are more amenable to treatment. Finally, there is no evidence that intrafamilial child sexual offenders limit themselves to a single assault, a single victim, or related victims only.<sup>124</sup> Therefore, providing a loophole for a related offender not only puts the child victim at risk of further abuse, but also puts other children, related and unrelated, at risk.<sup>125</sup>

Apologists for intrafamilial child sexual offenders further advocate for probation or counseling in lieu of prosecution. They argue that these are proper sentences and suggest that the incest law classifies a sexual assault on a related child as a nonviolent crime, in that physical force is rarely used. However, this argument is specious, since under California law, force is not a necessary element of the crime of sexual assault on a child.<sup>126</sup> As California courts have noted, the sexual assault of a child requires offenders to be sentenced to a term in prison, regardless of whether force was used, because the violation comprises harm beyond physical suffering.<sup>127</sup> As this is the case, the only child sexual offenders who are able to escape sentences of imprisonment are those who victimize related children, and the rationale for their exemption consists solely of their familial status with respect to their child victims.

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<sup>124</sup> See Kim English et al., *Sexual Offender Containment: Use of the Postconviction Polygraph*, in ANNALS OF THE N.Y. ACADEMY OF SCIENCES 411, 411-427 (2003) (showing study of convicted sexual offenders, in which two-thirds of intrafamilial child sexual offenders had also raped nonrelated children); Peggy Heil et al., *Crossover Sexual Offenses*, 15 SEX ABUSE 221, 221-36 (2003) (examining study of incarcerated child sexual offenders, in which majority of offenders admitted to raping both related and nonrelated children); see also Mark Weinrott & Maureen Saylor, *Self-Report of Crimes Committed by Sex Offenders*, 6 J. INTERPERSONAL VIOLENCE 286, 286-300 (1991) (reporting study of sex offenders, in which intrafamilial child sexual offenders self-reported high degree of "crossover" offenses, such as i.e. rapes of nonrelated children or adult women).

<sup>125</sup> See *People v. Otto*, 26 P.3d 1061, 1063 (Cal. 2001). In *Otto*, the state sought to commit, as sexually violent predator, offender who had assaulted four children not related to him. While addressing the offender's propensity to engage in sexually violent behavior, as required under California Welfare and Institutions Code section 6600, prosecutors offered, *inter alia*, offender's admission that he had previously sexually abused his minor stepchildren, although he had never been prosecuted for those crimes.

<sup>126</sup> See CAL. PENAL CODE § 288 (Deering 2006). Subsection (a) has no requirement of force or duress. CAL. PENAL CODE § 288(a). Instead, it requires only that, in sexually assaulting a victim under 14 years of age, the perpetrator had lewd intent. *Id.*

<sup>127</sup> See, e.g., *People v. Wilkerson*, 6 Cal. App. 4th 1571, 1578 (Ct. App. 1992); *People v. Sanchez*, 208 Cal. App. 3d 721, 748-50 (Ct. App. 1989) (holding that force or duress not requirement of California Penal Code section 288(a)).

A separate subsection of the child sexual abuse law increases the term of imprisonment for a perpetrator who uses "force."<sup>128</sup> But even under this provision, California law does not demand proof of *physical* force.<sup>129</sup> Courts have noted that the sexual assault of a child may be considered forceful or violent because of the power disparity that exists between the adult perpetrator and the child victim. This power disparity only looms greater when the adult perpetrator is a parent or relative.<sup>130</sup>

Because there are no significant differences between the crimes or characteristics of intrafamilial and extrafamilial child sexual abuse perpetrators, the only possible justification for the extreme disparity in the penal treatment of the two groups lies in the claim that children suffer less harm from a relative's sexual abuse than they would suffer from abuse by a stranger. But this argument is unsupportable, because "position of trust" provisions in the penal law of most states evince the opposite proposition; that is, that sexual abuse by a family member stands among the most damaging experiences a child can suffer.

#### V. HOW STATE AGENCIES SUPPORT THE INCEST AND PROBATION LOOPHOLES

This Part examines the behaviors of prosecutors and legislators in sentencing child sex offenders. It examines the factors that drive their decision-making and how these factors contribute to the leniency of sentences meted out to perpetrators of intrafamilial child sexual abuse.

