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INTRAFAMILY CHILD SEXUAL ABUSE: EXPLORING SENTENCING ALTERNATIVES TO INCARCERATION

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LEGISLATIVE REFERENCE BUREAU

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FOREWORD

This report was prepared in response to Senate Concurrent Resolution No. 107, S.D. 1, which was adopted by the Senate and the House of Representatives during the Regular Session of 1988, and Senate Resolution No. 117, S.D. 1, which was adopted by the Senate in the same session. The report examines the subject of post-conviction sentencing alternatives to incarceration of persons who have sexually abused children.

The information, findings, and recommendations presented in this report could not have been developed without the expertise of the advisory group appointed under the resolutions. The views expressed in the report, however, are not necessarily the views of the advisory group or of its individual members.

SAMUEL B. K. CHANG
Director

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STATE OF HAWAII

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Chapter 1

INTRODUCTION

If I had my druthers, when it comes to the death penalty, it should be reserved for hired killers, rapists and child molesters.

-Harold Falk, Director, Hawaii
Department of Corrections¹

In most cases [of father-daughter incest], if appropriate therapy is available, a long suspended sentence [for the convicted father] with mandatory treatment as a condition of probation is the most constructive choice.

-Judith Herman, Psychiatrist, Somerville,
Massachusetts²

I don't know if those guys [convicted child sexual abusers, including incest offenders] wouldn't be as free from future offenses if they spent one or two years in jail as they would by being in a community treatment program.

-Lucy Berliner, Social Worker,
Seattle, Washington³

Scope of the Study

The sexual abuse of children, says a leading researcher, is a "profound and troubling problem."⁴ The following study barely scratches the surface of the hotly debated subject of child sexual abuse. The study presents background information pertinent to assessing alternatives to incarceration of convicted intrafamily child sexual abusers.

S.C.R. No. 107, S.D. 1, adopted by the Senate and House of Representatives of the State of Hawaii during the Regular Session of 1988, and S.R. No. 117, S.D. 1, adopted by the Senate in the same session (see Appendices A and B, respectively), request the Legislative Reference Bureau (hereinafter Bureau) to "study post-conviction sentencing alternatives to incarceration that can be applied by the criminal justice system in cases of intrafamily child sex abuse."

The resolutions ask that the study determine the effectiveness of the sentencing alternatives "in achieving the following objectives in the order of priority in which they are listed":

- (1) Preventing revictimization of the child or other children;
- (2) Rehabilitating the offender and the offender's family; and
- (3) Punishing the offender.

The resolutions request that the study include in its findings and recommendations, but not be limited to:

- (1) The legislation, if any, that should be enacted to provide for sentencing alternatives;
- (2) The programs that should be established to deal with intrafamily child sex abuses [sic]; and
- (3) The estimated cost of those programs and recommendations....

In chapter 2, the present study summarizes the "state of the art" in child sexual abuse. Chapter 3 outlines Hawaii's current statutory scheme for dealing with child sexual abuse. Chapter 4 summarizes the rationales for sentencing alternatives, provides a sampling of those alternatives, and explains the difficulties in evaluating alternatives. The fifth chapter contains findings and recommendations.

The study makes four recommendations:

- (1) For policy development purposes, the Children's Advocacy Center of the Judiciary should develop precise definitions of intrafamily and extrafamily child sexual abuse that specify the meaning of "family" and "child" and that identify the crimes included in the definitions;
- (2) The Children's Advocacy Center should implement the system it is currently developing for tracking the progress of intrafamily and extrafamily child sexual abuse cases through the child protective and criminal justice systems, focusing particularly on improving Hawaii's capacity to measure recidivism;
- (3) Proponents of any new legislation establishing, expanding, or enhancing alternatives to incarceration for convicted intrafamily sexual abusers of children should carefully evaluate whether to include not only intrafamily offenders but also extrafamily offenders in the pool of potentially eligible offenders; and
- (4) The Children's Advocacy Center should evaluate the benefits, costs, and feasibility of implementing a media program designed to inform children and adults of children's right to be free from sexual abuse and of where to turn for help.

This study takes no position on most of the core policy issues surrounding sentencing, such as whether community-based mental health treatment of child sexual abusers is preferable to lengthy incarceration. This tentativeness reflects the limited empirical evidence, complex variables, diverse theories, and conflicting beliefs that exist concerning the causes, effects, prevention, treatment, and legal management of child sexual abuse.

The luxury of tentativeness, however, is not available to child protective workers, police officers, prosecutors, defense attorneys, judges, corrections officials, therapists, and others who labor in the front lines of the child sexual abuse war. And tentativeness stymies legislators and other

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policymakers faced with public demands for action. But the field of child sexual abuse is embryonic. For this study to have taken a stand on the fundamental policy dilemmas in child sexual abuse would have required making a choice--albeit an educated one--among the experts' often conflicting impressions and beliefs. Doing so would have forced the Bureau to abandon its statutory obligation of impartiality.

Nevertheless, legislators considering the alternative sentencing issue must make choices. Empirically, much about child sexual abuse--including the effectiveness of sentencing alternatives--is uncertain and may well remain so. Thus, legislators must turn to the front line people for guidance. Equally important, legislators should seek the advice of survivors of child sexual abuse. Their views can be worth thousands of pages of studies.

One writer comments: "It is not possible to write dispassionately about incest."⁵ This observation could apply to other types of child sexual abuse as well. Real-life accounts of abuse can "make your hair stand on end." But for objectivity's sake, the intent was to screen personal emotion from this study. This choice should not be misinterpreted as indifference to the often devastating impact of child sexual abuse on victims, their families, and offenders.

Emergence of Child Sexual Abuse as a National Issue

During the past decade, the attention of the public, of the helping professions, and of government to the sexual abuse of children has increased dramatically.

Reports of child sexual abuse have been rising. Simultaneously, there has been increased activity concerning child sexual abuse in many fields, such as research, education, treatment, social services, and law.

National media coverage has been given to numerous cases involving allegations of child sexual abuse, both intrafamilial and extrafamilial.

This study cannot easily convey the state of shock into which disclosure of sexual abuse can plunge a family. Judith Herman paints a vivid picture of one type of child sexual abuse, father-daughter incest:⁶

Unfortunately, given the current state of law enforcement, child protective services, and the mental health professions, the child victim has good reason to fear exposure. Too often, because of bias and ignorance within the helping professions and the criminal justice system, the intervention of outsiders is destructive to both parents and child....

All experienced workers agree that the disclosure of the incest secret initiates a profound crisis for the family. Usually, by the time the secret is revealed, the abuse has been going on for a number of years and has become an integral part of family life. Disclosure disrupts whatever fragile equilibrium has been

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maintained, jeopardizes the functioning of all family members, increases the likelihood of violent and desperate behavior, and places everyone, but particularly the daughter, at risk for retaliation.

Traditionally, the response to particular reports of intrafamily child sexual abuse has occurred primarily through the following mechanisms:

State child protective agencies. Here the focus is on whether the child victim of abuse should be removed from the home and placed in some form of custodial care, for the child's own protection.

Police departments. The police investigate reports of child sexual abuse for possible action by prosecutors.

County prosecutors. Here the focus is on determining whether criminal charges should be brought against the person suspected of child sexual abuse, and, if the case is prosecuted, on obtaining a conviction.

Courts. In connection with child-protective or prosecutorial activity, the criminal, juvenile, and family courts review evidence and make rulings. In addition, the civil courts are beginning to hear lawsuits filed by or on behalf of persons who claim to have been the victims of child sexual abuse.

Correctional programs. A conviction may result in incarceration (with or without parole options), probation, or other disposition.

Mental health programs. Sometimes there is mental health treatment of the abuser, of the child victim, and/or of other persons affected by the abuse (e.g., the nonabusing parent in an intrafamily case). Treatment may take place in the community, in a mental health institution, or even in a prison.

Accompanying the increased attention to child sexual abuse has been a growing feeling that society's traditional interventions in such cases were ineffective. Perceived deficiencies in the traditional approach to intrafamily abuse--particularly abuse by fathers of their daughters--are nicely summarized by staff members of the Boulder County (Colorado) Child Sexual Abuse Treatment Program:⁷

1. The victim was subjected to numerous interviews where she was asked to recount the details of the sexual experience often to untrained or insensitive interviewers.
2. Sudden arrest and jailing of the perpetrator often placed the family in economic crisis and forced the mother and children to turn to public assistance for financial support.
3. Law enforcement investigation focused on building a criminal case against the perpetrator which made it difficult to get a confession, and with counsel, the perpetrator was often advised not to talk. This not only pitted father against daughter, but

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also reinforced his denial and inhibited the initiation of treatment.

4. Long-term foster care was used as part of the victim's treatment program. Often, however, the victim wanted to return to the home after a short period of time. The long separation from family reinforced her feelings of guilt and responsibility for the abuse and her removal was perceived by her as punishment.
5. The victim was blamed for talking about the family secret and the ensuing family disruption. The family pressured her to retract her statements or to withhold her testimony, adding further to her traumatization.
6. Offenders were often acquitted, because "incest" was considered hard to prove. The victim had to testify in court, often without family support. Unsuccessful prosecutions not only cost the criminal justice system time and money, but also gave the family permission to continue to deny the problem and blame the victim.
7. Newspaper coverage of the family situation was detrimental by increasing the social disgrace and trauma to the family.
8. If the perpetrator was incarcerated, there was seldom treatment and, upon release, the chance for recidivism was high. The victim blamed herself as did the rest of the family, continuing the punishing effect.
9. Intervention had a negative impact upon victims; many became runaways, suicidal, emotionally distraught, or involved with delinquent behaviors, such as prostitution or drug abuse.
10. Counseling for the family was sparse or frequently absent, particularly if the perpetrator was out of the home. The mother and other family members seldom received treatment, leaving the family in shambles.

Recently, important efforts have been made to improve the ability of one or more of these mechanisms--as well as involved family members and society as a whole--to intervene effectively in child sexual abuse. Many of these efforts focus particularly on intrafamily cases. Here is a sampling of the new developments:

1. Increased research into the causes of child sexual abuse, its effects on victims, its diagnosis, its treatment, and prevention;
2. Increased education concerning child sexual abuse for the police; for prosecutors; for judges; for persons working in child protection, health care, mental health, education, corrections, and other fields;

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3. Increased education concerning child sexual abuse for the public, including children (e.g., how to recognize child sexual abuse, where to seek help);
4. Special measures to protect the child victim from the trauma of criminal proceedings (e.g., videotaping the child's testimony so that the child need not testify in open court; reducing the number of times the child must be interviewed; and vertical prosecution, in which a single prosecuting attorney handles a child sexual abuse case from start to finish);
5. Special measures to ensure that the child's interests are fully represented in court proceedings, such as the appointment of a guardian ad litem;
6. Reforms designed to increase the likelihood of convicting abusers (e.g., allowing hearsay testimony; eliminating the requirement that child's testimony be corroborated; and establishing child sexual abuse units within the prosecutor's office);
7. Alternative approaches to prosecution and disposition of child sexual abuse cases. Alternatives include pre-trial diversion programs in which the prosecution of a criminal charge relating to child sexual abuse is "put on hold" while the alleged offender receives, e.g., mental health treatment; and alternative sentencing, such as probation and mental health treatment instead of incarceration;
8. Increases in the powers of child protective agencies to cope with child sexual abuse (e.g., giving the agencies statutory authority to obtain from the civil courts an order barring the intrafamily offender from the home; traditionally, such authority was reserved for the criminal process, where stricter standards of proof apply);
9. Development of special mental health programs providing comprehensive treatment, including crisis management and long-range help, for intrafamily child sexual abuse victims and their families. Such a program may be based in a private organization, in a court, in a child protective agency, or in some other suitable site;
10. Growth of organizations of parents, such as Parents United and Families Re-united, in which self-help combined with assistance from professional counselors provides support and rehabilitation of families afflicted with sexual abuse;
11. Coordination/integration of agencies and programs dealing with child sexual abuse (e.g., coordination of the prosecutor's office with the child-protective agency; coordination of the juvenile, family, and criminal courts). In some communities, coordination is quite sophisticated, embracing virtually every concerned agency, court, and treatment program.

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Definitions

The field of child sexual abuse is riddled with definitional problems. There are differing definitions of "child sexual abuse" and "intrafamily." These inconsistencies run through the social science research and find their way into statutes. Chapter 3 of the present study highlights some specific inconsistencies in the Hawaii Revised Statutes, including ambiguity as to whether age 18 or age 16 is the cutoff date for a "child," and as to the precise meaning of "family." Additional problems arise from the wide variety of terms used--often inconsistently--to describe the pertinent behaviors: e.g., "sexual abuse," "incest," "child molestation," and "pedophilia."

Given this confusion, it seems prudent to avoid hard and fast definitions of child sexual abuse, intrafamily child sexual abuse, and related terms for purposes of this study. In some instances below, a specific definition used by a researcher is given when referring to his or her research. Or a statutory definition may be highlighted for discussion purposes. The definition of sexual abuse of children used in the federal Child Abuse Prevention and Treatment Act,⁸ which spans a wide variety of behavior including child pornography, rape, molestation, incest, prostitution, and other harmful "sexual exploitation,"⁹ provides a useful guide. Generally, the social sciences research discussed in the present study appears to focus on sexual abuse conducted not primarily for financial profit but rather for the personal gratification of the offender.

In this study, "sexual abuse" or "abuse" are sometimes used as shorthand for "child sexual abuse."

A word about "sentencing alternatives to incarceration." In theory, this phrase could include capital punishment or castration. But in the literature and in practice, the phrase does not include such drastic measures. Rather, it includes probation, community treatment, restitution, or other alternatives generally seen as "milder" than incarceration. It is those "milder" meanings that are covered in this study.

Chapter 2

CHILD SEXUAL ABUSE: A FIELD IN ITS INFANCY

The Limitations of Current Knowledge

In 1956, the noted psychologist Albert Ellis wrote:¹

What is presently known about sex offenders and the offenses they commit is infinitesimal compared to the lack of knowledge in this regard which is now prevalent. More research, still more research, and still more research again is vitally needed at the present time; and only after such research is at least partially completed will many of the serious problems involved in sex offenses begin to be seen in their true light, and possible solutions to them begin to become apparent.

In 1959, a report of the Hawaii Governor's Committee on Sex Offenders, studying violent sex crimes and sex crimes against children, concluded:²

At the present stage of knowledge and research...there are only scattered bodies of scientifically validated evidence as to the cause, prevention, and cure of illegal sex behavior.... The most that can be said is that there are many assumptions in this field, some resulting from carefully gathered but fragmentary pieces of circumstantial evidence, while others are essentially unsubstantiated conclusions. Much of the confusion characterizing the varying approaches to this highly complex problem appears to have been fostered by failure to distinguish between assumptions and facts.

Time has worked no miracles. In 1982, Susan Meyers Chandler of the School of Social Work at the University of Hawaii wrote of child sexual abuse:³

The literature on the sexual abuse of children is still a potpourri of untested theories, poorly designed studies, single-case insights, and a research tradition based on small clinical samples, making generalizations difficult and resulting in a weak knowledge base for social work practice.

In that same year, Jon R. Conte, another social work expert, observed:⁴

We desperately need rigorous research on virtually every aspect of sexual abuse.... While there exist ample descriptive reports (e.g., presenting the ages of children who are sexually abused or the relationship of child victim to offender), there has been little controlled research which compares various subgroups of victims and/or offenders on some set of variables. Nor has there been much research which employs actual measurement of the variables under consideration. [Emphasis in original.]

In 1986, David Finkelhor's A Sourcebook on Child Sexual Abuse⁵ was published. Finkelhor, a sociologist, is a highly respected expert on child sexual abuse who is Associate Chair of the Family Research Laboratory and Associate Director of the Family Violence Research Program at the University of New Hampshire. His work has been funded by the National Center on Child Abuse and Neglect, the National Center for Prevention and Control of Rape, the National Institute of Mental Health, and other sponsors.

In Sourcebook, Finkelhor meticulously reviews the scientific research on child sexual abuse. It is abundantly clear from Sourcebook that the field is still in its infancy. The available research, Finkelhor says, "is plagued by inadequate samples, oversimplistic research design, conflicting definitions, and unsophisticated analyses."⁶ Thus, assumptions and theories about child sexual abuse still are largely unsubstantiated. Indeed, Finkelhor says that the empirical research dealing with sexual abusers "is so flawed with conceptual and methodological problems that there is good reason to question virtually everything this accumulated work reveals."⁷ Finkelhor, like Ellis 30 years earlier, calls for more research. He recommends specific strategies for improvement.⁸

But improved research in the future does not help policymakers now. Furthermore, there is no assurance of substantial improvement in the research. Finkelhor himself says:⁹

Sexual abuse is an extremely difficult problem to study. Because of the shame and stigma that surround it, victims, offenders, and their families are not eager and cooperative research subjects. Ethical dilemmas hamper and complicate many direct and simple approaches to answering important questions.

Other obstacles to research include: the need for professionals to focus instead on clinical emergencies; decreased federal funds for research; and the fact that sexual abuse does not fall squarely within a single established field such as psychiatry or criminology.¹⁰

It is important to note that, as Chandler puts it, "there are different knowledge-generating approaches"¹¹ to understanding sexual abuse. One is the empirical research approach. The research studying victims, for example, "searches systematically for observable trends among a large sample of victims, seeking to uncover patterns or similarities generalizable to a wider population."¹² At the heart of the empirical approach is the attempt to objectify, standardize, and quantify information.¹³

The other approach is clinical observation:¹⁴

Clinical observation provides rich and detailed case material from which a practitioner can learn and develop theories about the types of persons who are typically seen as victims, the dynamics of particular cases, the types of activities which can be most traumatizing, and the types of therapies or counseling strategies which seem to successfully reduce stress and bring about healthy functioning. Clinical observations, which are usually based on small samples, are extremely important in a clinician's own practice

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and in generating questions to be investigated through research. However, they have a potential for a variety of weaknesses such as reporting biased and selective findings based on small samples.

Thus, clinical observations and the theories generated through them can contribute to understanding child sexual abuse, but they are arguably "softer" than empirical findings and empirically based theories. Paradoxically, they could turn out to be more accurate and insightful than empirical approaches.

Professionals who treat child sexual abuse offenders, victims, and families--often on an emergency basis--must choose a direction based on limited scientific knowledge combined with their own (or other professionals') clinical observations, assumptions, beliefs, and theories. If they choose a direction that happens to be "correct" for the patient, they can do much good. Otherwise, the treatment will not help, and may even harm, the patient.¹⁵

There are many types of theories that seek to explain child sexual abuse. For example, Vander Mey and Neff divide theories of incest into anthropological, psychological, sociological, ecological, and feminist theories. They further subdivide those perspectives (e.g., they divide anthropological theories into social organization theories, biological impossibility theories, aversion theories, genetic theories, and role confusion theories).¹⁶

Besides, within each of the disciplines that address child sexual abuse--e.g., psychology, psychiatry, sociology, social work, criminology--there are widely differing schools of thought concerning why people behave as they do and concerning whether, when, and how society should attempt to control human behavior. So even improved research on child sexual abuse would be subject to various interpretations.

Both empirical research and clinical observations about child sexual abuse are severely limited. Theories, beliefs, and assumptions differ and lack proof. Thus policymakers will for a long time, perhaps indefinitely, have to live with uncertainty.

This does not necessarily mean that no changes can or should be made in Hawaii's system for managing intrafamily child sexual abuse. But it does mean that:

- (1) Decisions on whether and how to change Hawaii's system must be based largely on opinions--even hunches; and
- (2) Reform of Hawaii's system carries no guarantee of success and could even make things worse.

These conditions, of course, apply to many areas of public policy.

