I. INTRODUCTION

Ashley Morgan’s monologue *Full Circle*\(^1\) explores the difficult subject of child sexual abuse. In 2005 alone, over 83,000 children were confirmed victims of sexual abuse in the United States.\(^2\) This number is staggering. Even more shocking is a 1994 retrospective survey of adults, which suggests that the number of confirmed sexual abuse victims is extremely understated.\(^3\) The survey estimated that at least twenty percent of American women and five to ten percent of American men experienced some form of sexual abuse as children.\(^4\) More alarming than the number of children who are victims of child sexual abuse is understanding who is responsible for the abuse; most children are abused by someone they know and trust,\(^5\) and very often the perpetrators are family members.\(^6\)

This Note will discuss child sexual abuse and related law in the United States. It will then consider some definitional controversies that arise within child sexual abuse statutes. Next, it will examine the problem of prosecuting child sexual abuse cases and explore Children’s Advocacy Centers as one solution to the prosecution problem. Finally, it will address incest loopholes that prevent convicted intrafamilial offenders from receiving the maximum punishment allowed by law.


\(^4\) Id.


\(^6\) Id.
II. CHILD SEXUAL ABUSE AND THE LAW

Child sexual abuse is not a problem of modern import. Indeed, “charity and social workers in the late nineteenth-century United States were familiar with child sexual abuse and knew that [the] most common form of abuse was intrafamilial—that is, incest.”7 Hundreds of child protective agency cases from the late nineteenth century indicate that incest occurred, that these agencies were aware of it, and that they were taking action against it.8

The “child-savers view” of child sexual abuse changed dramatically in the early twentieth century, and “incest was de-emphasized.”9 Child protective agencies continued to see incest cases, but they “obscured” information showing that most acts of child sex abuse occurred within the family.10 “[T]he locus of the problem was moved from home to streets,” the culprit transformed from family member to stranger, and the victim transformed from innocent to sex delinquent.11 This “reinterpretation of child sexual abuse removed scrutiny from family and home, restoring the curtain of impunity that surrounded those sacred institutions.”12

Following the resurrection of nonsexual child abuse as a social problem in the 1960s, incest was again “pulled out of the closet” in the early 1970s.13 Congress began debating child abuse in 1973. These discussions led to the enactment of the Child Abuse Prevention and Treatment Act of 1974 (CAPTA).14 CAPTA allocated federal government resources to prevent of child abuse and neglect, and authorized the Secretary of Health and Human Services to establish an Office of Child Abuse and Neglect.15 Additionally, CAPTA authorized the Secretary to provide federal grants to states for child abuse and neglect prevention and treatment programs,16 as well as programs related to the investigation and prosecution of child abuse and neglect cases—“particularly cases of child sexual abuse.”17 Importantly, CAPTA placed significant emphasis on reporting child abuse crimes18 and provided

8 Id. at 57.
9 Id.
10 Id. at 58.
11 Id. at 57–58.
12 Id. at 58.
13 Id. at 56.
15 Id.
16 Id. § 5106(a)(1)(c).
17 Id. § 5106(c)(a)(1).
18 Id. § 5119(a).
funding for states to maintain accurate child abuse information for criminal
background checks.\textsuperscript{19}

To date, CAPTA is the primary source of federal law addressing child abuse.
CAPTA has been amended and reauthorized several times.\textsuperscript{20} It was most recently
amended and reauthorized on June 25, 2003, by the Keeping Children and Families
Safe Act of 2003.\textsuperscript{21} States responded to CAPTA by enacting state laws prohibiting
child sexual abuse, and by 1986 all fifty states and the District of Columbia had
enacted statutes identifying child sexual abuse as criminal behavior.\textsuperscript{22} Additionally,
each state has added child abuse reporting laws.\textsuperscript{23} Thus, laws criminalizing child
sexual abuse in the United States are primarily creatures of state statute.

### III. DEFINITIONAL CONTROVERSIES

The definition of child sexual abuse under CAPTA is rather broad. The Act
provides:

> [T]he term ‘sexual abuse’ includes—(A) the employment, use, persuasion, inducement, enticement, or coercion of any child to engage
in, or assist in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of
producing a visual depiction of such conduct; or (B) the rape, and in cases of caretaker or inter-familial relationships, the statutory rape,
 molestation, prostitution, or other form of sexual exploitation of children, or incest with children.\textsuperscript{24}

Importantly, Congress included incest in the Act’s definition of child sexual abuse.