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<sup>128</sup> See CAL. PENAL CODE § 288(b) (lewd acts with force on victim under age 14); see also *People v. Cicero*, 157 Cal. App. 3d 465, 475-76 (Ct. App. 1984) ("[I]f the will and sexuality of an adult woman are protected by the Penal Code, then the will and sexuality of children deserve no lesser protection. Accordingly, both logic and fairness compel the conclusion that 'force' in subdivision (b) must reasonably be given the same established meaning it has achieved in the law of rape: 'force' should be defined as a method of obtaining a child's participation in a lewd act in violation of a child's will and not exclusively as a means of causing physical harm to the child.").

<sup>129</sup> An insightful discussion of this point can be found in *State v. Etheridge*, 352 S.E.2d 673 (N.C. 1987), where the court, upholding the conviction of a parent on sexual assault, explicitly overruled precedent requiring proof that the parent threatened the child with physical force. "Sexual activity between a parent and a minor child is not comparable to sexual activity between two adults . . . . The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose. . . . In such cases the parent wields authority as another assailant might wield a weapon." *Id.* at 681-82.

<sup>130</sup> *Id.*

A. *How Legislators Contribute to Differential Punishment for Related Offenders*

1. The Incest Loophole<sup>131</sup>

As this Article has discussed, California legislators have written laws that specifically target child sexual abuse. Since this is the case, why has the legislature not abolished the prosecutors' use of the incest law for cases of child sexual abuse? Ironically, one reason may be the legislators' fear of appearing to be soft on crime. As elected officials, they are extremely reluctant to propose or vote for any legislative change that limits the reach of a law used to prosecute sex offenses.<sup>132</sup>

Unfortunately, this creates the problem of "overlap," wherein multiple laws with differing penalties address a single criminal act. This leaves the decision of which law to use in charging the crime to the prosecutor's discretion. In allowing the establishment of overlapping criminal code sections, the legislature turns over authority for establishing public policy on criminal sanctions to the prosecutor.<sup>133</sup>

2. The Probation Loophole<sup>134</sup>

Why have legislators progressively written more loopholes for related offenders into California's law by expanding the ways related perpetrators may be exempted from the strict penalties provided for

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<sup>131</sup> See *supra* notes 103-105 and accompanying text.

<sup>132</sup> See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 746 (1996)

The irrationality of the politics of criminal code revisions can perhaps best be seen in the Arizona Criminal Code. When the Arizona Legislature adopted its revised Criminal Code, which borrowed heavily from the Model Penal Code, a majority of legislators refused to go on record as voting for a repeal of any sex offense statutes. In the Arizona Criminal Code there are two complete sections of statutes which criminalize certain forms of sexual conduct; the first section is new and uses Model Penal Code terminology; the second section is old and is a codification of common law offenses. The new provisions were intended by the Arizona Law Reform Commission to replace the old provisions.

*Id.*

<sup>133</sup> *Id.* at 746-47 ("The existence of overlapping provisions, which is inevitable to some degree, creates power in the office of the prosecutor. Most states' legislatures, by creating too many policy choices, have effectively abdicated public policy-making to the prosecutor since it is the prosecutor, and not the legislature, that has the final decision in determining which public policy, if any, is breached by an individual's conduct.")

<sup>134</sup> See *supra* notes 107-14 and accompanying text.

perpetrators of child sexual abuse?

Over the past twenty-five years, California lawmakers have addressed child sexual abuse as a crime against child victims, perpetrated most often by the very adults whom society expects to be most protective of their safety and growth. More than once during this period, California legislators have attempted to establish penalties for all child sexual offenders without regard to any family relationship.<sup>135</sup> Nevertheless, each time, defenders have successfully lobbied the legislature to consider intrafamilial child sexual abuse as a separate and distinguishable phenomenon.<sup>136</sup> Defenders encouraged the legislature to treat intrafamilial child sexual abuse as a family dysfunction that could be resolved by therapy.<sup>137</sup> They urged legislators to prioritize “family