Magnitude

Researchers express the magnitude of child sexual abuse as (1) incidence, "the number of new cases occurring in a given time period, usually

a year,"¹⁷ [emphasis in original] or (2) prevalence, "the proportion of a population that have been sexually abused in the course of their childhood."¹⁸

The magnitude of sexual abuse is not known, either in the nation or in Hawaii. Determining incidence is extremely difficult. Ideally, incidence could be estimated by looking at cases reported to child protective agencies, police, and other professionals. But it is generally accepted that most incidents of child sexual abuse never come to the attention of these entities, because "[t]he nature of the problem--its secrecy and shame, the criminal sanctions against it, and the young age and dependent status of its victims--inhibits discovery and discourages voluntary reporting."¹⁹ So the incidence figures that exist are generally considered to be "a substantial underestimate."²⁰ Perhaps about 10 per cent of victims report their sexual assault to authorities.²¹

Furthermore, even though modern reporting statutes, such as chapter 350, Hawaii Revised Statutes, require health professionals and various other persons to report child abuse within the family--including sexual abuse--to state authorities, they often do not do so.²²

One is reminded of these statements made in 1959 by the Governor's Committee on Sex Offenders concerning sexual felonies against both adults and children:²³

The statistics on convictions for sexual felonies do not reflect the true frequency of such offenses. This is because it is unusually difficult to prove the commission of many sexual felonies. Convincing evidence is frequently lacking. There may be no witnesses. Victims refuse to testify or to press charges, etc. As a result, many persons who have probably committed sexual felonies are convicted for assault and battery or similar charges. Hence, the Committee is unable to draw reliable conclusions about the actual magnitude of the problem of sex offenses as compared with other types of felonies. Accordingly, the Committee is unable to ascertain whether sex offenses warrant preferential concern over other types of felonies for legislative and budgetary purposes. [Emphasis added.]

And from the same report:²⁴

Data are lacking which reveal the true magnitude of the sex offense problem. There is a deficiency of special personnel to gather and interpret such data and to make them available as a basis for programming of services. As a result the responsible agencies are handicapped, and community misunderstandings of the problem are perpetuated.

Systems for gathering crime statistics at the local, state, and national levels have not facilitated the collection and retrieval of accurate information about the incidence of child sexual abuse.²⁵ For example, historically the prosecuting attorney for the City and County of Honolulu tracked sexual

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assault and incest cases, but kept no record of whether the victim was a child.²⁶ (That situation has only recently been remedied.)

Incidence figures for child sexual abuse are rising, but this is generally attributed to "new education, awareness, and professional attention to the problem."²⁷

Seth Goldstein, an investigator for a county district attorney's office in California, points out that in addition to the factors that discourage a child from reporting either extrafamily or intrafamily sexual abuse (e.g., fear of embarrassment, of blame, of punishment, of retaliation), victims of intrafamily sexual abuse face special barriers to reporting. For example, the child abused within the family must struggle with confusion at being betrayed by a loved one; with guilt that if the incident is reported, the loved one may go to jail; and with a desire to protect the family from disruption. Sometimes, Goldstein says, the child will leave home or commit suicide rather than face the agony of reporting the incident.²⁸

In the Honolulu prosecutor's tracking of sexual assault cases, intrafamily cases are not broken out.²⁹ Consequently, it is impossible to ascertain the number of prosecutions of intrafamily child sexual abuse cases brought in the City and County of Honolulu.

Prevalence is a more useful measure than incidence. As a child, the victim may not report incidents of sexual abuse to authorities, so the incidents likely will not show up in incidence statistics. But later, as an adult or near-adult, the victim may reveal the past abuse (e.g., in response to a survey questionnaire). In this way, the abuse enters the prevalence statistics.

Peters and others reviewed the results of 19 prevalence studies conducted over the past 60 years or so, most during the 1980's. They report that the prevalence rate for child sexual abuse varied from study to study, ranging from 6 per cent to 62 per cent for females, and from 3 to 31 per cent for males. Looking particularly at prevalence rates for girls, they suggest several possible reasons for the wide discrepancy, such as differences among the studies in the definition of child sexual abuse, in the population sampled, and in the methods by which the surveys were conducted (such as the types of questions asked).³⁰ There appear to be no surveys providing an estimate of prevalence in Hawaii.

An important question is: Who commits sexual abuse? Conte, along with Lucy Berliner (a social worker specializing in child sexual abuse), studied a sample of 583 sexually abused children and found that fathers were the abusers in 16 per cent of the cases, stepfathers in 15 per cent, other relatives (grandfathers, uncles, brothers) in 15 per cent, "nonrelated parenting figures" such as a mother's boyfriend in 6 per cent, strangers in 8 per cent, "an acquaintance of the child or the child's family" in 35 per cent, and "others" in 2 per cent.³¹ "Among reported cases of [sexual] abuse," says Finkelhor, "90% or more of offenders appear to be men."³² The evidence is strong, he says, that girls are at higher risk for abuse than are boys; how much higher is uncertain.³³

Effects

Clinical literature has linked child sexual abuse to a variety of subsequent psychological, medical, and social problems, some serious. Berliner and Stevens say the effects vary, that some children are "seriously and permanently damaged," that most victims grow up to function adequately as adults, but that the "insidious and often long-term effects on life choices and self-image are extremely difficult to measure."³⁴

In Sourcebook, Browne and Finkelhor reviewed the empirical literature concerning effects on girls.³⁵ (They did not review the effects on boys, explaining that few studies exist on this subject.)³⁶

Here they define child sexual abuse as either "forced or coerced sexual behavior that is imposed on a child" or "sexual behavior between a child and a much older person or a person in a caretaking role."³⁷ Warning that the research is still at a very early stage and that the studies they reviewed could be fatally flawed, Browne and Finkelhor state:³⁸

Summarizing, then, from studies of clinical and nonclinical populations, the findings concerning the trauma of child sexual abuse [of girls] appear to be as follows: In the immediate aftermath of sexual abuse, from one-fifth to two-fifths of abused children seen by clinicians manifest some noticeable disturbance.... When studied as adults, victims as a group demonstrate more impairment than their nonvictimized counterparts (about twice as much), but less than one-fifth evidence serious psychopathology. These findings give reassurance to victims that extreme long-term effects are not inevitable. Nonetheless, they also suggest that the risk of initial and long-term mental health impairment for victims of child sexual abuse should be taken very seriously.

Browne and Finkelhor also reviewed the empirical studies of whether certain types of sexual abuse mean a worse prognosis for the victim. They say that the studies do not agree on a single factor. But there are trends in the studies, they say, suggesting that more trauma is experienced by girls who undergo:

- (1) Longer-lasting abuse;
- (2) Several incidents of abuse;
- (3) Abuse by fathers or stepfathers;
- (4) Abuse by force;
- (5) Abuse by males rather than females; or
- (6) Abuse by adults rather than teenagers.

There is some tentative indication, they say, that when the girl's family is unsupportive of her and/or when she is removed from the home, her prognosis is worse. The studies are unclear, they say, as to the effect on

her prognosis of the girl's age, of the type of sex act involved, of her revealing rather than concealing the abuse, or of the abuse being perpetrated by relatives as opposed to nonrelatives (except in the case of fathers or stepfathers, where the studies suggest a worse prognosis).³⁹

Brown and Finkelhor propose four principal sources of trauma from child sexual abuse: traumatic sexualization (the shaping of the child's "sexual feelings and attitudes" in a "developmentally inappropriate and interpersonally dysfunctional fashion"); betrayal (the children "discover that someone on whom they are vitally dependent has caused them harm"); powerlessness (the "process in which the child's will, desires, and sense of efficacy are continually contravened"); and stigmatization (the "negative connotations--for example, badness, shame, and guilt--that are communicated to the child about the experiences and that then become incorporated into the child's self-image").⁴⁰

Browne and Finkelhor issue two caveats of particular importance. First, they warn that when approaching policymakers, child advocates should not overstate the "intensity or inevitability" of bad effects.⁴¹ Doing so could further victimize sexually abused children and their families. Second, they stress that regardless of whether it causes damage in the child's adult life, child sexual abuse is a "serious problem of childhood, if only for the immediate pain, confusion, and upset that can ensue."⁴²

It also goes without saying that child sexual abuse can cause physical damage, even death; can result in pregnancy; and can transmit sexual diseases.

Furthermore, disclosure of the abuse can subject the child to stress--often over a lengthy period--associated with the civil and criminal processes. There also are risks associated with social work interventions, e.g., the risk that an insensitive worker will "continu[e] to direct casework time to the sexual abuse long after the client is ready to allow the wounds to heal...."⁴³

The complexity of assessing effects of child sexual abuse is aptly illustrated by the following speculation by Conte:⁴⁴

Intercourse with a father may or may not be more traumatizing than a child's being photographed without clothing for pornographic pictures. The child who becomes the victim of an exhibitionist may require more intensive social work interventions than the child who is victimized by an uncle who fondles her/him.

Causation

As noted above, Finkelhor believes that virtually all conclusions derived from empirical research on sexual abusers of children are open to doubt. Apparently, it is not known definitively why some people sexually abuse children. Berliner and Stevens say:⁴⁵

There is no general agreement on what causes an individual to commit a sexual offense. Explanations differ depending on the model

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for understanding human behavior (e.g., psychodynamic, behavioral, or systems theory).

Basically, Finkelhor holds that:

- (1) The studies on sexual abusers tend to have serious methodological problems;
- (2) No single theory (such as the theory that offenders have low self-esteem or the theory that they have hormonal problems) can explain all the different kinds of abuse;
- (3) Single-factor theories may not even be able to explain particular types of abuse; and
- (4) Unquestioning acceptance of oversimplified theories poses great dangers for policymakers and the public.⁴⁶

The fragility of commonly held assumptions about sexual abuse is revealed in Finkelhor's scrutiny of the widely popularized theory that people who sexually abuse children are simply people who were themselves sexually abused as children (the "intergenerational transmission" theory).⁴⁷ Finkelhor says that several studies do suggest that many incarcerated sexual abusers were previously abused themselves. But that does not establish cause and effect, he argues. First, incarcerated offenders are a particular group that "were so repetitive, compulsive, and flagrant in their molesting that they were caught, convicted, and jailed."⁴⁸ Thus, they probably are not a representative group of offenders; findings about them may not be applicable to all abusers.

Second, Finkelhor says, the studies did not use appropriate groups for purposes of comparison. In order to determine whether sexual abusers have a greater amount of sexual abuse in their own backgrounds than non-abusers, they should have been compared with men from the same social backgrounds who did not become abusers. But such comparisons were not made. Thus, the apparent link between being sexually abused and becoming a sexual abuser could actually be a link between some other factor--such as growing up in a disadvantaged neighborhood--and becoming an abuser.

Third, says Finkelhor, even if sexual abusers were shown to have more sexual abuse in their backgrounds than non-abusers have, it is clear that not all abusers were abused. Therefore, being abused does not necessarily make one an abuser. In fact, Finkelhor believes, only a small percentage of abused persons actually become abusers. So there must be other factors at work. For example, it may be that victims who receive "support and comfort"⁴⁹ are less likely to abuse.

One of Finkelhor's most telling points against "intergenerational transmission" is that despite the large number of girls who are sexually abused, relatively few abusers are women.

The danger of accepting without question the assumption that victims become abusers, says Finkelhor, is that it:

- (1) Creates a false sense of security that child sexual abuse is understood, thereby forming a poor basis for public policy and discouraging research into other possible causes of abuse;
- (2) Focuses on deviant events occurring in the childhood of the abuser, thus fostering a pessimistic, "psychopathology-oriented"⁵⁰ view of offenders, to the detriment of sociological theories that might open avenues for preventive action; and
- (3) Very importantly, it frightens victims and their parents into thinking that the victims are doomed to be offenders, and it may even push some victims into becoming offenders.

Araji and Finkelhor suggest simply that four factors be looked at in trying to understand why sexual abusers abuse: (1) the offender's emotional need to relate to a child; (2) the offender's capacity to be sexually aroused by the child; (3) the blockage of the offender's ability to obtain sexual and emotional gratification in adult heterosexual relationships; and (4) the breaking down of the usual inhibitions against sexual involvement with children. They propose further inquiry into those areas by researchers.⁵¹ Conte says simply: "There may be a wide range of 'reasons' that adults sexually misuse children. Additional research is necessary to categorize cases of child sexual abuse into functional typologies which consider all possible variables before classification."⁵²

There is no agreement in the field as to whether sexual abusers of children are afflicted with a mental illness or disorder. Most would say there is no single psychological profile of all offenders. It is generally accepted that offenders come from all walks of life.

Important controversies exist as to the existence and significance of different "psychological types" of offenders. That controversy is complex and cannot be detailed here.

However, one widely known typology should be discussed briefly, since it has important implications for intrafamily child sexual abuse. A. Nicholas Groth, a specialist in the treatment of male sexual abusers of children, proposes that they fall into one of two categories, each of which reflects their "level of socio-sexual maturation."⁵³ First, he says, there are the "fixated" offenders, whose primary sexual orientation is toward children, most often male children. Their compulsive attraction to children goes back to the beginning of their adolescence. They tend to see themselves as children and to relate to the child as a peer. Second, he says, there are the "regressed" offenders, whose sexual development followed a relatively normal path at first, whose primary sexual orientation is toward age-mates, but who "regress" and get sexually involved with children, usually females, when they find adult responsibilities overwhelming or are having problems in their adult relationships, such as their marriage. They tend to use the child as an adult substitute.

But this typology is open to question. Groth bases his conclusions on his experience working with persons who have been identified and convicted. He acknowledges that his sample may be biased, since it draws solely on that

population; still, he feels that his offenders came from a wide enough range of backgrounds to justify his conclusions.⁵⁴ But the possibility of bias is there and creates doubt about his typology. The lesson is that Groth's typology and other typologies should be viewed with great caution.

Are intrafamily offenders different from extrafamily offenders? It is difficult to say. One theory that gained currency was that incestuous fathers--one type of offender--tend to be of the "regressed" type, molesting only their own children, and then only in response to marital problems or other stresses. This theory is now being sharply challenged. Some say that at least some incestuous fathers, perhaps all, are in fact fixated on children, that many of them have a considerable history of child sex abuse, and that their contacts are not limited to children within their family. Seth Goldstein paints one scenario (here his "preferential" child molester is roughly equivalent to Groth's "fixated" child molester):⁵⁵

It has become commonly accepted that incestuous fathers are typically regressed child molesters who molest only their own children, do not collect child pornography, and are best dealt with in noncriminal treatment programs. However, there are cases in which the incestuous father appears to be a...preferential child molester...who married simply to gain access to children. In many cases, he has molested children outside the marriage or children in previous marriages.

Such individuals frequently look for women who already have children who meet [the molester's] age and gender preferences. Their marriages usually last only as long as there are children in the victim target range. Examination of the background of the offender who is married is extremely important to determine if there is a pattern and if there are any other children who might have been or who are presently at risk.

There are documented cases where an individual has married into a family for the express purpose of molesting children in that family. For example, if an offender prefers girls in the 13-to-16-year-old range, whom better to marry than a divorcee with three girls 6, 9 and 13 years old? As soon as the offender establishes himself within the family, he will begin to molest the oldest. When she grows out of the age range, he turns to the middle sister. When she grows out of his range, he turns to the youngest. This is often when the case comes to light, because the oldest daughter, seeing the attention given to her youngest sister, decides that he isn't going to do the same thing to her, totally unaware that the middle sister has also been molested.

In today's more liberal society, such an offender frequently no longer marries the woman, but simply moves in with her and her children. On some occasions, he merely befriends the mother and does not even pretend to have a romantic interest in her but only expresses a desire to be a "father figure" for her children. Another technique is to marry a woman and adopt children or take in foster children. The last and least desirable technique for the

preferential child molester who uses marriage to gain access to children is to have his own children. It is the least desirable method because it requires the offender to have sex with his wife and because there are no guarantees that the baby she bears will be of the preferred sex.

Conte says:⁵⁶

There is little data which inform questions about the similarities or differences in intrafamily versus extrafamily sexual abuse....

* * *

There is some evidence to indicate that incestuous and nonincestuous child molesters share more in common than there is that separates them....

Part of the belief that intrafamily sexual abuse is different than extrafamily sexual abuse is the belief that incestuous fathers tend not to involve children outside of their family as sexual objects, and the incestuous behavior begins as husband-wife sexual contact terminates. Although representative data is lacking, there is evidence to suggest that the pattern is more complex than this. In fact, there is great variation in whether men have exclusive or multiple sexual relations with their daughters, other children outside the home, and their wives....

* * *

To date there is insufficient evidence to make a decision about whether the choice of the child sexual object (family member or not a family member) reflects a real difference in types of pathology or happenstance. What would seem more plausible is that in some cases sexual abuse of children is related to dynamics within the family, and in other cases it is not....

Recidivism; Effectiveness of Offender Treatment

Finkelhor says:⁵⁷

[A] serious shortcoming in the sex-offender literature is the scant attention given to the study of sex-offender recidivism. The most important public policy question for judges, prosecutors, defense attorneys, and therapists who work with sexual abuse cases is how likely child molesters are to reoffend after they have been caught and punished. One point of view within the criminal justice community tends to see child molesters as incorrigible; long prison sentences for offenders, then, are the only way to protect the community. Others, however, take a more optimistic view. They hold that being caught deters many offenders from risking the crime again and that, especially when treated, these offenders have a fairly high probability of long-term reform. Unfortunately, there is painfully little evidence to resolve this debate fully. Only a few

efforts have been made to follow up identified child molesters over a period of time to find out whether or not and under what conditions they do continue to offend.

The few available follow-up studies, says Finkelhor, are badly flawed. For example, they:

- (1) Mix child molesters in with other sex offenders;
- (2) Reflect only those subsequent offenses that the authorities learn about and sometimes they reflect only offenses leading to convictions (so probably they seriously underestimate the re-offense rate);
- (3) Study only incarcerated offenders, a biased sample that tends to be made up of men whose molesting inclinations are seriously out of control (and who have a propensity for other crimes as well); and
- (4) Tend not to use long-term follow-up, so they miss many offenses.⁵⁸

Finkelhor says that the research tends to show that exhibitionists and abusers of boys are most subject to recidivism, and that recidivism rates are low for incest offenders. But he issues strong warnings about these findings. First, he points out that incest offenders sometimes molest outside the family as well. Second, he says that although fathers who abuse their daughters may stop doing so as the child grows older or better protected, later in life the fathers may molest again, with grandchildren and nieces. Third, he says that families are particularly reluctant to report subsequent offenses by a relative (e.g., the husband-father), even when the relative has been previously convicted.⁵⁹

The clearest conclusion from all the recidivism studies, says Finkelhor, is simply that "a history of prior offenses creates greater risk for future offenses."⁶⁰

But perhaps the most important question, Finkelhor says, is whether treatment of offenders reduces recidivism.⁶¹ His conclusion: "The fairest judgment at the present time is that good treatment programs for child molesters have not been evaluated yet in terms of their ability to reduce long-term recidivism."⁶² [Emphasis added.] He calls for better studies, to answer such questions as whether the offender and the victim should be separated once discovered; whether it is safe to reunite incestuous fathers with their families; whether offender treatment works, and if so, what kind is most effective; whether longer sentences reduce recidivism; and whether pre-trial diversion programs or post-conviction treatment is more effective.⁶³

Risk Factors

Warning that the studies of risk factors for child sexual abuse tend to lack depth and sophistication, and that their findings are not yet confirmed, Finkelhor notes some "emerging consistencies." The studies suggest that:

- (1) Girls are more at risk than boys;

- (2) Pre-adolescents are at higher risk than children younger or older than that; and
- (3) Victim girls are more likely than non-victim girls "to have lived without their natural fathers", "to have mothers who were employed outside the home," "to have mothers who were disabled or ill," "to witness conflict between their parents," "to report a poor relationship with one of their parents," and to have lived with stepfathers.⁶⁴

Finkelhor says that the studies strongly suggest that being black is not a risk factor.⁶⁵ Nor are girls from lower social strata at higher risk than other girls.⁶⁶

Finkelhor cautions against misuse of risk factors. It is all too easy, he says, to use risk factors to blame the sexual abuse on the child victim or the mother. For example, it is thought by some that children without friends are at higher risk. It is tempting to jump ahead a step and label such children, or mothers who work outside the home, as the cause of the abuse.⁶⁷ "It is important to emphasize," Finkelhor says, "that true causal responsibility for abuse lies with offenders. All the research suggests that it is offenders who initiate the sexual activity."⁶⁸ At most, for example, the mother's absence from the home makes it easier for the abuser to sexually abuse. But he would not abuse unless he was already motivated to abuse and had overcome any internal inhibitions against abusing.⁶⁹

In this context, the following passage from a description of the pioneering Santa Clara County Child Sexual Abuse Treatment Program is of interest:⁷⁰

The philosophical orientation of the program is that the family is viewed as an organic system and that family members assume behavior patterns to maintain system balance (family homeostasis). A distorted family homeostasis is evidenced by psychological symptoms in family members. Incestuous behavior is one of the many symptoms possible in troubled families. The marital relationship is a key factor in family organic balance and development. Incestuous behavior is not likely to occur when parents enjoy a mutually beneficial relationship.

