REDRAWING THE BOUNDARIES OF RELATIONAL CRIME

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ABSTRACT

*One person hits another repeatedly, causing bruising and pain. Two adults have consensual sex. Surely the first is the crime of assault, whereas the second is private conduct beyond the reach of the criminal law. Yet things are not so clear. In the first case, if a father is disciplining his child, then the assault is forgiven. And if the second case involves a brother and sister, then consensual sex becomes a crime. The relationship between two parties can erase criminal liability from harmful conduct or criminalize otherwise innocent actions. Legal scholarship has mostly neglected this phenomenon, which I term here "relational crime." This Article offers an examination and critique of relational crime for the post-*Obergefell *constitutional landscape. It argues that the current scope of relational crime warps harm assessments and family status. By legitimizing serious harm, punishing harmless conduct, and importing anachronistic family norms into the criminal law, it results in punishment that is both over and underinclusive. Take these examples. A stepfather can beat his stepdaughter through her childhood, then have sex with her when she is an adult without being criminally liable for assault or incest. On the other hand, biological siblings who first meet in adulthood and have consensual sex are subject to prosecution and severe punishment. To remedy such distortions, this Article introduces a new theoretical framework that incorporates evolving notions of sexual harm, changed parenthood definitions, and the constitutional principles of equality and autonomy newly embedded in family law. Under this framework, categorization shifts so that corporal punishment is no longer forgiven, and a stepfather would be punished for sex with his stepdaughter because the power differential renders meaningful consent impossible. Conversely, sex between two consenting adult siblings is no longer criminal. In this fashion, my framework rightsizes the boundaries of relational crime.*

INTRODUCTION

One person hits another repeatedly, causing mild bruising and pain. Two adults have consensual sex.

It seems easy to determine which of these two examples is a crime—the former is an assault while the latter is private conduct beyond the reach of the criminal law.

Yet things are not so straightforward. If, in the first example, a parent is disciplining his child, then the action is deemed innocent. And if the second example involves two siblings, the consensual adult sex becomes a crime.

The relationship between two parties can erase criminal liability from harmful conduct, or criminalize otherwise permissible actions. This phenomenon, which I term relational crime, is undertheorized, yet it challenges core principles of criminal and family law. Relational crime ignores serious harms, while punishing other conduct based primarily on disgust and cultural biases.[1] It also entrenches inequities within families, such as parental "ownership" of the children entrusted to their care,[2] and between families, such as the criminalization of biological siblings who marry.[3]

Despite these distortions to punishment and family recognition, relational crime has received surprisingly little attention. Most criminal law scholarship assumes that victims and offenders are strangers to each other,[4] while family law scholarship has largely centered on state recognition of nontraditional family forms rather than the ongoing use of the criminal law to police family boundaries.[5] Those commentators who have explored the nexus of family and criminal law have almost exclusively focused on the marital or adult intimate relationship.[6] A rich literature critiques the historic underpunishment of intimate partner violence and the overpunishment of consensual adult sexual activity.[7] Yet it largely overlooks the other constitutionally protected relationship, that of parent and child.[8] As a result,

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1. *See infra* Part II.B.

2. *See* Barbara Bennett Woodhouse, *"Who Owns The Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992) (critiquing parental rights jurisprudence for positing a "narrow, tradition-bound vision of the child as essentially private property"). For an argument that treating children as property is unconstitutional, see Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359 (1992).

3. *See* Muth v. Frank, 412 F.3d 808 (7th Cir. 2005).

4. For just a few examples of iconic criminal scholarship, see Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003). My claim is not that this presumption is wrong, as much crime is committed by strangers, but simply that this paradigm is an ill fit for familial crime.

5. To cite just a few examples of this rich literature, see MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014).

6. I have previously critiqued the focus on marriage over parenthood and the prioritization of certain types of families in the same-sex marriage context. *See* Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311 (2015); Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136 (2015).

7. *See, e.g.*, Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). As to the criminal regulation of sex, see, for example, Katherine M. Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685 (2008); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012).

8. This is not to deny the important scholarship on the overlap between family and criminal law, such as the seminal work of Markel, Collins, and Lieb. *See* DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LIEB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES (2009). Jennifer Collins in particular has written about parenthood. *See* Jennifer M. Collins, *Crime and*

while intimate partner violence has been criminalized and sodomy and adultery laws repealed, anachronistic laws permitting corporal punishment and banning incest have gone virtually unnoticed.[9]

In this Article, I begin to fill this gap by examining relational crime through the parent–child dyad with an eye to the post-*Obergefell* constitutional landscape. The current scope of relational liability warps harm assessments and family status and results in punishment that is both over and underinclusive. Consider Woody and Soon Yi. Woody, fifty-three years old, helped raise Soon Yi, the adoptive daughter of his longtime girlfriend.[10] As her stepfather, Woody was free to corporally punish Soon Yi until she was eighteen under the "parental discipline privilege."[11] Yet, because he was not her legal or biological father, he was also free to have sex with her when she was an adult and not be prosecuted for incest.[12] Take

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Parenthood: The Uneasy Case for Prosecuting Negligent Parents, 100 NW. U. L. REV. 807, 820–32 (2006) (researching cases of children dying of hyperthermia after their parents left them alone in cars). I build on these works, focusing more intensely on the parent–child relationship and incorporating recent massive shifts in constitutional and doctrinal visions of the family since they were written.

9. Incest and corporal punishment are particularly understudied. Legal feminism, which has produced so much work on intrafamilial crime, largely ignores child abuse, perhaps because it complicates the gendered picture of domestic violence in that the victimized woman then becomes an offender herself, victimizing a child. *See* Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75 (1993). Legal scholars have likewise largely avoided examining the "taboo" of incest through a criminal law lens. Nonetheless, its fascination to the general public has become apparent via popular culture, in particular recently in the very popular book and television show *Game of Thrones*. The show's pairing of two attractive and powerful characters, Jon Snow and Daenerys Targaryen, who are related but do not know it, led to dozens of articles and commentaries wrestling with the taboo and the simultaneous fascination and revulsion it invokes. Typical are these headlines: "Jon Snow and Daenerys Targaryen in Love: Disgusting Awesome or Disgustingly Awesome" and "*Game of Thrones* Director: The Most Anticipated Incest of the Year is Gonna Happen." Stephanie Merry, *Jon Snow and Daenerys Targaryen in Love: Disgusting, Awesome or Disgustingly Awesome?*, WASH. POST (Aug. 21, 2017), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/08/21/jon-snow-and-daenerys-targaryen-in-love-disgusting-awesome-or-disgustingly-awesome/?utm_term=.b523322cd25c; Matt Miller, Game of Thrones *Director: The Most Anticipated Incest of the Year Is Gonna Happen*, ESQUIRE (Aug. 23, 2017), http://www.esquire.com/entertainment/tv/news/a57170/jon-daenerys-romance-game-of-thrones-finale/. Both scholarship and doctrine need to catch up.

10. Anna Silman, *A History of Woody Allen and Soon-Yi Previn Describing Their Relationship, from "The Heart Wants What it Wants" to "I was Paternal*," SALON (July 30, 2015, 3:08 PM), http://www.salon.com/2015/07/30/a_history_of_woody_allen_and_soon_yi_previn_describing_their_relationship_from_the_heart_wants_what_it_wants_to_i_was_paternal.

11. I adopt the widely accepted sociological definition of corporal punishment to mean any physical punishment, including spanking with or without objects, such as belts and other physical disciplinary tools. *See, e.g.*, Benjamin Shmueli, *Corporal Punishment in the Educational System Versus Corporal Punishment by Parents: A Comparative View*, 73 LAW & CONTEMP. PROBS. 281, 281–82 (2010). As for stepfathers, I use the vernacular definition of a parental figure whose parentage is not necessarily legally established, i.e., via adoption or even marriage to a child's mother, but rather based on the romantic relationship with a child's mother. Accordingly, my definition includes both formal and functional parents.

12. Every state has a parental discipline privilege exculpating parental assault on children. *See* Appendix A. The Model Penal Code and many states do not criminalize sex between stepparents and adult children. *See* Appendix B. This asymmetrical use of parenthood to exculpate and inculpate leads

another example. Jaime and Cersei, twins, equal in age and, let us assume, authority, have consensual sex as adults.[13] Unlike Woody, they would be subject to prosecution in every state.[14] Scholars have not confronted these inconsistencies, but we should—this distorted scope fails to protect some victims, punishes nonculpable people, and infringes on new constitutional norms of familial equality and autonomy.[15]

Using family status to exculpate or inculpate severely muddles the assessment of harm, a key organizing principle of the criminal law.[16] Harm is obscured. A wide swath of adults are allowed to corporally punish children, including those who they do not legally parent, despite overwhelming evidence of its harm to children's physical and mental development.[17] Harm is mislabeled. The misnomer "spanking" transforms hitting, kicking, and whipping with a belt, from assault into justified behavior.[18] The large majority of states term incest a crime against the family or marriage,[19] although the harm meriting punishment is really that of sexual assault. Harm is manufactured. Consensual adult sex is deemed harmful based on flawed science and mainstream disgust.[20]

Specifically, the myopic focus by reformers and commentators on the marital relationship has resulted in sexual exploitation within the family

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to what I term the "stepfather problem." *See infra* Part II.D; Silman, *supra* note 10 (discussing Woody Allen).

13. This example is also taken from the book and HBO series, *Game of Thrones*. Since the writing of this Article, the show has introduced another incestuous couple, Jon Snow and Daenerys Targaryen, who are aunt and nephew. As I discuss further *infra* Part II.A.2, the different reactions to the two couples illustrate a great deal about the incest taboo and its use to distinguish between attractive and unattractive people rather than to actually assess the conduct and harm, or lack thereof.

14. *See* Appendix B.

15. I use autonomy here to incorporate liberty and dignity values. David Meyer points out that family constitutional cases focus on equality or autonomy, or both. *See* David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 529 (2008). After *Obergefell*, Laurence H. Tribe has described these intertwined principles as a double helix of "equal dignity." Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16 (2015).

16. I take as a guiding principle of the criminal justice system the harm principle. Articulated first by John Stuart Mill and theorized by subsequent scholars, it limits criminal prohibition to conduct that harms others. *See, e.g.*, JOEL FEINBERG, 1 THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984). The harm principle is not the only criterion; it is necessary but not sufficient, and it is subject to criticism. *See* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 113, 149–52, 182 (1999) (arguing that the criminal justice system has abandoned a meaningful harm principle, rendering virtually any act describable as socially "harmful" and thus criminally prohibited). Nonetheless, harm still serves a valuable role in assessing the merits of criminalization. *See infra* Part III.A.

17. *See infra* Parts II.A, II.D.

18. *See* Chloe Kerr, *Mind Your Language*, THE SUN (Jan. 6, 2017, 1:18 AM), https://www.thesun.co.uk/news/2547037/word-spank-should-be-replaced-with-assault-because-it-legitimises-violence-against-children-say-psychologists (reporting research that people's approval of corporal punishment decreases significantly when the words hit, beat, etcetera are used instead of "spank").

19. *See* Appendix B.

20. *See infra* Parts II.A–B.

being largely ignored, while parental assault is forgiven as for the "child's own good." Not one state distinguishes between intergenerational or vertical incest, and intragenerational or horizontal incest.[21] In contrast, sociologists and psychologists differentiate between Woody and Soon Yi, on the one hand, and Cersei and Jaime on the other.[22] Most laypeople likely agree. Relational crime's paradigm of adult intimacy has led to a presumption that both parties are equal, a presumption that makes little sense when applied to the parent–child dyad.[23] That relationship is explicitly structured around the power imbalance between minors and the adults entrusted with their care.[24] Parental authority does not suddenly dissipate when children turn eighteen; instead, the relationship remains inherently unequal.[25]

This thick construction of parenthood might make sense as a family law matter, but it worsens the harm in the criminal context. The fact that Woody is entrusted with Soon Yi's care renders his assaults more damaging than those of a stranger.[26] And it is his authority over her as a parental figure that makes it virtually impossible for her to consent to sex with him, even as an adult.[27] Assault and battery are among the oldest

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21. *See* Appendix B. Many legal scholars do not either. *See, e.g.*, Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1546 (2005). *But see* Naomi Cahn, *Protect and Preserve*, 13 NEW CRIM. L. REV. 127, 135–36 (2010) (describing the greater "breach of trust" in sexual relationships between intergenerational adult incest than other kinds of incest). Incest's adherence to biological boundaries, rather than legal or functional, shows its outdated bionormative focus and reliance on flawed science, while ignoring both psychological insights and demographic data. *See infra* notes 101–01, 313–325.

22. Psychologists define abusive incest as that where the parties "are discrepant in age, power, and experience." Richard P. Kluft, *Ramifications of Incest*, 27 PSYCHIATRIC TIMES, Jan. 11, 2011, at 3.

23. Of course, there is still a gendered income and caregiving imbalance in opposite-sex couples, but each spouse is now equal as a formal legal matter.

24. Parents' broad rights to make choices for their children are intertwined with their duty to protect and care for them. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (describing "the [parental] right, [as] coupled with the high duty, to recognize and prepare [a child] for [adulthood]").

25. This highly variable definition of parental status has resulted in an asymmetric scope of liability, wherein the scope of exculpation is considerably broader than that of inculpation, even for the same actor. The same person is permitted to assault a child and claim the parental discipline privilege but is often not treated as a parent for adult incest purposes and so is free to engage in sexual relations despite the power imbalance. This asymmetric scope is depicted in Figure 1, *infra* Part II.D.

26. *See* Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343, 348, 391–95, 401 (2007) (noting the "unique harms associated with non-stranger violence, such as increased victim injuries and breach of trust" and arguing that "violence that occurs within close personal relationships . . . is more blameworthy" than stranger violence); *see also* Erwin Chemerinsky & Michele Goodwin, *Religion is Not a Basis for Harming Others: Review Essay of Paul A. Offit's* Bad Faith: When Religious Belief Undermines Modern Medicine, 104 GEO. L.J. 1111, 1128–31 (2016) (arguing that harm to children by their parents is particularly problematic).

27. *See* discussion *infra* at notes 137–149 (documenting the extreme harm of, particularly, father–daughter incest, and demonstrating that the power dynamics and breached trust render it worse than other sexual abuse).

recognized crimes,[28] and parental corporal punishment is the only remaining status-based exception.[29] The criminal law has also long recognized the impossibility of consent with authority figures such as police officers and mental health professionals.[30] The analysis of consent through this exploitation lens is being applied in new contexts, such as trafficking and sexual assault by coercion or exploitation.[31] The failure to apply it within the family—the site of archetypal power imbalances—leaves harm unpunished and perpetuates a traditional family model with a gendered and heteronormative hierarchy baked in.[32]

Taking a fresh look at relational crime is particularly important given the new terrain of familial and intimate freedoms. The criminal law is lagging behind in recognition of functional parents and increased protection for sexual choices and children's interests, a gap compounding the theoretical incoherence of the current relational crime framework and curtailing recently expanded autonomy rights.[33] To be clear, I am not claiming that family status is never relevant to exculpation or inculpation; family is different and may legitimately influence criminal laws and enforcement.[34] My more modest claim is that as our understandings of

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28. *See* Michelle Zehnder, *Who Should Protect the Native American Child: A Philosophical Debate Between the Rights of the Individual Verses the Rights of the Indian Tribe*, 22 WM. MITCHELL L. REV. 903, 919 n.66 (1996) ("The original seven crimes were murder, manslaughter, assault with intent to commit murder, arson, burglary, rape, and larceny.").

29. Other status exceptions from Blackstone's time, such as the privilege to beat wives, apprentices, and students, have all been abolished. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 120 (photo. Reprint 1979) (1768) ("[B]attery is, in some cases, justifiable or lawful; as where one who hath authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice.").

30. *See infra* notes 174–75 (discussing adult statutory rape).

31. MODEL PENAL CODE § 213.4 (AM. LAW INST., Discussion Draft No. 2, 2015) (positing a new category of sexual assault "by coercion or exploitation," which prohibits sex between a wider array of authority figures, including certain lawyers and clients). *See also* discussion *infra* notes 220–23.

32. *See infra* Part II.C (discussing one court's treatment of stepparent–stepchild sex as "neither illicit nor exploitative" and using the unusual, and adolescent male fantasy, example of an adult son and his same-age stepmother); *see, e.g.*, Kevin Carr, *Six Scenes We Love From 'Bill & Ted's Excellent Adventure'*, FILM SCHOOL REJECTS (Feb. 9, 2014), https://filmschoolrejects.com/6-scenes-we-love-from-bill-teds-excellent-adventure-ceae19ab5066/ (discussing the classic 1980's film and appreciating "the taboo" of "the plot element of Bill's high school crush Missy . . . marrying his father and becoming his unlikely stepmom"). Tellingly, "stepmom" is a very popular category of pornography. *See* Kate Feldman, *Ted Cruz's Twitter and the Mainstream Appeal of Incest Porn*, N.Y. DAILY NEWS (Sept. 14, 2017, 7:00 AM), http://www.nydailynews.com/entertainment/ted-cruz-twitter-mainstream-appeal-incest-porn-article-1.3494416 (reporting that in 2016 the term was the most searched term on the largest pornography website, *Pornhub*).

33. *See infra* Parts III.B–C. The criminal law was robustly used in the past to police morality, but such a function was significantly curtailed by *Lawrence*. *See* Pamela S. Karlan, *Loving* Lawrence, 102 MICH. L. REV. 1447, 1458–60 (2004) (describing the *Lawrence* decision's protection of intimate harmless conduct but also noting the Court's likely extension only in cases of more respectable societal groups).

34. *See* Alafair S. Burke, *When Family Matters*, 119 YALE L.J. 1210, 1214 (2010) (noting practical concerns about intervention in the family).

family, gender roles, and parenthood change, relational crimes deserve special scrutiny. In particular, because they are so prone to inculpating and exculpating based on family status rather than criminal law values, the harm principle should be vigorously applied to counteract this tendency for outdated family norms to migrate into the criminal law.

This Article proceeds in four parts. In Part I, I argue for a re-envisioned theory of relational liability to incorporate the rapidly shifting constitutional terrain of the family and the increased focus on the criminal harms of interpersonal exploitation. Parts II and III then take up this task. Part II maps the distortions of harm and family status in current relational crime doctrine and theory, using the case studies of corporal punishment and adult incest. Part III introduces a new theoretical framework for assessing intrafamilial exculpation and inculpation. This three-part inquiry incorporates evolving notions of sexual harm, changed parenthood definitions, and the family equality and autonomy principles embedded in our new constitutional landscape. In Part IV, I apply this framework to my case studies. Categorization shifts so that corporal punishment is no longer forgiven, and a stepfather, like Woody, would be punished for sex with his stepdaughter because the power differential renders consent impossible. Conversely, sex between two consenting adult siblings, like Cersei and Jaime, would no longer be criminal. In this fashion, this framework rightsizes the boundaries of relational crime.[35]

I. THE ENTANGLEMENT OF FAMILY STATUS AND FAMILY HARMS

The rapidly shifting constitutional terrain of the family and expanded attention to the criminal harms of interpersonal exploitation necessitate rethinking the nexus of family status and harm. In this Part, I critique the existing legal structures and theories of relational crime both for missing a type of harm and for failing to incorporate contemporary family equality and autonomy norms. In subsequent Parts, I construct and defend a new theory of relational crime to address these flaws.

A. Current Relational Crime Framework

The family has always been a robust site of criminal regulation. Historically, seduction, adultery, and sodomy laws criminalized non-normative sex while marriage brought immunity from criminal liability for

35. For a visual depiction of the current scope of incest criminalization as compared to my proposal, see Figures 2 & 3, *infra* note 323.

assault.[36] The criminal law continues, albeit in a more limited fashion, to police the boundaries of family and to mediate intra-familial harms and interactions. It does so via a network of laws regulating marriage (bigamy),[37] adult intimate interaction (intimate partner violence),[38] the financial care of dependents (child support laws),[39] and, what I focus on here, the scope of permissible conduct within the parent–child relationship, as delineated by corporal punishment and adult incest laws.

Scholars and reformers alike have largely focused on the marital or intimate adult relationship, leaving the parent and child dyad surprisingly understudied.[40] There are two rich strains of scholarship examining the criminal regulation of adult intimate relationships, critiquing the historic underpunishment of intimate partner violence and the overpunishment of consensual sexual activity, respectively. These two literatures reflect the two axes of family privacy, shielding intrafamilial harms and protecting the family from intrusive state intervention.[41]

The first group of scholars argues that the law has legitimated a gendered hierarchy within the marital dyad and obscured serious harms.[42] In their seminal work, Liz Schneider and Reva Siegel have demonstrated that historic spousal immunity from assault and rape laws, often justified for family privacy reasons, entrenches male dominance and leaves intimate partner violence "permitted, acceptable and part of the basic fabric of American family life."[43] In contrast to those arguing for state protection of more vulnerable family members, other scholars question a one-track

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36. Murray, *supra* note 7; Schneider, *supra* note 7, at 976.

37. *E.g.*, N.Y. PENAL LAW § 255.15 (McKinney 1939).

38. *E.g.*, CAL. PENAL CODE § 273.5 (West 2014); N.Y. PENAL LAW §§ 120.00, 120.15, 120.45, 240.30 (McKinney 2009).

39. *E.g.*, IND. CODE § 31-25-4-32 (1976).

40. The first cases to designate a familial zone free from state interference concerned parental rights. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 401 (1923). Adult intimate privacy/autonomy was first outlined in *Griswold v. Connecticut*, 381 U.S. 479 (1965), then rapidly expanded in subsequent cases. Other, even very close, familial relationships are not protected. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000) (holding that grandparents do not have a constitutionally protected right to a relationship with their grandchildren); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 882 (2004) (documenting the lack of a constitutionally protected sibling relationship).

41. Feminist and critical race scholars have persuasively demonstrated the artificial and malleable nature of the law's public/private divide. *See* Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 320 (1993) ("Struggles over power inform, fuel, and permeate the debate over the public/private dichotomy. At issue is support for or opposition to the status quo."); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1470 (1991) (noting "the contradictory meaning of the private sphere for women of color" in describing their disproportionate punishment for actions during pregnancy).

42. *See* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989).