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<sup>135</sup> The original draft of section 1203.066 would have barred parole and required mandatory prison terms for sex offenses against a child, without regard to familial relationship. See Joint Cmte. for Revision of the Penal Code, 1981-1982 Reg. Sess., [Dec. 16, 1980] at 49, 152-53, 163-64. These provisions were stripped after the testimony by members of the intrafamilial sexual offender lobby group Parents United. See *infra* notes 136-139 and accompanying text. In 1994, the original draft of the One Strike Law would have deleted section 1203.066 and amended section 288 to impose a uniform sentence on life without parole on all acts of substantial sexual conduct with a child, without regard to familial relationship. See Sen. Cmte. on Judiciary, Analysis of S. 26X, 1993-1994 1st Ex. Sess., (Cal. May 4, 1994). After lobbying by apologists for intrafamilial offenders, each law was rewritten to include loopholes to accommodate this special interest group.

<sup>136</sup> Jane E. Stevens, *Ending an Awful Irony*, L.A. TIMES, Jan. 25, 2006, at B11.

Why would a crime that usually results in an automatic prison sentence ever have been given a free ride? Because two decades ago what was most crucial to many family activists was keeping families intact. Groups such as Parents United lobbied for the incest exception, claiming that relatives who abused children were “situational offenders,” not pedophiles. Life stress was said to have induced them to abuse once or twice. With a little therapy, it was claimed, situational offenders would never abuse a child again.

Hank Giarretto, a psychologist and the executive director of Parents United in 1981, testified in Sacramento that lawmakers needed to be careful that the “father offender” who “had, usually, a very outstanding career both in industry and in his place in his community,” was not mixed up “with the type of offender, the predator, the type of fellow who stalks his victims or who sets up situations through which he can molest these children.”

By 1994, however, the American Psychiatric Assn. had rejected the idea of situational offenders, finding instead that there was no difference between a person who sexually abuses a stranger and one who sexually abuses his own child.

*Id.*

<sup>137</sup> See Joint Cmte. for Revision of the Penal Code, *Hearings on Child Molestation Legislation*, 1981-1982 Reg. Sess., Apr. 24, 1981, at 8-9, 22, 60-61.

reunification services<sup>138</sup> over the goal of ensuring the safety of the child victim or the punishment of the perpetrator.<sup>139</sup> The success of the apologists for intrafamilial sexual offenders served perpetrators of sexual assault in many ways. At the same time, apologists undermined the protection of victimized children, since the resulting low penalties and multiple exemptions served to emphasize that intrafamilial child sexual abuse did not constitute a serious crime.<sup>140</sup>

B. *How Prosecutors Contribute to Differential Punishment for Related Offenders*

1. The Incest Loophole

Since state incest laws were not intended to address intrafamilial child sexual abuse and legislators have written laws to target child sexual abuse specifically, why do prosecutors still charge perpetrators with incest for sexual assaults on related children?

Prosecutors depend on high felony conviction rates to maintain their viability for re-election.<sup>141</sup> To keep their positions, they trumpet their “win rate” during campaign seasons. To maintain their win rates, they exhort the assistant prosecutors who work under them to avoid charging choices that might lower the rate.<sup>142</sup> Opposition candidates, meanwhile,

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<sup>138</sup> Grier Weeks, *Putting Children First: Redressing California's Betrayal of Child-Abuse Victims*, S.F. CHRON., April 6, 2004, at B-9.

<sup>139</sup> Elizabeth Kim, *Family Values*, THE RECORDER, June 7, 2002, available at [http://www.protect.org/california/caRecorder\\_060702.html](http://www.protect.org/california/caRecorder_060702.html). (“In 1981 the state legislature passed a law that should rank high in a legal Hall of Shame, granting probation for people who molest children within their own families. The idea in those legislators’ minds 20 years ago was that a family should stay together, and that packing a parent off to prison wasn’t in the child’s best interests . . . the public’s consciousness was not as sensitive to the issue of child molestation, nor were the horrific ramifications of the crime taken as much into consideration.”)

<sup>140</sup> See Leonore M.J. Simon, *Sex Offender Legislation and the Antitherapeutic Effect on Victims*, 41 ARIZ. L. REV. 485, 518 (1999) (“The availability of treatment to offenders who commit sex crimes, at a time when general criminal offenders do not have the option for treatment, further reinforces everyone’s perception that what occurred was not a real crime.”).