It is somewhat unfair to take this passage out of the context of the full program description. Still, it seems that, like certain risk factors bandied about in the literature, the theory of incest set forth in the quotation could lead to an unjustified blaming of the child and the non-abusing parent. Also, "family systems" theories apparently have contributed to the view that incestuous (or intrafamily) child sexual abuse is a different beast from extrafamily abuse, a distinction that is increasingly being questioned.⁷¹

The Santa Clara program is addressed in more detail in chapter 4 of this study.⁷²

Preventive and "Coping" Education⁷³

Beginning in the late 1970's, education-oriented programs specifically designed to prevent child sexual abuse, and to help people cope with it when it occurs, came to the fore. Some programs are directed toward children (e.g., workshops in schools, storybooks, films, and ad campaigns). Programs for children tend to focus on defining sexual abuse; alerting children as to who might try to abuse them (both strangers, and persons known to and liked by them); and telling children how to resist abuse and what to do if it occurs.

Other prevention programs educate parents on how to provide information on sexual abuse to their children and how to detect and report sexual abuse.

Prevention programs for professionals--such as teachers, physicians, mental health workers, and police--are designed to educate them how to better detect and more appropriately respond to child sexual abuse incidents (and, as in the case of parents, how to educate others about sexual abuse).

Looking particularly at preventive education for children, Finkelhor observes that systematic evaluation of such programs is still at an early stage.⁷⁴ He concludes simply:⁷⁵

Reasonable questions have been raised about whether or not this kind of education really protects most children from abuse, and about what some unintended consequences of the training can be, especially if done poorly.

Potential adverse effects that have been suggested, he notes, include "undermining parental authority, making children afraid of adults, or giving children negative messages about touching and sex."⁷⁶

It is important to realize that education is not the only proposed road to prevention. Treatment of offenders, victims, and families is another; so is punishment of the offender; and there are others. What is appropriate treatment and punishment is still a matter of considerable debate. Some writers advocate broad societal changes designed to destroy the roots of child sexual abuse. All proposed approaches to prevention contain an element of controversy.

There are often striking similarities among experts as to both the fundamentals and the limits of preventive and coping education. Vander Mey and Neff say:⁷⁷

...we cannot safely assume that a purported incest taboo obviates any need to educate people regarding the importance of refraining from incestuous contacts with their children. Just as public-service messages warn us against drinking and driving, similar messages are needed proscribing incestuous child abuse. Unlike physical child abuse, the fact that incest causes severe and lasting emotional damage to the child is not self-evident. Neither is the fact that, however alluring the child's behavior may appear, the

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responsibility for avoiding incest and thus its damage to the child lies wholly with the adult. Both the costs to the child and the parent's accountability, moral as well as legal, should be articulated in these messages.

Another implication (following from evidence on the absence of social support networks in neighborhoods beset by high levels of family violence including child abuse) is that instituting and publicizing abuse hotlines, shelters, and community counseling centers constitute prime prevention initiatives.

* * *

Sex education, incorporating material on molestation and how to respond when an adult violates the boundaries, is almost certainly the single most effective deterrent to child sexual abuse, including incest. Nevertheless, the overwhelming resource and power advantages of the parent, in relationship to the child, must caution us that enlightening the child is by no means a panacea. Ultimately, every responsible adult should serve as a barrier mitigating against incest in his or her community.

And Judith Herman writes of father-daughter incest:⁷⁸

If incestuous abuse is indeed an inevitable result of patriarchal family structure, then preventing sexual abuse will ultimately require a radical transformation of the family. The rule of the father will have to yield to the cooperative rule of both parents, and the sexual division of labor will have to be altered so that fathers and mothers share equally in the care of children. These ambitious, even visionary changes will not be the work of one lifetime.

Before the arrival of the millennium, however, there are some more immediate things that can be done. In the short run, consciousness raising among potential victims probably represents the best hope of preventing sexual abuse. This means sex education for children, an idea that much of society still finds controversial....

* * *

Since most sexual abuse begins well before puberty, preventive education, if it is to have any effect at all, should begin early in grade school....

In addition to basic information on sexual relations and sexual assault, children need to know that they have the right to their own bodily integrity....

Finally, children need to know the recourse that is available to them outside their families if they are being abused....

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As in the case of sex education generally, parents are often as much in need as their children. Parents who want to warn their children about the possibility of sexual abuse need, first, to be well informed about the problem themselves; second, to feel comfortable talking about it; and third, to learn appropriate ways to impart the necessary information to young children.... Preventive education for parents, therefore, should focus on relieving parental anxiety and on teaching parents how to discuss sexual matters with their children....

If an educational campaign for children and parents were carried out on a national scale, it would probably result in some degree of prevention....

Note that Herman is not certain that education will work.

Education through mass media in Hawaii might be expected to result in increased reporting of child sexual abuse, including intrafamily abuse. This increase, while desirable for many reasons, could pose a serious problem for state agencies, particularly the child protective services unit of the Department of Human Services with its recently publicized staff shortages and burnout. Existing problems could be magnified. False reports could increase.

Furthermore, Hawaii has no consistent, clearly articulated policy toward child sexual abuse. So sexual abuse victims or others do not know, even in broad terms, what to expect from official entities if an incident is reported. The lack of a policy also creates uncertainty among those entities: What is expected of them? Indeed, the lack of a policy makes it difficult to visualize what educational messages, such as media spots, would look like.

Chapter 3

HAWAII'S CURRENT STATUTORY APPROACH TO CHILD SEXUAL ABUSE

Introduction

Hawaii does not have a comprehensive, coordinated policy, plan, or statutory scheme for dealing with child sexual abuse, although the recently enacted statute creating the children's advocacy program¹ (and the establishment of the Children's Advocacy Center under that statute) is an important step in that direction. But many provisions of Hawaii's statutes do respond to child sexual abuse, directly or indirectly. This chapter focuses on the key provisions.

First, this chapter summarizes the following provisions of the Hawaii Revised Statutes: chapter 350, which deals with reporting of child abuse and neglect;² chapter 586, which deals with domestic abuse protective orders;³ chapter 587, the Child Protective Act;⁴ and chapter 588, establishing the children's advocacy program.⁵

Second, this chapter summarizes Hawaii's sentencing laws⁶ and some related provisions, and charts the sentencing options currently available for key crimes in the Hawaii Penal Code under which child sexual abuse might be prosecuted. Those crimes are: sexual assault in the first,⁷ second,⁸ third,⁹ fourth,¹⁰ and fifth¹¹ degrees; incest;¹² promotion of "child abuse" (child pornography) in the first¹³ and second¹⁴ degrees; promotion of prostitution in the first,¹⁵ second,¹⁶ and third¹⁷ degrees; promotion of pornography for minors;¹⁸ and open lewdness.¹⁹

Except for chapter 588, none of these provisions contains the terms "child sexual abuse". The provisions, however, do cover a variety of behavior that falls within the broad definition of child sexual abuse in the federal Child Abuse Prevention and Treatment Act (see text accompanying footnotes 38 and 39 of the present chapter).

Third, this chapter makes some observations on definitional and data-gathering problems related to the provisions under discussion.

This chapter does not analyze the pertinent statutes in depth. Furthermore, it does not deal with all Hawaii statutes possibly relevant to child sexual abuse. For example, it does not discuss the statute governing the consent of minors to medical services related to venereal disease and pregnancy,²⁰ two conditions that can result from sexual abuse. It does not present all of the crimes that might come into play in a case of child sexual abuse, such as murder in the first degree,²¹ murder in the second degree,²² manslaughter,²³ assault in the first,²⁴ second,²⁵ and third²⁶ degrees, reckless endangering in the first²⁷ and second²⁸ degrees, terroristic threatening in the first²⁹ and second degrees,³⁰ kidnapping³¹ (which contains a provision specific to sexual offenses),³² unlawful imprisonment in the first³³ and second degrees,³⁴ and custodial interference in the first³⁵ and second³⁶ degrees. It should be noted that given the frequent difficulty of proving

specifically sexual crimes (such as sexual assault)--particularly when the victim is a child and even more so when the suspected offender is a friend or family member who can strongly pressure the child to recant--prosecutors often must focus on easier-to-prove nonsexual crimes that may have accompanied the suspected sexual abuse crime.

Little attention is given here to the inchoate crimes--attempts, conspiracy, solicitation. Such crimes, however, can be an important factor in the total child sexual abuse picture and might be properly included in policy analysis related to sentencing.

This chapter does not deal with federal statutes relating to child abuse. An important statute is the federal Child Abuse Prevention and Treatment Act.³⁷ Originally enacted in 1974, that law established the National Center on Child Abuse and Neglect, provided for a variety of grants to states and public and private agencies, and played a key role in stimulating state child protective legislation and innovative programs in the child abuse (including child sexual abuse) field. The law defines children as persons under age 18 or the age specified by the child protection law of the state in question,³⁸ and defines sexual abuse as including:³⁹

(i) the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or having a child assist any other person to engage in, any sexually explicit conduct (or any simulation of such conduct) for the purpose of providing any visual depiction of such conduct, or

(ii) the rape, molestation, prostitution, or other such form of sexual exploitation of children, or incest with children,

under circumstances which indicate that the child's health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary [of Health and Human Services]....

This chapter deals with the pertinent Hawaii statutes in their current versions. No effort is made here to resolve the thornier issues raised by the frequent revision of statutes, such as determining under which version a particular defendant should be prosecuted or sentenced and determining whether statutory cross-references are to current or previous versions.

Case law concerning sentencing is not examined: rather, the statutes are looked at on their face.

Reporting of Child Abuse or Neglect

Chapter 350 of the Hawaii Revised Statutes covers the reporting of "child abuse or neglect," defined as:⁴⁰

...acts or omissions of any person who, or legal entity which, is in any manner or degree related to the child, is residing with the child, or is otherwise responsible for the child's care, that have resulted in the physical or psychological health or welfare of the

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child, who is under the age of eighteen, to be harmed, or to be subject to any reasonably foreseeable, substantial risk of being harmed.

A variety of circumstances indicate child abuse or neglect for reporting purposes, including, but not limited to the following:

- (1) The child exhibits evidence of certain physical or emotional injuries--such as substantial bruising or bleeding, malnutrition, fracture, extreme pain, extreme mental distress, and death--and the injury is not justifiably explained, or the history given varies with the reality, or circumstances indicate that more than an accident is involved;
- (2) The child has been the victim of sexual contact or conduct, including, but not limited to, sexual assault as defined in the Hawaii Penal Code, molestation, sexual fondling, incest, or prostitution; obscene or pornographic photographing, filming, or depiction; or other similar forms of exploitation;
- (3) There is psychological injury evidenced by an observable and substantial impairment in the child's ability to function;
- (4) The child lacks adequate food, clothing, shelter, psychological care, physical care, medical care, or supervision; or
- (5) The child is being provided with certain dangerous, harmful, or detrimental drugs (unless properly prescribed).⁴¹

Certain categories of persons who in their professional or official capacity have reason to believe that child abuse or neglect has occurred, or that there is a substantial risk that it may occur in the reasonably foreseeable future, must immediately report the matter orally to the state Department of Human Services (DHS) or to the appropriate police department. Mandated reporters include: (1) any licensed or registered professionals of the healing arts and any health-related occupation who examine, attend, treat, or provide other professional or specialized services; (2) employees or officers of public or private schools; (3) employees or officers of any public or private agency or institution--or other persons--who provide social, medical, hospital, or mental health services, including financial assistance; (4) employees or officers of law enforcement agencies, such as the courts, police departments, correctional institutions, parole offices, and probation offices; (5) individual providers of child care, or employees or officers of licensed or registered child care facilities, foster homes, or similar institutions; (6) medical examiners and coroners; and (7) employees of public or private agencies providing recreational or sports activities.⁴²

The initial oral report must be followed, as soon as possible, by a written report, except that when a police department is the "initiating agency," a written report to the DHS is not required unless the police have declined to take further action and the DHS informs the police that it intends to pursue the orally reported incident.⁴³

It is a petty misdemeanor for a mandated reporter either to knowingly prevent another person from reporting child abuse or neglect, or to knowingly fail to provide pertinent information concerning the incident.⁴⁴ Even persons who are not mandated reporters are permitted to report (orally, to the police or to the DHS)--facts or circumstances that give them reason to believe abuse or neglect has occurred or that there is a substantial risk it will occur in the reasonably foreseeable future.⁴⁵

Reports to the DHS are confidential and the DHS must make every reasonable effort to protect the identity of reporters who so request.⁴⁶ Other provisions relate to immunity from liability for reporting and to admissibility of reports as evidence.⁴⁷

Upon receiving a report concerning child abuse or neglect, the DHS must proceed under chapter 587, the Child Protective Act (briefly described below).⁴⁸ When the appropriate police department or prosecutor's office requires relevant information concerning a case for investigation or prosecution, the DHS must provide it; if the reporter has requested confidentiality, release of the reporter's name to the police or prosecutor requires a court order.⁴⁹

The DHS must maintain a central registry of reported child abuse or neglect cases. Reports may be expunged as the DHS deems appropriate.⁵⁰

Chapter 350, then, provides a mechanism for reporting child sexual abuse. The "sexual conduct or contact" provision is particularly pertinent. But other provisions apparently could relate to child sexual abuse as well. For example, the condition of substantial bleeding could result from sexual abuse. Child abuse can be either acts or omissions. Thus, for example, both a parent who personally molests his or her child and a parent who allows molestation by an outsider to occur apparently would be responsible for child abuse and neglect.

Orders of Protection Against Domestic Abuse

Chapter 586, Hawaii Revised Statutes, gives the Family Court authority to issue temporary restraining orders and protective orders to separate "family and household members" when necessary to prevent domestic abuse from occurring or recurring.⁵¹

"Family and household members" is defined as "spouses or former spouses, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit."⁵² "Domestic abuse" means:⁵³

- (1) Physical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury, or assault, extreme psychological abuse or malicious property damage between family or household members; or
- (2) Any act which would constitute an offense under [Hawaii Revised Statutes] section 709-906 [a Penal Code provision that deals with physical abuse of family and household members and is

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considered to apply to spouse abuse], or under part V [sexual offenses] or VI [child pornography] of chapter 707 [offenses against the person], committed against a minor family or household member by an adult family or household member.

The Family Court takes requests for orders of protection upon the filing of a petition for relief (1) by a family or household member on his or her own behalf or on behalf of a minor, incapacitated person, or "physically unable" person, or (2) by any state agency on behalf of a minor, incapacitated person, or "physically unable" person.⁵⁴

The temporary restraining order (30 days maximum) may be granted to restrain either or both parties from contacting, threatening, or physically abusing each other. One or both of the parties may be ordered to leave the premises during the period of restraint.⁵⁵

After a hearing, a protective order may be issued, which can include all orders stated in the restraining order, and such further orders as the court deems necessary, including orders establishing temporary visitation with regard to minor children and orders to either or both parties to participate in treatment or counseling. The protective order is limited to 180 days, except that if the court has ordered a party to participate in treatment or counseling, another 180 days can be added.⁵⁶

The Family Court must designate an employee or appropriate nonjudicial agency to assist in preparing the petition.⁵⁷ Where the alleged abuse involves a minor family or household member, the designated employee or nonjudicial agency must report the matter to the DHS, as required by chapter 350, and must notify the DHS of the granting of the restraining order and of the hearing date.⁵⁸ The DHS, in turn, must report to the family court on the progress of their investigation on or before the hearing date.⁵⁹

At the petitioner's request, a copy of any order for protection must be forwarded by the court clerk within 24 hours to the county police department.⁶⁰ Each county police department must "make available to other law enforcement officers in the same county, through a system for verification, information as to the existence and status of any order for protection...."⁶¹

Child Protective Act

Chapter 587, Hawaii Revised Statutes, creates within the Family Court's jurisdiction a Child Protective Act whose purpose is to "safeguard, treat, and provide permanent planning for children who have been harmed or threatened with harm."⁶² "Children" are persons under age 18; "family" is defined as:⁶³

...each legal parent, the natural mother, the natural father, the adjudicated, presumed, or concerned natural father as defined under section 578-2, each parent's spouse, or former spouses, each sibling or person related by consanguinity or marriage, each person residing in the same dwelling unit, and any other person who or legal entity which is a child's legal or physical custodian or guardian, or who

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is otherwise responsible for the child's care, other than an authorized agency which assumes such a legal status or relationship with the child under this chapter.

The definition of "harm" is similar to the description in chapter 350 of circumstances indicating child abuse or neglect for reporting purposes; as in chapter 350, abusive sexual contact or conduct is explicitly included.⁶⁴

The Child Protective Act is relatively complex, largely because it must balance the need to protect children against the need to respect family prerogatives and protect the due process rights of all parties. In summary, the Act seeks to:⁶⁵

...provide children with prompt and ample protection from the harms detailed [in the Act], with an opportunity for timely reconciliation with their families where practicable, and with timely and permanent planning so they may develop and mature into responsible, self-sufficient, law-abiding citizens. This permanent planning should effectuate placement with a child's own family when possible and should be conducted in an expeditious fashion so that where return to the child's family is not possible as provided in [the Act], such children will be promptly and permanently placed with responsible, competent, substitute parents and families, and their place in such families secured by adoption or permanent custody order.

The Act is designed to give the DHS flexibility. After investigating a case, the DHS can: (1) close the matter; or (2) enter a voluntary service plan under which the family and authorized agencies cooperate to try to improve the situation; (3) file a petition with the Family Court or make sure some other appropriate agency does so; or (4) assume temporary foster custody of the child and file a petition with the Family Court within 48 hours.⁶⁶

Filing a petition triggers a formal process that can include temporary foster custody hearings, adjudicatory hearings, disposition hearings, permanent plan hearings, and various review hearings. A guardian ad litem is appointed for the child, and additional counsel may be appointed for the child and other parties.⁶⁷ Upon the filing of a petition, the court, on hearing, may issue an "order of protection." This order may, for example, require that a party stay away from the family home or from any other place presenting an opportunity for contact with the child that is not in the child's interests.⁶⁸

Whenever treatment or services are provided to a party, or care, support, or treatment is provided to the child under the Act, the court can order the legally obligated party to pay the costs.⁶⁹

Failure to comply with the terms or conditions of a court order issued under the Act leads to application of the penalties provided in section 710-1077, Hawaii Revised Statutes (criminal contempt) as well as other applicable provisions.⁷⁰

Standards of proof differ depending on the nature of the hearing. In a temporary custody hearing, a determination that a child is subject to imminent harm "may be based upon any relevant evidence whatsoever, including, but not limited to, hearsay evidence when direct evidence is unavailable or when it is impractical to subpoena witnesses who will be able to testify to facts from personal knowledge."⁷¹ In an adjudicatory hearing, a determination that the child has been harmed or is subject to threatened harm "shall be based on a preponderance of the evidence," and normally only "competent and relevant evidence" is admissible.⁷² In any subsequent hearing other than a permanent plan hearing, any determinations must be based on a preponderance of the evidence, and any relevant evidence must be admitted.⁷³ In a permanent plan hearing, a determination that permanent custody of a child be awarded to an appropriate authorized agency must be based on clear and convincing evidence; a determination that the child should be adopted must be based on a preponderance of the evidence.⁷⁴

Children's Advocacy Program

Chapter 588, Hawaii Revised Statutes, establishes a children's advocacy program within the Judiciary to deal specifically with the problem of child sexual abuse, both intrafamilial and extrafamilial. Chapter 588 states:⁷⁵

For the purpose of this chapter, "child sexual abuse" means any of the offenses described under chapter 707, part V, when committed on a person under the age of 16 years or as is set forth in paragraph (2) of the definition of harm in section 587-2.