43. Schneider, *supra* note 7, at 976, 984–85. In her history of the law's treatment of domestic violence, Reva Siegel demonstrates the concept of "preservation through transformation" as different rationales and structures preserved immunity from punishment for men who beat their wives. Siegel, *supra* note 7, at 2119.

criminal justice approach to intimate partner violence given the familial costs of criminal justice involvement and overcriminalization more broadly.[44]

The second literature centers on the criminal regulation of sexuality. Scholars have mapped the historic criminalization of non-marital and same-sex sex.[45] This regulation of sexuality has been undergirded by a normative view of family and sexual and gender norms, rather than by the notions of force and non-consent structuring other sex crimes.[46] Accordingly, many argue for decriminalization of private adult consensual sex, a goal largely, but not completely, achieved in *Lawrence v. Texas*.[47] Going beyond decriminalization, some scholars call for "sex-positive law," which would affirmatively recognize the benefits of consensual sex, rather than just prohibit non-consensual sex.[48]

There are exceptions to this scholarly focus on the criminal regulation of adult intimate relationships. Jennifer Collins, for instance, has demonstrated that parents who kill their children, whether negligently or intentionally, are often underpunished.[49] She attributes this to a societal view of the parent–child relationship through "rose-colored glasses" and argues for more consistent and stringent prosecution of parents who kill their children.[50] I build on these works, and the others outlined above, with new insights into harm generated by interpersonal power dynamics, the significantly changed family, and the intimate constitutional map of the last decade.[51]

Legal reforms in family regulation have also centered on intimate partner violence and sexual freedom rather than on harms and relational

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44. *See, e.g.*, Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J.L. & GENDER 53 (2017) (concluding that it should not but that other approaches can strengthen the fight against domestic violence).

45. *See, e.g.*, WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003 (2008); Murray, *supra* note 7. I have previously documented this regulation of sex, particularly in the juvenile context. *See* Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. (forthcoming 2017).

46. As I detail further below, incest is most often termed a crime against the family, like bigamy, rather than a sexual assault. *See* Appendix B.

47. 539 U.S. 558 (2003). *See, e.g.*, Franke, *supra* note 7, at 2686 (arguing that *Lawrence* "explicitly limits the state's ability to punish nonmarital sex, and in so doing recognizes new rights to sexuality outside marriage"); *see also* Karlan, *supra* note 33, at 1458 (describing the *Lawrence* decision's protection of intimate harmless conduct).

48. *See, e.g.*, Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* THE LESBIAN AND GAY STUDIES READER (Henry Abelove et al. eds., 1993); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001).

49. *See* Collins, *supra* note 8.

50. Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System's Romanticization of the Parent–Child Relationship*, 93 IOWA L. REV. 131, 133–34 (2007) (arguing that we fail to adequately punish parents for child abuse and homicide because the law is too trusting of parental love).

51. *See infra* Part III.

dynamics in the parent–child context. Since New York was the first state to criminalize marital rape in 1984,[52] all other states have followed suit. Similarly, people who assault their spouses are no longer immune from punishment, and the law protects an increasingly wide range of unmarried adults from intimate partner violence.[53] As to sexual liberty, legal reforms beginning in the 1960s and accelerating post-*Lawrence* protect almost all private adult consensual sex from criminal sanction.[54] A caveat—these reforms are not all-encompassing; different rape liability and punishment, as well as the ongoing lack of enforcement of intimate partner violence, illustrate that the legally-constructed hierarchy between spouses persists.[55] Moreover, the *Lawrence* decision explicitly exempted commercial sex, public sex, and a few other forms of adult consensual sex from its ambit, and harsh civil regulation of adultery and sodomy continues in a handful of public employment contexts.[56]

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52. People v. Liberta, 474 N.E.2d 567, 572–73 (N.Y. 1984).

53. *See, e.g.*, CONN. GEN. STAT. § 46b-38a (1958) (protecting persons from another family/household member or a current or former dating partner); D.C. CODE. §§ 16-1001(6)(B), (7)(B), (9) (2001) (statute protecting persons to get a civil protection order against a same-sex partner); 23 PA. CONS. STAT. §§ 6102, 6106 (1930) (protecting "spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood"); W. VA. CODE § 48-27-305 (2013) (protecting any "family or household member" on behalf of a minor child).

54. ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 98–108 (2009). Courts have found both adultery and fornication laws unconstitutional post-*Lawrence*. *See, e.g.*, Martin v. Ziherl, 607 S.E.2d 367 (Va. 2005) (fornication); *Judge Rules Adultery Law Unconstitutional*, BISMARK TRIBUNE (Feb. 28, 2005), http://bismarcktribune.com/news/local/judge-rules-state-adultery-law-unconstitutional/article_7aab8dd6-5cf4-5f08-b1cf-e5d9faa9857b.html (describing a North Dakota adultery ruling). Courts have also cited *Lawrence* to strike down other criminal laws prohibiting higher penalties for assault between an unmarried rather than a married couple, see, for example, *Estes v. State*, 487 S.W.3d 737 (Tex. App. 2016), and prohibiting cohabitation among multiple adults holding themselves out as married. Brown v. Buhman, 947 F. Supp. 2d 1170, 1202 (D. Utah 2013), *vacated as moot*, 822 F.3d 1151 (10th Cir. 2016). Not all states have decriminalized adultery, but remaining laws are virtually never enforced, and many experts believe they are no longer constitutionally valid outside of narrowly prescribed employment contexts. *See, e.g.*, Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality and Marriage*, 2003 SUP. CT. REV. 27, 73. *But see* DEBORAH L. RHODE, ADULTERY: INFIDELITY AND THE LAW 60–88 (2016) (noting that numerous states maintain such laws on their books and occasionally enforce them, and arguing for the repeal of all criminal and civil penalties for adultery).

55. *See* LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM (2014); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000).

56. Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The present case does not . . . involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."). As to civil regulation, see Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573, 577 (2016). While acknowledging that "*Lawrence* fundamentally disrupted the established system of sexual regulation by both providing constitutional protection for nonmarital sex and sexuality and creating space for sex and sexuality outside of marriage and crime," *id.* at 582, Murray also argues that an "alternative system of civil sexual regulation achieves

Nonetheless, there has been a sea change in the protection of adult intimate partners from each other and a massive deregulation of consensual sexual intimacy. In stark contrast, the parental discipline privilege and incest bans have been highly static. The former has remained largely unchanged for decades despite empirical demonstration of the harms of corporal punishment and its abolition in virtually every setting other than the home.[57] Incest laws are likewise anachronistic, failing to incorporate modern definitions of parenthood and to account for the harms generated by interpersonal power dynamics.[58]

B. Gaps in Assessing Harms and Defining Family

The myopic focus on the adult intimate relationship and pre-*Obergefell* contours of family has led to two significant gaps in the theory and doctrine of relational crime—first, an accurate assessment of harms within families, particularly between parents and children, and, second, a delineation of the proper scope of this relationship for relational exculpation or inculpation.

Harm between parents and children has been discounted. The law has historically exculpated relational harms, and even arguments for the equal treatment of crimes committed within families overlook the fact that a close relationship may actually increase harms or even generate new harms. The violation of trust and conflicted loyalties can render marital rape or familial child sex abuse worse than the same assault by strangers.[59] In this fashion, family status transforms otherwise innocent behavior into harmful, even criminal, conduct. This harm based on power imbalances, or the potential for exploitation, underlies adult statutory rape laws.[60] Recent anti-trafficking laws and proposed revisions to the Model Penal Code (MPC)

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many of the same punitive ends that criminal sexual regulation accomplished before *Lawrence* and in so doing repudiates *Lawrence*'s core values." *Id.* at 574.

57. Corporal punishment is banned in prisons, day cares, and schools in a large majority of states. *See* discussion *infra* notes 86–87. The Massachusetts Stubborn Child Law of 1646 allowed fathers to execute their children. *See* Lawrence R. Sidman, *The Massachusetts Stubborn Child Law: Law and Order in the Home*, 6 FAM. L.Q. 33, 42–43 (1972). In a sense, this massive paternalistic power endures in the significant assault and battery parents are still allowed to inflict on their children in many states. *See* Appendix A.

58. The few scholars examining corporal punishment or incest view them largely in isolation, rather than holistically as part of a coherent criminal law. *See, e.g.*, James G. Dwyer, *Parental Entitlement and Corporal Punishment*, 73 LAW & CONTEMP. PROBS. 189 (2010) (analyzing corporal punishment through the lens of children's rights); Cahill, *supra* note 21, at 1546 (giving a thoughtful analysis of the role of incest laws in policing the acceptable boundaries of family, particularly of adult marital-like relationships).

59. *See* Hessick, *supra* note 26, at 391–95, 401; *see also* Hasday, *supra* note 55, at 1496–97.

60. *See infra* notes 167–75.

sexual assault provisions expand recognition of this harm beyond the limited context of schools and prisons.[61]

Yet scholars and reformers continue to overlook the harms of exploitation in the family context. Conflating the marital relationship with that between a parent and child confuses the harm at issue in incest, so we punish both vertical and horizontal incest, although there is no valid rationale for criminalizing the latter. At the same time, parental duties are posited to justify beatings of children that leave them physically harmed and that would be assault or a more serious crime if committed by a non-parent. This failure to coherently distinguish and consistently delineate the relationship at issue has led to laws that are both over and underinclusive. Laws punish consensual adult sex that is non-normative but harmless, while condoning assault and sex that is exploitative based on the inherent imbalance between parents and even adult children.

Given the significance of the parent–child relationship in determining certain types of harm, a key question is who qualifies as a parent? The criminal law has not accounted for significant changes in family law doctrine recognizing functional parenthood. For instance, many states do not criminalize sex between adult children and their stepfathers and other functional parents.[62] This both undercounts harm and entrenches intrafamilial hierarchies. These hierarchies, and the enforcement of a single family and intimate model via the heavy hand of the criminal law, disregard the equality and autonomy values articulated in the *Lawrence–Obergefell* lines of cases.[63] In sum, these gaps and distortions necessitate a reenvisioned theory of relational liability, a task I take up in the next Parts.

II. RELATIONAL CRIME'S DISTORTED BOUNDARIES

This Part maps the distortions at the nexus of family status and intrafamilial harm. Using the case studies of corporal punishment and adult incest, I demonstrate that relational liability does not accord with punishment norms and constitutional values. First, using family status to exculpate or inculpate warps the treatment of harms by misidentifying or discounting them and by criminalizing harmless conduct. Second, current relational crime entrenches an outdated hierarchy within families and continues to punish non-normative intimate conduct, despite new equality and autonomy norms. This Part concludes by describing the differential treatment of status for exculpation and inculpation—what I term the

61. *See* MODEL PENAL CODE § 213.4 (AM. LAW INST., Discussion Draft No. 2, 2015) (positing a new category of sexual assault "by coercion or exploitation"); *see also* 18 U.S.C. §§ 1589–1592 (2012); Trafficking Victims Protection Act, 22 U.S.C. §§ 7101–7114 (2012).

62. *See* Appendix B.

63. *See infra* Part III.C.

"stepfather problem." This asymmetry compounds the already warped contours of each offense.

A. Relational Exculpation & Inculpation

1. Exculpation: Parental Corporal Punishment

Every state grants parents the right to physically punish their children.[64] This exception to criminal liability for assault and battery has both common law and constitutional roots. In Blackstone's time, a parent had the power to "lawfully correct his child . . . in a reasonable manner; for this is for the benefit of his education."[65] This privilege is also sometimes supported by a parent's right to raise his child as he sees fit.[66] The Court, however, has never explicitly addressed corporal punishment, and lower courts have disagreed about whether this right includes reasonable corporal punishment.[67] Additional rationales for the parental discipline privilege include religion,[68] the pragmatic realities of child-rearing,[69] and, the one

64. Most states codify the parental discipline privilege as an affirmative defense to prosecution or as an exception to the statutory definition of child abuse. *See, e.g.*, MICH. COMP. LAWS § 750.136b(9) (1967) (exception: "This section does not prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force."); N.Y. PENAL LAW § 35.10(1) (McKinney 2009) (affirmative defense: "The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal [when] . . . A parent, guardian or other person entrusted with the care and supervision of a person under the age of twenty-one . . . may use physical force, but not deadly physical force, upon such person when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person.").

65. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 440 (photo. reprint 1979) (1765); *see also* BLACKSTONE, *supra* note 29, at 120 (positing parental discipline as an exception to battery). Courts continue to cite Blackstone's rule as support for the privilege. *E.g.*, Raford v. State, 828 So. 2d 1012, 1015 n.5 (Fla. 2002).

66. *See* Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (holding that parents may choose to have their children taught a language in addition to English in school). These rights are limited by the state's *parens patriae* obligation to children. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 167 (1944) (holding that the "state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare").

67. *Compare* Doe v. Heck, 327 F.3d 492, 523 (7th Cir. 2003) ("[T]he . . . parents' liberty interest in directing the upbringing and education of their children includes the right to discipline them by using reasonable, nonexcessive corporal punishment, and to delegate that parental authority to private school officials.") *with* Sweaney v. Ada County, 119 F.3d 1385, 1389 (9th Cir. 1997) (concluding that the *Meyer* line of cases do not give parents the right to "strike a child with a belt without being" investigated and potentially prosecuted).

68. "Spare the rod and spoil the child" remains a frequently, if incorrectly, cited biblical passage. *See* MURRAY A. STRAUS, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES AND ITS EFFECTS ON CHILDREN 183–84 (1994) (detailing the relationship between religion and corporal punishment and noting that this passage refers to a shepherd guiding or redirecting his flock of sheep, not striking them).

69. Pragmatic proponents argue that parents need to rely on physical discipline to best help children learn and grow, and that an occasional spanking is needed if, in the archetypal example, a toddler runs into the street. *See, e.g.*, L. Nicole Williams, *8 Reasons to Spank Your Kids*, MADAME

cited most often, personal opinion or "folk wisdom" about what is best for children.[70] Many jurisdictions do not state any purpose at all for permitting parental corporal punishment.[71] The privilege historically attached only to fathers but has since been extended to all legal parents and guardians.[72] Most states allow custodians or persons acting as a parent to assert the privilege.[73]

The privilege is a justification, not an excuse, meaning that the conduct itself is deemed innocent or not meriting punishment.[74] States vary in the scope of force allowed, but all condone force extending well beyond a spanking.[75] All states permit, for instance, hitting children with objects, including a wooden spoon or leather belt, and many also allow face-slapping, pulling hair, and pinching.[76] Recent cases demonstrate that in some states parents can legally hit children repeatedly with a wooden paddle, shame them online, or even choke them.[77] The influential MPC

NOIRE (Feb. 8, 2011), http://madamenoire.com/40373/8-reasons-to-spank-your-kids. Accordingly, most statutes state that corporal punishment must be for an appropriate disciplinary purpose. *See, e.g.*, N.H. REV. STAT. ANN. § 627:6 (2015) (allowing corporal punishment "when and to the extent that he [or she] reasonably believes it necessary to prevent or punish such minor's misconduct").

70. These proponents do not cite to any child development research, but instead rely on their own experiences growing up or parenting. *See, e.g.*, Williams, *supra* note 69 ("While some studies have shown the negative effects of spanking, today's disrespectful youth have shown what happens when necessary spanking is forgone. . . . Some kids need it, period. When time-out, talking and taking away toys doesn't work, you have to get that butt."). This issue was also raised in a recent high-profile case when football star Adrian Peterson was charged with child abuse for hitting his child with a stick and stated that he simply followed the way he was disciplined growing up, a childrearing which he believed "ha[d] a great deal to do with the success [he has] enjoyed as a man." Bill Briggs, *Adrian Peterson Case: Some Parents Say Spankings Improved Them*, NBC NEWS (Sept. 19, 2014, 12:18 PM), http://www.nbcnews.com/storyline/nfl-controversy/adrian-peterson-case-some-parents-say-spankings-improved-them-n206516.

71. Seventeen states do not mention any rationale for the parental discipline privilege. *See* Appendix A.

72. *See* Appendix A.

73. *See* Appendix A; *see also* J.C. v. Dep't of Children & Families, 773 So. 2d 1220, 1222 (Fla. Dist. Ct. App. 2000) (finding that an eleven-year-old child was not abused when the stepfather used a belt to spank the child on the buttocks, which caused bruising).

74. *See, e.g.*, Carter v. State, 67 N.E.3d 1041, 1045 (Ind. App. 2016) (noting that parental privilege is "a complete defense . . . a legal justification for an otherwise criminal act"); *see also* ALASKA STAT. § 11.81.430 (2016).

75. *See* Appendix A. In determining the reasonableness of punishment, courts look at a variety of factors including the child's age and gender; the form, amount, and bodily location of the hitting; and the totality of the circumstances. *See* RESTATEMENT (SECOND) OF TORTS § 150 (AM. LAW INST. 1965). This analysis often explicitly incorporates the reason for the discipline, as well as the related questions of the parent's frequency of corporal punishment and other efforts to discipline the child. *See, e.g.*, Commonwealth v. Dorvil, 32 N.E.3d 861, 870–71 (Mass. 2015).

76. *See* Elizabeth Thompson Gershoff, *Corporal Punishment, Physical Abuse and the Burden of Proof: Reply to Baumrind, Larzelere, and Cowan (2002), and Parke (2002)*, 128 PSYCHOL. BUL. 602, 603 (2002).

77. *See, e.g.*, Carter v. State, 67 N.E.3d 1041, 1049 (Ind. Ct. App. 2016) (choking and beating with a belt); Denene Millner, *The Perils and False Rewards of Parenting in the Era of 'Digi-Discipline,'* NPR (Apr. 7, 2017, 4:01 AM), http://www.npr.org/sections/codeswitch/2017/04/07/504625091/the-perils-and-false-rewards-of-

reflects a robust version of this privilege, forgiving corporal punishment as long as:

> (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and (b) the force used is not designed to cause or known to create a *substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation*.[78]

All state definitions go well beyond the medical definition, which classifies all of this conduct as child neglect or abuse.[79] Parental corporal punishment is widespread conduct. The majority of Americans support it and at least half engage in it, often on babies and toddlers.[80] This is not limited to mild spanking; for instance, twenty-eight percent of parents said that they punished children using a belt, paddle, or other implement.[81] Religion, geography, and race all significantly impact the likelihood that a parent approves of and engages in corporal punishment.[82] Prosecutions

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parenting-in-the-era-of-digi-discipline (describing parents who film themselves beating and yelling derogatory names at their children and post the videos online, who receive thousands, even millions, of likes and approving comments); The Sanford Herald, *Guest Editorial: N.C. Spanking Case Raises Questions on Parental Rights*, WILSON TIMES (March 19, 2017, 7:50 PM), http://wilsontimes.com/stories/guest-editorial-nc-spanking-case-raises-questions-on-parental-rights,82322 (describing a recent case of beating with a wooden paddle).

78. MODEL PENAL CODE § 3.08(1) (AM. LAW INST. 1985) (emphasis added). This standard does not require that the force be reasonable or that the parent reasonably believes the use of force is appropriate. *See id*. § 3.08 cmt. 2. A number of states follow this standard. *See* Appendix A.

79. For instance, the Centers for Disease Control (CDC) defines physical abuse as "the intentional use of physical force against a child that results in, or has the potential to result in, physical injury," including pushing, hitting, and beating, and explicitly states that abuse can result from discipline. CDC, CHILD MALTREATMENT SURVEILLANCE: UNIFORM DEFINITIONS FOR PUBLIC HEALTH AND RECOMMENDED DATA ELEMENTS (2008), https://www.cdc.gov/violenceprevention/pdf/cm_surveillance-a.pdf.

80. Murray A. Straus, *Prevalence, Societal Causes, and Trends in Corporal Punishment by Parents in World Perspective*, 73 LAW & CONTEMP. PROBS. 1, 3–6 (2010). Rates are particularly high among babies and toddlers. *See* Elizabeth T. Gershoff & Susan H. Bitensky, *The Case Against Corporal Punishment of Children*, 13 PSYCHOL., PUB. POL'Y, & L. 231, 232 (2007). As to public opinion, see Steve Hendrix, *The End of Spanking?*, WASH. POST MAG. (Jan. 3, 2013), https://www.washingtonpost.com/lifestyle/magazine/the-end-of-spanking/2013/01/02/d328cf1e-3273-11e2-bb9b-288a310849ee_story.html (reporting that 65% to 75% of people believe that "it's okay to occasionally spank a child"). In recent years, support for corporal punishment has declined modestly. *Attitudes Towards Spanking*, CHILDTRENDS.ORG, http://www.childtrends.org/indicators/attitudes-toward-spanking (last visited Sept. 20, 2017) (using biannual GSS data).

81. *See* Straus, *supra* note 80, at 29.

82. This was the topic of one episode of the popular television show *black-ish*. *See* James Poniewozik, black-ish *Whips Up a Conversation About Spanking*, TIME (Oct. 23, 2014), http://time.com/3534219/review-blackish-spanking; *see also* Harry Enten, *Americans' Opinions on Spanking Vary By Party, Race, Region and Religion*, FIVETHIRTYEIGHT (Sept. 15, 2014, 4:48 PM), https://fivethirtyeight.com/datalab/americans-opinions-on-spanking-vary-by-party-race-region-and-religion/ (using data from 1986–2010 to demonstrate the "large gaps" in opinion between evangelical Christians and other Americans, reporting that African-Americans are 11% more likely to support

appear to be reserved for more extreme cases, or those where the parent hit his or her child in a public place, such as a school.[83] Even in these more extreme cases, courts are often reluctant to impose more than a slap on the wrist,[84] or are eager to find that the beatings were for the child's own good so as to immunize the parents' actions.[85]

Corporal punishment has been banned in almost all non-home settings, including day care, prisons, and hospitals.[86] The majority of states prohibit its use in schools, and the Secretary of Education recently called for a national ban.[87] Nonetheless, and despite reforms to other exemptions of criminal liability based on familial status such as intimate partner violence, efforts to abolish or even limit the parental corporal punishment privilege have failed.[88]

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corporal punishment than whites, including Hispanics, and showing that people in the South are 17% more likely to support spanking than those in the Northeast).

83. *See, e.g.*, Commonwealth v. Dorvil, 32 N.E.3d 861, 865–66 (Mass. 2015). As with the criminal justice system generally, however, there is also likely a racial and class disproportionality in enforcement. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012). I address some of these concerns about the distributional effects of my proposal *infra* Part IV.A. The recent high-profile prosecution of football star Adrian Peterson for hitting his five-year-old repeatedly with a tree branch is arguably both an example of this disproportionality as well as a more serious case. *See* Anthony Zurcher, *Adrian Peterson: Parenting, Punishment and Race*, BBC NEWS (Sept. 15, 2014), http://www.bbc.com/news/blogs-echochambers-29186080. Some commentators, including Peterson himself and other prominent black Americans, argued that this type of parenting was the only thing that would have kept them safe and made them successful adults. *See* Stephanie Hanes, *To Spank or Not to Spank: Corporal Punishment in the US*, CHRISTIAN SCI. MONITOR (Oct. 19, 2014), http://www.csmonitor.com/USA/Society/2014/1019/To-spank-or-not-to-spank-Corporal-punishment-in-the-US.

84. In one case, a father severely burned his five-year-old's hand over an open flame. *See* Stuart Pfeifer & Jennifer Mena, *Burning Son's Hand: $100 Fine*, L.A. TIMES (Apr. 27, 2002), http://articles.latimes.com/2002/apr/27/local/me-burn27. The judge reduced the father's conviction to a misdemeanor and his sentence to a $100 fine, opining that the father merited less punishment because what he did was "of a corrective nature." *Id*.

85. For instance, one court recently reversed a conviction, finding that the parental discipline privilege applied to nullify criminal liability, despite the fact that the father was cursing and screaming at the child throughout the severe beating. The Sanford Herald, *supra* note 77.