<sup>141</sup> See generally Kenneth Bresler, “I Never Lost a Trial”: *When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537 (1996) (noting that prosecutors feel pressure to track and maintain their “win rate”); Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates’ Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941 (1994) (demonstrating that prosecutors emphasize their conviction rates in seeking reelection).

<sup>142</sup> See generally Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000).

point to any dip in the rate as a sign that the incumbent should be voted out.<sup>143</sup>

The felony win rate, however, is a purely numerical count; no weight is given to the seriousness of the felony or the disposition at sentencing. This means that a prosecutor's win rate will increase if the defendants plead guilty to *any* felony charge, without regard to whether the defendant serves any time in prison. Incest is a felony in California, but one that does not demand prison time. A prosecutor has complete discretion to offer an intrafamilial child sexual abuse perpetrator the opportunity to be charged under the incest law instead of the child sexual abuse law. This benefits both the perpetrator, who escapes much heavier penalties, and the prosecutor, who can painlessly add to his conviction rate.<sup>144</sup>

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<sup>143</sup> Martin Kuz, *Let It Bleed: Prosecutors' Reluctance to Charge Murder Suspects in S.F. Leaves Alleged Killers on the Street Flush with Bravado*, S.F. WKLY, Jan. 18, 2006, at 1. The article reports on the sharp two-year increase in the city's murder rate and finds that one underlying cause is the district attorney's known reluctance to file serious charges. *Id.* This consistent failure to file charges has resulted in greater difficulty in investigating crimes. *Id.* Potential witnesses, fearing retribution, refuse to give information or testify. *Id.* Police, frustrated by the release of suspects without charges being brought, make fewer arrests because they believe doing so will be futile. *Id.* The article suggests that the district attorney's concerns about re-election underlie a strategy of avoiding the uncertainties inherent in trial.

[Quoting a former prosecutor:] "She's trying to protect herself from losing, but at some point you have to stop looking at stats. You can't let people think they got away with homicide." . . .

While Harris insists that her conviction rate has no influence on whether prosecutors file . . . a high percentage of dismissals or acquittals would spoon-feed campaign chum to prospective political foes.

[Quoting a police union official:] "If a DA loses five homicides in a row, guess what the next candidate for DA will be saying?"

*Id.*

<sup>144</sup> Dan Cook, *Parents Who Rape Their Kids Don't Deserve a Break*, PORTLAND BUS. J., Dec. 3, 1999, available at <http://portland.bizjournals.com/portland/stories/1999/12/06/tidbits.html>.

In an ideal world, when a parent or stepparent is accused of raping a child or stepchild, the adult would be charged, prosecuted and sentenced for child rape. But because the incest exception exists, it provides defense attorneys and prosecutors with an alternative to child rape. The defense attorney will try to get the charge reduced to incest, since the perp's stretch for incest will be a lot shorter than for rape. A prosecutor who is more interested in getting a conviction than in sending a pedophile away for a long stretch may take the bait. So the charge is reduced, the perp pleads guilty, and it looks like justice has been done. Until the adult comes home and rapes again.

## 2. The Probation Loophole

The introduction of mandatory sentencing has limited the range of outcomes resulting from conviction on a given charge. As a result, the decision of which charges to bring has become the determinative factor in the magnitude of the penalty a perpetrator faces. Because the selection of charges and any bargaining over charges lies entirely within the control of the prosecutor, the shift away from judicial discretion in sentencing has made the offender's prospective penalty largely dependent upon prosecutorial discretion over charging.<sup>145</sup>

Unfettered discretion leads to the danger that prosecutors will make their decisions based on self-interest, rather than on considerations such as the criminal behavior at issue or the vulnerability of the victim. This concern is magnified by the fact that review of prosecutorial discretion is rarely institutionalized through regular administrative, judicial, or legislative processes.<sup>146</sup> For example, prosecutors with concerns about re-election can manipulate their win rates by bringing to trial only easy-to-prosecute cases. In contrast, sexual abuse cases, which regularly present certain difficulties at trial — young victims who are considered unreliable by jurors, perpetrators who are easily able to conceal criminal behavior in the home, and adult witnesses who are reluctant to testify — may be negotiated by charge-bargaining. Because the community is not aware of what a conviction rate actually measures, the prosecutor has an incentive to dispose of child sexual abuse cases speedily through charge bargaining. This creates a risk that the prosecutor will prioritize maintaining a high conviction rate over securing justice for child victims.<sup>147</sup>

Prosecutors as a group are well aware that the most likely perpetrators of child sexual abuse are the child's relatives.<sup>148</sup> By failing to imprison

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*Id.*

<sup>145</sup> See Misner, *supra* note 132, at 742-50.