As noted above, Part V of chapter 707 sets forth the sexual assault and incest crimes. Paragraph 2 of the chapter 587 definition of harm deals with sexual harm. It is similar to the sexual contact or conduct provisions of chapter 350, set forth above.

The director of the children's advocacy program is appointed by the administrative director of the courts.⁷⁶ The purposes of the program, in summary, are to: (1) develop interagency and interprofessional cooperation and coordination in the management of child sex abuse cases; (2) obtain evidence for criminal prosecution and civil child protective proceedings; (3) reduce the number of interviews of child sex abuse victims so as to minimize revictimization of the child; (4) coordinate public and private therapeutic and treatment resources for victims and their families; (5) provide for a multidisciplinary team and case management approach that focuses first on the child victim's needs, second on family members who are supportive of the child and whose interests are consistent with the child's, and third on law enforcement and prosecutorial needs; (6) provide for the training and education of interviewers of child victims; and (7) serve as the focus of information and referral for child sex abuse programs.⁷⁷

Penal Code

Summary of Sentencing Statute

In the Hawaii Penal Code, the rules for sentencing convicted persons are set forth in chapter 706, Hawaii Revised Statutes, titled "Disposition of

Convicted Defendants" (hereinafter the "sentencing statute"). The following summary of the statute focuses on basic matters most relevant to alternative sentencing in child sexual abuse cases. Many complex issues are omitted, such as sentencing for multiple crimes or multiple counts of the same crime, and sentencing of persons already under a previous sentence.

In 1986, the sentencing statute was amended "to reflect a shift from the [previous] policy underlying sentencing, which emphasize[d] rehabilitation, to one intended to achieve the goal of just punishment."⁷⁸ However, as will be seen, the new sentencing statute in reality still embodies four policies: punishment; public protection; deterrence; and rehabilitation.

The sentencing statute states that subject to limitations set forth in other provisions of the Penal Code, the court may sentence a convicted defendant to one or more of the following: (1) probation; (2) fine; (3) imprisonment; (4) restitution; or (5) community service.⁷⁹ In addition, a suspended sentence is an option available for misdemeanors and petty misdemeanors.⁸⁰ Persons convicted of an offense called a "violation" can be sentenced to any of the above dispositions except imprisonment.⁸¹ Defendants cannot be sentenced to probation and imprisonment except as authorized by the probation part of the statute,⁸² which, for example, permits the court to require as a condition of probation that the defendant serve a term not exceeding one year in felony cases or six months in misdemeanor cases.⁸³

In imposing sentence, the court must consider a variety of factors: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence to reflect the seriousness of the offense, promote respect for law, provide just punishment, deter criminal conduct, protect the public from further crimes of the defendant, and give the defendant needed educational or vocational training, medical care, or other correctional treatment; (3) the kinds of sentences available; and (4) the need to avoid unwarranted sentence disparities among defendants with similar records found guilty of similar conduct.⁸⁴

Except for first and second degree murder and first and second degree attempted murder, which have their own sentencing provisions, felonies are divided into three classes (A, B, and C) for sentencing purposes, representing a descending order of seriousness.⁸⁵ Thus, available sentencing options depend on whether the crime is a class A, B, or C felony, a misdemeanor, a petty misdemeanor, or a violation. Sentencing of persons convicted of inchoate crimes--attempts, solicitation, conspiracy--is governed by the sentencing statute taken together with provisions in the inchoate crime chapter of the Penal Code that "grade" the inchoate crimes.⁸⁶ Those provisions will not be discussed here. But as noted in the Introduction to the present chapter of this study, inchoate crimes related to child sexual abuse should not be overlooked in analyzing sentencing policy.

When a person prosecuted for a class C felony, misdemeanor, or petty misdemeanor is a chronic alcoholic, narcotic addict, or suffers a mental abnormality, and the person is subject by law to involuntary hospitalization for medical, psychiatric, or other rehabilitative treatment, the court may order such hospitalization and dismiss the prosecution. More germane to the

present study, the court may order the involuntary hospitalization after conviction (and simultaneously set aside the verdict or judgment of conviction and dismiss the prosecution).⁸⁷ It is apparent that the issue of whether or not some or all child sexual abuse inherently reflects a mental abnormality could be critical here, if the offender is not suffering from some other abnormality or an addiction.

Part II of the sentencing statute deals with probation. The court has authority to withhold a sentence of imprisonment and order probation instead, except for first or second degree murder, attempted first or second degree murder, class A felonies, repeat offenders under section 706-606.5, offenders who used firearms in the commission of the felony, as provided in section 706-660.1(b), and crimes involving serious or substantial bodily injury to a child, elderly person, or handicapped person.⁸⁸

In deciding whether to impose probation, the court must consider, to the extent applicable, the factors in section 706-606 (the factors described above that must be considered in sentencing in general).⁸⁹ In addition, under section 706-621, certain factors weigh in favor of withholding imprisonment: (a) the defendant's criminal conduct neither caused nor threatened serious harm; (b) the defendant acted under strong provocation; (c) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense; (d) the victim of the defendant's criminal conduct induced or facilitated its commission; (e) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the crime; (f) the defendant's criminal conduct was the result of circumstances unlikely to recur; (g) the character and attitudes of the defendant indicate that the defendant is unlikely to commit another crime; (h) the defendant is particularly likely to respond affirmatively to a program of restitution, or probation, or both; or (i) the imprisonment of the defendant would entail excessive hardship to the defendant or the defendant's dependents.⁹⁰

The challenge for judges in applying these criteria to child sexual abuse offenders is apparent. For example, as shown in chapter 2 of this study, empirical knowledge is uncertain as to how much such abuse harms the victim (relevant to factor (a) in the preceding paragraph); recidivism (relevant to factor (g)); and rehabilitability (relevant to factor (h)). Some factors in a case may argue in favor of probation, such as the economic hardship that imprisonment of an abusing father imposes on a family (see factor (i)); other factors in the same case may argue against probation, such as the danger of having the abusing parent on the loose, possibly back in the home with his vulnerable children.

If not sentenced to imprisonment, a person convicted of a felony must be placed on probation.⁹¹ Unless the court discharges the defendant earlier, the period of probation is five years for a felony, one year for a misdemeanor, and six months for a petty misdemeanor.⁹²

There are both mandatory and discretionary conditions of probation. The mandatory conditions are that the defendant forego further crime during probation, report to a probation officer, remain within the court's jurisdiction unless special permission to leave is received, notify a probation officer of

any change of address or employment, notify a probation officer if arrested or questioned by a law enforcement officer, and permit the probation officer to visit the defendant at the defendant's home or elsewhere as specified by the court.⁹³

A wide range of discretionary conditions of probation are possible, including short prison terms (maximum one year in felony cases, six months in misdemeanors); community service; support of dependents and meeting other family responsibilities; payment of a fine; making of restitution; refraining from frequenting certain places or associating with certain persons, including but not limited to the victim; undergoing medical, psychiatric, or psychological treatment, even including institutional care if required; refraining from residing in a certain place; or refraining from leaving the dwelling place except for certain purposes. A catch-all provision allows the court to impose other reasonable conditions.⁹⁴

After a hearing, the court can revoke probation or reduce or enlarge its conditions. Probation must be revoked if the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of probation or has been convicted of a felony. The court may revoke probation if the defendant has been convicted of a crime which is not a felony. The court may modify the conditions of probation or of a suspended sentence if it finds that doing so will help the defendant lead a law-abiding life. If the court revokes probation, it may impose any sentence that could have originally been imposed for the crime.⁹⁵

Part III of the sentencing statute deals with fines. It authorizes fines not exceeding \$50,000 for class A felonies, murder in the first or second degree, or attempted murder in the first or second degree; \$25,000 for class B felonies; \$10,000 for class C felonies; \$2,000 for misdemeanors; and \$1,000 for petty misdemeanors or violations (and, for all of these, fines in any higher amount equal to double the pecuniary gain derived from the offense by the defendant, and any higher or lower amount authorized by statute).⁹⁶

Four basic criteria exist for imposing fines. First, a fine alone is not allowed when any other sentence is allowed by law, unless, looking to the nature and circumstances of the crime and the history and character of the defendant, the court believes that a fine alone will protect the public. Second, fines may not be imposed in addition to imprisonment or probation unless the defendant derived a pecuniary gain from the crime, or the court believes that the fine is "specially adapted to the deterrence of the crime or to the correcting of the defendant." Third, a fine may not be imposed unless the defendant is or will be able to pay it and the fine will not prevent the defendant from making restitution or reparation to the victim. Fourth, in determining the amount and payment method, the court must consider the financial resources of the defendant and the burden that payment will impose.⁹⁷ Payment of the fine may be made a condition of probation.⁹⁸

Failure to pay a fine or to make restitution can itself result in imprisonment in a manner similar to civil contempt unless the defendant can show the failure was not "contumacious."⁹⁹ There are provisions for revocation of the fine or restitution or any unpaid portion, if the court finds that the circumstances which warranted its imposition have changed or

requiring payment would otherwise be unjust.¹⁰⁰ Payment of ordered restitution or reparation takes priority over payment of the fine.¹⁰¹

Part IV of the sentencing statute deals with imprisonment and parole. First and second degree murder and attempted first and second degree murder have their own sentencing provisions and are not discussed here. A person convicted of a class A felony must be sentenced to an indeterminate 20-year prison term with no possibility of suspension of sentence or probation, but with possibility of parole. The Hawaii paroling authority determines the minimum length of imprisonment.¹⁰² A person convicted of a class B or class C felony may be sentenced to prison. For class B, if a prison sentence is imposed it must be an indeterminate sentence of 10 years (maximum); for class C, 5 years (maximum). In both cases, the paroling authority determines the minimum length of imprisonment. Persons may also be sentenced to mandatory minimum terms of imprisonment without possibility of parole as provided in section 706-660.1 relating to use of firearms in felony offenses and section 706-606.5 relating to repeat offenders.

Extended indeterminate terms of imprisonment for felonies--life for a class A felony, 20 years for class B, and 10 years for class C, all with the possibility of parole and with the paroling authority setting the minimum length of imprisonment--are allowed¹⁰⁴ if the defendant is found to be one or more of the following as defined by statute: a persistent offender; professional criminal; dangerous person; multiple offender; offender against elderly, handicapped, or minor under the age of eight. Certain conditions must exist in order for each of these categories to apply. Common to all the categories is the requirement that imprisonment for an extended term is necessary for the protection of the public. Of particular interest for the field of child sexual abuse is the requirement that for imposing an extended sentence for a sexual offender against the elderly, handicapped, or minor under the age of eight, the offense must be a felony under chapter 707; serious or substantial bodily harm must have been inflicted in the course of attempting or committing the crime; and the offender must have known (or reasonably should have known) of the disability due to age or handicap.¹⁰⁵

A source of confusion is the use of the phrases "under the age of eight" and "eight years of age or younger" within the same subsection.¹⁰⁶

In several situations, mandatory imprisonment without possibility of parole must be applied. First, if in the course of committing or attempting to commit a felony, a person causes death or inflicts substantial bodily injury on a person over 60 years of age, a blind person, a quadriplegic person, or a person eight years old or younger, and the offender knew or should have known of the disability, the offender--if not subjected to an extended term of imprisonment--must be sentenced to a mandatory term of imprisonment without possibility of parole (for murder 15 years; for a class A felony, six years, eight months; for a class B felony, three years, four months; and for a class C felony, one year, eight months).¹⁰⁷

Second, a person convicted of a felony who while engaged in the felony had in his possession, or used, or threatened the use of, a firearm (whether loaded or unloaded, operable or not) may in addition to the pertinent indeterminate term of imprisonment be sentenced to a mandatory minimum term

of imprisonment without possibility of parole or probation (the parole board does not set the minimum term of imprisonment in such a case).¹⁰⁸ For a first firearm offense, if the mandatory term is imposed it must be as follows: For murder and attempted murder in the second degree, up to 15 years; for a class A felony, up to 10 years; for a class B felony, up to five years; and for a class C felony, up to three years. For a second firearm felony offense, the terms are: for murder in the second degree, 20 years; for a class A felony, 13 years, four months; for a class B felony, six years, eight months; and for a class C felony, three years, four months.

Third, there are mandatory minimum prison terms without possibility of parole for "repeat offenders" (felons who within certain time periods of the current offense had one or more prior convictions of certain felonies). The repeat offender provisions apply when the current offense is murder in the second degree, a class A felony, a class B felony, or a wide range of class C felonies. Sexual crimes included in that range are sexual assault or rape in the third degree, sodomy in the third degree, sexual abuse in the third degree, promoting child abuse in the second degree (the child pornography provision), and promoting prostitution in the second degree. Attempts at second degree murder, class A or class B felonies, or the specified class C felonies are included as well. For the repeat offender provisions to apply, the person convicted of the current crime must have a prior felony conviction (or convictions) of second degree murder, a class A or class B felony, or any of the specified class C felonies--or any felony conviction in another jurisdiction.¹⁰⁹

It is not entirely clear how the repeat offender provisions relate to the most recent versions of the sexual offense statutes, which do not, for example, include crimes specifically labeled rape or sodomy.

For repeat offenders, the length of the mandatory, no-parole prison term is determined by reference to a grid that links the type of current conviction with the number of prior felony convictions. For example, where the current conviction is for one of the specified class C felonies and there is one prior felony conviction, the required no-parole prison sentence is one year and eight months. Where the current conviction is for a class A felony and there are three or more prior felony convictions, the required no-parole term is twenty years.¹¹⁰

The court may impose the repeat-offender sentence consecutive to any sentence imposed for a prior conviction, but must impose the repeat offender sentence concurrent with the sentence imposed for the instant conviction. The court may impose a lesser sentence than the mandatory minimum for repeat offenders where there are strong mitigating circumstances.¹¹¹

Imprisonment of a definite term, fixed by the court, of one year is allowed for misdemeanors and of thirty days is allowed for petty misdemeanors.¹¹²

There is a special provision for "young adult defendants," that is, persons who at the time of sentencing are at least 16 but less than 22 years of age, and who have not been previously convicted of a felony as an adult (or adjudicated as a juvenile for an offense committed at age 16 or older

which would have been a felony if committed by an adult). Except for murder or attempted murder, when a young adult offender is being sentenced to a term of imprisonment that may exceed 30 days, the offender may be committed to the custody of the Department of Corrections and shall receive, as far as practicable, appropriate correctional and rehabilitative treatment. In addition, a young adult offender convicted of a felony may receive, instead of any other authorized prison sentence, a special indeterminate prison term if the court feels that term is adequate for corrective, rehabilitative, and public protection objectives. This special term must be eight years for a class A felony, five years for class B, and four years for class C, all with possibility of parole and the minimum length of imprisonment set by the paroling authority. Whenever practicable in such cases, the young adult is to be incarcerated separately from career criminals.¹¹³

Imprisoned persons are in the custody of the Department of Corrections.¹¹⁴

A sentence to an indeterminate term of imprisonment includes as a separate term of the sentence a term of parole or of recommitment for violation of the conditions of parole.¹¹⁵

Within six months of the sentencing of a person to an indeterminate or extended indeterminate prison term, the paroling authority sets the minimum term of imprisonment to be served before the person becomes eligible for parole. If no minimum term is set, the defendant simply serves the full maximum sentence. A hearing is required. Prior to the hearing, the paroling authority must obtain a report evaluating the defendant's personality to determine the defendant's propensity toward criminal activity.¹¹⁶

At least a month before the minimum term expires, there must be a hearing to determine whether parole will be granted. If parole is not granted at that time, additional hearings must be held at twelve month intervals or less until parole is granted or the maximum term of imprisonment expires. If parole is granted, a minimum initial parole term must be set by the authority. Conditions of parole may be imposed similar to the mandatory and discretionary terms of probation. Violation of parole leads to re-incarceration. At such time as the maximum term of parole expires, or a minimum short of that as set by the authority, the offender must be released.¹¹⁷

The Department of Corrections has the authority to grant furloughs to committed persons who have a "minimum or lower security classification" for the purpose of compliance, "social re-orientation," education, training, or any other valid purpose. Money that the offender earns from such employment must first be used to satisfy any restitution order and to reimburse the state for room and board. Any amounts left over are kept in an individual account for the offender.¹¹⁸

The sentencing statute does not contain separate "parts" covering restitution, community service, or suspended sentences, as it does for probation, fines, and imprisonment. However, restitution, community service, and suspended sentences do receive attention in various provisions of the sentencing statute; some of those provisions are mentioned above. Both

restitution and community service can be applied as conditions of probation (as can a fine).¹¹⁹ Restitution and community service sometimes are applied not as a condition of probation but as sentences of their own, either as the only sentence or in conjunction with some other sentence, such as a fine. Restitution is sometimes applied in conjunction with a prison sentence; in theory community service could be too, but in practice this is not done. One reason is that the prison sentence is viewed as having fulfilled the defendant's obligation to the community; another reason is that imprisonment would make prompt application of a community service sentence impossible.¹²⁰ Community service and restitution (as well as fines) can be applied as conditions of parole.¹²¹

For juveniles committed to a youth correctional facility, there is a community service program that coordinates placement of the juvenile in educational, vocational, and work release programs and residential placement.¹²² There also is a juvenile parole program that assists paroled juveniles in locating residential placement, finding employment and adjusting to community life.¹²³

It is important to note that persons accused of crimes--including sexual offenses--are under the exclusive original jurisdiction of the Family Court if they are less than age 18 at the time of the conduct alleged. If the person was under 16 at the time of the alleged offense, criminal proceedings are barred completely and the special procedures of the Family Court come into play. If the person was 16 or 17, criminal proceedings are barred and Family Court procedures apply, unless the Family Court waives jurisdiction and orders the defendant to the division of the circuit court handling penal proceedings, which has concurrent jurisdiction with the Family Court for that age category.¹²⁴

When the Family Court handles juveniles accused of a crime, there can be no conviction of the juvenile. Thus, in such cases "post-conviction sentencing alternatives" would not apply.

Key Crimes Related to Child Sexual Abuse; Sentencing Options

Figure 1 presents the key sexual crimes under which child sexual abuse may be prosecuted under the Hawaii Penal Code, along with the most basic sentencing options for each crime. The figure is intended as an outline only; it does not pretend to be the final word. Readers seeking greater detail should consult the Penal Code itself, which, among other things, defines various terms used in Figure 1 (such as "sexual penetration," "sexual contact," "sexual conduct," "pornographic for minors," "lewdness," "advancing prostitution") and elaborates on sentencing options.

As noted previously, when child sexual abuse is suspected, a nonsexual crime may be charged instead; and a charge of a sexual crime, such as sexual assault, may be accompanied by a charge of a nonsexual crime, such as murder, assault, kidnapping, and so on. Figure 1 deals only with specifically sexual crimes.