86. *See* Letter from John B. King, Jr., U.S. Secretary of Education, to Governors and Chief State School Officers (Nov. 22, 2016), https://www2.ed.gov/policy/gen/guid/school-discipline/files/corporal-punishment-dcl-11-22-2016.pdf [hereinafter King letter] ("Corporal punishment has also been banned in . . . U.S. prisons and U.S. military training facilities, and most juvenile detention facilities. . . . A long list of education, medical, civil rights, disabilities, and child advocacy groups . . . have also been calling for a ban on this practice."); *see also Summary: North Carolina Child Care Law and Rules*, N.C. DEP'T OF HEALTH & HUMAN SERVICES (April 2003), http://ncchildcare.dhhs.state.nc.us/pdf_forms/Law_Summary_11_00.pdf ("Corporal punishment (spanking, slapping, or other physical discipline) is prohibited in all family child care homes and centers.").

87. King letter, *supra* note 86 (citing extensive data that corporal punishment is "harmful [and] ineffective" and arguing that "[a]s the evidence against corporal punishment mounts, so does our moral responsibility to eliminate this practice").

88. *See* Hendrix, *supra* note 80 (reporting that recent proposals in California and Maryland to limit more serious corporal punishment were "greeted with howls of nanny-state overreach" and "hooted down"); *see also* Denver Nicks, *Hitting Your Kids is Legal in All 50 States*, TIME (Sept. 17, 2014), http://time.com/3379862/child-abuse.

Medical and psychological experts are virtually unanimous in finding that even moderate corporal punishment is not effective at teaching children and is in fact harmful.[89] Some injury, such as mild bruising, is expressly permitted in every state, and some statutes, such as the MPC outlined above, condone a significant amount of injury.[90] Corporal punishment also brings significant harm beyond physical injury. A 2016 meta-analysis of over 100 studies on corporal punishment found no evidence that spanking improves child behavior, and in contrast found spanking correlated with increased risk of thirteen detrimental mental health, behavioral, and cognitive outcomes.[91] As long ago as the 1990s, professional organizations such as the American Academy of Pediatrics issued strong statements against its use.[92] Many other countries have banned it and international law prohibits it.[93]

One of the foremost experts on corporal punishment and child abuse, Murray Straus, summarizes the harms: "Corporal punishment can tremendously influence the psychological development of children . . . serv[ing] to *legitimize other* forms of violence."[94] Because it legitimizes intrafamilial violence, the correlation with future intimate partner and parent–child violence by the child as he or she grows is significant.[95] Children who are corporally punished are also at greater risk of decreased

89. Gershoff & Bitensky, *supra* note 80, at 238–41 (cataloguing research on the harms).

90. *See* Appendix A.

91. Elizabeth T. Gershoff & Andrew Grogan-Kaylor, *Spanking and Child Outcomes: Old Controversies and New Meta-Analyses*, 30 J. FAM. PSYCHOL. 1, 13 (2016).

92. American Academy of Pediatrics, *Guidance for Effective Discipline*, 101 PEDIATRICS 723, 723 (1998), http://pediatrics.aappublications.org/content/pediatrics/101/4/723.full.pdf ("Corporal punishment is of limited effectiveness and has potentially deleterious side effects. The American Academy of Pediatrics recommends that parents be encouraged and assisted in the development of methods other than spanking for managing undesired behavior.").

93. *See* Constance Gibbs, *France Says 'Non!' to Hitting Kids as It Bans Corporal Punishment*, N.Y. DAILY NEWS (Jan. 4, 2017 10:40 AM), http://www.nydailynews.com/life-style/france-hitting-kids-bans-corporal-punishment-article-1.2934219 (detailing that fifty-two countries worldwide have now banned corporal punishment, including most of Europe); *see also Corporal Punishment Policies Around the World*, CNN (Nov. 9, 2011, 4:05 PM), http://www.cnn.com/2011/WORLD/asiapcf/11/08/country.comparisons.corporal.punishment ("Sweden, in 1979, was the first to make it illegal to strike a child as a form of discipline. Since then, many other countries in Europe have also instituted bans, as have New Zealand and some countries in Africa and the Americas."); *see, e.g.*, United Nations G.A. Res. 44/25, Art. 37(a), Convention on the Rights of the Child, (Nov. 20 1989), http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf ("No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.").

94. STRAUS, *supra* note 68, at 9. Straus and other researchers have demonstrated that even infrequent and mild corporal punishment can lead to an increased risk of antisocial behavior. *Id.*

95. Elizabeth Thompson Gershoff, *Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review*, 128 PSYCHOL. BUL. 539, 541 (2002) finding that every one of the twenty-seven studies she surveyed concluded that corporal punishment is associated with increases in children's aggressive behaviors).

moral internalization, aggression, delinquent and criminal behavior, and mental health problems.[96]

Also concerning is that corporal punishment easily elides into abuse, and there is a strong correlation between the two. Corporal punishment and more serious parental violence against children are driven by the same root causes;[97] as one expert explains, "The risk of a parent going too far and going out of control [is] way more if the parent is engaging in corporal punishment in the first place."[98] Tellingly, studies of substantiated cases of physical abuse have found that between sixty-six and eighty-five percent of these cases began as ordinary corporal punishment that escalated.[99]

2. Inculpation: Adult Incest

Almost every state criminalizes consensual sexual conduct among adults who are related to each other, yet, as outlined further below, the scope of these laws is enormously varied.[100] Their rationales also vary, with different jurisdictions stating historic/moral/religious,[101] "scientific,"[102] preservation of the family unit,[103] and exploitation rationales.[104] The first

96. *See* Joan Durrant & Ron Ensom, *Physical Punishment of Children: Lessons from 20 Years of Research*, 184 CANADIAN MED. ASS'N J. 12 (2012) (reviewing over two decades of research, including fifty studies, and finding that the vast majority of research found correlations to negative outcomes and noting that not one study "has found physical punishment to have a long-term positive effect").

97. Hanes, *supra* note 83.

98. *Id.* (quoting Professor Kenneth Dodge) (alteration in original).

99. *See* Straus, *supra* note 80, at 21–22 (noting corporal punishment and abuse "share much of the same etiology"); *see also* Gershoff, *Corporal Punishment*, *supra* note 76, at 604 (physical discipline and abuse are "often at the core the same").

100. *See* Appendix A.

101. The religious rationale remains a very significant factor in the criminalization of incest. As the commentary to the Alabama statute acknowledges:

> (1) The law against incest may represent a reinforcement by civil sanctions of a religious tenet. The incest taboo has been rationalized by religious theory in most societies from primitive societies forward. . . . Despite the admonition of the federal Constitution to separate church and state, this widespread, popular attitude is an important consideration in the employment of criminal sanctions for such conduct.

ALA. CODE § 13A-13-3, Commentary (1975). Relatedly, authorities cite the long tradition of incest bans. *See, e.g.*, Muth v. Frank, 412 F.3d 808 (7th Cir. 2005).

102. The Model Penal Code, for instance, relies in part on this rationale; it delineates incest only by close biological and adoptive relationships. MODEL PENAL CODE § 230.2 (AM. LAW INST. 1980).

103. *See, e.g.*, Heikkila v. State, 98 S.W.3d 805, 807 (Ark. 2003) (explaining that the incest statute "protects the integrity of the family").

104. *See, e.g.*, Lowe v. Swanson, 663 F.3d 258, 264 (6th Cir. 2011) (affirming a prohibition on adult incest between a man and his stepdaughter because this type of intergenerational incest is "the kind of relationship in which a person might be injured or coerced or where consent might not easily be refused, regardless [that they were both adults], because of the inherent influence of the stepparent over the stepchild") (citing Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

three are the most commonly cited, although courts and legislatures have recently increased their attention to exploitation within families.[105]

Illustrating the morals rationale, the offense is sometimes labeled as "illicit" sexual relationships,[106] and courts continue to justify incest bans by societal mores.[107] Tellingly, the public so struggled with their endorsement of a recent fictional incestuous couple—Jon and Dany—from *Game of Thrones*,[108] that one publication consulted a therapist to assure readers that supporting incest was OK, as long as it was in the fantasy realm: "There's nothing wrong with people wanting [incest in a fictional world]. The fantasy of taboo is always going to be exciting—to have that thrill enacted, and we know that it's fantasy. To enact that in real life, to say that's a justification for incest, [however] no, that's not OK."[109] No explanation is offered for why incest must remain in the fantasy realm; the strength of the taboo is deemed self-evident. Indeed, another expert expressed concern that even this fictional depiction of sexy incest between attractive characters did not sufficiently highlight "the problematic nature of [incest]" and might normalize it too much.[110]

Genetics also remains a major rationale for incest bans, with courts and legislatures expressing concern that incestuous offspring have a higher chance of possessing recessive, less desirable traits.[111] This biocentric view

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105. *See* Appendix B.

106. Illicit is defined as "contrary to accepted morality (especially sexual morality) or convention," *Illicit*, VOCABULARY.COM, https://www.vocabulary.com/dictionary/illicit (last visited Sept. 20, 2017), or "not sanctioned by law, rule, or custom." *Illicit*, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com/view/Entry/91445?redirectedFrom=illicit#eid (last visited Sept. 20, 2017). Illicit differs from illegal in not being limited to conduct prohibited by law, but rather primarily referring to conduct "forbidden or disapproved of by custom or society, as in an illicit love affair." *Illegal*, ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/illegal (last visited Sept. 20, 2017) (contrasting usage of "illegal" and "illicit").

107. *See* Nguyen v. Holder, 21 N.E.3d 1023, 1027 (N.Y. 2014) (describing the "universal horror" and "abhorrence" with which certain incestuous pairings are viewed).

108. Typical is this comment from one viewer: "Me: incest is wrong; Also me: when are Dany and Jon going to get together?" Anna Vu (@realannavu), TWITTER (Aug. 20, 2017, 9:36 PM), https://twitter.com/realannavu/status/899460228219117568?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fdailytitan.com%2F2017%2F08%2Fgame-thrones-romanticizing-incest-problematic%2F.

109. Tufayel Ahmed, *'Game of Thrones' Incest: Why It's OK That You're OK with Jon Snow and Daenerys's Relationship*, NEWSWEEK (Aug. 22, 2017, 12:52 PM), http://www.newsweek.com/game-thrones-incest-why-its-ok-youre-ok-jon-snow-and-daenerys-relationship-653505.

110. Harrison Faigen, *'Game of Thrones'' Romanticizing of Incest Could be Problematic*, DAILY TITAN (Aug. 28, 2017, 1:34 PM), https://dailytitan.com/2017/08/game-thrones-romanticizing-incest-problematic/ (quoting Janna Kim, Associate Professor of Child and Adolescent Studies at California State University, Fullerton).

111. The majority of states do not criminalize affinial incest, indicating the concern with incest is limited to biological relatives. *See* Appendix B. The Model Penal Code, for instance, specifically considered and rejected criminalizing affinial incest, and primarily relies on this rationale; it mainly prohibits biological relationships although it also includes children by adoption: "A person is guilty of incest, a felony of the third degree, if he knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood [or an uncle, aunt, nephew or niece of the whole blood]." MODEL PENAL CODE § 230.2 (AM. LAW INST. 1980). Numerous courts and

of the harm is clear in the many jurisdictions that do not ban affinial incest or allow otherwise impermissible relationships if the couple can show they will not be able to reproduce.[112] Incest criminal bans are closely tied to family law boundaries, with marriage bans mirroring or slightly exceeding them.[113] As to the family rationale, the MPC Commentary explains that the central underlying rationale for adult incest bans is "the protection of the integrity of the family unit."[114] Tellingly, the MPC and the majority of state statutes categorize incest as a crime against the family or a crime against marriage, rather than including it with sexual assault and other sex crimes.[115]

States do not distinguish between what I term here vertical, or intergenerational, incest as between parents and children, and horizontal, or intragenerational, incest as between siblings.[116] Every state criminalizing adult incest penalizes in some fashion sex between biological parents and children, and biological siblings.[117] Other than these two seminal categories, states vary widely on which relationships they punish. Twenty-one states prohibit parental relationships formed by adoption.[118] Twenty-eight states prohibit some stepparent/stepchild sex, although these vary in how they define this relationship and for how long it is prohibited.[119] All states prohibit aunt and uncle with niece or nephew relationships to some degree, but only a few include adopted or step relationships. Several states

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legislatures continue to primarily rely on this rationale. *See, e.g.*, *Nguyen*, 21 N.E.3d 1026–27 (noting the "relatively small, genetic risk" to construe state statute not to preclude a half uncle and half niece pairing). Calls by scholars and policymakers for greater regulation of sperm and egg donors to protect against "accidental incest" also demonstrate the ongoing salience of the biological rationale. *See, e.g.*, Naomi Cahn, *Accidental Incest: Drawing the Line – or the Curtain? – For Reproductive Technology*, 32 HARV. J.L. & GENDER 59 (2009).

112. Most states also do not prohibit relationships with in-laws, where there is no concern over recessive inheritance. *See* Appendix B. Others also only prohibit incest between aunts and uncles and nephews and nieces where they are blood-related rather than through marriage. *See* Appendix B.

113. Twelve states criminalize sex between first cousins, whereas thirteen ban them from marrying. *See* Appendix B.

114. MODEL PENAL CODE § 230.2 explanatory note (AM. LAW INST. 1980).

115. *Id.* Other crimes in this category include polygamy, abortion, and endangering the welfare of children. MODEL PENAL CODE § 230.1–.5 (AM. LAW INST. 1980). For the other states, see Appendix B.

116. The exploitation rationale has been used primarily to justify incest bans in cases involving parents or stepparents, rather than to exculpate horizontal incest. *Compare* Lowe v. Swanson, 663 F.3d 258, 264 (6th Cir. 2011) (noting concern that relationship between stepfather and stepdaughter was coercive) *with* Muth v. Frank, 412 F.3d 808, 817–18 (7th Cir. 2005) (not relying on an exploitation rationale).

117. *See* Appendix B.

118. *See* Appendix B.

119. *See* Appendix B. For instance, in one state the relationship is permitted if consensual (i.e., among adults), and three of the twenty-eight states specify that this relationship is prohibited only while the marriage creating the relationship lasts. *See* Appendix B.

do not punish same-sex incest.[120] Only six states prohibit relationships with in-laws.[121] Over half of the states do not criminalize sex between stepparents and their adult children, and all states exempt functional parents and custodians from incest bans.[122]

Incest of all types is likely very rare behavior, although father–daughter or stepfather–stepdaughter is by far the most prevalent type.[123] Unlike corporal punishment, there are no public opinion polls on incest, but it is likely that there is a societal consensus that incest is morally wrong. This attitude, however, may be changing slightly with younger generations rooting for fictional couples (Jon and Dany again), engaging in incest sexual "role play," and condoning horizontal "accidental" incest.[124]

Given the widely varied rationales for and scopes of adult incest liability, it is perhaps not surprising that there appears to be no consensus on what criteria should determine who is prosecuted and what sentence is appropriate. Prosecutions for adult–adult cases stem from application for public benefits, reports by another family member, or a person "outing" him or herself via a memoir.[125] In both horizontal and vertical cases, sometimes both parties are prosecuted, and sometimes only one party is.[126] Particularly inconsistent is whether the younger-generation party in vertical adult incest cases is to be treated as a victim or an offender.[127] Prosecutions

120. *See, e.g.*, ME. REV. STAT. ANN. tit. 17, § 556 (1-C) (2006) (listing prohibited relationships for women to include "her father, grandfather, son, grandson, brother, brother's son, sister's son, father's brother, or mother's brother," and, for men, "his mother, grandmother, daughter, granddaughter, sister, brother's daughter, sister's daughter, father's sister, or mother's sister").

121. *See* Appendix B.

122. *See* Appendix B.

123. Burke, *supra* note 34, at 1226–27 (citing research).

124. Again, there is no hard data on this, but one recent case illustrates the latter point. A woman found out that her fiancé was in fact her half-brother. The response to her anguished online post was overwhelmingly sympathetic, also illustrating the importance of functional families, since she and the brother/fiancé had not grown up together. *See* Tess Korman, *This Woman Found Out Her Fiancé is Actually Her Half-Brother*, COSMOPOLITAN (Dec. 14, 2016, 5:50 PM), http://www.cosmopolitan.com.au/love/woman-finds-out-fiance-is-her-brother-19641 (reporting that most of the 3400 commenters on Reddit.com, popular with millennials, were "supportive of the relationship").

125. Some prosecutions serve as cover for non-consensual or forcible rape. Here I am focusing on incest prosecutions for the harm of incest alone. Moreover, although I understand the need for using other charges to punish "real" rape prosecutions given the difficulties in securing convictions in rape cases, I have previously argued that such proxy prosecutions are not without costs. *See* Godsoe, *supra* note 45 (in the context of statutory rape).

126. *See David Epstein Pleads Guilty To Misdemeanor Incest*, HUFFINGTON POST (June 21, 2011, 5:07 PM), http://www.huffingtonpost.com/2011/06/21/david-epstein-pleads-guil_n_881639.html ("Epstein, who is still employed at the university, was originally charged with felony incest after it was discovered he was having what appeared to be a consensual relationship with his daughter, [age] 24.").

127. *See, e.g.*, Alexa Tsoulis-Reay, *Is Incest a Two-Way Street?*, SLATE (Dec. 10, 2010, 7:31 PM), http://www.slate.com/articles/news_and_politics/explainer/2010/12/is_incest_a_twoway_street.html (comparing a 2010 case of adult father–daughter incest where only the (college professor) father was charged because the daughter was "seen as the victim" with another case the same year where the

can bring severe sanctions, including incarceration and mandatory sex offender registration.[128]

Incest's harms are much more diffuse and difficult to parse out than those of corporal punishment because the law's wide net conflates very different sexual behavior, such as that between two adults of varying relations versus sex between adults and children. This is compounded by the varied rationales and scopes of incest bans and by the fact that incest is so rarely studied empirically or even discussed by scholars and policymakers. Generally, though, policymakers and courts cite three main harms: the genetic harm of increased birth defects through "inbreeding," the societal harm of (non-marital) intrafamilial sexual activity, and the risks of exploitation between family members.[129] As discussed further in Part IV.B, the first two of these harms are not significant enough to warrant criminalization and are inconsistent with other sexual regulation. The genetics harm relies on flawed science, and the harm to family is too attenuated and not closely tailored to the scope of incest criminalization.[130]

The risk of exploitation is the least frequently cited rationale[131] but constitutes an empirically proven and real harm. I argue that vertical incest poses a great risk of this harm because it inherently entails power differentials that call into question whether real consent is possible. The inability of adults to meaningfully consent to sex with other adults in a power relationship is an established legal principle.[132] Moreover, both psychological research and the experiences of persons who have engaged in adult incest demonstrate that vertical incest, particularly parent–child adult incest, is a situation where meaningful consent by the child, even as an adult, is virtually impossible. Psychologists, for instance, consider incest to be "abusive when the individuals involved are discrepant in age, power, and experience."[133] Some experts go further and describe incest in general "as a form of sexual violence . . . a form of sexual assault . . . relationships [that are] normally one-sided and abusive."[134]

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adult daughter was charged with a felony). I argue below that this inconsistent treatment is problematic. *See infra* Part II.A.

128. *See, e.g.*, Lowe v. Swanson, 663 F.3d 258, 265 (6th Cir. 2011) (stepfather prosecuted for incest with adult stepdaughter and sentenced to incarceration and registry); Muth v. Frank, 412 F.3d 808, 810 (7th Cir. 2005) (siblings convicted of and incarcerated for incest).

129. *See, e.g.*, *Lowe*, 663 F.3d at 264; Commonwealth v. Chau, 925 N.E.2d 572 (Table) (Mass. App. Ct. 2010).

130. *See infra* Part IV.B.

131. *See infra* Part IV.B.

132. Most states penalize consensual sex among adults where there is a significant power differential, such as between a prison guard and a prisoner or a mental health specialist and his patient. *See* discussion *infra* notes 167–74.

133. *See* Kluft, *supra* note 22, at 3.

134. Faigen, *supra* note 110 (quoting Janna Kim, Associate Professor of Child and Adolescent Studies at California State University, Fullerton).

There is very little research on incest; the extreme taboo and victim-blaming have made it a difficult subject for empirical study.[135] Virtually all of the scant research focuses on the most prevalent type, which is adult–child incest, in particular father or stepfather and daughter. Although the situations are not exactly parallel, many of the findings shed light on the harms of vertical adult incest. The research demonstrates that incest survivors experience psychological problems and difficulty with intimate relationships at rates that are statistically significantly higher than the general population.[136]

One recent study of father–daughter incest is particularly relevant, even though it studied victims whose abuse began when they were children or teenagers.[137] The study compared incest victims with other child sexual abuse victims and found that the effects of incest are *more* harmful than child sexual abuse by another person.[138] The incest survivors were "significantly more likely" to have sought psychological treatment, be vulnerable to depression, have family and intimacy problems, and "feel[] like damaged goods."[139] The researchers hypothesized that the shame and stigma attached to incest, coupled with the fractured relationships incest victims had with both their parents, led to this greatly increased trauma.[140] Other studies confirm this paradigm, finding greater psychological harms from incest by a "father figure" than by another adult relative.[141] This comports with research documenting the greater harm when the victim is assaulted by a trusted person.[142]

The virtually non-existent research on adult incest is supplemented by the narratives of survivors. These memoirs detail the power imbalances and

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135. Sandra S. Stroebel et al., *Father–Daughter Incest: Data from an Anonymous Computerized Survey*, 21 J. OF CHILD SEXUAL ABUSE 176, 177–178 (2012) (noting the research difficulties in studying incest).

136. *See, e.g.*, Kluft, *supra* note 22 (summarizing research).

137. Stroebel et al., *supra* note 135, at 177.

138. *Id*. at 187–90. The study consisted of self-interviews of survivors.

139. *Id*. at 183.

140. *Id*. at 178.

141. *See, e.g.*, Pamela C. Alexander et al., *Adult Attachment and Longterm Effects in Survivors of Incest*, 22 CHILD ABUSE & NEGLECT 45, 52 (1998) (reporting findings that attachment problems and concomitant depression and PTSD were not statistically related to the age of abuse onset, type of abuse, presence of coercion, or number of abusers, but were only related to the father figure as abuser); *see also* Susan G. Cole, '*The Incest Diary' is an Unbearable Read, so Imagine What It's Like for Survivors*, NOW TORONTO (July 24, 2017, 1:58 PM), https://nowtoronto.com/art-and-books/books/the-incest-diary-unbearable-read-imagine/ (noting the many additional harms of incest, including "the hugely complicated nature of the relationship between abuser and victim and between victim and [the rest of the family and community]").