“Within the minimum standards set by CAPTA, each State is responsible for
providing its own definitions of child abuse and neglect.”\textsuperscript{25} Statutory definitions of
child sexual abuse vary by state. Each state includes sexual abuse in its definition
of child abuse,\textsuperscript{26} however, some state statutes refer specifically to various acts of
sexual abuse, while others address sexual abuse only generally.\textsuperscript{27}

\textsuperscript{19} Id. § 5119(b).
\textsuperscript{20} Child Welfare Information Gateway, About CAPTA: A Legislative History,
\textsuperscript{21} 42 U.S.C.A. at §§ 5101–5119(c) (West 2009).
\textsuperscript{22} National Center for Victims of Crime, supra note 5.
\textsuperscript{23} Donna M. Pence & Charles A. Wilson, Reporting and Investigating Child Sexual
Abuse, 4 SEXUAL ABUSE CHILD. 70, 71 (1994).
\textsuperscript{24} 42 U.S.C.A. § 5106(g)(4) (West 2009).
\textsuperscript{25} Child Welfare Information Gateway, State Definitions of Child Abuse and Neglect,
http://www.childwelfare.gov/can/defining/can.cfm (last visited Apr. 17, 2009).
\textsuperscript{26} CHILD WELFARE INFORMATION GATEWAY, DEFINITIONS OF CHILD ABUSE AND
Statutes prohibiting child sexual abuse only generally are often underinclusive. As Douglas Besharov stated, sexual intercourse “may be only the last step in a steadily worsening situation. For this reason and because of their inherent harmfulness, state laws should explicitly refer to lesser acts of sexual abuse, such as exhibitionism or improper sexual touching or contacts. They should enumerate specific acts . . . .”28 A statute which fails to prohibit specific acts also precludes the state from punishing an individual for those acts, thereby failing to adequately protect victims.

General child sexual abuse statutes can be overinclusive as well. A statute only generally prohibiting child sexual abuse may bring within its reach parents and caretakers who innocently touch their children. Thus, states should limit child sexual abuse to situations where the purpose of the touching is for sexual gratification.29 A state that does not explicitly provide such limitations may unintentionally illegalize behavior not intended to be reached by the statute.

In order to avoid these “definitional controversies”30 states with general child sexual abuse statutes should work to enact more specific statutes. “More specificity in the actual definition of child sexual abuse will . . . lead to more appropriate reporting.”31 Additionally, states and victims will benefit because all inappropriate acts with a child would be prohibited, and laws against such acts could be enforced.

IV. THE PROSECUTION PROBLEM

Lack of statutory specificity is not the only problem for child sexual abuse victims seeking protection from the law. Compared to other forms of child abuse, a higher percentage of sexual abuse reports are substantiated.32 Yet child sexual abuse is rarely prosecuted. “More than 90 percent of all child abuse cases do not go forward to prosecution” and the unfortunate result is that many suspects are released without further intervention by law enforcement or the justice system.33

systemwide/laws_policies/statutes/defineall.pdf.

27 Id.


29 Id. at 142–43.

30 Finkelhor, supra note 3, at 33.

31 Besharov, supra note 28, at 142.

32 Finkelhor, supra note 3, at 32. To substantiate (or support) a charge of child sexual abuse, a state child protection agency must believe and have evidence demonstrating that abuse occurred. Id.

Such cases may not be prosecuted for a number of reasons including “inability to establish the crime, insufficient evidence, unwillingness to expose the child to additional trauma, and the belief that child victims are incompetent, unreliable, or not credible as witnesses.”

“[C]hild sexual abuse is often exceedingly difficult to prove” as the evidence in such cases is sparse. “Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim.” Indeed, child sexual abuse cases with lower rates of prosecution “involve children who have no medical findings, who are younger, whose perpetrator lives in the home, and whose non-offending parent does not support them.”

The prosecutor dealing with a child sexual abuse case is in a conundrum. The prosecutor must prove his case beyond a reasonable doubt, and “[t]he criminal justice system’s mandate does not focus on the needs, wants, or interests of the child victim or family.” While the criminal justice system does not focus on the child victim or the family, the prosecutor may consider them in determining whether to prosecute. Thus, a prosecutor may decline to prosecute where “the probability of obtaining a conviction does not justify subjecting victims and their families to the stress of prosecution.”

Prosecutors might also decline to prosecute child sexual abuse cases that are already being dealt with in the child welfare system. This is a particular problem for a victim who was sexually abused by a family member, since child welfare agencies investigate intrafamilial abuse, while police departments focus on extrafamilial abuse. Because cases in the child welfare system focus more on the family than the perpetrator, the child is also more likely to be removed from the home. The best solution to this problem is for a prosecutor to decide to prosecute child sexual abuse cases whenever there is sufficient evidence, regardless of whether the case is also being handled by the child welfare system.