Figure 1 does not necessarily cover every aspect of sentencing. Among the subjects intentionally omitted are sentencing of young adult offenders,

Figure 1

Key Crimes Under Which Child Sexual Abuse May Be
Prosecuted, With Basic Sentencing Options: State of Hawaii*

Crime	"Basic" Prison Term	"Mandatory" Prison Term	Probation	Fine	Restitution	Community Service	Suspended Sentence
<p><u>Sexual Assault in the First Degree</u> (HRS §707-730)</p> <p>Class A Felony</p> <p>Knowingly (a) subjecting another person to an act of sexual penetration by strong compulsion, or (b) subjecting to sexual penetration another person less than age 14.</p>	<p>An "Indeterminate" prison term is required: either 20 years or, if extended sentence is applied, life. Possibility of parole. Paroling Authority sets minimum term.</p> <p>Extended sentence may be applied if the offender meets the statutory definition of persistent offender; professional criminal; dangerous person; multiple offender; or offender against elderly, handicapped, or minor under age 8.</p>	<p>Mandatory prison term (no possibility of parole) of length established by statute is required for person who meets statutory criteria concerning repeat offenders; or felony firearms offenders; or felons causing death or substantial bodily injury to persons over 60 years of age, blind persons, quadriplegic persons, or persons age 8 or younger (unless the offender is receiving an extended sentence).</p>	<p>Not an option.</p>	<p>In certain situations, a fine may be imposed in addition to imprisonment: up to \$50,000, or double the amount of any pecuniary gain from the offense, or as authorized by statute.</p>	<p>An option.</p>	<p>An option.</p>	<p>Not an option.</p>
<p><u>Sexual Assault in the Second Degree</u> (HRS §707-731)</p> <p>Class B Felony</p> <p>(a) Knowingly subjecting another person to an act of sexual penetration by compulsion, or (b) knowingly subjecting to sexual penetration another person who is mentally defective, mentally incapacitated, or physically helpless, or (c) while employed in a state correctional facility, knowingly subjecting to sexual penetration an imprisoned person.</p>	<p>Unless probation is given, an indeterminate prison term is required: 10 years, or if extended sentence is applied, 20 years. Except as noted in the preceding sentence, the summary of "basic prison term" for Sexual Assault in the First Degree above generally applies.</p>	<p>The description of mandatory prison term for Sexual Assault in the First Degree above generally applies.</p>	<p>If no prison sentence is given, 5 years probation, unless discharged earlier by the court, is required. Probation not allowed where mandatory prison term is required. Any prison term imposed as condition of probation has one-year maximum.</p>	<p>In certain situations, a fine may be imposed in addition to imprisonment or probation: up to \$25,000, or double the amount of pecuniary gain from the offense, or as authorized by statute. May be imposed as a sentence and/or as condition of probation.</p>	<p>An option. May be imposed as a sentence and/or as a condition of probation.</p>	<p>An option. May be imposed as a sentence and/or as a condition of probation.</p>	<p>Same as for Sexual Assault in the First Degree above.</p>

Crime	"Basic" Prison Term	"Mandatory" Prison Term	Probation	Fine	Restitution	Community Service	Suspended Sentence
<p><u>Sexual Assault in the Third Degree</u> (HRS §707-732)</p> <p>Class C Felony</p> <p>(a) Recklessly subjecting another person to an act of sexual penetration by compulsion, or (b) knowingly subjecting to sexual contact another person who is less than age 14 or causing such a person to have sexual contact with the person, or (c) knowingly subjecting to sexual contact another person who is mentally defective, mentally incapacitated, or physically helpless, or causing such a person to have sexual contact with the actor, or (d) while employed in a state correctional facility, knowingly subjecting to sexual contact an imprisoned person or causing such person to have sexual contact with the actor, or (e) knowingly, by strong compulsion, having sexual contact with another person or causing another person to have sexual contact with the actor.</p>	<p>Unless probation is given, an indeterminate prison term is required: 5 years, or if extended sentence is applied, 10 years. Except as noted in the preceding sentence, the summary of "basic prison term" for Sexual Assault in the First Degree above generally applies.</p>	<p>The description of mandatory prison term for Sexual Assault in the First Degree above generally applies.</p>	<p>Generally similar to Sexual Assault in the Second Degree.</p>	<p>In certain situations, a fine may be imposed in addition to imprisonment or probation: up to \$10,000, or double the amount of pecuniary gain from the offense, or as authorized by statute. May be imposed as a sentence or as a condition of probation.</p>	<p>Same as for Sexual Assault in the Second Degree above.</p>	<p>Same as for Sexual Assault in the Second Degree above.</p>	<p>Same as for Sexual Assault in the First Degree above.</p>

Crime	"Basic" Prison Term	"Mandatory" Prison Term	Probation	Fine	Restitution	Community Service	Suspended Sentence
Sexual Assault in the Fourth Degree (HRS §707-733)	An option, unless probation is given.	Not an option.	An option, unless prison sentence is given.	In certain situations, a fine may be imposed as a substitute for or in addition to imprisonment or probation: up to \$2,000, or double the pecuniary gain from the offense, or as authorized by statute. May be imposed as a sentence and/or as a condition of probation.	Same as for Sexual Assault in the Second Degree above.	Same as for Sexual Assault in the Second Degree above.	An option.
Misdemeanor							
(a) Knowingly subjecting another person to sexual contact by compulsion or causing another person to have sexual contact with the actor by compulsion, or (b) exposing the offender's genitals to another person to whom the offender is not married under circumstances likely to place the other person in fear of bodily injury.	Extended sentence provisions do not apply. Parole provisions do not apply.		One year probation, unless discharged earlier by the court. Any prison term imposed as condition of probation has 6-month maximum.				
Sexual Assault in the Fifth Degree (HRS §707-734)	An option, unless probation is given.	Not an option.	An option, unless prison sentence is given.	In certain situations, a fine may be imposed as a substitute for or in addition to imprisonment or probation: up to \$1,000, or double the pecuniary gain from the offense, or as authorized by statute. May be imposed as a sentence or as a condition of probation.	Same as for Sexual Assault in the Second Degree above.	Same as for Sexual Assault in the Second Degree above.	An option.
Petty Misdemeanor							
Intentionally exposing the offender's genitals to a person to whom the offender is not married under circumstances in which the exposure is likely to cause affront or alarm.	Definite term, set by the court, with 30-day maximum. Extended sentence provisions do not apply. Parole provisions do not apply.		Six months probation, unless discharged earlier by the court. Any prison term imposed as a condition of probation has 6-month maximum.				
Incest (HRS §707-741)	SENTENCING OPTIONS ARE GENERALLY THOSE DESCRIBED ABOVE FOR SEXUAL ASSAULT IN THE THIRD DEGREE						
Class C Felony							
Committing an act of sexual penetration with another who is within the degrees of consanguinity or affinity within which marriage is prohibited.							

Crime	"Basic" Prison Term	"Mandatory" Prison Term	Probation	Fine	Restitution	Community Service	Suspended Sentence
<u>Promoting Child Abuse in the First Degree</u> (HRS §707-750) Class A Felony If knowing or having reason to know its character and content, producing, directing, or participating in the preparation of pornographic material or engaging in a pornographic performance that employs, uses, or otherwise contains a minor (here defined as a person less than age 16) engaging in or assisting others to engage in sexual conduct.	SENTENCING OPTIONS ARE GENERALLY THOSE DESCRIBED ABOVE FOR SEXUAL ASSAULT IN THE FIRST DEGREE						
<u>Promoting Child Abuse in the Second Degree</u> (HRS §707-751) Class C Felony If knowing or having reason to know its character and content, disseminating any pornographic material that employs, uses or otherwise contains a minor (under age 16) engaging in or assisting others to engage in sexual conduct.	SENTENCING OPTIONS ARE GENERALLY THOSE DESCRIBED ABOVE FOR SEXUAL ASSAULT IN THE THIRD DEGREE						

Crime	"Basic" Prison Term	"Mandatory" Prison Term	Probation	Fine	Restitution	Community Service	Suspended Sentence
<u>Promoting Prostitution in the First Degree</u> (HRS §712-1202) Class B Felony Knowingly (a) advancing prostitution by compelling a person by criminal coercion to engage in prostitution, or profiting from such coercive conduct by another, or (b) advancing or profiting from prostitution of a person less than age 14.	SENTENCING OPTIONS ARE GENERALLY THOSE DESCRIBED ABOVE FOR SEXUAL ASSAULT IN THE SECOND DEGREE						
<u>Promoting Prostitution in the Second Degree</u> (HRS §712-1203) Class C Felony Knowingly (a) advancing or profiting from prostitution by managing, supervising, controlling, or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes, or (b) advancing or profiting from prostitution of a person less than 18 years old.	SENTENCING OPTIONS ARE GENERALLY THOSE DESCRIBED ABOVE FOR SEXUAL ASSAULT IN THE THIRD DEGREE						

Crime	"Basic" Prison Term	"Mandatory" Prison Term	Probation	Fine	Restitution	Community Service	Suspended Sentence
<u>Promoting Prostitution in the Third Degree</u> (HRS §712-1204) Misdemeanor Knowingly advancing or profiting from prostitution.	SENTENCING OPTIONS ARE GENERALLY THOSE DESCRIBED ABOVE FOR SEXUAL ASSAULT IN THE FOURTH DEGREE						
<u>Promoting Pornography for Minors</u> (HRS §712-1215) Class C Felony (a) Disseminating to a minor (under 16) material that is "pornographic for minors," if the offender knows the character or content of the material, or (b) If knowing the character and content of a motion picture or other performance that is in whole or in part pornographic for minors, exhibiting the film or performance to a minor, or selling to a minor an admission ticket or pass to premises where such film or performance is being exhibited or is to be exhibited, or admitting a minor to premises where such a film or other performance is being exhibited or is to be exhibited. The offense does not occur when any of the above activities is performed by a parent, guardian, or other person in loco	SENTENCING OPTIONS ARE GENERALLY THOSE DESCRIBED ABOVE FOR SEXUAL ASSAULT IN THE THIRD DEGREE						

Crime	"Basic" Prison Term	"Mandatory" Prison Term	Probation	Fine	Restitution	Community Service	Suspended Sentence
<p>parentis to the minor, or by a sibling of the minor, or by anyone who performs the above in his capacity as a staff member of a public library.</p> <p>Open Lewdness (HRS §712-1217)</p> <p>Petty Misdemeanor</p> <p>Performing in a public place any lewd act which is likely to be observed by others who would be affronted or alarmed.</p>	SENTENCING OPTIONS ARE GENERALLY THOSE DESCRIBED ABOVE FOR SEXUAL ASSAULT IN THE FIFTH DEGREE						

*See text introducing this Figure for qualifications on the scope of the Figure.

civil commitment in lieu of sentence, sentencing for inchoate crimes, sentencing under multiple counts, parole as a form of sentencing, sentencing of persons already serving a previous sentence, and delayed acceptance of guilty pleas. Case law interpreting the sentencing statutes is not examined. Figure 1 looks only to the face of the statutes.

Observations

Current Hawaii statutes offer a multitude of weapons, both civil and criminal, for fighting child sexual abuse. Post-conviction alternatives to incarceration are available for many offenders. The availability and nature of the alternatives depend on such factors as the seriousness of the crime, the defendant's past criminal history, and the defendant's criminal propensity.

Unfortunately, no system currently exists in Hawaii for comprehensively tracking the prosecution and disposition of child sexual abuse cases. For example, as noted in chapter 2 above, the Honolulu prosecutor's office historically kept statistics on incest and sexual assault prosecutions, but the data were not broken down by the age of the victim (fortunately this situation has recently been remedied). Even now, that office's tracking of sexual assault cases does not break out intrafamily cases. Without such a tracking system, assessment of current sentencing and recidivism in child sexual abuse cases is impossible, to the detriment of policy development.

Fortunately, efforts are now underway to correct this deficiency. The Children's Advocacy Center has begun the process of developing a system that will track the progress of reported child sexual abuse cases, both intrafamily and extrafamily, through the criminal and civil protective processes. The system is expected to provide data on sentencing and should facilitate analysis of recidivism.

Another problem for policymakers relates to definitions. First, the Hawaii Revised Statutes nowhere sharply define which crimes are "child sexual abuse" or "intrafamily child sexual abuse" crimes. The present study outlines sentencing alternatives currently available for a group of crimes that appear to cover a wide range of child sexual abuse behavior. However, a consensus is needed on whether the selection made here is appropriate for purposes of policy analysis.

For another thing, there is much ambiguity in the statutes concerning the meaning of "family." The definition of child abuse or neglect stated in the reporting statute covers persons "in any manner or degree related to the child, residing with the child, or otherwise responsible for the child's care." The statute on domestic abuse protective orders defines "family household members" as "spouses, former spouses, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit." In the Child Protective Act, family is defined as:

...each legal parent, the natural mother, the natural father, the adjudicated, presumed, or concerned natural father as defined under section 578-2, each parent's spouse, or former spouses, each sibling or person related by consanguinity or marriage, each person residing in the same dwelling unit, and any other person who or legal entity

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which is a child's legal or physical custodian or guardian, or who is otherwise responsible for the child's care, other than an authorized agency which assumes such a legal status or relationship with the child under this chapter.

As explained elsewhere in the present study, it may or may not make sense to view intrafamily and extrafamily abuse as distinct phenomena. But for discussion purposes, the term "family" needs clearer definition.

Finally, there is confusion as to the definition of "child" in the term "child sexual abuse." Most of the pertinent statutes view children as persons under age 18. But the statute establishing the children's advocacy program contains a definition of child sexual abuse that employs age 16. For policy analysis, this inconsistency should be resolved.

Chapter 4

SENTENCING ALTERNATIVES TO INCARCERATION: THEIR RATIONALE AND THEIR UNCERTAIN OUTCOME

Rationale

In the criminal justice system generally, sentencing alternatives to incarceration derive much of their political support from the need to reduce prison overcrowding.¹ Additional support comes from defense attorneys, who want to keep their clients out of prison. Defense-based alternative sentencing plans "typically include elements of employment, restitution, community service, and social service and treatment programs, supervised during a term of probation."² Support also comes from persons who see incarceration as socially nonbeneficial--at least in some cases--in achieving one or more of the four commonly acknowledged goals of sentencing: incapacitation, retribution, deterrence, and rehabilitation.³

Support for sentencing alternatives in cases of intrafamily child sexual abuse has similar sources. More particularly, it reflects a belief, held by many, that (1) in many individual intrafamily cases, straight incarceration of the offender fails to foster--indeed may undercut--achievement of one or more of the kinds of objectives stated in S.C.R. No. 107, S.D. 1, and S.R. No. 117, S.D. 1; and (2) a sentencing system in which straight incarceration of intrafamily offenders is the only option is likewise at odds with one or more of these kinds of objectives.

Apparently there are no statewide systems of sex-offender sentencing alternatives in the nation.⁴ But sentencing alternatives for some cases of intrafamily and extrafamily child sexual abuse are being used in certain courts within states,⁵ including Hawaii.⁶

In some counties, although not anywhere in Hawaii, sentencing alternatives are part of what has been called a "comprehensive innovative program" for handling intrafamily child sexual abuse cases.⁷ Such programs may differ from each other in their philosophy, goals, organization, methods, funding, public support, interagency cooperation, scope (e.g., do they include extrafamily as well as intrafamily abuse?), and other respects.⁸

But typically, comprehensive programs incorporating sentencing alternatives offer the probation alternative to offenders who meet certain screening criteria, with specialized mental-health treatment of the offender as a condition of probation. In some programs, the sentence includes a short jail term, possibly with work release. Quite commonly, the program includes mental-health treatment and other services for the child victim and other family members. Self-help groups, group therapy, and individual therapy may be used. Examples of comprehensive programs incorporating post-conviction sentencing alternatives can be found in Santa Clara County, California;⁹ King County, Washington;¹⁰ Boulder County, Colorado;¹¹ and Maricopa County, Arizona.¹²

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Thorough, up-to-date data do not exist on the use of sentencing alternatives in intrafamily child sexual abuse cases by judges throughout the nation, whether as part of a comprehensive program or otherwise.

Some useful information does exist, however. In 1981, the Child Sexual Abuse Project of the National Legal Resource Center for Child Advocacy and Protection of the American Bar Association published the results of its survey of prosecutorial policies, procedures, and case dispositions in intrafamily child sexual abuse cases (hereinafter the "ABA survey").¹³ The survey questionnaire was sent to nearly 300 prosecutors in various cities throughout the nation. Seventy-seven prosecutors' offices responded. Forty states were represented in the responses; 10 states, including Hawaii, were not represented.¹⁴

In the ABA survey questionnaire, intrafamily child sexual abuse was defined as:¹⁵

...any contacts or interactions with a child where the child is being used for the stimulation of a family member or other person in the child's household in a position of power or control over the child, including parents, stepparents, guardians, or live-in boyfriends.

In an ABA publication titled Innovations in the Prosecution of Child Sexual Abuse Cases (hereinafter Innovations), the general survey findings concerning case disposition were reported:¹⁶

Most jurisdictions stated that probation with treatment may be imposed in intra-family cases. However, only one-third of the jurisdictions from which we received surveys impose sentences of probation with a condition of treatment for non-family child sex offenders. In those jurisdictions which utilize probation with treatment for both types of cases, respondents stated that it was a more frequent disposition for intra-family than nonfamily offenses.

Frequently, defendants may be sentenced to combinations of dispositions, such as a suspended sentence, probation and counseling. For example, in Seattle, Washington, most offenders are sentenced to deferred or suspended prison-time, probation, and work release jail-time, with treatment for the sexual deviancy. Only 15 percent of Seattle's offenders go to in-patient mental health facilities and only five percent are incarcerated....

The survey responses indicated wide variations in the length of jail or prison terms; they ranged from one month to a maximum of 20 years for a first offense involving sexual intercourse or sodomy, and one month to five years for a first offense involving sexual contact or fondling. Somewhat higher sentences are imposed for second offenses. Further, the prison or jail sentences tend to be lower for intra-family offenders than for all child sex offenders.

The ABA survey has not been updated.¹⁷

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Some comprehensive innovative programs, such as those in Johnson County, Kansas¹⁸ and Sacramento, California,¹⁹ follow a pre-trial diversion model rather than a post-conviction sentencing model. In classic pre-trial diversion, prosecution is put on hold while the alleged offender performs certain obligations, such as submitting to counseling. If the offender satisfies the obligation, the case is dismissed. Otherwise prosecution moves ahead.²⁰

There is considerable debate over the relative merits of pre-trial diversion and post-conviction alternative sentencing. Key controversies are whether the threat of prosecution (in pre-trial diversion programs), or the fact of conviction (in post-conviction alternative programs) provides more leverage over the offender in terms of forcing treatment; which approach is "tougher"; which is more appropriate to the seriousness of the crime; and which provides more deterrence.²¹

Some view both pre-trial diversion and post-conviction alternative sentencing as "diversion" programs, apparently because both can divert the defendant from lengthy incarceration.²²

Indeed, a variety of "diversion" approaches are possible. For example, a program in Dayton, Ohio, allows certain offenders to plead guilty to a misdemeanor charge of child abuse, which can be punished by a six-month term in the county workhouse. The court accepts the plea but holds off on imposing sentence. If the defendant satisfactorily completes treatment, the state asks the court to allow withdrawal of the plea and to dismiss the charges. Even if the defendant pleads not guilty and is convicted, he still can be considered for diversion from incarceration.²³

In 1982, Josephine Bulkley, a lawyer, and Kee MacFarlane, a social worker, both experts on child sexual abuse, provided an excellent summary of what they call the "systemic problems and dilemmas associated with child sexual abuse that have spawned the development of such a range of specialized programs":²⁴

Low Likelihood of Successful Prosecution

Even if one has no philosophical conflict about prosecuting child sexual abuse in the same manner as any other violation of criminal law, traditional prosecution of these cases has shown itself to be a frustrating and largely unsuccessful endeavor if the desired outcomes are conviction and lengthy incarceration. Since prosecutors are reluctant to go to court with cases that are unlikely to result in convictions (particularly when they require an inordinate amount of preparation time), cases involving child sexual abuse, especially where the perpetrator is a family member, often do not reach criminal court at all. This is compounded by the generally accepted fact that most cases never even come to the attention of authorities.

The extreme difficulty in prosecuting child sexual abuse cases utilizing traditional legal procedures is largely because they are rarely accompanied by the kinds of evidence necessary to establish

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proof of guilt beyond a reasonable doubt. Evidentiary limitations include: lack of forensic evidence of sexual activity or physical violence; time lapse between the abuse and its discovery; lack of corroborative eye witnesses; reluctance of family members and friends to press charges or testify in court; and pressure on children to retract their statements due to fear of family disintegration. These are compounded by the belief that children do not make credible witnesses due to their limited cognitive and verbal abilities and alleged suggestibility, and the fact that accused abusers are unmotivated to plead guilty when alternatives to incarceration are few or the chances of acquittal are high.