142. *E.g.*, Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 276 (2001) (noting that "[m]easured in terms of frequency, duration, invasiveness, and force, fathers and father-substitutes subject their victims to abuse of singular destructiveness").

trauma of vertical incest. One well-known example is Mackenzie Phillips, the actress daughter of famous singer John Phillips of the Mamas and Papas.[143] Phillips related having sex with her father beginning at age nineteen and continuing for over a decade.[144] Although the first encounter was an identifiable rape, as she was passed out on drugs, Phillips characterizes subsequent encounters as perhaps seemingly "consensual," in that she was not blacked-out, but also a type of rape.[145] Phillips relates how her adoration for her father and desire for his attention and love made it virtually impossible for her to meaningfully agree to this "warped and twisted" relationship and how he kept it going through his "abuse of power" and "betrayal" of trust as her father.[146]

Writer Kathryn Harrison's account has less celebrity cachet but conveys the same sense of trauma from her sexual relationship as an adult with her biological father, whom as a child she had seen only twice.[147] She describes how her fear of losing her father's love led her to acquiesce to his demands and how he eventually blackmailed her with disclosure to keep the relationship going.[148] The special status of even an absent father (or perhaps particularly an absent one?) created a dynamic of control and abuse that, as one reviewer put it, makes the idea that this relationship was "consensual" impossible to "occur to anyone who has read the book."[149]

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143. *See* Ryan Smith, *Mackenize Phillips on Oprah: Why She Slept with Her Father and Why She Stopped*, CBS NEWS (Sept. 24, 2009, 10:57 AM), https://www.cbsnews.com/news/mackenzie-phillips-on-oprah-why-she-slept-with-her-father-and-why-she-stopped/.

144. *See id.*

145. *See id.*

146. *See id. See also Mackenzie Phillips' Family Secret*, OPRAH.COM (Sept. 23, 2009), http://www.oprah.com/relationships/mackenzie-phillips-family-secret (quoting Phillips: "Your father is supposed to protect you, not f*** you.").

147. A very recent memoir on incest that began when the daughter was a young child and continued into adulthood has demonstrated the complicated view of incest perpetrators and victims. *See* Zosia Bielski, '*The Incest Diary': New Memoir Chronicles the Devastating Legacy of Family Sexual Abuse*, GLOBE & MAIL (July 17, 2017), https://beta.theglobeandmail.com/life/relationships/the-incest-diary-new-memoir-chronicles-the-devastating-legacy-of-family-sexual-abuse/article35685179/?ref=http://www.theglobeandmail.com& (discussing the book *The Incest Diary*). One review accurately describes incest as "the worst betrayal of trust" and "a crime we continue to look away from," while another expresses contempt for the victim/author, reporting her "disgust" for the "young victim [who] is not coerced or terrified but a willing partner." *See id.*; Allison Pearson, *This Ticks All The Boxes of a Bestseller—But I Hated It*, TELEGRAPH (July 23, 2017, 7:00 AM), http://www.telegraph.co.uk/books/what-to-read/ticks-boxes-bestseller-hated/.

148. KATHRYN HARRISON, THE KISS 188 (1997).

149. Luc Sante, *Is 'The Kiss' Really So Awful?: Literary Criticism Turns Into a Witch Trial*, SLATE (Mar. 26, 1997, 3:30 AM), http://www.slate.com/articles/news_and_politics/hey_wait_a_minute/1997/03/is_the_kiss_really_so_awful.html.

B. Distorted Harms

Current relational harm doctrine and theory distorts harms. Harms are mislabeled, empirically proven, and significant harms are discounted and condoned. For instance, power imbalances and exploitation risks that the law has long recognized can vitiate consent are ignored. At the same time, conduct that is acknowledged to be harmless outside of the family context, such as consensual adult sex, is criminalized and severely punished.

1. Mislabeled and Conflated Harms

The reliance on familial status to exculpate and inculpate can result in a very confusing if not incoherent account of the conduct at issue, and any resultant harm. For instance, parental corporal punishment is widely called "spanking,"[150] rather than what it actually is—hitting, beating, slapping, pinching, or hitting with objects—conduct that the criminal law has long recognized as assault or even aggravated assault.[151] A recent study demonstrates that this terminology has a significant effect on public forgiveness of this conduct; child psychologists surveyed adults and found that corporal punishment was rated better or worse simply depending on the verb used.[152] The researchers recommended calling these actions assault rather than spanking, because the latter term minimizes and legitimates violence against children.[153]

The harm at issue in adult incest is also sometimes mislabeled. The majority of states term it an offense against the family or marriage, although it is very different than bigamy and "unlawfully solemnizing a marriage," other crimes in this category.[154] Incest laws prohibit sex, not marriage.[155] Its contours also do not comport with the wide range of existing family units, instead following narrow biological or marital lines.[156] Tellingly, some couples who marry and are incapable of procreation have still been prosecuted, again revealing the perceived harm at issue to be about sex rather than the erosion of marriage or other familial supports.[157] And yet, as noted further below, a substantial portion of the conduct criminalized as incest does not comport with recognized sex

150. *See, e.g.*, MISS. CODE ANN. §97-3-7(2)–(7) (1972) (describing spanking as reasonable discipline of a child).

151. *See id.*

152. Kerr, *supra* note 18 (describing the report and quoting the researchers).

153. *Id*.

154. *See, e.g.*, N.Y. PENAL LAW § 255.00 (McKinney 1939).

155. They are usually, however, coterminous with civil marriage bans.

156. *See* Appendix B.

157. *See infra* notes 186–88 (discussing the *Muth* case).

offenses, instead constituting adult consensual sex usually deemed harmless.

Two factors further confuse the message of the incest statutory framework. First, the framework conflates not only adult–child incest but, within adult–adult incest, horizontal and vertical incest.[158] This sweeping scope bringing the same punishment obscures the very real differences in the sibling and parent–child relationship, and the concomitant difference in any harms stemming from a sexual relationship. Second, incest prosecutions vary widely in who is prosecuted[159]—both parties? Only the older one, or one deemed more culpable for another reason? The younger-generation party is frequently prosecuted along with his exploiter.[160] One young woman was recently charged and pleaded guilty to incest after her father impregnated her and demonstrated his power over her by tattooing "Daddy's girl" on her buttocks and pimping her out for sex.[161] This confusion of victims and offenders underscores the contested nature of the harms at issue, and muddies the message of the criminal sanction.

2. Obscured Harms

Empirically proven, and legally recognized, harm is obscured in the legal frameworks of corporal punishment and vertical parent–child adult incest. The parental discipline privilege condones significant harm to children without criminal liability. For instance, the MPC and numerous state statutes explicitly permit parental discipline that falls short only of risking "serious bodily injury" or death.[162] Other states permit some physical harm and mental or emotional injury as long as it is not "severe" or "gross."[163] This concrete physical harm is permitted despite the fact that children have been deemed more vulnerable and harm to them particularly problematic.[164] Moreover, especially vulnerable children, such as those with disabilities or who identify as LGBTQ, are more likely to be physically punished by their parents.[165] These harms are often magnified

158. *See* Appendix B.

159. *See* Tsoulis-Reay, *supra* note 127.

160. *See id*.

161. *See id*.

162. *See* Appendix A.

163. *See* Appendix A.

164. *See, e.g.*, Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1682–85 (1992). I have previously outlined that children, particularly white, middle-class girls are deemed iconic victims. *See* Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313 (2015).

165. *See* Cynthia Godsoe, *Parental Love and Purposeful Violence*, *in* THE POLITICIZATION OF SAFETY (forthcoming 2018) (manuscript at notes 95–107) (on file with author) (detailing empirical evidence).

because of their racialized and gendered nature.[166] Finally, research also demonstrates that assault by relatives or those close to you can cause greater harm than assault by strangers.[167]

The exploitation harms at issue in some vertical incest are also undercounted. Although the parent–child relationship constitutes perhaps the ultimate power imbalance, many states continue to very narrowly define parenthood.[168] This reliance on formal rather than functional definitions leaves a large swath of persons unprotected from exploitation by stepfathers and others who have served as parents.

Both of these harms are ones that have previously been recognized as such in the criminal law. The conduct at issue in corporal punishment—beating, slapping, hitting with objects or a hand, etcetera—is one of the oldest recognized in the criminal law.[169] Every state criminalizes assault and battery, even when they do not cause any physical harm.[170] Indeed, many acts currently forgiven under the parental discipline privilege would constitute aggravated assault because they involve a weapon such as a belt or branch, or because the victim is a child.[171] Other categorical exceptions to assault and battery, such as the common law privileges Blackstone articulated to "correct" wives and apprentices, have been abolished.[172] Going further, some laws bring *greater* punishment for assault or battery within a relationship such as intimate partner violence.[173]

The negation of consent by virtue of a power relationship is also a harm recognized by the criminal law. Persons in positions of authority,

166. I elaborate on this pattern elsewhere. *See id.* (manuscript at notes 99–115) (arguing that "[p]arental punishment is also highly gendered and racialized.").

167. *See* Hessick, *supra* note 26, at 348, 391–95, 401 (detailing the "increased victim injuries and breach of trust").

168. *See* Appendix A.

169. *See* Shlomit Wallerstein, *Criminalising Remote Harm and the Case of Anti-Democratic Activity*, 28 CARDOZO L. REV. 2697, 2703 (2007) (noting that "[i]t is commonly recognized that the concept of harm includes . . . physical injuries").

170. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 16.1 (2d ed. 2003) ("*Battery* requires such an injury or touching. *Assault*, on the other hand, needs no such physical contact. . . .").

171. *See* MISS. CODE ANN. § 97-3-7(2)-(7) (1972) (where aggravating factors include "any injury to a child" except for "[r]easonable discipline of a child, such as spanking, [which] is not an offense" and "whether the crime was committed in the physical presence or hearing of a child under sixteen (16) years of age"); MONT. CODE ANN. § 45-5-201 (2015) (any weapon); N.Y. PENAL LAW § 120.00 (McKinney 2009) ("a deadly weapon or a dangerous instrument"); *see also* LAFAVE, *supra* note 170, at § 16.3(d) ("In all jurisdictions statutes punish, more severely than simple assault, such aggravated assaults as . . . 'assault with a dangerous [or deadly] weapon.'" (second alteration in original)).

172. *See supra* note 29.

173. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-3601, 13-3601.02 (2001) (defining "domestic violence" as a dangerous crime against victims within certain relationships and providing that the third violation of a domestic violence offense is a felony, which may require mandatory incarceration); CAL. PENAL CODE § 273.5 (West 2014) (criminalizing "[a]ny person who 'willfully inflicts corporal injury resulting in a traumatic condition upon [certain] victim[s]'").

including police officers, teachers, and prison guards, are prohibited from sex with those under their supervision in a large majority of states.[174] A number of jurisdictions include additional people with particular "trust" or influence, such as clerics,[175] mental health professionals,[176] and athletic coaches.[177] The prohibited relationship is often explicitly framed in custodial, disciplinary, or even familial terms. For instance, Tennessee's felony of "[s]exual contact by an authority figure" includes both persons "in a position of trust, or [with] supervisory or disciplinary power over the [victim] . . . [who] used the position of trust or power to accomplish the sexual contact" and those who had "parental or custodial authority over the [victim] and used the authority to accomplish the sexual contact."[178] This authority need not be permanent or all-encompassing; authority figures may include those "with temporary or occasional disciplinary control over the other person."[179] The underlying rationale is that voluntary consent is impossible, or too difficult to determine, because of the extreme power differential between the parties.[180] Some jurisdictions expand the scope of prohibited relationships where the power differential, and the concomitant "emotional dependence" of one party on another, is particularly high.[181] As discussed further below, this harm of sexual exploitation by those in positions of authority is one that is increasingly being recognized in new contexts.[182]

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174. LAFAVE, *supra* note 170, at § 17.3 (listing 37 states); *see also* TEX. PENAL CODE ANN. § 21.12 (West 2011) (criminalizing relationships between school employees and adult students).

175. OHIO REV. CODE ANN. § 2907.03(A)(12) (West 2006).

176. Twenty-three states criminalize sex between mental health professionals and clients. *See* Sherri Morgan, *Criminalization of Psychotherapist Misconduct*, NAT'L ASSOC. OF SOC. WORKERS (May 2013), http://c.ymcdn.com/sites/www.naswca.org/resource/resmgr/imported/7_13_legal_issue.pdf.

177. *See, e.g.*, OHIO REV. CODE ANN. § 2907.03(A)(9) (West 2006).

178. TENN. CODE ANN. § 39-13-527 (2014); *see also* COL. REV. STAT. ANN. § 18-3-404 (West 2013) ("The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim.").

179. OHIO REV. CODE ANN. § 2907.03(A)(9); *see also* MICH. COMP. LAWS ANN. § 750.520(e) (West 2004) (prohibiting sex between mental health professionals and their patients for two years following treatment).

180. *See, e.g.*, S.B. 7456B, 2011–2012 Leg., 199th Sess. (N.Y. 2011), http://www.nysenate.gov/legislation/bills/2011/s7456/amendmenta/a (providing that a patient is "deemed incapable of consent" to sex with her mental health or health care provider); MICH. COMP. LAWS § 750.520(e) (2004) ("The consent of the victim is not a defense."); *see also* Galia Schneebaum, *What is Wrong with Sex in Authority Relations? A Study in Law and Social Theory*, 105 J. CRIM. L. & CRIMINOLOGY 345, 346–47 (2016) (describing these offenses to "share a common element: they all proscribe sexual contact within a certain type of social relationship in which one side holds a position of power over the other").

181. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-71(a)(6) (West 2012) (prohibiting sex between mental health professionals and their clients and barring sex with former clients who are "emotionally dependent").

182. *See* discussion *infra* Part III.A.

3. Manufactured Harms

In addition to undercounting certain harms, relational crime also punishes harmless conduct. Consensual adult sex is one such category of conduct; indeed, consent has become the barometer between societally approved sex and sex worthy of punishment.[183] Accordingly, it has been decriminalized in non-marital contexts and with multiple partners.[184] Outside of a narrow range of recognized and extreme power imbalances, like the adult statutory rape laws I outlined above, people are free to choose their sexual partners and are not protected from doing so against every imbalance in bargaining power. Horizontal incest laws, however, manufacture harm based on flawed science or attenuated family harms to continue to punish harmless, but non-normative conduct.[185]

C. Distorted Family Status

The relational crime framework also warps family status. It entrenches hierarchies within families and punishes non-normative family units and intimate conduct.

1. Entrenches Intrafamilial Hierarchy

The doctrines of corporal punishment and adult incest illustrate the ways relational crime serves to entrench power hierarchies within families. The parental discipline privilege is the only categorical exception to assault and battery laws, granted to those entrusted with the care of society's most vulnerable members. Similarly, the limitation of incest bans in many states to biological parents serves to condone gendered and hierarchal sexual relationships between stepfathers and daughters. This hierarchy underprotects some family members, infringing on their autonomy and equality. Indeed, allowing parents to beat their children, or have sex with them when they reach adulthood, is reflective of outdated notions of ownership, children as property, a legal construction that cannot be supported in contemporary society.[186]

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183. *See* JOSEPH J. FISCHEL, SEX AND HARM IN THE AGE OF CONSENT 7 (2016).

184. *See* discussion *supra* note 54. As I discuss further below, some private consensual sex has also been found to be constitutionally protected. *See* discussion *infra* Part III.C. Here, I am making the related, but more modest, point that it has been deemed more beneficial to personhood than harmful.

185. For a more detailed discussion of the flawed nature of these rationales for criminalization, see *infra* Part IV.B.

186. *See generally* Amar & Widawsky, *supra* note 2 (arguing that treating children like parental property is unconstitutional); *see also* Woodhouse, *supra* note 2.

2. Perpetuates Interfamilial Hierarchy

The criminal law in the relational context also imposes a hierarchy among families. The scope of liability perpetuates a biocentric, gendered, and heteronormative family, while leaving other families unrecognized and vulnerable to punitive state intervention. Incest prohibitions are explicitly tied to family law boundaries more than any other crime.[187] Accordingly, incest bans reflect the same traditional marital family structure dominating constitutional law until very recently. Two examples are the laws' exclusion of non-biological adoptive parents, stepparents, and functional parents, and the ongoing failure to criminalize same-sex adult incest in a few states.[188]

Courts and legislatures import their own views of appropriate sexual relations and families to condone certain arguably exploitative relationships that follow traditional patterns, and to punish consensual ones that violate deeply embedded moralistic, cultural norms. As a result, prosecutions and sentences are highly dependent upon the judge's or other state actor's impression of that family, including their class and lifestyle and, of course, their sexual intimacy.[189] As Courtney Cahill has described it, disgust and ideological beliefs about "natural" families have made incest a particularly adept tool for excluding non-normative families, including adoptive and same-sex families.[190]

Compare these two cases. The first court construed its state incest ban to exclude stepparents, reasoning that these sexual relationships may be "neither illicit nor exploitative, as, for example, where a grown man marries his stepmother, who may be his own age, after his father's death."[191] Note the court's gendered assumptions that the stepmother might well be considerably younger than her husband—the age of his son—and that the son will have no problem having sex with someone who had served in some sort of parental fashion, even if just tangentially—perhaps because he is male and so not as easily exploited?[192] The second court upheld eight and five year prison sentences, respectively, for a brother and sister who

187. California, for instance, punishes incest among "[p]ersons being within the degrees of consanguinity within which marriages are . . . incestuous and void." CAL. PENAL CODE §§ 285, 785 (West 2014).

188. *See, e.g.*, ME. STAT. tit. 17, § 556 (2006) (listing only opposite-sex prohibited relationships).

189. *See* Note, *Inbred Obscurity: Improving Incest Laws in the Shadow of the "Sexual Family,"* 119 HARV. L. REV. 2464, 2478–82 (2006) (discussing cases).

190. *See* Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, 49 U.C. DAVIS L. REV. 183 (2015); *see also* Cahill, *supra* note 21.

191. Commonwealth v. Rahim, 805 N.E.2d 13, 19 (Mass. 2004).

192. Of course, sex between stepfathers and daughters is far more common than this near-fantasy tale. *See, e.g.*, State v. Ortiz-Valencia, 801 P.2d 57 (Idaho Ct. App. 1990); State v. Little, 861 P.2d 154 (Mont. 1993).

grew up in separate households, met as adults, married, and had children.[193] In doing so, the judge appeared to "recoil[]" from the siblings' relationship, viewing them as a "moral horror[]."[194] The trial judge's obsession with their sexual intimacy, despite the lack of any genetic harm (Mrs. Muth had voluntarily been sterilized), is clear: "I [believe] severe punishment is required in this case. . . . I think they have to be separated. It's the only way to prevent them from having intercourse in the future."[195]

Again, the fascination around *Game of Thrones* and the different public reactions to two incestuous pairings illustrates this point. Cersei and Jaime, who have committed numerous violent acts and are not popular with viewers, are reviled for their incest, while the attractive, younger, and more benevolent Jon and Dany are supported. As one viewer writes: "So #GameofThrones has taught me that I'm against twin incest but aunt/nephew incest is totally fine."[196] Or another: "[E]veryone watching [J]aime and [C]ersei: 'ew this is gross' [as opposed to] everyone watching [J]on and [D]aenerys: #GameOfThrones."[197] The tendency to forgive one pair and condemn the other for the same or even less culpable (horizontal) pairing demonstrates the malleability of the crime of incest. This distinction is not based on harm, or culpability, but rather on whether or not we "like" those involved—an illegitimate distinction and one that risks arbitrary or selective enforcement.[198]

D. The Stepfather Problem

Even more than these two crimes themselves, the interaction of corporal punishment and incest laws demonstrate the problematic contours

193. Muth v. Frank, 412 F.3d 808, 810 (7th Cir. 2005). The state also terminated their parental rights because of their incestuous relationship. *Id.* That and the long periods of incarceration forcibly broke up one self-described family. *Id.* at 812**.**

194. Matthew J. Franck, *Kissing Sibs: Could the Supreme Court Embrace Incest*?, NAT'L REV. (Aug. 4, 2005, 8:12 AM), http://www.nationalreview.com/article/215103/kissing-sibs-matthew-j-franck (discussing the Seventh Circuit opinion in *Muth*).

195. Jeff Jacoby, *Hypocrisy on Adult Consent*, BOS. GLOBE (Aug. 28, 2005), http://archive.boston.com/news/globe/editorial_opinion/oped/articles/2005/08/28/hypocrisy_on_adult_consent. The Muths were a marginalized family in other ways as well, having struggled with poverty, addiction, and involvement with the child protective system. *Muth*, 412 F.3d at 811.

196. Alyssa Neumann (@lyssaneumann), TWITTER (Aug. 27, 2017, 9:52 PM), https://twitter.com/lyssaneumann/status/902000816462077952?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.buzzfeed.com%2Fjennaguillaume%2Fthis-ship-has-sailed.

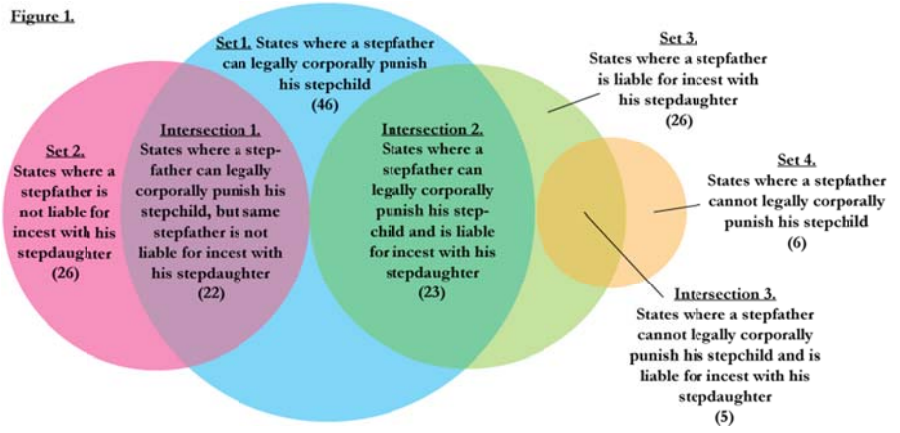
197. Kathleen (@kathleen_hanley), TWITTER (Aug. 27, 2017, 9:19 PM), https://twitter.com/kathleen_hanley/status/901992585882951682?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.elitedaily.com%2Fentertainment%2Ftwitter-got-sex-scene%2F2053370 (using a "gif" featuring a woman saying, "It's so beautiful," to describe Jon and Dany's relationship).

198. Of course, there may be other reasons viewers distinguish between the two couples, including the fact that Cersei and Jamie have children and know they are related to each other, but I believe, as many viewers acknowledge, that the distinction is largely based on a gut reaction. Such gut reactions should not determine criminalization and prosecution.

of relational crime. Parenthood is defined very differently in these two contexts, broadly and in functional terms for corporal punishment, and very narrowly and in formal, often purely biological, terms for adult incest. As a result, the scope of relational exculpation is considerably broader than the scope of inculpation, because the same person is deemed a parent for exculpation and a non-parent excusing him from inculpation.