35 John E.B. Myers, Adjudication of Child Sexual Abuse Cases, 4 SEXUAL ABUSE CHILD., 84, 84 (1994).
39 Delores D. Stroud et al., Criminal Investigation of Child Sexual Abuse: A Comparison of Cases Referred to the Prosecutor to Those Not Referred, 24 CHILD ABUSE & NEGLECT 689, 698 (2000).
40 Cross et al., supra note 36, at 326.
V. CHILDREN’S ADVOCACY CENTERS: ONE SOLUTION

Children’s Advocacy Centers are one solution to the problem of prosecuting child sexual abuse cases. CACs are agencies which “aim to improve the process of criminal justice investigations for children by making the experience more child-friendly and by coordinating the efforts of different investigators.” Research suggests that CACs may assist in providing better outcomes in sexual abuse cases. CACs aid in obtaining a clear disclosure of abuse from the child through forensic interviewing. The CAC model requires forensic interviews to be “of a neutral, fact-finding nature.” CACs also focus on improving forensic interviews. They are “taking care to enhance the value of the child’s report as evidence of a crime,” and these interviews are recorded to avoid duplication, making the experience less traumatic for the child-victim. A 2001–03 study found that most children interviewed by CACs had fewer than two interviews. CACS were also more likely than comparison communities to conduct their interviews in “a child-friendly environment.”

CACs assist the prosecution in obtaining crucial physical evidence of child sexual abuse. The CAC model also emphasizes medical evaluations. “Specialized medical evaluation and treatment are to be made available to CAC clients as part of the team response, either at the CAC or through coordination and referral with other specialized treatment providers.” In the 2001–03 study, forty-eight percent of the CAC sample received sexual abuse examinations compared to twenty-one percent in the comparison sample. In fact, some CACs have in-house doctors to provide immediate examinations. Moreover, the 2001–03 study indicated that CACs “have the effect of promoting examinations for more children with suspected sexual abuse.” Thus, CACs are more likely to obtain sexual abuse examinations than other comparison organizations.

---

42 Cross et al., supra note 36, at 325.
43 Kathleen Coulborn Faller & Vincent J. Palusci, Children’s Advocacy Centers: Do They Lead to Positive Case Outcomes?, 31 CHILD ABUSE & NEGLECT 1021, 1027 (2007).
45 Chandler, supra note 41, at 333.
46 Id.
47 Id.
48 Faller & Palusci, supra note 43, at 1026.
49 Id.
50 National Children’s Alliance, supra note 44.
51 Id.
52 Faller & Palusci, supra note 43, at 1025.
53 Id.
54 Id.
CACs still have room for improvement, but research suggests that they can have a positive impact on the prosecution of child sexual abuse. “Prosecution of child sex abuse relies heavily on whether the child provides a clear disclosure of abuse and whether an appropriate medical evaluation was performed, and CACs aid critically in both of these issues.”55 Because Children’s Advocacy Centers offer improved evidence-gathering techniques and support for victims, they are likely to result in higher prosecution rates and should be utilized in every case of child sexual abuse.

VI. SLIPPING THROUGH INCEST LOOPHOLES

“The statistics about child sexual abuse remain what they were a century ago: the most dangerous place for children is the home, the most likely assailant their father.”56 Yet the successful prosecution and conviction of an intrafamilial child sexual abuse offender does not guarantee that such offender will receive the appropriate punishment. As stated, all states have laws criminalizing child sexual abuse. But where an offender is the child-victim’s family member, “many states allow the prosecutor to file charges under the incest statute, rather than under [the child] sexual abuse statute.”57 Incest convictions often carry far less significant penalties.58

States and prosecutors should make every effort to close incest loopholes. States should amend their statutes to require child sexual abuse to be prosecuted under child sexual abuse statutes. Additionally, until state statutes reflect these changes, prosecutors should prosecute child sex offenders under sexual abuse laws, rather than incest laws. Sexual abuse against a child should be subject to uniform punishment, regardless of whether the offender and the child are related.

VII. CONCLUSION

Child sexual abuse and incest are not new concerns, although they have been “pulled out of the closet” in recent decades. The federal government and every state in the Union have reacted by enacting statutes criminalizing child sexual abuse. But in spite of these statutes, many child sexual abuse cases have not been prosecuted due to the high standard of proof and lack of evidence. However, the CAC model has emerged to assist prosecutors in obtaining critical evidence in child sexual abuse cases. Still, as the example of incest loopholes suggest, the

55 Miller & Rubin, supra note 38, at 17.
56 Gordon, supra note 7, at 61.
58 For an in-depth discussion of statutory schemes involving incest loopholes, see id. at 145–48.
states still have a long way to go to ensure not only that child sexual abuse offenders are prosecuted and convicted, but also that these offenders are punished to the fullest extent of the law.