In many instances, a prosecutor's case hinges solely on the word of a young child against the word of an adult--often a very credible adult with a good employment record, no prior arrests, apparent parental or civic concern for children and a good defense attorney. It is no wonder that so many child sexual abuse cases result in reduced pleas with no real consequences for perpetrators, dropped charges, or no charges at all.

Increased Trauma from the "Helping" System

Perhaps the greatest incentive to the development of specialized approaches to this problem comes from the collective observations of concerned professionals that the trauma experienced by child victims and their families can be substantially compounded by duplicative and insensitive interventions on the part of criminal justice and child protective systems.

The trouble with traditional approaches to legal intervention in these cases is that they inevitably require a singular focus on obtaining the kinds of physical or corroborative evidence necessary to prove a case in court. The various procedures to which a child may be subjected by the justice system have been documented elsewhere in the literature. They include: multiple detailed interrogation by law enforcement, medical and social service personnel; gynecological examinations that may include sedation or the use of restraints; subjection to polygraph tests and hypnosis; the appearance of uniformed police in the home or at school; testimony and cross-examination at a preliminary hearing, grand jury or open trial; involuntary separation from family; and others.

The brunt of this system-induced trauma can be attributed to several factors that are currently being addressed by most programs: (1) lack of coordination and cooperation among the systems and professionals involved in these cases; (2) lack of skill and sensitivity in dealing with child victims; (3) little allowance, particularly in the criminal justice system, for the special vulnerabilities of child witnesses; and (4) lack of options and flexibility in dealing with an offense whose victims and perpetrators often have very complex and mixed feelings about each other.

Limited Jurisdiction and Resources of
Child Protection Agencies

Services provided by child protective service agencies (CPS) and ordered by juvenile courts focus on protection of children and help for families, rather than on punishment of abusers. In contrast to the criminal court, juvenile court proceedings generally are regarded as less traumatic for children, and may be less threatening to parents who sometimes are more likely to cooperate with an agency's treatment plan when they are not facing criminal prosecution. However, while CPS agencies and the juvenile court can order and provide needed supervision and services to a child and family, they do not have direct control over the perpetrators of abuse. This can have immediate consequences for a child since, in the absence of the authority to order abusers out of their homes, the placement of victims (and sometimes their siblings) in foster homes is often regarded as the only means of assuring their protection. Such a move often leaves children feeling punished and guilty for the abuse or for its discovery.

Even without the limitations of out-of-home placements, CPS agencies often are ill-equipped to provide comprehensive treatment for this problem. In a 1980 study of sexual abuse case handling in public social agencies in the southeast (N = 1,045), it was found that CPS workers generally viewed their jobs as consisting of investigation and diagnosis, and that the majority delegated the responsibility [sic] for providing treatment to other resources. In addition, although the overwhelming majority of workers indicated that they felt unprepared to offer treatment, less than 50% wanted the responsibility for it--even is [sic] adequate specialized training was made available to them. The fact that most CPS workers lack the specialized skills, educational backgrounds, time, or even the mandate to provide long-term treatment for sexually abusive families, led a variety of other community agencies to take the lead in developing the specialized resources needed.

Difficulty in Keeping Families in Treatment

Individual therapeutic resources for child sexual abusers existed in most communities long before most specialized treatment programs came into existence. Special court arrangements, which are still available in many places, often involved agreements between defense and prosecuting attorneys (with the recommendations of private psychiatrists), that resulted in guilty pleas with treatment on an outpatient basis as a condition of probation. The problems with this solution, even if mandated by the court, include the following: (1) accountability for such arrangements is generally low, as is the long-term follow-through in many cases; (2) individual psychotherapists, regardless of their educational credentials, usually have little expertise in treating this problem due to limited experience and the lack of specialized training in the curricula of professional schools; (3) traditional, one-hour-a-week, non-directive or insight-oriented modes of psychotherapy have

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not proven to be very effective with this problem when offered in the absence of other types of intervention; (4) the child and other family members who may have played various roles in the abusive situation or who are suffering as a consequence of it, often are not the recipients of any remedial services themselves; (5) the confidential nature of the private patient-therapist relationship can serve to reinforce the secrecy and collusion that are inherent aspects of this form of abuse; and, finally (6) when there is no meaningful outside supervision, enforcement of boundaries or feedback mechanism (as in simultaneous treatment of the victim and other parent), or when the abuser remains in the home, the abuse may well continue while the abuser is "engaged" in treatment.

Of all the drawbacks to the singular, individualistic "solution" to child sexual abuse, perhaps the most obvious problem was, and remains, the extreme difficulty in engaging and keeping child sexual abusers in treatment. Whether the fault lies primarily with the limitations of traditional treatment methods, the inadequate skills of many therapists, the fear on the part of abusers of further shame or retribution, their inherent denial, defensiveness and resistance to acknowledging that they have this problem, or the unavoidable stigma associated with it, the problem remains that child sexual abusers are not a client population that willingly comes to or readily stays engaged in traditional psychotherapy.

There has been a broad array of comprehensive innovative programs addressing intrafamily child sexual abuse, a number of which are described in Innovations.²⁵ Perhaps the best-known is the pioneering Child Sexual Abuse Treatment Program (CSATP) run by the Juvenile Probation Department of Santa Clara County, California (a department equivalent to "child protective services" agencies in other jurisdictions).²⁶ The Santa Clara program, as noted in chapter 2 above, has a family systems philosophy. Incest is seen as a symptom of family dysfunction: marital problems and a low self-concept in the parents. Self-help for all family members--through Parents United, Daughters and Sons United, and Adults Molested as Children United--is a key element of the program, as is professional counseling. Offenders who meet certain criteria--e.g., who are not exclusively sexually oriented toward children; are not "predators;" who do have a "profound sense of guilt" for the molestation; who do not have a history of violence, heavy drug use, previous charges of sexual abuse, or a lengthy criminal record; and who are well-known to the victim--are eligible for the program. If they plead guilty, they will probably be sentenced to a county jail term with work furlough, a suspended prison term, up to five years of probation, community service, with the CSATP, and counseling.

Another locale providing sentencing alternatives is King County, Washington.²⁷ King County has a comprehensive "approach" to child sexual abuse. Rather than a centralized, unified program, there is a network whose core consists of the police, child protective services, prosecutors, and the probation and parole department. A sexual assault center and a rape relief program provide medical care, counseling, and advocacy for victims. Private mental-health professionals and agencies treat offenders, victims, and other

family members. Philosophically, the King County network sees child sexual abuse as both a crime and a "psychosocial or behavioral disorder." Offenders accepted into treatment are those who have been evaluated by "offender treatment specialists" as "those who can be safely treated in the community." Generally, where there is a guilty plea and the offender is determined to be amenable to treatment, the prosecutor recommends treatment as a condition of probation, with some work-release jail time. Usually the defense attorney concurs and the judge accepts the recommendation. Conditions of probation may include limitations on the offender's contact with the victim or other children, abstinence by the offender from alcohol, and payment by the offender of the victim's treatment costs.

MacFarlane and Bulkley have studied various comprehensive programs and find a common thread in many. They call it the "Godfather Offer":²⁸

One approach to dealing with intrafamily child sexual abuse cases is becoming such a dominant trend in the development of many systems that it merits examination by itself. Since this approach constitutes a technique for accomplishing the provision of treatment services, and is utilized by so many different types of programs, it is difficult to classify within any one model.

Basically, the approach involves offering a defendant the opportunity to avoid criminal prosecution, harsh penalties or other sanctions in exchange for certain concessions, usually involving his acknowledgement of the abuse, cooperation with treatment, and other pre-established criteria. In jurisdictions which provide treatment following conviction, the offer may be used in obtaining confessions or guilty pleas. Such offers generally involve anticipated outcomes or mutually hoped-for consequences of certain actions, rather than a promise of specific results (that is "90% of the people who cooperate receive this instead of that"). Or, in pre-trial diversion programs, the offer may be made by the prosecutor in the form of a formal pledge or specific contractual arrangement to defer prosecution (that is, "if you do these things, we will guarantee those things").

In cases of child sexual abuse, the offer is basically a bartering of things that are usually highly desired on all sides. Depending on the specific conditions of such an exchange, the benefits can include: (1) for the criminal justice system, a guilty plea or avoidance of the time and expense of litigation; (2) for a treatment program, the likelihood that, because of the continuing threat of punishment or prosecution, the abuser will not drop out of treatment; (3) for a victim, the avoidance of having to testify against a parent or having to feel responsible for the abuser's punishment; (4) for other family members, the opportunity to avoid the expense and stigma of a public trial, and to receive therapy to work through dysfunctional behaviors, even if separation is desired; and (5) for the abuser, a means of avoiding prison or a criminal record, as well as the loss of employment and status. As in the movie, The Godfather, it is an offer which, if not impossible, is at

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least very difficult for an accused abuser to refuse when faced with a felony charge of incest or child sexual assault.

A number of legal and treatment issues arise from the use of this approach. From a legal perspective, the "Godfather Offer" is a device for obtaining a confession, a guilty plea, or a defendant's participation in pretrial diversion. Programs must use caution in order to insure that a guilty plea or agreement to participate in a diversion program is legally valid; that is, it must be voluntary and knowing. Likewise, confessions must be voluntary; if they are obtained by psychological coercion, they are considered involuntary, regardless of their actual truth or falsity. In order to satisfy the voluntariness requirement, the defendant must understand the nature of the charges, the requirements of the program or conditions of a plea, the consequences if he violates these requirements, and his waiver of various rights. A defendant's access to an attorney who is familiar with the program is one way of assuring that his choice is a knowing one.

With regard to the efficacy of treatment, there is some question about whether any decision by an accused to confess, plead guilty or enter into a diversion agreement can, in fact, be voluntary. It is unlikely that a suspect facing criminal charges or prison decides to acknowledge responsibility for sexual abuse solely because he is repentant. For the most part, such decisions are made because of fear of punishment or to avoid the legal process; through acceptance of a special offer, defendants can avoid or limit pain. This is not meant to imply that abusers and their families who enter treatment programs under such conditions cannot benefit from or become engaged in a treatment process. Many treatment providers will attest to the positive changes they have seen in what, initially, were resistant and manipulative clients seeking to avoid criminal court. Nonetheless, programs are becoming cognizant of the fact that when the legal system, rather than the abuser's personal desire to change is the primary, if not exclusive, initial motivation to participate in therapy, treatment methods and expectations must be tailored accordingly.

Informal conversations with persons favoring sentencing alternatives in Hawaii indicate that this "Godfather Offer" is what they seek to achieve. They want to "box in" the alleged offender.

They also believe that prosecutors may be receptive to sentencing alternatives because of the prospect that the availability of such alternatives will stimulate an increase in guilty pleas, and thus more convictions. To date, it has not been proven that convictions will increase as a result of sentencing alternatives. But the ABA survey report hints that such may be the case:²⁹

According to survey responses, a little over two-thirds of the defendants plead guilty in intra-family cases, whereas a slightly lower number plead guilty in all child sex offense cases. The somewhat higher percentage of guilty pleas in intra-family cases may

be accounted for by the growing number of alternative sentencing programs being developed by prosecutors and associate agencies. These programs generally secure a guilty plea from the offender in exchange for a recommendation to the court of either a work-release jail sentence or probation conditioned upon treatment.

Lack of Evaluations of Sentencing Alternatives

Throughout the criminal justice system, a fundamental problem plagues sentencing policy analysis: "The corpus of sentencing reform impact evaluations is small, and most published reports suffer from serious methodological shortcomings."³⁰ Apparently, empirical knowledge of sentencing reform impacts is as limited as empirical knowledge of the prevalence, causes, effects, treatment, and prevention of child sexual abuse.

In the criminal process, the statutory establishment, increased use, or more systematic use of sentencing alternatives to incarceration can be viewed as a kind of sentencing reform. There has been substantial research into the degree to which alternative sentencing is judicially accepted and into the cost-benefits of alternative sentencing for the corrections system, but there has been little research into the impact of sentencing alternatives on recidivism.³¹ As noted in chapter 2 above, information on recidivism is widely viewed as a critical element in sentencing policy analysis.

Not surprisingly, then, sentencing alternatives in intrafamily child sexual abuse cases have not been evaluated adequately. In 1981, Kee MacFarlane, in her foreword to Innovations, wrote:³²

...[T]hese materials do not attempt to address the questions of whether or not the criminal justice system should be involved in cases of intra-family child sexual abuse or how and to what extent criminal prosecution of cases, diversion or plea bargaining is harmful or helpful to the victims and families affected by sexual abuse. They also are not intended to pass judgment on which state laws, diversion programs or treatment approaches are "best" for dealing with this problem. The state of our collective knowledge is in far too developmental a stage and reliable outcome data is far too sparse to make such determinations at this time. [Emphasis added].

Unfortunately, there has been relatively little growth of empirical knowledge since 1981. The federal government helped fund many innovative approaches to intrafamily child sexual abuse. The shift in federal funding away from categorical programs and the reluctance of government to collect "sensitive" data have been given as two reasons for the dearth of empirical data concerning the outcome of comprehensive innovative approaches.³³

Specialized treatment programs have begun evaluating themselves.³⁴ Those evaluations may turn out to be useful, but self-interest may cause bias.³⁵ As noted in chapter 2 above, Finkelhor believes that even the best treatment programs have not been adequately evaluated. In the absence of solid data, comprehensive innovative approaches to sentencing alternatives must still be considered experimental.

Obstacles to Bureau Evaluation of Sentencing Alternatives

Evaluation by the Bureau of the effectiveness of sentencing alternatives in achieving the objectives listed in S.C.R. No. 107, S.D. 1, and S.R. No. 117, S.D. 1, appears unfeasible, for several reasons:

First, there is the sheer complexity of the task. In order to accomplish a thorough evaluation of the alternatives, the effectiveness of all of the following should be evaluated: (1) each alternative mentioned in the resolutions--incarceration, probation, work release, and counseling for the offender and the family; (2) alternatives not mentioned in the resolutions, such as fines, community service, and restitution; (3) conditions of probation, such as requiring that the offender stay away from the victim; (4) various forms of counseling--e.g., group therapy, individual therapy, self-help, behavioral therapy, insight therapy; (5) various combinations of alternatives; (6) the use of sentencing alternatives (or combinations thereof) as part of a comprehensive approach to intrafamily sexual abuse versus the more traditional individualized approach; and (7) various models of organized approaches--e.g., unified programs versus loose networks. Alternatives should be evaluated against each other and against incarceration, including incarceration that includes treatment in prison.

The scope of "sentencing alternatives" could be further expanded: e.g., prison sentences that allow for parole could be assessed, since such sentences offer, in effect, an alternative to straight incarceration. (Indeed, conditions imposed on parole can be similar to probation conditions and can include, for example, requiring the offender to embark upon therapy).³⁶ The evaluation could be further expanded by examining the effectiveness of sentencing alternatives compared with pre-trial diversion and other innovative approaches.

Additional complexity is built into the objectives stated in S.C.R. No. 107, S.D. 1, and S.R. No. 117, S.D. 1, as the criteria for evaluating the sentencing alternatives. For example, the first objective includes within it the objective of preventing "revictimization" of the child. Revictimization could mean many things, including:

- (1) The child being sexually abused in the future by the same offender or by other offenders;
- (2) Suffering other forms of abuse (such as physical abuse or psychological retaliation) by the same offender or other offenders;
- (3) Experiencing guilt about the offender being convicted and going to prison as a result of the child's reporting him or testifying against him;
- (4) Suffering confusion if the offender is acquitted and does not go to jail;
- (5) Suffering the stress of lengthy prosecutorial proceedings;
- (6) Being taken out of the home;

- (7) Being subjected to possibly harmful mental-health counseling;
- (8) Being told that victims tend to become offenders;
- (9) Being subjected to hostile cross-examination by defense attorneys;
- (10) Suffering economic deprivation as a result of the father being removed from the home;

and so on.

In the second objective, "rehabilitation of the family" could mean:

- (1) Reuniting of the family with no further sexual abuse;
- (2) Reuniting of the family without any further sexual abuse or psychological abuse (such as continued intimidation or retaliation by the abusing family member);
- (3) Development of a stronger relationship between the non-abusing parent and the child victim, with or without the abusing parent ever returning to the home;
- (4) Preventing the abusing parent from ever returning to the home;

and so on.

Indeed, definitional uncertainty--noted previously in this study--goes to the very core of S.C.R. No. 107, S.D. 1, and S.R. No. 117, S.D. 1. For example, what are the crimes encompassed by "intrafamily child sexual abuse"? Are inchoate crimes--attempts, conspiracies, solicitation--included? Are child victims persons under 18, or is there some other cut-off age?

Even if the Bureau had the time, the resources, and expertise in child sexual abuse--which it does not--a major obstacle to any evaluation of sentencing alternatives is the absence of data. As is apparent from chapter 2 above, solid empirical studies concerning the prevalence, causes, effects, treatment, and prevention of child sexual abuse are rare; little is certain. The data on recidivism and on the effectiveness of offender treatment programs--areas of great importance to sentencing policy--to the extent they exist at all--are in disarray. Furthermore, as noted previously in the present chapter, sentencing alternatives--in criminal law generally or in the field of child sexual abuse specifically--have not been adequately evaluated. This lack of data undermines the ability to evaluate Hawaii's current use of alternatives, thereby making an attempt to evaluate other alternatives even more speculative.

The dearth of data on recidivism comes up again and again. Lucy Berliner is a social worker at the Sexual Assault Center at Harborview Medical Center, a University of Washington teaching hospital in Seattle that is part of the King County, Washington system, for dealing with intrafamily sexual abuse. Berliner was recently quoted as saying the following about treatment for convicted child sexual abusers (including incest offenders and others):³⁷

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"I don't know if those guys wouldn't be as free from future offenses if they spent one or two years in jail as they would by being in a community treatment program.... We just simply don't have the data, because those types of guys have never gone to jail or prison.... The teacher, the community leader, the 'nice guy' incest offender are never being sent to prison.... I would like to believe that the treatment programs are in themselves effective, but I'm not persuaded."

It is important to remember that the absence of empirical evidence as to the effectiveness of treatment does not mean that treatment is not effective. It just means that in the current state of the art, effectiveness is uncertain empirically.

Not every expert views the dearth of recidivism data as critical to assessing treatment effectiveness. In writing of father-daughter incest, Judith Herman notes that recidivism (which she describes as the "traditional" criterion for assessing the effectiveness of offender treatment programs)³⁸ is extremely difficult to assess; she proposes a different criterion:³⁹

[T]he progress in rehabilitation of incestuous fathers should be measured by the well-being of their wives and children. When no one in the family feels bullied, pressured, or intimidated by the father, when the daughter feels comfortable in his presence, and when the mother finds it possible to relate to the father as a mate rather than as an overlord, then therapy can be considered successful....

Thus, Herman can optimistically support various innovative treatment programs despite the absence of empirical proof of their effectiveness.⁴⁰ She may be right. But her measure of treatment effectiveness is highly subjective and not suitable for use by the Bureau.

Another obstacle arises from the fact that the Bureau, as an impartial office, lacks a particular theoretical framework or set of beliefs with which to interpret the data on intrafamily child sexual abuse. Herman acknowledges the need for such a perspective; she makes it clear that she writes from a feminist perspective.⁴¹ She sees father-daughter incest and society's apparently inadequate response to it as symptoms of a patriarchal society.⁴² The Bureau has no theoretical perspective. Furthermore, for the Bureau to inventory all possible theoretical frameworks and beliefs, and then evaluate sentencing alternatives in terms of those frameworks, would be a monumental task.