<sup>146</sup> *Id.* at 735-37.

<sup>147</sup> See Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 105-06 (1968).

<sup>148</sup> See Barbara E. Smith & Sharon G. Elstein, *Prosecution of Child Sexual and Physical Abuse Cases*, in LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS, AMERICAN BAR ASSOCIATION PRESENTATION TO THE NATIONAL INSTITUTE OF JUSTICE 12 (1998). This study of 1000 child abuse cases surveyed 600 prosecutors nationwide and reported that "[p]rosecutors stated that they see very few cases of child sexual abuse by strangers, and noted a rise in the number of cases with step-parents, romantic partners of the parent, and biological parents in the two years prior to the survey." *Id.* In addition, the cases documented stranger perpetrators in only 6% of the cases, while 32% of child victims were assaulted by parents or guardians. *Id.*

related offenders, and by charging them in ways that result in shorter prison terms, prosecutors raise the risk of potential harm for all children. Allowing prosecutors the continued opportunity to use the incest and probation loopholes invites a disastrous breakdown in the principle of equal protection. Worse, it again reduces children to the status of mere property, subject to whatever abuse the adults of their family wish to inflict upon them.

#### CONCLUSION

A resolution of the problems considered in this Article must include closing the incest and probation loopholes that have exempted related perpetrators from the enhanced penalties that citizens and their elected representatives intended to impose for the sexual assault of children. This can be achieved legislatively by removing the overlap between incest law and sexual assault law for the crime of child sexual abuse. In addition, the accumulated loopholes which have benefited related perpetrators likewise must be deleted from the penal code.<sup>149</sup>

It may be more comfortable for legislators to avoid making radical changes in the law of sex offenses. It may be more advantageous for prosecutors to retain their customary discretion to reduce to nothing the penalties handed out to related perpetrators. But neither comfort nor custom can excuse leaving these loopholes on the books. With the removal of these loopholes in California, those who sexually abuse their own children will at last possess no camouflage behind which they can hide.

The passage of such a bill would be a legislative triumph that can be measured by the number of children who would be affected. Consider the fact that there are 9.6 million children in California,<sup>150</sup> and that over 7000 of these children must be removed from their homes annually, due to substantiated allegations of sexual abuse.<sup>151</sup> Consider also the position of California as a social bellwether for the nation. Its passage of a bill that offers equal protection for all of its children will stand as a challenge to the forty-plus states in which the laws persist in treating children as

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<sup>149</sup> See *infra* Appendix: Executive Summary and Proposed Bill "A Proposed Bill to Close Loopholes for Intrafamilial Child Sexual Offenders."

<sup>150</sup> STATE OF CALIFORNIA, DEP'T OF FIN., RACE/ETHNIC POPULATION WITH AGE AND SEX DETAIL, 1990-1999 AND RACE/ETHNIC POPULATION WITH AGE AND SEX DETAIL, 2000-2050. (Projection 2005).

<sup>151</sup> See Barbara Needell et al., Univ. of Cal. at Berkeley Ctr for Social Servs. Research *Child Welfare Services Reports for California* (2005), available at <http://cssr.berkeley.edu/CWSCMSreports/> (last visited Sept. 1, 2005).



property. Until these laws are abolished across the nation, not only will there be adults who abuse related children using a justification of ownership and control, but places in which such perpetrators can remain confident that they will be abetted by the laws of the state.

APPENDIX: A PROPOSED BILL TO CLOSE LOOPHOLES THAT BENEFIT  
INTRAFAMILIAL CHILD SEXUAL OFFENDERS

Notice:

[A> UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED <A]

[D> UPPERCASE TEXT WITHIN THESE SYMBOLS IS DELETED <D]

**THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS  
FOLLOWS:**

SECTION 1. Section 285 of the Penal Code is amended to read:

285.