I will illustrate this asymmetry using the example of stepfathers. The treatment of stepfathers presents a particularly helpful lens into definitional problems because they are some of the most common offenders in these two instances[199] and yet are defined very differently for each. I define stepfathers here in their most common iteration as a parental figure whose parentage is not necessarily legally established via adoption or even marriage to a child's mother, but rather comes through his romantic relationship with a child's mother.[200] I examine this problem in terms of men in relationships with women, as this is by far the most frequent scenario in the case law,[201] but a similar analysis could apply to stepmothers and to same-sex couples.

Stepfathers: Corporal Punishment Legality and Incest Liability by State[202]



As the preceding diagram demonstrates, the large majority of states accord the parental discipline privilege to stepfathers and other persons

199. *See supra* note 192 and *infra* note 206.

200. Most dictionary definitions do not turn on legal parentage and instead focus on marriage. *See, e.g.*, *Step-father*, BLACK'S LAW DICTIONARY (2d ed. 1910) ("The man who marries a widow, she having a child by her former marriage . . . is step-father to such child.").

201. *See* discussion *supra* note 199.

202. Figure 1 represents the laws of all fifty states, the District of Columbia, and the Model Penal Code as of December 31, 2016, as summarized in Appendix B.

who are not legal, biological, or adoptive parents.[203] Forty states allow custodians to assert the privilege,[204] and thirty-four go even further, allowing adults *in loco parentis*, those "acting like a parent," to do so.[205] The statutes do not define terms, including stepparents, and there is likewise surprisingly little discussion of the scope of parenthood in corporal punishment cases; instead, parental status is almost always assumed.[206] Accordingly, a significant number of people without a legal or significant caregiving relationship to a child, such as a mother's boyfriend, are permitted to corporally punish that child.

In contrast, incest laws define parents much more narrowly for inculpation. Only twenty-one states criminalize incest between adoptive parents and children.[207] A slight majority of states, and the MPC, do not criminalize sex with stepparents.[208] Those that do narrowly define stepparents to include those married to the child's parent. Several states erase this liability once the marriage ends through divorce or death; unlike biological or adoptive parents, the former stepparent is deemed to be only temporarily a parent during the marriage.[209] Not one state criminalizes incest for custodians or persons *in loco parentis*. This extremely formalist approach does not recognize the reality of families where numerous unmarried stepparents, or formerly married stepparents, are parents in the real sense of the term.

To return to my earlier example, film director Woody Allen helped raise Soon Yi from the time she was a young girl and was adopted by Allen's long-time partner and co-parent of other children, Mia Farrow.[210] Many in the family referred to him as Soon Yi's "stepfather," although he

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203. *See, e.g.*, OHIO REV. CODE ANN. § 2151.031(C) (West 2006) (defining child abuse but excluding "a child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, person having custody or control, or person in loco parentis"); J.C. v. Dep't of Children and Families, 773 So. 2d 1220, 1220 (Fla. Dist. Ct. App. 2001) (finding that an eleven-year-old child was not abused when his stepfather used a belt to spank the child on the buttocks, bruising him).

204. *See* Appendix A.

205. *See* Appendix A.

206. *See, e.g.*, Howard v. McGinnis, 632 F. Supp. 2d 253, 260 (W.D.N.Y. 2009) (stepfather); Kama v. State, 507 So. 2d 154, 154 (Fla. Dist. Ct. App. 1987) (stepfather); State v. Miller, 98 P.3d 265, 266–67 (Haw. Ct. App. 2004) (uncle).

207. *See* Appendix B.

208. *See* Appendix B.

209. Very few states, only eleven and thirteen respectively, include adoptive or step-grandparents in criminal incest prohibitions. *See* Appendix B.

210. Maria Vultaggio, *Woody Allen, Wife Soon-Yi and Their Bizarre History: Ronan Farrow Addresses Sex Abuse Allegations At Cannes*, INT'L BUS. TIMES (May 11, 2006, 8:29 PM), http://www.ibtimes.com/woody-allen-wife-soon-yi-their-bizarre-history-ronan-farrow-addresses-sex-abuse-2367707.

and Farrow were not married and maintained separate residences.[211] Allen would qualify under New York's parental discipline privilege to physically punish Soon Yi, as it covers "[a] parent, guardian or other person entrusted with the care and supervision of a [minor]."[212] Yet, Allen was not prosecuted for the sexual relationship he began with Soon Yi soon after she reached adulthood, because the state incest ban covers only biological parents, not adoptive or stepparents.[213]

I am not claiming that the scope of criminal coverage must be exactly coterminous for every encounter between two actors—here the stepfather and child. Yet in this case, the power accorded broadly in the first instance—to assault and then assert as a justification for full exculpation that one is a parent—is part of what creates the harm in the second instance—the exploitation and difficulty of consent between a parent and even an adult child. The extremely different definitions of parent used in these two instances worsen the harm, and then obscure it because functional parents and stepfathers are not covered under many adult incest statutes. This interaction between the two crimes also further enshrines traditional gendered family hierarchies by normalizing sex between two parties, even where one, usually the older man, has tremendous power over the other, usually a younger woman.

III. RELATIONAL CRIME THEORY FOR THE POST-*OBERGEFELL* WORLD

In Parts I and II, I used incest and corporal punishment to map the distortions in current relational crime doctrine and theory. I turn in this Part to the normative, introducing a new theoretical framework for assessing relational crime that incorporates evolving notions of sexual harm, changed parenthood definitions, and the new constitutional terrain of the family. This three-part inquiry first scrutinizes the harm, then assesses whether family status mitigates or generates these harms, and finishes by tailoring the scope of family status to best capture the relational power dynamics.

A. Unraveling Exploitation and Moral Harms

Essential to a workable theory of relational crime is a coherent assessment and treatment of harms. Consistently defining and punishing harms is a hallmark of any legitimate criminal law framework, particularly

211. Beverly Beyette, *Houses Divided: The Woody-Soon Yi Romance Has Sparked Questions About the Complex Ties That Bind the Modern Family: Stepfamilies: '(Romance) happens primarily because boundaries are very unclear,' one sociologist says*., L.A. TIMES (Sept. 3, 1992), http://articles.latimes.com/1992-09-03/news/vw-7384_1_woody-allen.

212. N.Y. PENAL LAW § 35.10(1) (McKinney 2009).

213. N.Y. PENAL LAW § 255.25 (McKinney 1939).

in the current climate of rampant overcriminalization.[214] To this end, we must disentangle recognized harms from moral distaste and scrutinize exculpation for obscured harms.

The harm principle is not the only consideration in determining what conduct should be criminalized, but it remains a dominant one.[215] Criminal law theorists past and current have posited substantive harm as a constraint on criminalization, along with moral desert or wrongfulness.[216] A robust application of the harm principle allows for distinguishing between conduct that should be punished and conduct that is merely unpopular or non-mainstream. As H.L.A. Hart argued fifty years ago: "First, we must ask whether [conduct] is harmful, independently of its repercussion on the general moral code."[217] This argument has only grown stronger with *Lawrence* and increased concerns about overcriminalization. The punishment of harmless conduct and the failure to punish harmful conduct are both problematic.[218]

Harm is not, however, as simple a concept in assessing criminalization as it might at first appear. Bernard Harcourt has persuasively demonstrated that the harm principle is elastic and indeterminant, and that its failure to address the "comparative importance of harms" renders it less useful as a limiting principle.[219] In the cases of relational crime discussed here, however, the harm is to a specific victim, the child, whether an adult or still a minor. Accordingly, we are not discussing remote harm, which is more amorphous and controversial.[220] Despite his (warranted) pessimism about the harm principle as a meaningful limitation on criminalization, Harcourt

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214. One of the earliest scholars to predict this troubling dynamic was Sanford Kadish who, long before *Lawrence*, argued against the criminalization of widespread, harmless behavior, particularly in the sexual realm. *See* Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1961). Overcriminalization is the most pressing criminal justice problem of our time. For a seminal account, see William J. Stuntz, *The Pathological Politics of the Criminal Law*, 100 MICH. L. REV. 505 (2001).

215. *See, e.g.*, Wallerstein, *supra* note 169, at 2699 (describing the harm principle as "the most commonly recognised criterion for criminalisation in democratic societies").

216. *See, e.g.*, FEINBERG, *supra* note 16; DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF CRIMINAL LAW 65 (2008); *see also* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 758, 768 (2005) (documenting the use of fornication and adultery to illegitimately impose mainstream morality on unpopular groups).

217. *See* H.L.A. Hart, *Immorality and Treason*, LISTENER, July 30, 1959, at 162–63 (concluding that the regulation of private adult consensual sexual activity such as sodomy did not meet this test).

218. S*ee, e.g.*, Godsoe, *supra* note 164 (critiquing the punishment of prostituted young people and the failure to adequately punish, if at all, their customers/abusers); HUSAK, *supra* note 216.

219. Harcourt, *supra* note 16, at 182. Relatedly, scholars are concerned about the harm principle being "co-opted by legal moralism." *See* Kimberly Kessler Ferzan, *Prevention, Wrongdoing, and the Harm Principle's Breaking Point*, 10 OHIO ST. J. CRIM. L. 685, 691 (2013) (discussing Harcourt's work).

220. *See, e.g.*, Wallerstein, *supra* note 169, at 2712.

does support a costs and benefits analysis of various harms.[221] This is exactly how I intend the harms assessment of family harms to proceed.

The harm assessment should be based on empirical data. Numerous scholars and reformers have called for a greater reliance on data across the criminal justice system.[222] A reliance on folk wisdom and emotions such as disgust, rather than research and science, is a particular problem in the regulation of sexual behavior and family-related crimes.[223] Recognizing this, one prominent legal scholar argues that *Lawrence* "implicitly demand[s] that states defend laws governing sexual conduct with evidence that this conduct is causing harm to other people."[224] When punishment is not data-driven, it is arguably flawed from both a retributive and instrumentalist perspective.[225]

The harm at issue should also be properly labeled. The criminal law serves an important expressive purpose,[226] which is diluted and muddled without the accurate and coherent labeling of harm. Accordingly, in the intimate partner violence and marital rape context, scholars and reformers have argued for the importance of criminalization to "defin[e] battering as a public harm," rather than its traditional depiction as a private, family matter.[227]

Assault and battery have long been recognized as criminal harms, whether or not they result in injury.[228] The harm of sexual exploitation by

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221. *See* Bernard E. Harcourt, *The Collapse of the Harm Principle Redux: On Same-Sex Marriage, the Supreme Court's Opinion in* United States v. Windsor, *John Stuart Mill's Essay on Liberty (1859), and H.L.A. Hart's Modern Harm Principle* (Chi. Pub. Law and Legal Theory Working Paper No. 437, 2013), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1421&context=public_law_and_legal_theory; *see also* Steven D. Smith, *The Hollowness of the Harm Principle* 58 (Univ. of San Diego Pub. Law and Legal Theory Research Paper Series No. 17, 2004), http://digital.sandiego.edu/lwps_public/art17 (critiquing the harm principle but concluding that it is still useful because "[e]veryone can embrace the principle and simply count as 'harms' injuries to the sorts of values or interests for which protection would be prescribed by his or her theory of government or the good life").

222. *See, e.g.*, Michael Tonry, *Policing to Parole: Reconfiguring American Criminal Justice*, *in* 46 CRIME AND JUSTICE 10–11 (Michael Tonry ed., 2017) (calling for "rationality [and] evidence" in policy making); *see also* HUSAK, *supra* note 216, at 153 (concluding that the empirical data show that many drug offenses do not merit criminalization).

223. Cahill, *supra* note 21; *see also* Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1621 (2014) (arguing this contributes to "[t]he profoundly dysfunctional criminal regulation of sexual harm").

224. William Eskridge, Jr., *Revolution in Waiting: Taking the Pulse of Gay Rights in the Courts*, SLATE (June 20, 2008, 7:56 AM) http://www.slate.com/articles/news_and_politics/jurisprudence/2008/06/ revolution_in_waiting.html.

225. *See generally* FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING xiv (2004) (contending that the punishment of adolescent sex offenders is flawed because it ignores empirical and scientific evidence and depends largely on stereotypes).

226. *See, e.g.*, Dan Kahan, *supra* note 4, at 424.

227. Schneider, *supra* note 7, at 994.

228. *See* 1 AM. JUR. PROOF OF FACTS 3D §§ 2–3 (1988).

those in positions of authority is also a criminal harm in most jurisdictions, and it is one that has recently been recognized in new contexts of trafficking and more broadly sexual assault.[229] Trafficking laws and prosecutions also aim to capture the harm of non-consent by reason of exploitation, in the prostitution context. The federal Trafficking Victims Protection Act (TVPA) and state laws define trafficking as inducing a person into a commercial sex act (prostitution, pornography) "by force, fraud, or coercion."[230] Fraud involves false promises regarding employment, wages, working conditions, or other matters. Coercion includes the abuse or threatened abuse of the legal process. The TVPA also categorizes anyone under age eighteen as a minor even without a showing of coercion.

There is also a growing recognition of exploitation harms in defining sex offenses. Although most states do not currently criminalize sex by economic or psychological coercion or fraud, some, and the federal government, have recently begun to take account of exploitation and non-physical coercion in considering consent to sex.[231] Significantly, the proposed revisions to the MPC include a new category of sexual assault "by coercion or exploitation."[232] It criminalizes sexual intercourse where consent is obtained by, for instance, threatening to accuse someone of criminal action, including immigration matters, or "expos[ing] any information tending to impair the credit or business repute of any person."[233] It also punishes intercourse via exploitation, defined to include professionals representing someone in a criminal or family law matter or treating them for mental illness.[234] In so doing, the MPC drafters note the harm of non-violent coercion and analogize to financial crimes such as fraud and extortion.[235] They also acknowledge the need to protect the "dependent party [in the professional relationship] from the risks of exploitation and diminished freedom of choice."[236] This trend is consistent

229. *See supra* notes 174–182 (discussing adult statutory rape laws). For a discussion of trafficking laws, see Godsoe, *supra* note 164 (discussing the commercial sexual exploitation of minors); *see also* MARCIA A. ZUG, BUYING A BRIDE: AN ENGAGING HISTORY OF MAIL-ORDER MATCHES (2016) (describing the shift in consideration of arranged or "'mail-'order" marriages to a more recent lens of exploitation and trafficking).

230. 22 U.S.C. § 7102(9) (2012).

231. A handful of states do, however, punish intercourse obtained by threats of humiliation, extortion, and "use of physical, intellectual, moral, emotional, or psychological force, either express or implied." MODEL PENAL CODE § 213.1 cmt. 2.a. at 39 (AM. LAW INST., Discussion Draft No. 2, 2015) (collecting state laws).

232. *Id*. § 213.4.

233. *Id*. § 213.4(1)(a)(ii).

234. *Id.* § 213.4(2).

235. *Id.* § 213.4 cmt. 1 at 77.

236. *Id.* § 213.4 cmt. 3.a at 96.

with the work of numerous scholars who have framed rape as a crime against autonomy or sexual integrity rather than about physical force.[237]

B. Defining Family in Functional Terms

In addition to scrutinizing and accurately assessing harms, a theory of relational crime must also correctly delineate family relationships. Familial status operates both to protect those within the family—for instance, against exploitation by a functional parent—and protect the family unit from unwarranted state intervention—for instance, against interference with adults' right to consensual albeit non-normative sexual intimacy. Expanding definitions of parenthood incorporate functional as well as formal family statuses, permitting the capture of power dynamics, essential to truly parsing out relational crimes.[238]

Recognition of functional family members accords with both growing scholarly critique and an emerging doctrinal trend. Following Martha Fineman's seminal critique of the law's prioritization of the reproductive, sexual family centered on marriage and biology,[239] scholars have argued that the law's exclusion of families who do not meet a normative ideal is both illegitimate and not reflective of the reality of most families.[240] This is even more true today; in 2016, the majority of American households are "non-traditional," meaning unmarried, cohabitating, or single parent households.[241] Families needing greater recognition include non-marital, adoptive, same-sex, and functional (including step) families.[242] This recognition is particularly important in the parenthood context, given children's inherent dependence, both financial and physical.[243]

The law of parenthood has begun to change in response to these critiques, the evolving demographic reality, and the expanding boundaries

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237. *See, e.g.*, STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (2000).

238. I am recommending that functional parents supplement the existing routes to parenthood recognition via biology, marriage, and adoption, not replace them.

239. FINEMAN, *supra* 5 at 38.

240. *See, e.g.*, Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 461–64 (1990); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN L. REV. 167 (2015).

241. UNITED STATES CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2016, TABLE H3 (last revised Apr. 6, 2017), http://www.census.gov/data/tables/2016/demo/families/cps-2016.html.

242. *See* Murray, *supra* note 56; *see also* Polikoff, *supra* note 240.

243. The privatization of dependency is a key function of family law. *See* Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 363–64 (2012).

of marriage.[244] In the last decade, parental definitions have become more fluid, and currently a majority of states recognize some form of functional parent.[245] De facto parents or parents by estoppel are treated like legal parents with standing to petition for custody or visitation. A major impetus for this trend has been the recognition of same-sex marriage as a fundamental right. Two state high courts, for instance, recognized de facto parenthood in 2016, relying heavily on *Obergefell* to do so.[246] In this way, courts and legislatures continue to connect marriage and parenthood, albeit to recognize parents outside of the traditional biomarital paradigm. This, coupled with the focus on children's interests in the recognition of functional parents, suggests that the new constitutional landscape of *Lawrence–Obergefell* is not limited to the adult intimate relationship.

To be clear, biology and marriage continue to do significant work in defining parenthood; aspiring functional parents have to meet a very high bar after an intensive factual analysis. The ALI test, for instance, requires that the adult

> ["F]or a significant period of time not less than two years,
>
> (i) lived with the child and,
>
> (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship . . .
>
> (A) regularly performed a majority of the caretaking functions for the child, or
>
> (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived."[247]

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244. Although I focus here on parenthood, it is worth noting that a similar trend is emerging with adult intimate partners, both in scholarly critiques and doctrine. *See, e.g.*, Cynthia Grant Bowman, *The Legal Relationships Between Cohabitants and Their Partners' Children*, 13 THEORETICAL INQUIRIES L. 127 (2012) (calling for recognition of rights and responsibilities between cohabitants and between cohabitants and their children).

245. Some do so by statute and some by judicial decision. *See, e.g.*, IND. CODE ANN. § 31-9-2-35.5 (West 2008); Conover v. Conover, 146 A.3d 433 (Md. 2016); *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005). Functional parenthood is not an entirely modern concept; historically, the *in loco parentis* doctrine operated to recognize those who acted as parents but did not have the legal status. *See* 59 AM. JUR. 2D *Parent and Child* § 9, Westlaw (database updated 2016) ("[A] person stands in loco parentis when he or she puts himself or herself in the situation of a lawful parent by [voluntarily] assuming the obligations incident to the parental relation without going through the formalities necessary to a legal adoption."); *see also* Smith v. Smith, 922 So. 2d 94 (Ala. 2005) (detailing the status).

246. *See Conover*, 146 A.3d at 453 (Md. 2016); Brook S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016) (noting that a narrow and rigid parenthood definition "has become unworkable when applied to increasingly varied familial relationships").

247. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(C) (AM. LAW. INST. 2002).

Similarly, one state statute requires that a de facto parent have taken on the full responsibilities of a parent, have held herself out as the child's parent with the permission of the other parent, and either (1) lived with the child since birth or adoption or (2) lived with the child for ten months out of the last year and, finally, have formed a "strong emotional bond" with the child.[248] Nonetheless, the increasing recognition of functional parenthood represents a sea change in family law doctrine—one that should inform the criminal law.

C. Incorporating New Constitutional Norms of Familial Equality and Intimate Autonomy

The new constitutional landscape of familial recognition and freedom of adult sexual intimacy also must inform relational crime theory. The *Lawrence–Obergefell* line of cases can be read to limit the state's power to enforce a single familial model, particularly via the harsh mechanism of the criminal law, and even to suggest some personhood or quasi-rights for children. This reading does not mean that courts and legislatures will readily change the law; political and majoritarian influences remain strong.[249] Nonetheless, this line of cases has and will continue to significantly change family definitions and structures.

I will only briefly sketch the trio of cases underlying the radically altered landscape of intimate-familial relations as they are undoubtedly very familiar. In *Lawrence v. Texas*, the Supreme Court articulated a zone of freedom for adult sexual conduct: "The State cannot demean [people's] existence or control their destiny by making their private sexual conduct a crime."[250] The private nature of the conduct and the "full and mutual consent" between the parties were central to the Court's decision, and, as noted earlier, the Court exempted public sex and cases where one party "might be injured or coerced or *who are situated in relationships where consent might not easily be refused*."[251]

Although many did not agree with Justice Scalia's prediction that *Lawrence* heralded the advent of same-sex marriage,[252] just a decade later

248. D.C. CODE ANN. § 16-831.01 (West 2001).

249. *See* Stuntz, *supra* note 214.

250. 539 U.S. 558, 578 (2003).

251. *Id.* at 578 (emphasis added) (concluding that even rarely-enforced criminal bans have far-reaching consequences, including the stigmatization of groups of people and invasion of privacy, because the bans "touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home" and that "[t]he stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense. . . . Still, it remains a criminal offense with all that imports for the dignity of the persons charged.").

252. *Id.* at 604–05 (Scalia, J., dissenting) ("If moral disapprobation of homosexual conduct is 'no legitimate state interest' . . . what justification could there possibly be for denying the benefits of

the Court recognized such a right in *Windsor* and *Obergefell*. In 2013, the Court ruled that section three of the Defense of Marriage Act (DOMA) was unconstitutional.[253] In doing so, it emphasized the dignity and equality that must be accorded intimate adult choices, such as the choice to be married.[254] Justice Kennedy's opinion recognized that DOMA impacted not only same-sex adults who sought to "enhance their own liberty" through marriage,[255] but also their children: "DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others."[256]

Following *Windsor*, courts across the country struck down same-sex marriage bans extremely rapidly.[257] In 2015, the Court finished the arc *Lawrence* had started and declared a right to same-sex marriage.[258] The *Obergefell* opinion emphasized autonomy and equality as key to humanity.[259] It also specified children's interests in the recognition of a widening circle of families, opining:

> [A] "basis for protecting the right to marry is that it safeguards children and families . . . [otherwise] children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples."[260]

Scholars have read this line of cases to limit the state's power not just to regulate same-sex conduct, but instead as binding the state from infringing upon consensual sex and family formation more broadly. As Cary Franklin put it, "[These cases] placed a series of limits on the state's power to enforce a single, traditional model of sexuality and the family."[261]

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marriage to homosexual couples exercising '[t]he liberty protected by the Constitution?'" (quoting majority opinion))(alteration in original). He also predicted that it "decree[d] the end of all 'morals legislation,'" including incest, *id*. at 599, a prediction that did not prove accurate. *See* Murray, *supra* note 56.

253. United States v. Windsor, 133 S. Ct. 2675 (2013).

254. *Id.* at 2692–93 (noting our "evolving understanding of the meaning of equality" and that the choice to marry goes to one's very humanity or "personhood").

255. *Id.* at 2695.

256. *Id.* at 2696.