There is a paradox. On the one hand, it is virtually impossible to respond to child sexual abuse without some theory or belief. For policymakers and practitioners alike, theories and beliefs both justify and shape action. On the other hand, as Conte points out, a misguided theoretical perspective could be harmful.⁴³

In the absence of clear-cut empirical data on the impact of sentencing alternatives, could not the Bureau be guided by the opinions of persons working in the field? Quite simply, this would require making educated

choices among persons with great differences in perspective. For example, Judith Herman and Sarah Nelson, although both feminists, hold quite different views of sentencing in cases of father-daughter incest. Herman argues for milder sentences: "In most cases," she says, "if appropriate therapy is available, a long suspended sentence with mandatory treatment as a condition of therapy is the most constructive choice."⁴⁴ This recommendation is not intended to condone such crimes, she says. Rather, it is based simply on the following notion:⁴⁵

Victims may be less reluctant to accuse, district attorneys to prosecute, juries to convict, and judges to sentence incestuous fathers if they know that their actions will not result in an unreasonably severe punishment. Except for the small minority of sadistic, violent, or grossly perverse offenders who are beyond the reach of any known modality of therapy, little social benefit is to be derived from long imprisonment.

An exception to the principal of milder sentencing should be made, however, in the case of men convicted of a second offense or those who violate the conditions of their probation or parole....

Nelson, on the other hand, says that imprisonment is society's only way of seriously condemning certain acts; offering treatment gives the message that the offender is less than fully responsible for his actions and lessens the gravity of the crime in society's eyes:⁴⁶

Anyone who advocates treatment on the grounds that it is appropriate for the male offender must be quite clear about the implications of what they are saying. It means that the men are sick, deviant, abnormal or inadequate. Alternatively, it means that they bear less responsibility for their actions than other types of offenders whose disposal is via the penal system. In particular, family treatment programmes imply that responsibility must be shared, especially by the wife [an implication that Nelson challenges].

...[T]he problems of reporting and testifying are real. But should they be met by means which also weaken the statement we make about the crime, especially if this leads to treatment that is inappropriate for offender, mother and victim?

Is Herman right or is Nelson? Making assumptions based on either perspective, or something in between, is a policy decision.

Nelson goes so far as to say:⁴⁷

...[w]e can only talk about softer treatment for incest offenders in the context of reformed sentencing for all offenders. Within the present system, there is no reason why incest abusers should be treated more leniently than others, and many reasons, in terms of criteria like danger, damage and deterrence for the sake of prevention, why they should be regarded as serious criminals relative to other offenders.

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Her comment reminds us that fundamental issues of social policy exist here. It would be irresponsible for the Bureau to claim it has the authority or ability to resolve such issues.

Nelson is not the only writer to warn of the dangers of treatment. Conte has pointed out that social work intervention in child sexual abuse cases, by child protective workers, could itself be traumatic for the children and their families. Dangers could result from the application of "unproven theoretical models" and by "continuing to direct casework time to the sexual abuse long after the client is ready to allow the wounds to heal...."⁴⁸ The same concerns could apply to therapists. Perhaps they are sometimes hurting, rather than helping the victims and families! While good training of therapists arguably could prevent such harm, that is not certain, since little is known about what kind of treatment is best.

Others have pointed out that offender treatment can have the unintended consequence of giving the offender a more sophisticated understanding of how to beat the system by saying the "right" things and avoiding detection.

As the above discussion makes clear, controversy pervades virtually every aspect of child sexual abuse. It even extends to the apparently uncontroversial area of interagency coordination. It is almost rote by now that coordination between the various agencies responding to reports of child sexual abuse is critical. Yet MacFarlane and Bulkley point out that some believe that cooperation by therapists and caseworkers with the criminal justice system can blur professional roles, with the therapists and caseworkers unintentionally becoming an "arm of the legal system."⁴⁹

Given the complexity of the issues, uncertain knowledge, limited time and resources, conflicting theories and beliefs, the almost total lack of data, and the Bureau's obligation to remain impartial, the Bureau cannot at this time evaluate sentencing alternatives for persons convicted of intrafamily child sexual abuse.

A final observation: It appears that despite Hawaii's array of statutory provisions concerning child sexual abuse, it has no comprehensive, clearly articulated public policy on this subject. Nelson speaks eloquently to this problem:⁵⁰

...[T]here is no point in finding [cases of incestuous abuse] if agencies don't know what to do with them. Without a clear policy programme, large-scale investigation could be irresponsible in its effects. Agencies often feel helpless enough in dealing with the cases they do know about. If social workers, psychiatrists, teachers or other groups worked hard to identify many more abused women and children, what kind of help could they offer people whose hopes had been raised?

Survivors [of incest] have a right to know, before they share their experience with others, what kind of help they can expect and what kind of treatment they will be asked to take part in....

SENTENCING ALTERNATIVES TO INCARCERATION

...[I]f a comprehensive treatment programme is an offer, and that seems essential if agencies are not to lose trust and effectiveness by contradicting each other's policies, those who are abused will want to know what ideas underpin the programme. For instance if mothers are expected to shoulder a large part of the responsibility, they may never even find the courage to come forward.

Thus the first step in designing a programme among social work, medical, legal and other agencies involves reaching a consensus on what incestuous abuse is about, and how it should be treated. That means agreeing on a theory.

...[D]ecisions on how you deal with each family member depend crucially on how you theorise about them. Is he/she mad, bad, sick or inadequate; blameless, collusive, or responsible for the whole thing? Are we looking at a family pathology, a Freudian spiders' web, a legacy of patriarchy?

Theory decides whether you believe a runaway girl's story, and whether or not you send her home. It shapes what you tell the tearful mother who arrives on your doorstep. Should she be more dutiful to her incestuous husband and give up her job and social life, or should she be less obedient and dutiful? It determines the policy you design for the offender: Should he be imprisoned, removed from the home, psychoanalyzed, or helped to repair his marriage? It decides whether or not you intervene at all: is incest just a happy part of the culture, and best left alone?

That is why...agencies must begin by hammering out the very basis of their policies, however time-consuming, stressful or conflictual the exercise may be.

Chapter 5

FINDINGS AND RECOMMENDATIONS

Senate Concurrent Resolution No. 107, S.D. 1, and Senate Resolution No. 117, S.D. 1, call for the Legislative Reference Bureau to study post-conviction sentencing alternatives to incarceration that can be applied by the criminal justice system in cases of intrafamily child sex abuse.

The resolutions ask "that the study examine the sentencing alternatives to determine their effectiveness in achieving the following objectives in the order of priority in which they are listed:

- (1) Preventing revictimization of the child or other children;
- (2) Rehabilitating the offender and the offender's family; and
- (3) Punishing the offender.

The Bureau is asked to "include in its findings and recommendations, but not be limited to, the following":

- (1) The legislation, if any, that should be enacted to provide for sentencing alternatives;
- (2) The programs that should be established to deal with intrafamily child sex abuses [sic]; and
- (3) The estimated cost of those programs and recommendations.

Findings

The resolutions create an almost limitless range of variables, not clearly defined for analysis.

Little is certain as to the magnitude, effects, causes, treatment, and prevention of child sexual abuse, either extrafamilial or intrafamilial. The empirical research is plagued by definitional confusion, by the inherent difficulty of studying a subject surrounded by shame and secrecy, and by methodological problems and inconsistencies. Theories, assumptions, and beliefs vary and lack proof, generally speaking. The prospects for a major improvement in the knowledge base, particularly in the immediate future, are dim.

There is no single type of child sexual abuse. It encompasses many forms of behavior, many kinds of victims (both male and female), many possible causes, and many types of offenders. It cuts across all segments of society.

Some believe that extrafamily and intrafamily child sexual abuse are essentially different phenomena. But there is insufficient evidence as to

whether this belief is justified. Some evidence suggests that extrafamily and intrafamily molesters have much in common.

Little is known about the likelihood that sexual abusers of children, once convicted, will repeat their offense. The data on recidivism and on the effectiveness of mental health treatment of offenders are in chaos.

By statute, Hawaii addresses child sexual abuse--either directly or indirectly--through reporting requirements, child protective activity, domestic abuse restraining/protective orders, the children's advocacy program, and various felony and misdemeanor provisions of the Penal Code. The most pertinent crimes appear to be sexual assault in the first through the fifth degrees, incest, promotion of prostitution in the first through third degrees, promotion of child abuse (child pornography) in the first and second degrees, promotion of pornography for minors, and open lewdness.

The Penal Code does not define child sexual abuse, either intrafamily or extrafamily. The definition of sexual abuse provided in the law establishing the children's advocacy program is ambiguous, particularly with regard to the definition of "child." The definitions of "family" in the pertinent statutes appear inconsistent.

Under the Penal Code, imprisonment of convicted child sexual abusers is sometimes mandatory. But in many cases, sentencing alternatives to incarceration--e.g. probation, restitution, fines, community service--are available. The availability and nature of alternatives depends on such factors as the seriousness of the crime, the defendant's past criminal history, and the defendant's criminal propensity. The parole process provides, in effect, for alternatives to incarceration as well. Furloughs are available for incarcerated offenders, in certain cases, to allow, for example, for employment.

Hawaii lacks a system for comprehensively tracking extrafamily and intrafamily child sexual abuse cases through the civil and criminal systems. As in the nation, data on recidivism are hard to come by. This lack hampers policy development. However, the Children's Advocacy Center has begun to develop a tracking system.

Many cities and counties in the nation have developed organized approaches to child sexual abuse, particularly intrafamily abuse, that incorporate sentencing alternatives to incarceration. To a large extent, these approaches hold out to alleged offenders and their attorneys the "carrot" of probation, conditioned on participation in specialized mental-health treatment and other requirements, in exchange for a guilty plea. This approach is seen by some as giving society greater control over the defendant and greater ability to protect the victim than did the traditional approach of offering only incarceration, going to trial, and gaining few convictions while subjecting the child victim to the stress of the criminal process and possible removal from the home. This rationale underlies the interest in sentencing alternatives in Hawaii.

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Treatment and other alternatives to incarceration of child sexual abusers have not been adequately evaluated in any jurisdiction as to their effectiveness in achieving the types of objectives stated in the resolutions.

The impressions, assumptions, and beliefs of individuals working in the field of child sexual abuse differ on such issues as whether treatment works, what forms of treatment are best, whether treatment should be an option, whether offenders should be incarcerated and if so for how long, whether the victim and other family members share responsibility for the offender's actions, and whether offending adults can or should be reunited with their victims. Different theoretical perspectives and treatment approaches to both victims and offenders have evolved, each of which has the positive potential of casting light on the confusing data and the negative potential of bias or doing harm.

An evaluation of the effectiveness of sentencing alternatives by the Bureau is unfeasible at this time, for the following reasons: the complexity and ambiguity of the variables stated in the resolutions; the limitations of empirical data on the causes, effects, treatment, prevention, and legal management of child sexual abuse; and the limited resources and expertise of the Bureau. The Bureau, however, does offer the following recommendations which, hopefully, will correct some of the problem areas perceived in conducting this study.

Recommendations

For policy development purposes, the Children's Advocacy Center of the Judiciary should develop precise definitions of intrafamily child sexual abuse and extrafamily child sexual abuse that specify which crimes are included within the definitions, what "family" means, and what "child" means.

The Children's Advocacy Center should implement the system it is currently developing for tracking the progress of intrafamily and extrafamily child sexual abuse cases through the child protective and criminal justice systems, focusing particularly on improving Hawaii's capacity to measure recidivism.

Proponents of any new legislation establishing, expanding, or enhancing alternatives to incarceration for convicted intrafamily sexual abusers of children should carefully evaluate whether to include not only intrafamily offenders but also extrafamily offenders in the pool of potentially eligible offenders.

The Children's Advocacy Center should evaluate the costs, benefits, and feasibility of implementing a media program designed to inform children and adults of children's right to be free from sexual abuse and of where to turn for help.

FOOTNOTES

Chapter 1

1. Quoted in MidWeek Magazine (Oahu), August 24, 1988, p. A-8.
2. Judith L. Herman with Lisa Hirschman, Father-Daughter Incest (Cambridge, Massachusetts: Harvard University Press, 1981), p. 174, hereinafter cited as Father-Daughter Incest.
3. Quoted in David Hechler, The Battle and the Backlash: The Child Sexual Abuse War (Lexington, Massachusetts: Lexington Books (D.C. Heath), 1988), p. 221.
4. David Finkelhor, "Introduction," David Finkelhor and others, A Sourcebook on Child Sexual Abuse (Beverly Hills, Calif.: Sage, 1986), p. 14.
5. Father-Daughter Incest, p. 3.
6. Ibid., pp. 129-131.
7. American Bar Association, National Legal Resource Center for Child Advocacy and Protection, Innovations in the Prosecution of Child Sexual Abuse Cases (report edited by Josephine Bulkley) (Washington, D.C.: November 1981; 5th Printing, February 1985), pp. 119-120.
8. 42 U.S.C.A. secs. 5101-5106 (West Supp. 1988).
9. 42 U.S.C.A. secs. 5102(1) and 5102(2)(A) (West Supp. 1988). The basic elements of this federal definition are presented in the text and quotations accompanying footnotes 38 and 39 of chapter 3 of the present study.

Chapter 2

1. Albert Ellis and Ralph Brancale, The Psychology of Sex Offenders (Springfield, Ill.: Charles C. Thomas, 1956), p. 92.
2. Hawaii, Governor's Committee on Sex Offenders, Report (Honolulu: 1959), p. 1, hereinafter cited as Governor's Committee Report.
3. Susan Meyers Chandler, "Knowns and Unknowns in Sexual Abuse of Children," Jon R. Conte and David A. Shore (eds.), Social Work and Child Sexual Abuse (New York: Haworth, 1982), p. 51, hereinafter cited as "Knowns and Unknowns" and Social Work and Child Sexual Abuse, respectively.
4. Jon R. Conte, "Sexual Abuse of Children: Enduring Issues," Social Work and Child Sexual Abuse, pp. 15-16, hereinafter cited as "Enduring Issues."
5. David Finkelhor and others, A Sourcebook on Child Sexual Abuse (Beverly Hills, Calif.: Sage, 1986), hereinafter cited as Sourcebook.
6. David Finkelhor, "Introduction," Sourcebook, p. 12, hereinafter cited as Finkelhor, "Introduction."

Susan Chandler provides an example of a fundamental problem in the research: "While most writers estimate that perhaps only 10 percent of [child sexual abuse] victims ever report their assault to an authority, such as the police or a social agency, most of the research data come from reported cases. Thus we are learning about a small and perhaps atypical group of victimized persons." "Knowns and Unknowns," p. 54.

7. David Finkelhor, "Abusers: Special Topics," Sourcebook, p. 119, hereinafter cited as "Special Topics."
8. Throughout Sourcebook, Finkelhor and his associates call for expanded and improved research. See in particular the suggestions for studies of prevalence, pp. 50-52; of risk factors, pp. 81-86; of offenders, pp. 137-142; of effects on victims, pp. 199-223; and of prevention programs, pp. 250-254.
9. Finkelhor, "Introduction," p. 11. Drawing on her own practice, Susan Chandler gives an example of an ethical obstacle to research. She was providing crisis intervention to a child who had just been abused. A researcher wanted to administer a questionnaire to the child. Chandler denied the request, because of the potential interference with appropriate treatment. Telephone conversation with Susan Chandler, September 6, 1988.
10. Finkelhor, "Introduction," pp. 11-12.
11. "Knowns and Unknowns," p. 53.
12. Ibid., p. 54.
13. Telephone conversation with Susan Chandler, September 6, 1988.
14. Chandler, "Knowns and Unknowns," pp. 53-54.
15. See the comments concerning the potential damage of social work interventions in "Enduring Issues," p. 14; and in LeRoy G. Schultz, "Child Sexual Abuse in Historical Perspective," Social Work and Child Sexual Abuse, pp. 28-30.
16. Brenda J. Vander Mey and Ronald L. Neff, Incest as Child Abuse: Research and Application (New York: Praeger, 1986), pp. 22-41, hereinafter cited as Incest as Child Abuse.
17. Stefanie Doyle Peters and others, "Prevalence," Finkelhor, Sourcebook, p. 16, hereinafter cited as "Prevalence."
18. Ibid.
19. Ibid., p. 18.
20. Ibid.
21. "Knowns and Unknowns," p. 54.
22. Says one expert: "Professionals--physicians, nurses, teachers, social workers, child care workers, and police officers--fail to report more than half of the maltreated children that they see." Douglas J. Besharov, "'Doing

- Something' About Child Abuse: The Need to Narrow the Grounds for State Intervention," 8 Harv. J. Law & Pub. Pol. 539, 550 (1985) [footnote omitted].
23. Governor's Committee Report, p. 7.
 24. Ibid., p. 8.
 25. David Hechler, The Battle and the Backlash: The Child Sexual Abuse War (Lexington, Mass.: Lexington Books (D.C. Heath), 1988), p. 147, hereinafter cited as The Battle and the Backlash, and Seth L. Goldstein, The Sexual Exploitation of Children: A Practical Guide to Assessment, Investigation, and Intervention (New York: Elsevier, 1987), p. 31, hereinafter cited as Sexual Exploitation.
 26. Telephone conversation with Michael McGuigan, Deputy Prosecuting Attorney, City and County of Honolulu, July 22, 1988.
 27. "Prevalence," p. 18. One of the two efforts to collect national incidence data was conducted by the American Humane Association. The Association's estimated incidence of child sexual abuse increased by approximately 1,000 per cent from 1976 to 1983. See "Prevalence," p. 17. The other effort was made by the National Center for Child Abuse and Neglect; see the Center's Study Findings: National Study of Incidence and Severity of Child Abuse and Neglect (Washington, D.C.: Department of Health, Education and Welfare, 1981).

Incidence estimates are not reported in the present study because they are generally considered inaccurate. Restating them could foster misconceptions.
 28. Sexual Exploitation, pp. 33-38.
 29. Telephone conversation with Michael McGuigan, Deputy Prosecuting Attorney, City and County of Honolulu, July 22, 1988.
 30. "Prevalence," pp. 18-22.
 31. "Enduring Issues," p. 4. For detailed discussions of specific categories of incest perpetrators--e.g., fathers, stepfathers, brothers, grandfathers, uncles, brothers-in-law, first cousins, and more distant relatives--see Part IV of Diana E. H. Russell, The Secret Trauma: Incest in the Lives of Girls and Women (New York: Basic Books, 1986).
 32. "Special Topics," p. 126.
 33. David Finkelhor and Larry Baron, "High-Risk Children," Sourcebook, pp. 61-63, hereinafter cited as "High-Risk Children."
 34. Lucy Berliner and Doris Stevens, "Clinical Issues in Child Sexual Abuse," Social Work and Child Sexual Abuse, p. 103, hereinafter cited as "Clinical Issues."
 35. Angela Browne and David Finkelhor, "Initial and Long-Term Effects: A Review of the Research," Sourcebook, hereinafter cited as "Effects."
 36. Ibid., p. 144.
 37. Ibid.
 38. Ibid., p. 164 [references omitted].
 39. Ibid., p. 175.
 40. David Finkelhor and Angela Browne, "Initial and Long-Term Effects: A Conceptual Framework," Sourcebook, pp. 181-185.
 41. "Effects," p. 178.
 42. Ibid.
 43. "Enduring Issues," p. 14.
 44. Ibid., p. 2.
 45. "Clinical Issues," p. 99.
 46. "Special Topics."
 47. Finkelhor's critique of the "intergenerational transmission" theory appears at ibid., pp. 119-124.
 48. Ibid., p. 120.
 49. Ibid., p. 122.
 50. Ibid., p. 123.
 51. Sharon Araj and David Finkelhor, "Abusers: A Review of the Research," Sourcebook, pp. 91-118.
 52. "Enduring Issues," p. 6.
 53. Groth's typology is described in A. Nicholas Groth, William F. Hobson, and Thomas S. Gary, "The Child Molester: Clinical Observations," Social Work and Child Sexual Abuse, pp. 129-144.
 54. Ibid., pp. 129-130.
 55. Goldstein, Sexual Exploitation, p. 83.
 56. "Enduring Issues," pp. 4-6.
 57. "Special Topics," p. 130.
 58. Ibid., pp. 130-134.
 59. Ibid., pp. 134-135.
 60. Ibid., p. 136.
 61. Ibid.
 62. Ibid., p. 137.
 63. Ibid., pp. 137-142.
 64. "High-Risk Children," p. 79.
 65. Ibid., p. 80.
 66. Ibid.
 67. Ibid., p. 86.