Persons [A> AGE 18 YEARS AND OLDER <A] being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison.

SECTION 2. Section 288.1 of the Penal Code is amended to read:

288.1

Any person convicted of committing any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years shall not have his or her sentence suspended until the court obtains a report from a reputable psychiatrist [D> , <D] [A> OR <A] from a reputable psychologist who meets the standards set forth in Section 1027, [D> OR FROM A RECOGNIZED TREATMENT PROGRAM PURSUANT TO SECTION 1000.12 OR 1203.066, <D] as to the mental condition of that person.

SECTION 3. Section 290.45 of the Penal Code is amended to read:

(e)(2)(C) (i-iv) [Deleted.]

SECTION 4. Section 290.5 of the Penal Code is amended to read:

(b)(3) [Deleted.]

SECTION 5. Section 1000.12 of the Penal Code is amended to read:

1000.12.

(a) It is the intent of the Legislature that nothing in this chapter deprive

a prosecuting attorney of the ability to prosecute any person who is suspected of committing any crime in which a minor is a victim of an act of [A> PHYSICAL <A] abuse or neglect to the fullest extent of the law, if the prosecuting attorney so chooses.

(b) In lieu of prosecuting a person suspected of committing any crime, involving a minor victim, of an act of [A> PHYSICAL <A] abuse or neglect, the prosecuting attorney may refer that person to the county department in charge of public social services or the probation department for counseling or psychological treatment and such other services as the department deems necessary. The prosecuting attorney shall seek the advice of the county department in charge of public social services or the probation department in determining whether or not to make the referral.

(c) [A> THIS <A] section shall not apply to any person who is charged with [A> SEXUAL ABUSE OR MOLESTATION OF A MINOR VICTIM, OR <A] any sexual offense involving force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the minor victim or another person.

SECTION 6. Section 1000.13 of the Penal Code is repealed:

1000.13. [Deleted.]

SECTION 7. Section 1203.066 of the Penal Code is amended to read:

1203.066. Ineligibility for probation of persons convicted of lewd act with a child

(c) (1-5) [Deleted.]

[D> (d) <D] [A> (c) <A]

(e) (1-2) [Deleted.]

(f) [Deleted.]

Additions are **underlined in bold**

Deletions are ~~stricken through~~

**THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:**

SECTION 1. Section 285 of the Penal Code is amended to read:

285. Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who, **being 18 years of age or older,** commit fornication or adultery with each other, are punishable by imprisonment in the state prison.

SEC. 2. Section 288.1 of the Penal Code is amended to read:

288.1. Any person convicted of committing any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years shall not have his or her sentence suspended until the court obtains a report from a reputable psychiatrist, **or** from a reputable psychologist who meets the standards set forth in Section 1027, ~~or from a recognized treatment program pursuant to Section 1000.12 or 1203.066,~~ as to the mental condition of that person.

SEC. 3. Section 290.45 of the Penal Code is amended to read:

~~(e)(2)(C) (i) An offense for which the offender successfully completed probation, provided that the offender submits to the department a certified copy of a probation report, presentencing report, report prepared pursuant to Section 288.1, or other official court document that clearly demonstrates both of the following:~~

~~(I) The offender was the victim's parent, stepparent, sibling, or grandparent.~~

~~(II) The crime did not involve either oral copulation or penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object.~~

~~(ii) An offense for which the offender is on probation at the time of his or her application, provided that the offender submits to the department a certified copy of a probation report, presentencing report, report prepared pursuant to Section 288.1, or other official court document that clearly demonstrates both of the following:~~

~~(I) The offender was the victim's parent, stepparent, sibling, or~~

~~grandparent.~~

~~(ii) The crime did not involve either oral copulation or penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object.~~

~~(iii) If, subsequent to his or her application, the offender commits a violation of probation resulting in his or her incarceration in county jail or state prison, his or her exclusion, or application for exclusion, from the Internet Web site shall be terminated.~~

~~(iv) For the purposes of this subparagraph, "successfully completed probation" means that during the period of probation the offender neither received additional county jail or state prison time for a violation of probation nor was convicted of another offense resulting in a sentence to county jail or state prison.~~

SEC. 4. Section 290.5 of the Penal Code is amended to read:

(b)(1) Except as provided in paragraphs (2) ~~and (3)~~, a person described in paragraph (2) of subdivision (a) shall not be relieved of the duty to register until that person has obtained a full pardon as provided in Chapter 1 (commencing with Section 4800) or Chapter 3 (commencing with Section 4850) of Title 6 of Part 3.