257. *See* Tom Watts, *From Windsor to Obergefell: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. ONLINE S52, S65–68 (2015).

258. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

259. *Id*.

260. *Id*. at 2600–01.

261. Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 830 (2014) (remarking that "courts have situated recent marriage cases in a broader

This jurisprudence combines "personal dignity and autonomy"[262] with equality to create what Laurence Tribe has termed "equal dignity."[263] This right—one with long doctrinal roots but not fully articulated until *Obergefell*—protects individual choices about family and intimacy because these choices go to the core of our humanity.[264] This protection of intimate choice is particularly important for those making unpopular choices; this line of cases shields individuals "standing against the forces of coerced conformity."[265]

Conformity can be imposed via the denial of state recognition of marriage and parenthood, but it is most coercive when implemented via criminalization and punishment. The *Lawrence* opinion emphasized the significant harms on liberty of even underenforced laws with minor penalties.[266] Accordingly, scholars have found in *Lawrence* grounds to argue against criminalization of adult consensual intimacy of all types. Melissa Murray and Alice Ristroph, for instance, describe how criminal statutes, such as bigamy laws, "constitute efforts to establish an official family model," enshrining a gendered hierarchy and prioritizing marriage.[267] They argue that protection of intimate choices and changing family forms require that the family be "disestablished," i.e., that the state get out of the business of bolstering normative family frameworks and, particularly, prohibiting or punishing "'deviant'" ones via the criminal law.[268]

The *Lawrence–Obergefell* line of cases does not just impact adult rights to intimacy. Children were at the center of the debates on same-sex marriage and, as I noted above, figure heavily in both the *Windsor* and

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strand of liberty jurisprudence"). Despite their transformative impact, I and other scholars have critiqued the same-sex marriage cases for simultaneously reifying marriage and entrenching traditional gender stereotypes. *See* Godsoe, *supra* note 6, at 153 (critiquing the litigation, particularly the plaintiff selection, and resultant opinion for reifying "a particular type of relationship and family—traditional and conformist").

262. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992); *see also* Kenji Yoshimo, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 155, 170 (2015) (remarking that Kennedy first articulated this connection in *Casey*).

263. Tribe, *supra* note 15.

264. Yoshimo, *supra* note 262, at 170 (noting that "[w]hile *Obergefell* makes repeated reference to dignity, it focuses more on the concept of liberty"); *see also* Tribe, *supra* note 15, at 22 (arguing that *Obergefell* represents "the idea that *all individuals* are deserving in equal measure of personal autonomy and freedom to "'define [his or her] own concept of existence' instead of having their identity and social role defined by the state" (alteration in original) (quoting *Casey*, 505 U.S. at 851)).

265. Tribe, *supra* note 15, at 20–24, 26; *see also* William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes in Identity Politics*, 88 MINN. L. REV. 1021, 1025 (2004) (terming the connection between liberty and equality a "jurisprudence of tolerance").

266. *See* discussion *supra* note 251.

267. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1259, 1275 (2010).

268. *Id.*

Obergefell opinions.[269] Children's rights—to equality, family relationships, and autonomy—can accordingly find some support in these cases.[270] This builds on a growing call by scholars and courts for recognition of children's relational and human rights.[271] My point is not that this line of cases creates children's rights, or equalizes them to those of adults. Rather, I am illustrating that *Obergefell* and the other same-sex marriage cases imply children's personhood and dignity of their own, an interest, if not a right, in not being "humiliated." This, in turn, both changes the parent–child relationship by strengthening limitations on parental rights to treat their children however they wish, and alters governmental power to regulate the family and intimate conduct.[272] Such regulation must take into account harms to children even if it seems to apply only to adult conduct.[273]

Courts have also taken notice of this new constitutional family law, decriminalizing more sexual conduct and emphasizing children's interests in family bonds.[274] As noted earlier, in *Lawrence*'s wake, courts struck down criminal adultery, fornication, and cohabitation laws, significantly widening the ambit of protected consensual sex.[275] Courts have also emphasized children's interests in recognizing expanded parenthood status.

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269. *See* discussion *supra* note 260.

270. *See, e.g.*, Catherine Smith, Obergefell*'s Missed Opportunity*, 79 LAW & CONTEMP. PROBS. 223, 223, 227 (2016) (regretting that the *Obergefell* Court "[fell] short of a transformative or pivotal paradigm shift on behalf of children and their rights," but arguing that, nonetheless, "*Obergefell*'s legitimate concern for addressing the social, economic, and psychological harm to children . . . [offers] a window of opportunity to advance children's equal protection rights"); *see also* Susan Hazeldean, *Anchoring More Than Babies: Children's Rights After* Obergefell v. Hodges, 38 CARDOZO L. REV. 1397, 1431 (2016) ("*Obergefell* suggests that children have a right to live with their parents," and specifically applying this right to the case of children of undocumented parents). Smith notes that these cases build on an earlier, more explicitly child-centered constitutional jurisprudence, including the illegitimacy cases and *Plyler v. Doe*, 457 U.S. 202 (1982). Smith, *supra* at 228–31.

271. *See* JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN (2006); *see also* BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE (2008). Some scholars have also argued that corporal punishment must be abolished because of children's rights. *See, e.g.*, Deanna A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U. L. REV. 447 (2003). This is consistent with but distinct from my argument. My argument is that an accurate assessment of the family status/harms nexus militates towards criminalization of this harmful conduct towards children. Accordingly, children need not be rights-bearers more broadly for my argument.

272. This is consistent with scholarship positing parents as trustees, rather than owners, of their children. *See* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1814 (1993) (outlining a "generist" framework wherein parents are tasked with nurturing children as trustees rather than owners).

273. Such harms, as outlined in *Windsor* and *Obergefell*, may be physical, societal, financial, or psychological.

274. For optimism about the impact of *Obergefell* on other intimate choices than same-sex marriage, see Tribe, *supra* note 15, at 17, 32 (remarking that "*Obergefell* is an important landmark, but it will not be—and should not be—the last word" and that apart from a "distressing marriage myopia," the opinion is "otherwise farsighted and fully capable of expanding our understanding of the Constitution to protect new freedoms as we come to appreciate them").

275. *See* discussion *supra* note 54.

For instance, the New York Court of Appeals in 2016 recognized de facto parenthood for the first time recently, overruling its own relatively recent decision.[276] In doing so, it relied heavily on *Obergefell* to emphasize "equality for same-sex parents" and "the opportunity for their children to have the love and support" of their functional parents.[277] The court extensively discussed the harm to children of not having de facto parenthood, analogizing to the "stigma" marriage bans visited on children and citing the large number of "nontraditional families" as well as social science literature on parent–child attachment.[278]

To be clear, I am not arguing that *Lawrence–Obergefell* means that *all* adult intimate conduct will be decriminalized;[279] as a practical matter, this expansion is unlikely in the near future, if ever. Commentators have more realistically predicted that change would come incrementally, distinguishing LGBT individuals from smaller and more marginalized groups of people. Pamela Karlan, for instance, describes the limits of *Lawrence*:

> "[T]he Court [did not] recognize[]—and almost certainly never will—that individuals have an absolute constitutionally protected interest in following their individually defined bliss. . . . [T]he Court is most likely to recognize rights which reflect the practices of large numbers of people whose lives the Court otherwise finds worthy of respect.[280]

Bearing this out, the few courts addressing post-*Lawrence* challenges to incest prohibitions have upheld the constitutional validity of such challenges. For instance, the Sixth Circuit upheld an Ohio law criminalizing adult incest, finding the law served a rational state basis of preserving family unity and preventing coercion or exploitation.[281] Two factors, however, limit the import of these decisions for my proposal. First, they were mostly limited in the scope of their review because the challenges were presented on habeas petition.[282] Second, most of the cases concern vertical incest, as in *Lowe*.[283] These intergenerational cases are

276. Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991), *overruled by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

277. *Brook S.B.*, 61 N.E.3d at 499.

278. *Id.*

279. Or relatedly, that the children and family relations within these unions will be protected.

280. Karlan, *supra* note 33, at 1458–60.

281. Lowe v. Swanson, 663 F.3d 258 (6th Cir. 2011).

282. *Id*. at 263 (remarking that it was governed by AEDPA); *see also* Muth v. Frank, 412 F.3d 808, 813 (7th Cir. 2005) (noting the "limited power of a federal court" on habeas review).

283. *But see Muth*, 412 F.3d at 818 (affirming the sentence of adult siblings for incest because, *inter alia*, "*Lawrence* did not announce a fundamental right of adults to engage in all forms of private consensual sexual conduct").

arguably prone to exploitation and thus fall within the exception recognized in *Lawrence* itself.

D. Exculpation v. Inculpation

The analysis of relational crime is not exactly parallel for exculpation and inculpation. This is both because of the presumption against criminalization,[284] and more importantly, because we are asking a different question in these two instances.[285] For exculpation, we must ask whether there are sufficient reasons—pragmatic, societal, or other—to mitigate or forgive a pre-existing offense because of the relationship. For inculpation, we must ask whether the relationship creates a harm, or is a good proxy for harm, sufficient to criminalize otherwise non-culpable conduct.

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This Part has theorized a three-part inquiry to assess relational crimes. To rectify the distortions in harms and family status, this framework centers on a functional family structure that is sensitive to power dynamics within the family that may mitigate or generate harms and is animated by familial autonomy and equality norms.

IV. RIGHTSIZING RELATIONAL CRIME

In this Part, I apply my framework to the two case studies of adult incest and corporal punishment. Close scrutiny of the harms in these cases, and the relational role in neutralizing or worsening them, leads me to different conclusions for the two offenses. First, I argue for abolition of the parental discipline privilege. The parental discipline privilege ignores real harms to society's most vulnerable members and perpetuates a patriarchal family structure that is outdated and constitutionally unsound.

My conclusion as to adult incest is more complex because some of it captures real harms stemming from the relationship. Through this lens of power differentials, I argue that relational inculpation based on outdated

284. There are numerous framings of this central value. A more philosophical one is the minimalist principle permitting criminalization only when less severe regulatory measures fail. *See* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 33–34 (5th ed. 2006). A more narrow doctrinal iteration is the statutory rule of lenity favoring criminal defendants. The rule of lenity requires that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" to the defendant. Yates v. United States, 135 S. Ct. 1074, 1088 (2015). In *Yates*, the Court construed the term "tangible object" not to include fish, a strained result that was widely seen as reviving the rule of lenity amidst concerns about overcriminalization. *See, e.g.*, Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191 (2015).

285. My thanks to Sasha Natapoff for this important point.

notions of morality or gender hierarchies should be abolished, while those based on a high risk of or actual exploitation between the victim and offender should remain. Specifically, horizontal incest should be decriminalized. Conversely, the statutory reach of vertical incest should be expanded to include stepfathers and other functional parents. I address concerns about the distributional effects and scope of my proposals but ultimately conclude that these boundaries of relational liability best fulfill the principles of the criminal and family law.

A. Abolish the Parental Disciplinary Privilege

I argue against the parental disciplinary privilege because it condones documented harm and perpetuates intrafamilial violence for no legitimate reason. The privilege is based on "folk wisdom" about child rearing rather than science, and perpetuates an outdated family structure inconsistent with normative commitments of equality and autonomy. Nor is the exculpation of parent–child assault constitutionally required. In contrast, the state duty to protect children may even mandate criminalization.

Corporal punishment sometimes brings physical harms, and there is overwhelming evidence that even in mild forms, it brings psychological and other harms, adding up to an increased societal risk of antisocial conduct and violence.[286] These harms are likely worsened because they are inflicted by someone close to the child, indeed the person entrusted with his or her care. The slippery slope between arguably non-harmful corporal punishment and abuse compounds the danger. As one court recently put it: "[The state interest in protecting children] is particularly powerful in the context of corporal punishment, given the risk that the parental privilege defense will be used as a cover for instances of child abuse."[287] Demonstrating that the use of terminology such as "spanking" obscures these harms, significantly more people disapprove of corporal punishment when it is accurately labeled as "assault," or "hitting," or "beating."[288]

Assault and battery are core offenses in our criminal law, and parental assault on children remains the only widespread categorical exception. Corporal punishment of children has been banned in other settings, including, in a majority of states, in schools, based on concern about the harms of corporal punishment and the greater effectiveness of non-physical disciplinary methods.[289] As noted earlier, the Secretary of Education under

286. *See* discussion *supra* notes 89–92.

287. Commonwealth v. Dorvil, 32 N.E.3d 861, 868 (Mass. 2015).

288. *See* Kerr, *supra* note 18.

289. *See* discussion *supra* notes 85–86; *see also* Hendrix, *supra* note 80. As of 2016, twenty-eight states and the District of Columbia have banned corporal punishment in schools, and the vast majority of children "paddled" in schools live in just five states. Melinda D. Anderson, *Where Teachers*

President Obama recently called for a complete ban on school corporal punishment, citing extensive data that it is "harmful [and] ineffective" and arguing that "[a]s the evidence against corporal punishment mounts, so does our moral responsibility to eliminate this practice."[290] There are, of course, significant differences between teacher and parental corporal punishment, given the unique status of the family unit. But the majority of states do not allow teacher corporal punishment even where a parent permits it or wants it, reflecting an evolving consensus on the problems with physical discipline.[291]

Having determined that the parental discipline privilege condones empirically proven harm that is long recognized in our criminal law, we turn to the second part of the inquiry—does family status justify this exception to a preexisting offense? I argue that it does not for several reasons. First, perhaps there is a pragmatic reason to allow parents to assault children as they are the ones raising them on a day-to-day basis. Yet, the research clearly shows that corporal punishment does not work to discipline children and, as I have detailed, in fact harms them. This research undermines the most commonly cited rationales of child rearing: folk wisdom and tradition. Recall that many jurisdictions do not justify the privilege at all; instead, it has simply remained on the books since Blackstone's time.[292] Tradition alone cannot justify harms or the denial of some persons' rights; just as our understandings of marriage "[have] evolved over time" so must our conception of parenthood, and its concomitant duties and privileges.[293]

A contemporary assessment of the privilege is particularly necessary because it perpetuates intrafamilial inequalities. Similarly to intimate partner violence, experts have connected parental violence more broadly to inequality, particularly patriarchy.[294] This hierarchy entrenched in the criminal law flies in the face of the normative commitments to familial autonomy and equality, including children's interests or quasi-rights. As with once permissible intimate partner violence, parent–child violence is no longer in accord with our constitutional family terrain.

Are Still Allowed to Spank Students, ATLANTIC (Dec. 15, 2015), http://www.theatlantic.com/education/archive/2015/12/corporal-punishment/420420.

290. King letter, *supra* note 86.

291. *See* Anderson, *supra* note 289.

292. *See* BLACKSTONE, *supra* note 65, at 440.

293. Obergefell v. Hodges, 135 S. Ct. 2584, 2595 (2015) (describing how marriage "has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change."). Justice Kennedy elaborates on the abolition of gendered inequities characterizing marriage historically, such as the coverture doctrine, concluding that "changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations. . . ." *Id.* at 2596.

294. *See, e.g.*, RICHARD J. GELLES & MURRAY A. STRAUS, INTIMATE VIOLENCE 30–32 (1988).

Abolishing the discipline privilege is consistent not only with the same-sex marriage jurisprudence, but also with parental rights. There is no federal constitutional right for parents to corporally punish children. Few statutes explicitly cite parental rights as underlying the privilege, but several lower courts have relied in part on parental rights.[295] Even those courts, however, clarify that this activity is limited; as one court bluntly put it, "Child abuse is not a constitutionally protected activity."[296] I take the argument further and contend that constitutional norms are not a bar, and indeed may militate, towards the abolition of corporal punishment. The malleable and more limited nature of parental rights, coupled with an evolving consensus about legitimate childrearing practices, differentiates parental rights from other privacy rights.[297] This distinction is illustrated in concrete ways: the Court has declined to apply strict scrutiny to state regulation of parental rights and has made clear that the state may intervene where there is harm to the child or society of any kind, and likely where it acts "reasonably" to regulate children's education, health, and general care.[298]

Parental rights are largely justified by the presumption that parents act with their children's best interests in mind, so the benefits of parenthood are intertwined with obligations.[299] Relying in part on this framework, Jennifer Collins has argued for more consistent and stringent prosecution of parents who negligently kill their children: "[P]rosecution can reinforce the normative judgment that parents have a *greater* responsibility to their children because of their decision to assume the obligations—and the

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295. While the statutes codifying the parental discipline privilege never explicitly mention parental rights, see Appendix A, a few arguably imply parental rights in rendering lawful reasonable parental corporal punishment. *See, e.g.*, ALASKA STAT. § 11.81.430 (2016) (parent or person *in loco parentis* has the "authority" to discipline). Some state and lower federal courts articulate such a right, but also stress its limitations. *See, e.g.*, State v. Wilder, 748 A.2d 444, 449 (Me. 2000) (a parent has the fundamental right to "use . . . reasonable or moderate physical force to control behavior"); State v. Rosa, 6 N.E.3d 57, 59 (Ohio Ct. App. 2013) (noting "a parent's fundamental constitutional right to child-rearing, which includes a right to impose reasonable discipline, including the use of corporal punishment"). *But see* Sweaney v. Ada County, 119 F.3d 1385, 1389 (9th Cir. 1997). Even the courts discussing parental rights focus considerably more on tradition and practicality in justifying the parental discipline privilege. *See, e.g.*, Commonwealth v. Dorvil, 32 N.E.3d 861, 870 (Mass. 2015).

296. State v. Sinica, 372 N.W.2d 445, 449 (Neb. 1985) (articulating rights to familial privacy and parental choices in child-rearing).

297. I more fully explore this constitutional argument in a forthcoming essay for a symposium on the Constitution and the family. *See* Cynthia Godsoe, *Redefining Parental Rights*, 31 CONST. COMMENT. 281 (2017); *see also* David D. Meyer, *Family Diversity and the Rights of Parenthood*, *in* WHAT IS PARENTHOOD?: CONTEMPORARY DEBATES ABOUT THE FAMILY 29, 31 (Linda McClain & Daniel Cere eds., 2013) (demonstrating that modern jurisprudence establishes parental rights as "essentially soft" and merely presumptive based on the need to accommodate societal and children's interests).

298. In the most recent case, *Troxel v. Granville*, the Court articulated only a presumption in favor of a fit parent's choices rather than a fundamental right. 530 U.S. 57, 65 (2000).

299. Parham v. J.R., 442 U.S. 584, 602 (1979) (a parent's "natural bonds of affection lead [her] to act in the best interests of [her] children").

concomitant tremendous rewards and undeniable risks—of the parental role."[300] Corporal punishment should be treated in a similar fashion—no statutory exemption even if enforcement should not be as parallel to non-parents, as Collins argues for in the more serious case of child fatalities.

This broad reading of state power has allowed for greater curtailment of parental rights with evolving views on children's education and health. For instance, parents' ability to choose medical care for their children has been limited in numerous cases far short of life-threatening.[301] More recently, constitutional scholars Erwin Chemerinsky and Michele Goodwin persuasively argue for the constitutionality of mandatory vaccination laws with no exceptions on childrearing or religious grounds; California in 2016 enacted such a statute.[302] Chemerinsky and Goodwin use the harm principle to justify their argument, contending that "the freedom of one person ends when it inflicts an injury on another."[303] They argue that this prohibition is particularly true when the victims are vulnerable children, and the offenders are parents, legally entrusted with their care.[304] Just as "[s]trong and irrefutable medical and scientific evidence" support compulsory vaccination against parental rights, so data overwhelmingly demonstrates that corporal punishment is harmful both to individual children and to society at large.[305] Protection is not only for the child's sake but also for society's, given its need for "the healthy, well-rounded growth of young people into full maturity as citizens."[306]

Abolishing the parental discipline privilege is not without costs. Of particular concern is contributing to the overcriminalization epidemic and the distributional costs of increasing criminal liability. I share the concern of many scholars and policymakers about overcriminalization, both as a

300. Collins, *Crime and Parenthood*, *supra* note 8, at 812.

301. Godsoe, *supra* note 297 (discussing cases).

302. S.B. 277 § 2(b), 2015–2016 Leg. (Cal. 2015) ("The governing authority shall not unconditionally admit any person as a pupil of any private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center, unless, prior to his or her first admission to that institution, he or she has been fully immunized."). *See* Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 594, 603–05 (2016) (describing the passage of a compulsory vaccination law with no religious or personal belief exemptions despite parental rights arguments against it and also describing courts' consistent rejection of constitutional challenges to compulsory vaccination laws).

303. Chemerinsky & Goodwin, *supra* note 26, at 1128.

304. *See id*. at 1128–31; Chemerinsky & Goodwin, *supra* note 302, at 594 (describing the passage of a compulsory vaccination law with no religious or personal belief exemptions despite parental rights arguments against it).

305. Chemerinsky & Goodwin, *supra* note 302, at 614; *see also* Meyer, *supra* note 297, at 136 (arguing that even "a significant state incursion on a fundamental family liberty is not necessarily unconstitutional").

306. Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

whole and in its disproportionate impacts on certain communities.[307] The state's record of fairly intervening to address family behavior, particularly parenting, is fairly abysmal.[308]

Nonetheless, I conclude that with appropriately tailored laws, the benefits outweigh the costs for the victim class of often very young children.[309] One major reason for this is that some parental corporal punishment is already criminalized; the state already intervenes in families to police parental discipline. The current vague laws and blurry line between acceptable corporal punishment and abuse likely worsen the disproportionate enforcement endemic to state intervention. One state appellate court recently characterized this area of the law as the most "fraught with subjectivity," and opined that it impedes the notice function of the criminal law given that "one's guilt or innocence depend[s] upon how someone else [i.e. the judge or jurors] disciplines his or her children when there is no consensus about what is appropriate."[310] There is great value to more clearly drawn lines—instead of reasonable or not excessive corporal punishment, no corporal punishment at all—both in diluting discretion and sending a sharp expressive message about appropriate conduct.

To address the concerns outlined above, the ban on parental corporal punishment could be a violation subject to ticketing rather than severe penalties, or a civil ban subject to fines.[311] As such, it would play a role educating the public as to the harms of corporal punishment, and hopefully decreasing its use. Many European countries banning it have done so via a civil ban, or a criminal ban that was rarely enforced.[312] For instance,

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307. *See* Godsoe, *supra* note 45 (arguing for the decriminalization of peer statutory rape in part based on these overcriminalization concerns).

308. With other scholars, I have critiqued state intervention into the family in the name of protection, as punitive measures are focused disproportionately on already-marginalized families, particularly low-income single mothers of color. *See* Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113 (2013) (critiquing state intervention in regulating parenting, particularly the child protection system); *see also* Alexandra Natapoff, Gideon*'s Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 446 (2015) (describing how "the criminal system and the welfare state knit poverty and criminality together, functionally as well as ideologically").

309. Weighing these costs and benefits is very difficult, particularly taking into account the implementation of the criminal law in the "real world." I discuss this balance further in a contribution to a forthcoming book on the politicization of safety, still concluding that intrafamilial assault should be criminalized, as are other assaults, while also arguing that criminalization must be accompanied by other methods such as public education and restorative justice. See Godsoe, *supra* note 165.