68. Ibid.
69. Ibid.
70. American Bar Association, National Legal Resource Center for Child Advocacy and Protection, Innovations in the Prosecution of Child Sexual Abuse Cases (report edited by Josephine Bulkley) (Washington, D.C.: November 1981; 5th Printing, February 1985).
71. Incest as Child Abuse, pp. 146-147.
72. See p. 51 of this report.
73. The present summary of preventive and "coping" education owes much to David Finkelhor, "Prevention: A Review of Programs and Research," Sourcebook; other sources are drawn upon as well.
74. Ibid., p. 247.
75. Ibid., p. 254.
76. Ibid., p. 252.
77. Incest as Child Abuse, pp. 169-170.
78. Judith L. Herman with Lisa Hirschman, Father-Daughter Incest (Cambridge, Mass.: Harvard University Press, 1981), pp. 202-204.

Chapter 3

1. Hawaii Rev. Stat., ch. 588.
2. Hawaii Rev. Stat., ch. 350.
3. Hawaii Rev. Stat., ch. 586.
4. Hawaii Rev. Stat., ch. 587.
5. Hawaii Rev. Stat., ch. 588.
6. Hawaii Rev. Stat., ch. 706.
7. Hawaii Rev. Stat., sec. 707-730.
8. Hawaii Rev. Stat., sec. 707-731.
9. Hawaii Rev. Stat., sec. 707-732.
10. Hawaii Rev. Stat., sec. 707-733.
11. Hawaii Rev. Stat., sec. 707-734.
12. Hawaii Rev. Stat., sec. 707-741.
13. Hawaii Rev. Stat., sec. 707-750.
14. Hawaii Rev. Stat., sec. 707-751.
15. Hawaii Rev. Stat., sec. 712-1202.
16. Hawaii Rev. Stat., sec. 712-1203.
17. Hawaii Rev. Stat., sec. 712-1204.
18. Hawaii Rev. Stat., sec. 712-1215.
19. Hawaii Rev. Stat., sec. 712-1217.
20. Hawaii Rev. Stat., ch. 577A.
21. Hawaii Rev. Stat., sec. 707-701.
22. Hawaii Rev. Stat., sec. 707-701.5.
23. Hawaii Rev. Stat., sec. 707-702.
24. Hawaii Rev. Stat., sec. 707-710.
25. Hawaii Rev. Stat., sec. 707-711.
26. Hawaii Rev. Stat., sec. 707-712.
27. Hawaii Rev. Stat., sec. 707-713.
28. Hawaii Rev. Stat., sec. 707-714.
29. Hawaii Rev. Stat., sec. 707-716.
30. Hawaii Rev. Stat., sec. 707-717.
31. Hawaii Rev. Stat., sec. 707-720.
32. Hawaii Rev. Stat., sec. 707-720(1)(d).
33. Hawaii Rev. Stat., sec. 707-721.
34. Hawaii Rev. Stat., sec. 707-722.
35. Hawaii Rev. Stat., sec. 707-726.
36. Hawaii Rev. Stat., sec. 707-727.
37. 42 U.S.C.A. secs. 5101-5106 (West Supp. 1988).
38. 42 U.S.C.A. sec. 5102(1) (West Supp. 1988).
39. 42 U.S.C.A. sec. 5102(2)(A) (West Supp. 1988).
40. Hawaii Rev. Stat., sec. 350-1.
41. Hawaii Rev. Stat., sec. 350-1.
42. Hawaii Rev. Stat., sec. 350-1.1(a).
43. Hawaii Rev. Stat., sec. 350-1.1(b).
44. Hawaii Rev. Stat., sec. 350-1.2.
45. Hawaii Rev. Stat., sec. 350-1.3.
46. Hawaii Rev. Stat., sec. 350-1.4.
47. Hawaii Rev. Stat., secs. 350-3 and 350-5.
48. Hawaii Rev. Stat., sec. 350-2(a).
49. Hawaii Rev. Stat., sec. 350-2(b).
50. Hawaii Rev. Stat., sec. 350-2(c).
51. Hawaii Rev. Stat., ch. 586.
52. Hawaii Rev. Stat., sec. 586-1.
53. Hawaii Rev. Stat., sec. 586-1.
54. Hawaii Rev. Stat., secs. 586-2 and 586-3.

55. Hawaii Rev. Stat., secs. 586-4 and 586-5.
56. Hawaii Rev. Stat., sec. 586-5.5.
57. Hawaii Rev. Stat., sec. 586-3(d).
58. Hawaii Rev. Stat., sec. 586-10.5.
59. Hawaii Rev. Stat., sec. 586-10.5.
60. Hawaii Rev. Stat., sec. 586-10(a).
61. Hawaii Rev. Stat., sec. 586-10(b).
62. Hawaii Rev. Stat., sec. 587-1.
63. Hawaii Rev. Stat., sec. 587-2.
64. Hawaii Rev. Stat., sec. 587-2.
65. Hawaii Rev. Stat., sec. 587-1.
66. Hawaii Rev. Stat., sec. 587-21(b).
67. Hawaii Rev. Stat., sec. 587-34.
68. Hawaii Rev. Stat., sec. 587-52.
69. Hawaii Rev. Stat., sec. 587-76.
70. Hawaii Rev. Stat., sec. 587-77.
71. Hawaii Rev. Stat., sec. 587-41(a).
72. Hawaii Rev. Stat., sec. 587-41(b).
73. Hawaii Rev. Stat., sec. 587-41(c).
74. Hawaii Rev. Stat., sec. 587-41(d).
75. Hawaii Rev. Stat., sec. 588-2.
76. Hawaii Rev. Stat., sec. 588-3.
77. Hawaii Rev. Stat., secs. 588-1 and 588-4.
78. Hawaii Rev. Stat., Commentary on Chapter 706 following table of contents to statute, citing Conference Committee Report No. 51-86.
79. Hawaii Rev. Stat., sec. 706-605(1).
80. Hawaii Rev. Stat., sec. 706-605(3).
81. Hawaii Rev. Stat., sec. 706-605(4).
82. Hawaii Rev. Stat., sec. 706-605(2).
83. Hawaii Rev. Stat., sec. 706-624(2)(a).
84. Hawaii Rev. Stat., sec. 706-606.
85. Hawaii Rev. Stat., sec. 706-610.
86. Hawaii Rev. Stat., sec. 705-502 (attempts), sec. 705-512 (solicitation), and sec. 705-526 (conspiracy).
87. Hawaii Rev. Stat., sec. 706-607.
88. Hawaii Rev. Stat., sec. 706-620.
89. Hawaii Rev. Stat., sec. 706-621(1).
90. Hawaii Rev. Stat., sec. 706-621(2).
91. Hawaii Rev. Stat., sec. 706-622.
92. Hawaii Rev. Stat., sec. 706-623.
93. Hawaii Rev. Stat., sec. 706-624(1).
94. Hawaii Rev. Stat., sec. 706-624(2).
95. Hawaii Rev. Stat., sec. 706-625.
96. Hawaii Rev. Stat., sec. 706-640.
97. Hawaii Rev. Stat., sec. 706-641.
98. Hawaii Rev. Stat., sec. 706-642.
99. Hawaii Rev. Stat., sec. 706-644.
100. Hawaii Rev. Stat., sec. 706-645.
101. Hawaii Rev. Stat., sec. 706-642(3).
102. Hawaii Rev. Stat., sec. 706-659.
103. Hawaii Rev. Stat., sec. 706-660.
104. Hawaii Rev. Stat., sec. 706-661.
105. Hawaii Rev. Stat., sec. 706-662.
106. Hawaii Rev. Stat., secs. 706-662(5) and 706-662(5)(b)(iii).
107. Hawaii Rev. Stat., sec. 706-660.2.
108. Hawaii Rev. Stat., sec. 706-660.1.
109. Hawaii Rev. Stat., sec. 706-606.5.
110. Hawaii Rev. Stat., sec. 706-606.5.
111. Hawaii Rev. Stat., sec. 706-606.5(4).
112. Hawaii Rev. Stat., sec. 706-663.
113. Hawaii Rev. Stat., sec. 706-667.
114. Hawaii Rev. Stat., sec. 706-672.
115. Hawaii Rev. Stat., sec. 706-670(6).
116. Hawaii Rev. Stat., secs. 706-669 and 706-670(5).
117. Hawaii Rev. Stat., sec. 706-670.
118. Hawaii Rev. Stat., sec. 353-17.
119. Hawaii Rev. Stat., sec. 706-624(2)(b) (community service), 706-624(2)(d) (fine), and 706-624(2)(e) (restitution).
120. The statements concerning the incompatibility of community service with imprisonment are based on conversations with persons within the State's criminal justice system.
121. Hawaii Rev. Stat., sec. 706-670(2).

122. Hawaii Rev. Stat., sec. 352-23.
123. Hawaii Rev. Stat., sec. 352-24.
124. Hawaii Rev. Stat., secs. 571-11, 571-22, and 704-418.

Chapter 4

1. For a useful exploration of the prison overcrowding issue, see the colloquium titled "The Prison Overcrowding Crisis," 12 N.Y.U. Rev. of Law & Social Change 1-356 (1983-84). Of particular interest here are the following materials in that volume: M. Kay Harris, "Strategies, Values, and the Emerging Generation of Alternatives to Incarceration," pp. 141-170; Michael E. Smith, "Will the Real Alternatives Please Stand Up?", pp. 171-197; and the Responses by the Honorable Bernard J. Fried, pp. 199-202, and Kenneth Schoen, pp. 203-207.
2. See The Sentencing Project, "Summary of Evaluations of Defense-Based Sentencing Programs" (Washington, D.C.: February 1988) (five-page typewritten summary), p. 1. According to the summary, defense-based alternative sentencing programs have been developed by the National Center on Institutions and Alternatives (NCIA), public defenders, and private sentencing services, following the development by the NCIA in the late 1970's of its Client Specific Planning (CSP) model for alternative sentencing. Ibid.
3. See Note, Alternative Sentencing: A Proposed State Model, 12 J. of Legislation 225, 225-228 (1985).
4. Letter from Marc Mauer, Assistant Director, The Sentencing Project (Washington, D.C.), to Richard Pollack, State Public Defender (Honolulu, Hawaii), July 5, 1988 and telephone conversation with Mr. Mauer, December 22, 1988.
5. Donna Wulkan and Josephine Bulkley, "General Survey Findings Relating to Prosecutorial Practices and Policies," American Bar Association, National Legal Resource Center for Child Advocacy and Protection, Innovations in the Prosecution of Child Sexual Abuse Cases (report edited by Josephine Bulkley) (Washington, D.C.: November 1981; 5th Printing, February 1985), p. 6, hereinafter cited as "General Survey Findings" and Innovations, respectively. Innovations was funded by a grant from the National Center on Child Abuse and Neglect, U.S. Department of Health and Human Services.
6. The statement concerning Hawaii is based on conversations with various participants in the State's criminal justice system.
7. Innovations, p. 23.
8. See generally ibid.
9. See Innovations, pp. 24-33.
10. See ibid., pp. 112-118.
11. See ibid., pp. 119-129.
12. See two-page description titled "The Child Sexual Abuse Treatment Program: Maricopa County."
13. "General Survey Findings." The survey questionnaire is reprinted in Innovations, pp. 155-164.
14. "General Survey Findings," p. 1. A list of the prosecutors' offices that responded to the survey appears at Innovations, pp. 165-168.
15. Innovations, p. 165.
16. "General Survey Findings," p. 6.
17. Telephone conversation with Howard A. Davidson, Director, American Bar Association, National Legal Resource Center for Child Advocacy and Protection, October 7, 1988.
18. See Innovations, pp. 43-53.
19. See David Hechler, The Battle and the Backlash: The Child Sexual Abuse War (Lexington, Mass.: Lexington Books (D.C. Heath), 1988), pp. 218-221, hereinafter cited as The Battle and the Backlash.
20. Kee MacFarlane and Josephine Bulkley, "Treating Child Sexual Abuse: An Overview of Current Program Models," Jon R. Conte and David A. Shore (eds.), Social Work and Child Sexual Abuse (New York: The Haworth Press, 1982), p. 80, hereinafter cited as "Treating Child Sexual Abuse" and Social Work and Child Sexual Abuse.

Bulkley defines pre-trial diversion elsewhere as follows:

Definitions of pre-trial diversion vary, although the concept may be described as follows. Based on certain eligibility guidelines, offenders are diverted from the traditional criminal justice process, either before or after charges are filed, but prior to conviction or entry of judgment. Criminal proceedings are suspended conditioned upon the performance of specified obligations by the defendant, often including participation in counseling or treatment. Upon successful completion of or compliance with the conditions of diversion, the case is dismissed.

Josephine Bulkley and Donna Wulkan, "Pre-Trial Diversion, Juvenile/Criminal Court Coordination, and Other Innovative Approaches in Legal Intervention," Innovations, p. 9, hereinafter cited as "Pre-Trial Diversion."

21. See The Battle and the Backlash, pp. 215-221, and "Pre-Trial Diversion," p. 14.
22. See The Battle and the Backlash, pp. 215-221.
23. See Innovations, pp. 108-111.

24. "Treating Child Sexual Abuse," pp. 70-74 [references omitted].
25. See generally Innovations.
26. The description of the Santa Clara program provided in the text is based on the program description appearing in Innovations, pp. 24-33.
27. The description of the King County approach provided in the text is based on the program description appearing in Innovations, pp. 43-53.
28. "Treating Child Sexual Abuse," pp. 84-86. Interestingly, a report submitted to the Hawaii state legislature in 1986 stated that "voluntary participation is essential to the effectiveness of any therapeutic intervention" with sex offenders. Marie Milks, Marc Oley, and Martha Torney, Sex Offender Treatment: A Needs Assessment (Honolulu, Hawaii: January, 1986), p. 14.
29. "General Survey Findings," p. 6.
30. Alfred Blumstein, Jacqueline Cohen, Susan E. Martin, and Michael H. Tonry (eds.), Commission on Behavioral and Social Sciences and Education, Committee on Research on Law Enforcement and the Administration of Justice, Panel on Sentencing Research, Research on Sentencing: The Search for Reform (Washington, D.C.: National Academy Press, 1983), Volume I, p. 185, hereinafter cited as Research on Sentencing. The two-volume Research on Sentencing was prepared under a grant from the National Institute of Justice, U.S. Department of Justice.
31. Letter from Marc Mauer to John James McMahon, October 3, 1988.
32. Kee MacFarlane, "Foreword," Innovations, p. i.
33. "Treating Child Sexual Abuse," pp. 88-89.
34. Ibid., p. 88.
35. See The Battle and the Backlash, p. 144.
36. Hawaii Rev. Stat., secs. 706-624(2)(k) and 706-670.
37. Quoted in The Battle and the Backlash, p. 221.
38. Judith Lewis Herman with Lisa Hirschman, Father-Daughter Incest (Cambridge, Mass.: Harvard University Press, 1981), pp. 157-158, hereinafter cited as Father-Daughter Incest.
39. Ibid., p. 158.
40. Ibid., pp. 144-161.
41. Ibid., p. 3.
42. See generally ibid.
43. Jon R. Conte, "Sexual Abuse of Children: Enduring Issues for Social Work," Social Work and Child Sexual Abuse, p. 14, hereinafter cited as "Enduring Issues."
44. Father-Daughter Incest, p. 174.
45. Ibid., pp. 175-176.
46. Sarah Nelson, Incest: Fact and Myth (Edinburgh, Scotland: Stramullion Co-operative Limited, 2nd rev. ed. 1987), pp. 90-93, hereinafter cited as Incest: Fact and Myth.
47. Ibid., p. 93.
48. "Enduring Issues," p. 14.
49. "Treating Child Sexual Abuse," p. 83.
50. Incest: Fact and Myth, pp. 96-97.

(To be made one and seven copies)

THE SENATE

FOURTEENTH LEGISLATURE, 1988

STATE OF HAWAII

S.C.R. NO.

107
S.D. 1

SENATE CONCURRENT RESOLUTION

REQUESTING A STUDY OF ALTERNATIVE SENTENCES FOR INTRAFAMILY CHILD SEX OFFENDERS.

WHEREAS, intrafamily child sex abuse is a growing problem in our community; and

WHEREAS, in these cases every effort should be made to minimize trauma to the child victim, while simultaneously holding the offender responsible for the offender's actions and rehabilitating the family, whenever possible; and

WHEREAS, under the current laws and programs in this State, those desirable objectives are not met; and

WHEREAS, many other jurisdictions in other states have established sentencing alternatives for intrafamily child sex abuse cases that include a combination of incarceration, probation, work release programs, and counseling for both offender and the offender's family; and

WHEREAS, these jurisdictions provide a means of minimizing trauma to the child, rehabilitating the offender's family, and holding the offender responsible for the offender's actions; and

WHEREAS, the Legislative Reference Bureau is an impartial agency with respect to the prosecution of cases and has an interest in developing appropriate sentencing alternatives to incarceration for a wide range of cases, given its need to reduce overcrowding in the State's prisons, thus making it an appropriate agency to consider and develop sentencing alternatives for child sex offenders; now therefore,

BE IT RESOLVED by the Senate of the Fourteenth Legislature of the State of Hawaii, Regular Session of 1988, the House of Representatives concurring, that the Legislative Reference Bureau study post-conviction sentencing alternatives to incarceration that can be applied by the criminal justice system in cases of intrafamily child sex abuse; and

BE IT FURTHER RESOLVED that the study examine the sentencing alternatives to determine their effectiveness in achieving the following objectives in the order of priority in which they are listed:

- (1) Preventing revictimization of the child or other children;
- (2) Rehabilitating the offender and the offender's family; and
- (3) Punishing the offender; and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau shall include in its findings and recommendations, but not be limited to, the following:

- (1) The legislation, if any, that should be enacted to provide for sentencing alternatives;
- (2) The programs that should be established to deal with intrafamily child sex abuses; and
- (3) The estimated cost of those programs and recommendations; and

BE IT FURTHER RESOLVED that the Director of the Children's Advocacy Center of the Judiciary form an advisory group to provide expertise and guidance to the Legislative Reference Bureau in the conduct of the study consisting of a circuit and a family court judge, to be selected by the chief justice, and representatives of the following agencies to be chose by the Children's Advocacy Center, including but not limited to:

- (1) Children's Advocacy Center;
- (2) County police departments;
- (3) Department of the Prosecuting Attorney of the City and County of Honolulu;
- (4) Department of Human Services;
- (5) Department of Attorney General;
- (6) Public Defender's Office;

- (7) The Adult Probation Division of the Judiciary; and
- (8) The Child Sex Abuse Treatment program of Catholic Charities; and

BE IT FURTHER RESOLVED that the representatives of the respective agencies be representatives who have authority to speak on behalf of their agencies and who have expertise in the area of intrafamily child abuse; and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau submit findings and recommendations to the legislature twenty days prior to the convening of the 1989 Regular Session; and

BE IT FURTHER RESOLVED that the certified copies of this Concurrent Resolution be transmitted to the Director of Corrections, the Chief Justice of the Supreme Court of Hawaii, the Chief of each county police department, the Prosecuting Attorney of the City and County of Honolulu, the Attorney General, the Public Defender, and the Director of Human Services.

THE SENATE
FOURTEENTH LEGISLATURE, 19 88
STATE OF HAWAII

S.R. NO.

117
S.D. 1

SENATE RESOLUTION

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WHEREAS, in these cases every effort should be made to minimize trauma to the child victim, while simultaneously holding the offender responsible for the offender's actions and rehabilitating the family, whenever possible; and

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WHEREAS, many other jurisdictions in other states have established sentencing alternatives for intrafamily child sex abuse cases that include a combination of incarceration, probation, work release programs, and counseling for both offender and the offender's family; and

WHEREAS, these jurisdictions provide a means of minimizing trauma to the child, rehabilitating the offender's family, and holding the offender responsible for the offender's actions; and

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