...

~~(3) The court, upon granting a petition for a certificate of rehabilitation pursuant to Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3, if the petition was granted prior to January 1, 1998, may relieve a person of the duty to register under Section 290 for a violation of Section 288 or 288.5, provided that the person was granted probation pursuant to subdivision (e) of Section 1203.066, has complied with the provisions of Section 290 for a continuous period of at least 10 years immediately preceding the filing of the petition, and has not been convicted of a felony during that period.~~

SEC. 5. Section 1000.12 of the Penal Code is amended to read:

(a) It is the intent of the Legislature that nothing in this chapter deprive

a prosecuting attorney of the ability to prosecute any person who is suspected of committing any crime in which a minor is a victim of an act of **physical** abuse or neglect to the fullest extent of the law, if the prosecuting attorney so chooses.

(b) In lieu of prosecuting a person suspected of committing any crime, involving a minor victim, of an act of **physical** abuse or neglect, the prosecuting attorney may refer that person to the county department in

charge of public social services or the probation department for counseling or psychological treatment and such other services as the department deems necessary.

(c) **This** section shall not apply to any person who is charged with **sexual abuse or molestation of a minor victim, or** any sexual offense involving force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the minor victim or another person.

SEC. 6. Section 1000.13 of the Penal Code is repealed.

SEC. 7. Section 1203.066 of the Penal Code is amended to read:

~~(c) Paragraphs (7), (8), and (9) of subdivision (a) shall not apply when the court makes all of the following findings:~~

~~(1) The defendant is the victim's natural parent, adoptive parent, stepparent, relative, or is a member of the victim's household who has lived in the victim's household.~~

~~(2) A grant of probation to the defendant is in the best interest of the child.~~

~~(3) Rehabilitation of the defendant is feasible, the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child molestation immediately after the grant of probation or the suspension of execution or imposition of sentence.~~

~~(4) The defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by returning the defendant to the household of the victim. While removed from the household, the court shall prohibit contact by the defendant with the victim, except the court may permit the supervised contact, upon the request of the director of the court ordered supervised treatment program, and with the agreement of the victim and the victim's parent or legal guardian, other than the defendant. As used in this paragraph, "contact with the victim" includes all physical contact, being in the presence of the victim, communication by any means, any communication by a third party acting on behalf of the defendant, and any gifts.~~

~~(5) There is no threat of physical harm to the child victim if probation is granted. The court upon making its findings pursuant to this subdivision is not precluded from sentencing the defendant to jail or prison, but retains the discretion not to do so. The court shall state its reasons on the record for whatever sentence it imposes on the defendant. The court shall order the psychiatrist or psychologist who is appointed~~

~~pursuant to Section 288.1 to include a consideration of the factors specified in paragraphs (2), (3), and (4) in making his or her report to the court.~~

~~(d)~~ (c) The existence of any fact that would make a person ineligible for probation under subdivision (a) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

~~(e) As used in this section and in Section 1000.12, the following terms apply:~~

~~(1) "Recognized treatment program" means a program with substantial expertise in the treatment of children who are victims of sexual abuse, their families, and offenders, that demonstrates to the court all of the following:~~

~~(A) An integrated program of treatment and assistance to victims and their families.~~

~~(B) A treatment regimen designed to specifically address the offense.~~

~~(C) The ability to serve indigent clients.~~

~~(2) "Integrated program of treatment and assistance to victims and their families" means that the program provides all of the following:~~

~~(A) A full range of services necessary to the recovery of the victim and any nonoffending members of the victim's family, including individual, group, and family counseling as necessary.~~

~~(B) Interaction with the courts, social services, probation, the district attorney, and other government agencies to ensure appropriate help to the victim's family.~~

~~(C) Appropriate supervision and treatment, as required by law, for the offender.~~

~~(f) For purposes of this section and Section 1000.12, a program that provides treatment only to offenders and does not provide an integrated program of treatment and assistance to victims and their families is not a recognized treatment program.~~