310. Carter v. State, 67 N.E.3d 1041, 1049 (Ind. Ct. App. 2016) (Crone, J., concurring).

311. This could be similar to the highly successful civil bans on smoking in workplaces and public venues.

312. *See* Joan E. Durrant & Staffan Janson, *Law Reform, Corporal Punishment and Child Abuse: The Case of Sweden*, 12 INT'L. REV. VICTIMOLOGY 139, 155–56 (2005). Underenforced laws present their own problems, including being particularly vulnerable to selective or discriminatory enforcement. *See* Godsoe, *supra* note 45 (discussing this in the peer statutory rape context). They can, however, perform a valuable educational purpose. *See* Sunstein, *What Did Lawrence Hold?*, *supra* note 54, at 58

Sweden, the first country to ban corporal punishment, "aimed [its law] at educating the Swedish public, not at prosecuting parents."[313] Despite virtually no prosecutions of parents under the new law, the national prevalence of corporal punishment declined significantly in the twenty years following the ban.[314] A civil ban on parental corporal punishment does not send as strong an expressive message about assault as would a criminal sanction but may best balance the enforcement concerns in the family context.

B. Redraw the Boundaries of Adult Incest

Adult incest requires more nuanced conclusions. While some of its sweep is based on outdated and illegitimate stereotypes about sex and family relationships, others reflect real power differentials and an unacceptable risk of exploitation and non-consent. The lines of liability need to be redrawn to best capture these harms while not limiting familial autonomy and punishing non-traditional families. Specifically, horizontal incest should be decriminalized. In contrast, vertical incest should be expanded to include functional parents and other relatives (such as step-uncles) a generation older.

1. Eliminate Inculpation Based on Flawed Science, or Morality

Scrutinizing the purported harms of horizontal incest reveals that they are insufficiently proven or concrete for criminalization. The two main rationales for incest bans, genetics and family unity, do not suffice. The genetics rationale is based on flawed science and is inconsistent with other regulation of reproduction. The family unity rationale is amorphous and both over and underinclusive. On the one hand, it includes siblings and cousins who have never met, and thus are not part of a family unit. On the other hand, it does not include functional and stepsiblings who have grown up together.

First, the genetics rationale. Although it remains one of the most frequently cited rationales for incest bans,[315] its scientific validity is exaggerated, and the ban is inconsistent with other regulation of reproduction. Incestuous relationships between siblings, and between

(describing a state's option to "maintain a prohibition but to enforce it rarely" and listing examples including mild speeding, teenage alcohol use, and marijuana use).

313. Durrant & Janson, *supra* note 312, at 142 (quoting a legislator). Sweden banned corporal punishment in 1978. *See* Dennis Alan Olsen, *The Swedish Ban of Corporal Punishment*, 1984 BYU L. REV. 447, 447 (1984).

314. Durrant & Janson, *supra* note 312, at 143–44.

315. *See* Cahill, *supra* note 190.

parents and children, do slightly increase the risk of birth abnormalities.[316] This risk, however, is not significant in one-generation pairings, as opposed to generations of inbreeding which led to the infamous Romanov hemophilia and Hapsburg chins.[317] Indeed, there are arguably some genetic societal benefits from inbreeding, as harmful recessive genes are eventually eliminated.[318] There is very little risk in pairings between first cousins or half siblings,[319] and of course none at all between step or adopted siblings, who are prohibited from sexual relationships in many states.[320] The lower biological risk has led to decriminalization of first cousin incest provisions in several jurisdictions, but the sweep of horizontal incest regulation is still too broad.[321] At the same time, the fact that incest laws almost all include relatives incapable of reproduction, and many include same-sex incest, demonstrates that the genetic consequences are not the main harm at issue.

Even more significantly, the criminal incest ban is out-of-step with other laws regulating reproduction. We do not, for instance, require that any adults, even those with recessive genes that present a greater risk, be tested before having children.[322] Assisted Reproductive Technology (ART) provides a particularly apt comparison. Laws in every state allow anonymous sperm donation, creating the very real possibility that siblings, cousins and other biologically related people could "accidentally" commit incest.[323] Given the increasing rates of ART, were incest to pose a significant biological risk, sperm donation would have to be regulated. This inconsistency has led politicians and criminal justice experts in Canada and

316. *See id*.

317. *See id*.; *see also* Vera Bergelson, *Vice is Nice But Incest is Best: The Problem of a Moral Taboo*, 7 CRIM. L. & PHIL. 43, 47 (2013) (questioning the genetic harm of incest). Courts and legislatures have acknowledged that the science is mixed: while the science of human genetics has produced inconclusive proof that inbreeding in human populations would eventually show harmful effects, there is a higher probability of unfortunate, recessive gene combinations in the first generation offspring of closely related parents. *See id*.

318. *See* Jolene Creighton, *Genetics and the Benefits of Inbreeding*, FUTURISM (Apr. 4, 2014), https://futurism.com/genetics-and-the-benefits-of-inbreeding-2/.

319. *See, e.g.*, Steve Connor, *There's Nothing Wrong with Cousins Getting Married, Scientists Say*, INDEPENDENT (Dec. 24, 2008), http://www.independent.co.uk/news/science/theres-nothing-wrong-with-cousins-getting-married-scientists-say-1210072.html.

320. *See* Note, *supra* note 189, 2474–75 (mentioning incest statutes of Alabama, Missouri, Utah, Texas, Vermont, Virginia, and West Virginia).

321. *See, e.g.*, ARK. CODE ANN. § 5-26-202 (2013); 15 R.I. GEN. LAWS §§ 15-1-1, 15-1-2 (2013); N.J. STAT. ANN. § 2C:14-2 (West 2015).

322. This fact also led prominent criminal law scholar Eugene Volokh to be "skeptical about" the biological rationale. *See* Eugene Volokh, *Incest*, VOLOKH CONSPIRACY (Dec. 12, 2010, 12:40 PM), http://volokh.com/2010/12/12/incest.

323. *See* John K. Critser, *Current Status of Semen Banking in the USA*, 13 J. HUM. REPROD., supp. 2, 1998, at 55. Tellingly, Iceland has one of the most highly regulated sperm donation systems because its tiny and closely related population makes repeated accidental incest very likely. *See* Ian Steadman, *App to Prevent 'Accidental Incest' Proves a Hit with Icelanders*, WIRED (Apr. 18, 2013), http://www.wired.co.uk/news/archive/2013-04/18/iceland-incest-app.

several European countries to call for the decriminalization of sibling incest.[324] In the furthest step yet on this issue, a German government ethics council called for repeal of bans on sibling incest, concluding that the biological risk is not sufficient to warrant criminalization.[325]

Nor does a family unity rationale justify criminalizing horizontal incest. The contours of the ban, which punish some types of horizontal incest that are unrelated to family units while exculpating others because the siblings or cousins are not related by blood or marriage, reveal the law's use to police traditional family boundaries.[326] Indeed, incest can harm real families, as the *Muth* and other cases show. Recognizing this, a French court recently ordered the state to award both parents of a child born to an incestuous half-sibling couple legal parenthood of their daughter. The court drew on the European Convention on Human Rights and considered the child's best interests to change the longstanding rule that only one parent can be recognized where a child is born of incest. [327]

Punishment is also not consistent with current constitutional values. Like other consensual adult sex, horizontal incest is harmless private conduct that *Lawrence* should protect from state punishment. Punishment is largely driven by revulsion or disgust for non-mainstream intimacy, a governmental interest that should not meet the meaningful rational review given morals legislation.[328] Other governments have recognized that "preserv[ing] a social taboo" is not a legitimate use of the criminal law.[329]

Turning to the second part of the inquiry, status as a sibling or cousin does not generate harm or risk of harm to change the nature of the

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324. Countries include Canada, Sweden, Denmark, Switzerland, and Germany. *See, e.g.*, Thaddeus Baklinski, *'Sibling Incest Should Be Legal,' Says Danish Professor of Criminal Justice Ethics*, LIFESITE (Oct. 17, 2014), https://www.lifesitenews.com/news/sibling-incest-should-be-legal-says-danish-professor-of-criminal-justice-et (quoting a criminal justice ethics expert arguing that the rise in accidental incest from artificial insemination should lead us to "rethink the 'old taboos' against incest"); Lizzie Dearden & Elsa Vulliamy, *Incest and Necrophilia 'Should Be Legal' According to Youth Branch of Swedish Liberal People's Party*, INDEPENDENT (Feb. 24, 2016), http://www.independent.co.uk/news/world/europe/incest-and-necrophilia-should-be-legal-youth-swedish-liberal-peoples-party-a6891476.html (arguing that incest "can be considered unusual and disgusting," but the law "can not stem from it being disgusting").

325. Lizzie Dearden, *German Ethics Council Calls for Incest Between Siblings to Be Legalised by Government*, INDEPENDENT (Sept. 24 2014), http://www.independent.co.uk/news/world/europe/german-ethics-council-calls-for-incest-between-siblings-to-be-legalised-by-government-9753506.html.

326. This does not comport with today's demographic reality. *See supra* note 241 (citing census data to show the prevalence of "non-traditional" families).

327 *See* Jon Sharman, *Mother Wins Official Parentage of Daughter She Unwittingly Had with Long-lost Half-Brother*, THE INDEPENDENT (Sept. 22, 2017), http://www.independent.co.uk/news/world/europe/mother-parentage-daughter-unwitting-long-lost-brother-incest-half-siblings-france-caen-rose-marie-a7958056.html.

328. *See* Muth v. Frank, 412 F.3d 808 (7th Cir. 2005); *supra* notes 193–195 (discussing *Muth*). Scholars have interpreted *Lawrence* to require this. *See, e.g.*, Eskridge, *supra* note 224. Thanks to Julie Nice for this point.

329. Dearden, *supra* note 325.

consensual sex. Unlike vertical incest, and various categories of adult statutory rape, there are not sufficiently extreme power differentials to transform this protected conduct into a criminal offense. Criminalizing morally despised but harmless conduct contributes to overcriminalization with its many attendant costs. This use of the criminal law to bolster a bionormative traditional family also threatens autonomy and equality norms.

2. Retain Inculpation Based on Power Differentials and Exploitation

In contrast, vertical incest should remain a crime, because status as a parent, uncle or grandparent, reflects real power differentials and concomitant risks of harm. The criminal law is paying increasing attention to the harms of exploitation and the fact that interpersonal power relationships impede meaningful consent.[330] The risk of exploitation in vertical incest is greater than that in most couplings, more akin to that in trafficking and adult statutory rape by position or authority than in other sexual encounters.[331] One leading scholar has urged a focus on the legitimacy of the pressure used to compel sex.[332] Surely the pressure of a parent for his or her child's sexual intimacy is among the most illegitimate (and difficult to resist). Accordingly, although including all psychological or economic coercion in consent assessments would be unworkable, vertical incest is different enough to merit this treatment.

Lawrence presents no bar to the punishment of vertical incest because it prohibits only the punishment of truly consensual, and thus harmless, adult sexual intimacy.[333] Indeed, vertical incest implicates a power differential so large that it sits squarely within the *Lawrence* exception for cases "where consent might not easily be refused."[334] Most courts considering adult incest cases post-*Lawrence* have reasoned consistently with this, affirming the punishment of vertical, rather than horizontal, incest.[335] The Sixth Circuit, for instance, affirmed the conviction of a stepfather for incest with his adult stepdaughter, noting the potential for coercion in this relationship "regardless of age."[336]

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330. *See supra* notes 174–182 (discussing adult statutory rape laws and the proposed MPC expansion to include sexual assault by exploitation and coercion).

331. *See supra* notes 174–182.

332. Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2180 (1995).

333. *See* Cass R. Sunstein, *Liberty After* Lawrence, 65 OHIO ST. L.J. 1059, 1063 (2004) (reading *Lawrence* this way although perhaps also considering widespread societal disapproval in his calculus of harm).

334. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

335. *But see* Muth v. Frank, 412 F.3d 808, 813–15 (7th Cir. 2005)

336. Lowe v. Swanson, 663 F.3d 258, 260–61, 264 (6th Cir. 2011).

I argue not only for the ongoing criminalization of vertical incest, but also for an expanded scope. Because the power differential exists for biological and functional fathers, the scope of liability should include stepfathers and others in a parental relationship to most effectively deter and punish the harm. The diagram below depicts the redrawn boundaries of both horizontal and vertical incest.

Current v. Redrawn Boundaries of Incest[337]

Figure 2.

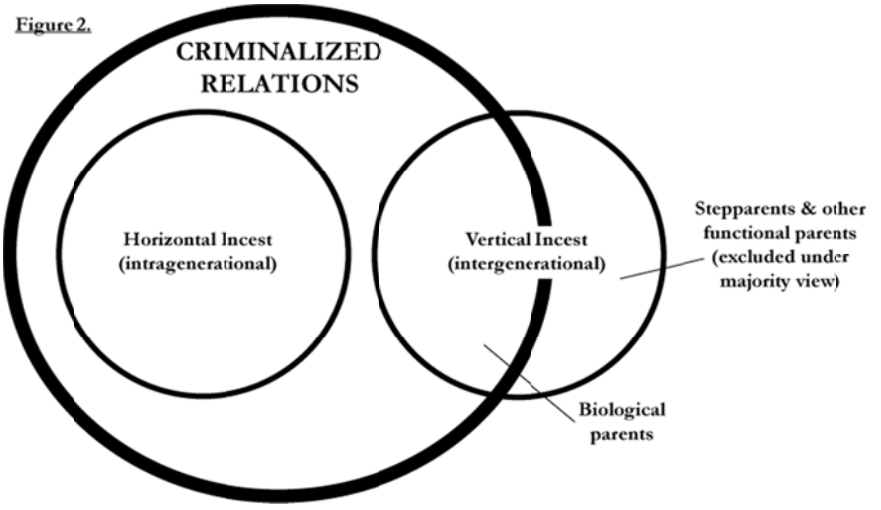
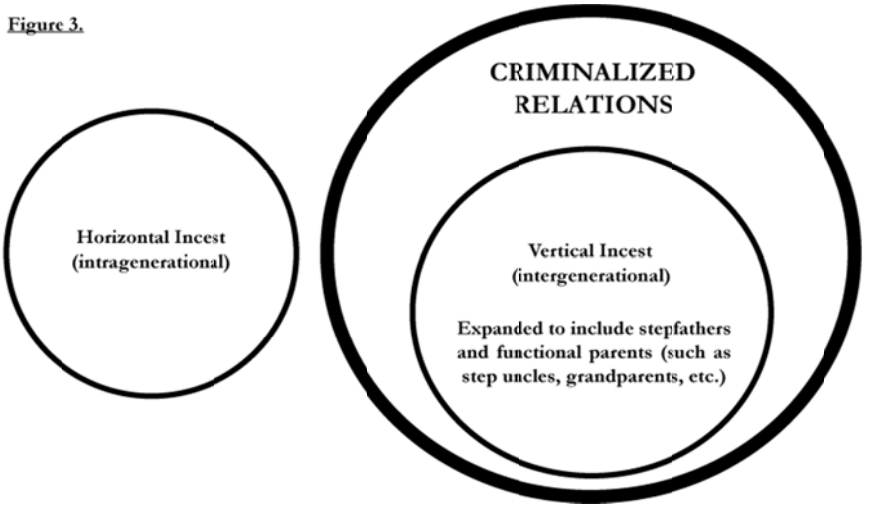


Figure 3.



337. Figure 2 depicts the current boundaries of incest laws in a majority of states. Figure 3 represents my recommendation for redrawing the boundaries of incest.

This crime needs to be renamed as well as resized. Vertical incest is most accurately described as a sex offense, akin to other non-consensual or exploitative rape, rather than an offense against the family or morality.[338] Changing its designation is essential to express condemnation of the real harms at issue, while also educating the public about the lack of harms in non-normative but consensual adult sex. Reframing vertical incest as centered on exploitation, rather than inaccurate science or societal disgust, both reinforces the need for empirically-based, rather than moralistic, criminal policies and expresses societal condemnation of non-consensual sex.

Clarifying the harm at issue as exploitation and lack of consent will also limit prosecutions to the true offender, the party from the older generation. Rightsized incest laws, as with most statutory rape laws, would not be applicable against the protected party.[339] This has tremendous import both for the real lives of victims and for the expressive message of the criminal law. The consistent treatment of victims and offenders is essential to respect the worth of various types of victims and for a legitimate punishment framework.[340]

I finish by considering a potential objection to my proposal—that the categories of vertical and horizontal incest are both over and underinclusive. There is some validity to this argument; for instance, there may well be a heightened risk of exploitation among even same-generation family members and a lack of exploitation among certain intergenerational couples. Nonetheless, although generational lines do not always reflect age or power differences, they are a reasonable proxy for exploitation given the legal and societal status of parents and other "elders." Moreover, age, and the relative ages of parties, is legally relevant to assessing consent as seen in the longstanding statutory rape law framework.[341] Finally, my redrawn framework is more narrowly tailored than the current incest framework, which criminalizes all biological incest while exculpating other parental figures such as stepfathers. There are always line-drawing problems in the

338. *See* discussion *supra* Part II.B.

339. In prior work I have extensively critiqued the punishment of young people for their own exploitation via prostitution or peer statutory rape prosecutions. *See* Godsoe, *supra* note 164.

340. Male victims are particularly unlikely to be seen as victims. One recent case involves a nineteen-year-old and his thirty-six-year-old mother, and both were charged and incarcerated. *See* Brooke Self, *Trial Dates Set for Mother, Son in NM Incest Case*, KLEW NEWS (Nov. 23, 2016), http://klewtv.com/news/nation-world/trial-dates-set-for-mother-son-in-clovis-incest-case; s*ee generally* Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1259 (2011) (arguing that the criminal justice system fails to recognize or punish the rape of male victims).

341. *See* Godsoe, *supra* note 45.

criminal law, and this proposal best punishes harm while respecting constitutional values.

CONCLUSION

The last decade has brought a revolution in the regulation of intimate partnerships, with the decriminalization of non-normative sex and the articulation of a right to marry someone of the same sex. In contrast, the regulation of the parent–child relationship has stayed remarkably static, particularly in the criminal law. Structured around a hierarchy of ownership and laden with outdated gendered and bionormative stereotypes about sex, the current relational crime framework forgives severe harms in the name of family.

My goal in this article has not been to argue that the treatment of parents and children must exactly mirror that of spouses or other adult couples, nor to prove that family status should never, as a normative matter, influence criminal liability. Children have unique needs, and family relationships can mitigate or generate harms. Rather, my narrower point is that the autonomy and equality values animating sexual intimacy and marriage jurisprudence can open the way to a more coherent and just theoretical paradigm for assessing harms within other family relationships. Nowhere is this more necessary than in the parent–child context. Structured around the archetypal power imbalance, this relationship is particularly susceptible to cultural biases and non-empirical rationales. As a result, rather than giving special deference to parental conduct, scholars, reformers, and lawmakers should closely scrutinize it and be *less* tolerant of injury by those entrusted with the care and custody of another. Only in this fashion can the criminal justice system fulfill its goals of accurately and fairly assessing harm and according punishment.

APPENDIX A

	State Statute Regarding Use of Corporal Punishment	Statutory Text Regarding Parents (*see example definitions below*)	Parents (Biological & Adoptive, including Adoptive Stepparents)	Foster Parents	Legal Guardians	Custodians (includes non-adoptive Stepparents)	Persons in loco parentis	Categorical exclusions/ inclusions (e.g., babysitters)
Model Penal Code	MPC § 3.08	"the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person"	Y	Y	Y	Y	Y	n/a
Alabama	AL ST § 13A-3-24	"A parent, guardian, or other person responsible for the care and supervision of a minor"	Y	Y	Y	Y	Y	n/a
Alaska	AS § 11.81.430	" a parent, guardian, or other person entrusted with the care and supervision of a child"	Y	Y	Y	Y	Y	n/a
Arizona	A.R.S. § 13-403	"A parent or guardian"	Y	N	Y	N	N	n/a
Arkansas	A.C.A. § 5-2-605	"A parent, teacher, guardian, or other person entrusted with care and supervision of a minor"	Y	Y	Y	Y	Y	n/a
California	West's Ann.Cal.Penal Code § 273d	"Any person who willfully inflicts upon a child"	N	N	N	N	N	n/a
Colorado	C.R.S.A. § 18-1-703	"A parent, guardian, or other person entrusted with the care and supervision of a minor "	Y	Y	Y	Y	Y	n/a
Connecticut	C.G.S.A. § 53a-18	" A parent, guardian or other person entrusted with the care and supervision of a minor"	Y	Y	Y	Y	Y	n/a
Delaware	11 Del.C. § 468	"the parent, guardian, foster parent, legal custodian or other person similarly responsible for the general care and supervision of a child, or a person acting at the request of a parent, guardian, foster parent, legal custodian or other responsible person"	Y	Y	Y	Y	Y	n/a
District of Columbia	DC ST § 16-2301	"parent, guardian, or custodian"	Y	N	Y	Y	N	n/a

Any categorical exclusions of certain children (i.e., below the age of 2) or certain acts (e.g., biting) from the parental privilege	Harm Requirement (e.g., how much harm is allowed to jutify the use of force)	Rationale / Statutory Purpose
n/a	"The use of force upon or toward the person of another is justifiable if: (1) the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and: (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation."	". . . for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct."
n/a	"...may use reasonable and appropriate physical force upon the minor..."	". . . when and to the extent that he reasonably believes it necessary and appropriate to maintain discipline or to promote the welfare of the minor" WestLaw Commentary: "The purpose of this section is to delineate certain circumstances when an actor, because of his special custodial or professional responsibilities, may apply reasonable physical force against a person in order to protect or promote the welfare of that person or others who might be endangered by his conduct. This section has been adopted from the Proposed Federal Criminal Code § 605; Michigan Revised Criminal Code § 610; New York Revised Penal Law § 35.10; Proposed Revision Texas Penal Code §§ 9.34, 9.61-9.63; and Model Penal Code §§ 3.07, 3.08. Subdivision (1) embodies the rule in Alabama that a parent or someone in loco parentis has the authority to use reasonable physical force to discipline children in his custody."
n/a	"...may use reasonable and appropriate nondeadly force upon that child..."	"When and to the extent reasonably necessary and appropriate to promote the welfare of the child."
n/a	"...may use reasonable and appropriate physical force upon the minor..."	". . . when and to the extent reasonably necessary and appropriate to maintain discipline."
n/a	"...may use reasonable and appropriate physical force upon the minor..."	". . . when and to the extent reasonably necessary to maintain discipline or to promote the welfare of the minor."
n/a	"Any person who willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition..."	n/a
n/a	"...may use reasonable and appropriate physical force upon the minor..."	". . . when and to the extent it is reasonably necessary and appropriate to maintain discipline or promote the welfare of the minor or incompetent person."
n/a	"...may use reasonable physical force upon such minor..."	". . . when and to the extent that he reasonably believes such to be necessary to maintain discipline or to promote the welfare of such minor."
"The force shall not be justified if it includes, but is not limited to, any of the following: Throwing the child, kicking, burning, cutting, striking with a closed fist, interfering with breathing, use of or threatened use of a deadly weapon, prolonged deprivation of sustenance or medication, or doing any other act that is likely to cause or does cause physical injury, disfigurement, mental distress, unnecessary degradation or substantial risk of serious physical injury or death;"	"The use of force upon or toward the person of another is justifiable if it is reasonable and moderate..." and "The size, age, condition of the child, location of the force and the strength and duration of the force shall be factors considered in determining whether the force used is reasonable and moderate."	"a. ... The force is used for the purpose of safeguarding or promoting the welfare of the child, including the prevention or punishment of misconduct; and b. The force used is intended to benefit the child."
"...the term "discipline" does not include: (I) burning, biting, or cutting a child; (II) striking a child with a closed fist; (III) inflicting injury to a child by shaking, kicking, or throwing the child; (IV) nonaccidental injury to a child under the age of 18 months; (V) interfering with a child's breathing; and (VI) threatening a child with a dangerous weapon or using such a weapon on a child. For purposes of this provision, the term "dangerous weapon" means a firearm, a knife, or any of the prohibited weapons described in section 22-4514."	"The term "abused", when used with reference to a child, does not include discipline administered by a parent, guardian or custodian to his or her child; provided, that the discipline is reasonable in manner and moderate in degree and otherwise does not constitute cruelty. "	n/a

Florida	FL ST § 827.03	"any person"	N	N	N	N	N	n/a
Georgia	Ga. Code Ann., § 16-3-20	"parent or a person in loco parentis"	Y	Y	Y	Y	Y	n/a
Hawaii	HRS § 703-309	"parent, guardian, or other person similarly responsible for the general care and supervision of a minor"	Y	Y	Y	Y	Y	n/a
Idaho	I.C. § 16-2002	"Parent" means: (a) The birth mother or the adoptive mother; (b) The adoptive father; (c) The biological father of a child conceived or born during the father's marriage to the birth mother.	Y	N	N	N	N	n/a
Illinois	325 ILCS 5/3	"parent/immediate family member/person responsible for the child's welfare/individual residing in the same house"	Y	Y	Y	Y	Y	n/a
Indiana	IC 31-34-1-15	"parent, guardian, or custodian"	Y	N	Y	Y	N	n/a
Iowa	I.C.A. § 726.6	"parent, guardian, or person having custody or control over a child"	Y	Y	Y	Y	Y	n/a
Kansas	K.S.A. 21-5602	"a person"	N	N	N	N	N	n/a
Kentucky	KRS § 503.110	"parent, guardian, or other person entrusted with the care and supervision of a minor"	Y	Y	Y	Y	Y	n/a
Louisiana	LSA-R.S. 14:18	" parents, tutors or teachers"	Y	N	N	N	Y	Specifically includes tutors.
Maine	17-A M.R.S.A. § 106	"A parent, foster parent, guardian or other similar person responsible for the long term general care and welfare of a child"	Y	Y	Y	Y	Y	Specifically includes foster parents.
Maryland	Sec. 4-501	"a parent or stepparent of the child"	Y	N	N	Y	N	Specifically includes stepparents.
Massachusetts	M.G.L.A. 265 § 13L	"any person"	N	N	N	N	N	n/a
Michigan	M.C.L.A. 750.136b	""Person" means a child's parent or guardian or any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person"	Y	Y	Y	Y	Y	n/a

n/a	"(a) "Aggravated child abuse" occurs when a person: 1. Commits aggravated battery on a child; 2. Willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or 3. Knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child." and "(c) "Maliciously" means wrongfully, intentionally, and without legal justification or excuse. Maliciousness may be established by circumstances from which one could conclude that a reasonable parent would not have engaged in the damaging acts toward the child for any valid reason and that the primary purpose of the acts was to cause the victim unjustifiable pain or injury."	n/a
n/a	"...reasonable discipline of a minor..."	" When the person's conduct is the reasonable discipline of a minor"
"...the following types of force are not justifiable for purposes of this [paragraph]: throwing, kicking, burning, biting, cutting, striking with a closed fist, shaking a minor under three years of age, interfering with breathing, or threatening with a deadly weapon..."	"(a) The force is employed with due regard for the age and size of the minor and is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct (...); (b) The force used does not intentionally, knowingly, recklessly, or negligently create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage."	n/a
n/a	Abuse includes physical cruelty in excess of that required for reasonable disciplinary purposes, inflicted by a parent or other person in whom legal custody is vested.	n/a
n/a	An "abused child" includes any child whose parent/immediate family member/person responsible for the child's welfare/individual residing in the same house/paramour of child's parent inflicts excessive corporal punishment.	n/a
n/a	"This chapter does not...Limit the right of a parent, guardian, or custodian of a child to use reasonable corporal punishment when disciplining the child."	" . . . when disciplining the child. . . "
n/a	"...by an intentional act or series of intentional acts, evidences unreasonable force, torture or cruelty which causes substantial mental or emotional harm to a child or minor..."	n/a
n/a	"...by an intentional act or series of intentional acts, evidences unreasonable force, torture or cruelty which causes substantial mental or emotional harm to a child or minor..."Abuse of a child is knowingly: (1) Torturing or cruelly beating any child under the age of 18 years; (2) shaking any child under the age of 18 years which results in great bodily harm to the child; or (3) inflicting cruel and inhuman corporal punishment upon any child under the age of 18 years."	n/a
n/a	"The force that is used is not designed to cause or known to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain, or extreme mental distress."	" . . . the force used is necessary to promote the welfare of a minor."
n/a	"...When the offender's conduct is reasonable discipline of minors by their parents..."	Statutory text implies corporal punishment's purpose must be for "discipline"
n/a	"...justified in using a reasonable degree of force...For purposes of subsection 1, "reasonable degree of force" is an objective standard. To constitute a reasonable degree of force, the physical force applied to the child may result in no more than transient discomfort or minor temporary marks on that child."...When the offender's conduct is reasonable discipline of minors by their parents..."	" . . . when and to the extent that the person reasonably believes it necessary to prevent or punish the child's misconduct"
n/a	"Nothing in this subtitle shall be construed to prohibit reasonable punishment, including reasonable corporal punishment, in light of the age and condition of the child, from being performed by a parent or stepparent of the child."	Statutory text implies corporal punishment's purpose must be for "discipline."
n/a	Reasonable corporal punishment by a parent is not prohibited. Excessive corporal punishment determined by statutory definition of abuse. Actual injury and substantial risk of injury, as defined by statute, considered abuse not reasonable corporal punishment. Cobble v. Commissioner of Dept. of Social Services, 719 N.E.2d 500 (Mass. 1999) "Abuse" is the non-accidental commission of any act by a caretaker upon a child which causes, or creates a substantial risk of physical or emotional injury. Physical injury defined as fracture of any bone, subdural hematoma, burns, impairment of any organ, any other such nontrivial injury, or soft tissue swelling or skin bruising depending upon such factors as the child's age, circumstances under which the injury occurred and the number and location of bruises.	Statutory text implies corporal punishment's purpose must be for "discipline."
n/a	"...use of reasonable force."	"This section does not prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force."

Minnesota	M.S.A. § 609.379	"a parent, legal guardian, teacher, or other caretaker of a child"	Y	Y	Y	Y	Y	n/a
Mississippi	Miss. Code Ann. § 43-21-105	"(e) "Parent" means the father or mother to whom the child has been born, or the father or mother by whom the child has been legally adopted. (f) "Guardian" means a court-appointed guardian of the person of a child. (g) "Custodian" means any person having the present care or custody of a child whether such person be a parent or otherwise."	Y	Y	Y	Y	Y	n/a
Missouri	V.A.M.S. 563.061	"parent, guardian or other person entrusted with the care and supervision of a minor"	Y	Y	Y	Y	Y	n/a
Montana	MCA 45-3-107	"A parent or an authorized agent of a parent or a guardian"	Y	N	Y	Y	Y	n/a
Nebraska	Neb.Rev.St. § 28-1413	"parent or guardian or other person similarly responsible for the general care and supervision of a minor"	Y	Y	Y	Y	Y	n/a
Nevada	N.R.S. 432B.150	"a person"	N	N	N	N	N	n/a
New Hampshire	N.H. Rev. Stat. § 627:6	"parent, guardian or other person responsible for the general care and welfare of a minor"	Y	Y	Y	Y	Y	n/a
New Jersey	N.J.S.A. 9:6-1	"parent or by a person having the custody and control of a child"	Y	Y	Y	Y	Y	n/a
New Mexico	N. M. S. A. 1978, § 32A-4-2	"parent, guardian or custodian"	Y	N	Y	Y	N	n/a
New York	McKinney's Penal Law § 35.10	"A parent, guardian or other person entrusted with the care and supervision of a person under the age of twenty-one"	Y	Y	Y	Y	Y	n/a
North Carolina	N.C.G.S.A. § 7B-101	"parent, guardian, custodian, or caretaker"	Y	Y	Y	Y	Y	n/a
North Dakota	NDCC, 12.1-05-05	"parent, guardian, or other person responsible for the care and supervision of a minor"	Y	Y	Y	Y	Y	n/a
Ohio	R.C. § 2919.22	"parent, guardian, custodian, person having custody or control, or person in loco parentis of a child"	Y	Y	Y	Y	Y	n/a
Oklahoma	21 Okl.St.Ann. § 844	"parent, teacher or other person"	Y	Y	Y	Y	Y	n/a
Oregon	O.R.S. § 161.205	"A parent, guardian or other person entrusted with the care and supervision of a minor "	Y	Y	Y	Y	Y	n/a
Pennsylvania	18 Pa.C.S.A. § 509	"parent or guardian or other person similarly responsible for the general care and supervision of a minor"	Y	Y	Y	Y	Y	n/a

n/a	"Reasonable force may be used upon or toward the person of a child without the child's consent…"	"Reasonable force may be used upon or toward the person of a child without the child's consent when the following circumstance exists or the actor reasonably believes it to exist: (a) when used by a parent, legal guardian, teacher, or other caretaker of a child or pupil, in the exercise of lawful authority, to restrain or correct the child or pupil; or (b) when used by a teacher or other member of the instructional, support, or supervisory staff of a public or nonpublic school upon or toward a child when necessary to restrain the child from self-injury or injury to any other person or property."
n/a	"Abused child" means a child whose parent, guardian or custodian or any person responsible for his care or support, whether legally obligated to do so or not, has caused or allowed to be caused, upon the child, sexual abuse, sexual exploitation, emotional abuse, mental injury, nonaccidental physical injury or other maltreatment. However, physical discipline, including spanking, performed on a child by a parent, guardian or custodian in a reasonable manner shall not be deemed abuse under this section..."	"However, physical discipline, including spanking, performed on a child by a parent, guardian or custodian in a reasonable manner shall not be deemed abuse under this section."
n/a	"The use of physical force by an actor upon another person is justifiable when...The force used is not designed to cause or believed to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain or extreme emotional distress."	"The actor reasonably believes that the force used is necessary to promote the welfare of a minor "
n/a	"...justified in the use of force that is reasonable and necessary to restrain or correct the person's child, ward, apprentice, or pupil."	". . . to restrain or correct the person's child, ward, apprentice, or pupil."
n/a	"justifiable if...Such force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress, or gross degradation"	"for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his or her misconduct"
n/a	"Corporal punishment so administered was not so excessive as to constitute abuse or neglect..."	"Excessive corporal punishment may result in physical or mental injury constituting abuse or neglect of a child under the provisions of this chapter."
n/a	"...justified in using force against such minor when and to the extent that he reasonably believes it necessary to prevent or punish such minor's misconduct...The justification extended...does not apply to the malicious or reckless use of force that creates a risk of death, serious bodily injury, or substantial pain."	". . . when and to the extent that he reasonably believes it necessary to prevent or punish such minor's misconduct."
n/a	"Cruelty to a child shall consist in any of the following acts: (a) inflicting unnecessarily severe corporal punishment upon a child;"	n/a
n/a	"An abused child includes one who has been cruelly punished…"	n/a
"under of the age of twenty-one"	"...may use physical force, but not deadly physical force, upon such person when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person."	". . . when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person."
n/a	"Abused juveniles.--Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker: a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means; b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means; c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;"	n/a
n/a	"...may use reasonable force upon the minor for the purpose of safeguarding or promoting the minor's welfare, including prevention and punishment of the minor's misconduct, and the maintenance of proper discipline. The force may be used for this purpose, whether or not it is "necessary" as required by subsection 1 of section 12.1-05-07. The force used must not create a substantial risk of death, serious bodily injury, disfigurement, or gross degradation."	". . . for the purpose of safeguarding or promoting the minor's welfare, including prevention and punishment of the minor's misconduct, and the maintenance of proper discipline."
n/a	"No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age: (3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child; (4) Repeatedly administer unwarranted disciplinary measures to the child, when there is a substantial risk that such conduct, if continued, will seriously impair or retard the child's mental health or development;"	"(3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child; (4) Repeatedly administer unwarranted disciplinary measures to the child, when there is a substantial risk that such conduct, if continued, will seriously impair or retard the child's mental health or development; . . ."
n/a	"Provided, however, that nothing contained in this act shall prohibit any parent, teacher or other person from using ordinary force as a means of discipline, including but not limited to spanking, switching or paddling."	". . . nothing contained in this act1 shall prohibit any parent, teacher or other person from using ordinary force as a means of discipline, including but not limited to spanking, switching or paddling."
n/a	"...may use reasonable physical force upon such minor..."	". . . to maintain discipline or to promote the welfare of the minoon when and to the extent the person reasonably believes it necessary to maintain discipline or to promote the welfare of the minor"
n/a	"...the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation."	". . . the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the preventing or punishment of his misconduct"

Rhode Island	Gen.Laws 1956, § 40-11-2	"parent or other person responsible for his or her welfare"	Y	Y	Y	Y	Y	n/a
South Carolina	Code 1976 § 63-7-20	"parent or guardian"	Y	N	Y	N	N	n/a
South Dakota	SDCL § 22-18-5	"parent or the authorized agent of any parent, or by any guardian"	Y	N	Y	Y	Y	n/a
Tennessee	TN ST § 39-15-401	""Parent or custodian" means the biological or adoptive parent or any person who has legal custody of the child"	Y	Y	Y	Y	N	n/a
Texas	TX FAMILY § 151.001	(e) Only the following persons may use corporal punishment for the reasonable discipline of a child: (1) a parent or grandparent of the child; (2) a stepparent of the child who has the duty of control and reasonable discipline of the child; and (3) an individual who is a guardian of the child and who has the duty of control and reasonable discipline of the child.	Y	Y	Y	Y	N	Specifically includes grandparents.
Utah	U.C.A. 1953 § 76-2-401	"parents, guardians, teachers, or other persons in loco parentis"	Y	Y	Y	Y	Y	n/a
Vermont	13 V.S.A. § 1042	"any person"	N	N	N	N	N	n/a
Virginia	(no specific statute, but there is related case law)	"parent"	Y	N	N	N	N	n/a
Washington	West's RCWA 9A.16.100	"parents, teachers, and their authorized agents"	Y	N	N	N	Y	n/a
West Virginia	W. Va. Code, § 49-1-20	"A parent, guardian or custodian"	Y	N	Y	Y	N	n/a

n/a	""Abused and/or neglected child" means a child whose physical or mental health or welfare is harmed or threatened with harm when his or her parent or other person responsible for his or her welfare: (i) Inflicts or allows to be inflicted upon the child physical or mental injury, including excessive corporal punishment; or (ii) Creates or allows to be created a substantial risk of physical or mental injury to the child, including excessive corporal punishment;"	"(i) Inflicts or allows to be inflicted upon the child physical or mental injury, including excessive corporal punishment; or (ii) Creates or allows to be created a substantial risk of physical or mental injury to the child, including excessive corporal punishment; "
n/a	""Child abuse or neglect" or "harm" occurs when the parent, guardian, or other person responsible for the child's welfare: (a) inflicts or allows to be inflicted upon the child physical or mental injury or engages in acts or omissions which present a substantial risk of physical or mental injury to the child, including injuries sustained as a result of excessive corporal punishment, but excluding corporal punishment or physical discipline which: (i) is administered by a parent or person in loco parentis; (ii) is perpetrated for the sole purpose of restraining or correcting the child; (iii) is reasonable in manner and moderate in degree; (iv) has not brought about permanent or lasting damage to the child; and (v) is not reckless or grossly negligent behavior by the parents."	"(a) inflicts or allows to be inflicted upon the child physical or mental injury or engages in acts or omissions which present a substantial risk of physical or mental injury to the child, including injuries sustained as a result of excessive corporal punishment, but excluding corporal punishment or physical discipline which: (i) is administered by a parent or person in loco parentis; (ii) is perpetrated for the sole purpose of restraining or correcting the child; (iii) is reasonable in manner and moderate in degree; (iv) has not brought about permanent or lasting damage to the child; and (v) is not reckless or grossly negligent behavior by the parents."
n/a	"...the force used is reasonable in manner and moderate in degree."	". . . lawful authority to restrain or correct the child, pupil, or ward and if restraint or correction has been rendered necessary by the misconduct of the child, pupil, or ward, or by the child's refusal to obey the lawful command of such parent, or authorized agent, guardian, teacher, or other school official, and the force used is reasonable in manner and moderate in degree."
n/a	""Knowingly" means the person knew, or should have known upon a reasonable inquiry, that abuse to or neglect of the child would occur which would result in physical injury to the child. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary parent or legal custodian of a child eight (8) years of age or less..."	n/a
n/a	"...reasonable discipline of the child;"	". . . the duty of care, control, protection, and reasonable discipline of the child."
n/a	"...when the actor's conduct is reasonable discipline of minors by parents, guardians, teachers, or other persons in loco parentis...The defense of justification under Subsection (1)(c) is not available if the offense charged involves causing serious bodily injury, as defined in Section 76-1-601, serious physical injury, as defined in Section 76-5-109, or the death of the minor."	". . . may use corporal punishment for the reasonable discipline of a child."
n/a	"Any person who attempts to cause or wilfully or recklessly causes bodily injury to a family or household member, or wilfully causes a family or household member to fear imminent serious bodily injury"	n/a
n/a	"Excessive, unreasonable, or cruel punishment is unlawful. A parent has the right to administer such reasonable and timely punishment as may be necessary to correct faults in children. The right cannot be used as a cloak for the exercise of malevolence or the exhibition of uncontrolled passion on the part of the parent. Punishment must be within the bounds of moderation and reason and for the welfare of child, if due moderation is exceeded then parent is criminally liable. The age, size and conduct of child will be considered as well as the instrument used for punishment and the kind of marks or wounds inflicted on the child's body. Carpenter v. Commonwealth, 44 S.E.2d 419 (Va., 1947) "	n/a
"The following actions are presumed unreasonable when used to correct or restrain a child: (1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child's breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks. The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate. This list is illustrative of unreasonable actions and is not intended to be exclusive."	"It is the policy of this state to protect children from assault and abuse and to encourage parents, teachers, and their authorized agents to use methods of correction and restraint of children that are not dangerous to the children. However, the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child. Any use of force on a child by any other person is unlawful unless it is reasonable and moderate and is authorized in advance by the child's parent or guardian for purposes of restraining or correcting the child."	". . . for purposes of restraining or correcting the child."
n/a	"A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home. Physical injury may include an injury to the child as a result of excessive corporal punishment;"	n/a

Wisconsin	W.S.A. 939.45	"Person responsible for the child's welfare" includes the child's parent, stepparent or guardian"	Y	N	Y	Y	N	n/a
Wyoming	W.S.1977 § 6-2-503	"A person responsible for a child's welfare" includes the child's parent, noncustodial parent, guardian, custodian, stepparent, foster parent or other person, institution or agency having the physical custody or control of the child"	Y	Y	Y	Y	Y	n/a
	TOTALS		46	32	39	40	34	

***EXAMPLE DEFINITIONS**

"Parent" means the father or mother to whom the child has been born, or the father or mother by whom the child has been legally adopted. Miss. Code Ann. § 43-21-105(e).

"Guardian" means a court-appointed guardian of the person of a child. Miss. Code Ann. § 43-21-105(f).

"Custodian" means any person having the present care or custody of a child whether such person be a parent or otherwise. Miss. Code Ann. § 43-21-105(g).

"Legal custodian" means a court-appointed custodian of the child. Miss. Code Ann. § 43-21-105(h).

"Person in loco parentis" means a person who acts in place of a parent, either temporarily (as a schoolteacher does) or indefinitely (as a stepparent does); a person who has assumed the obligations of a parent without formally adopting the child. Black's Law Dictionary.

n/a	"The defense of privilege can be claimed under any of the following circumstances: (b) When the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or creates an unreasonable risk of great bodily harm or death." and "The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct."	n/a
n/a	"A person is guilty of child abuse...if a person responsible for a child's welfare...intentionally or recklessly inflicts upon a child under the age of eighteen (18) years: (i) Physical injury ...excluding reasonable corporal punishment."	n/a

APPENDIX B

	State Statute Regarding Incest	Incest Crime Designation	Biological Parents	Adoptive Parents	Step Parents	Biological Grand-parents	Adoptive Grand-parents	Step Grand-parents
Model Penal Code	MPC § § 230.1, 230.2	Offenses against the family	x			x		
Alabama	AL ST § 13A-13-3	Offenses against the family	x	x	x[1]	x	x	
Alaska	AK ST § 11.41.450	Offenses against the Person	x			x		
Arizona	AZ ST § 13-3608	Family offenses	x			x		
Arkansas	AR ST § 5-26-202	Offenses involving the family	x	x	x	x	x	x
California	CA PENAL § 285	Of crimes against the person involving sexual assualt, and crimes against public decency and good morals	x			x		
Colorado	CO ST § 18-6-301	Offenses Involving the Family Relations	x	x	x	x	x	x
Connecticut	CT ST § 53a-191	Listed with Bigamy	x		x	x		
District of Columbia	DC CODE § 22-3008	with sexual abuse	x			x		
Delaware	DE ST TI 11 § 766	Offenses Against the Person - listed with rape + other offenses	m	m	m	m	m	m
Florida	FL ST § 826.04	with bigamy	x			x		
Georgia	GA ST § 16-6-22	under sexual offenses	x		x	x		
Hawaii[3]	HI ST § 707-741	Offenses Against the Person, with sexual offenses	x			x		
Idaho	ID ST § 18-6602	with sexual offenses	x			x		
Illinois	IL ST CH 720 § 5/11-11	with sexual offenses	x	x	x	x	v	x
Indiana	IN ST 35-46-1-3	in miscellaneous offenses, not with sexual offenses	x			x		

Biological Siblings	Adoptive Siblings	Step Siblings	Biological Aunt, Uncles, Nieces, Nephews	Adoptive Aunt, Uncles, Nieces, Nephews	Step Aunt, Uncles, Nieces, Nephews	First Cousins	In-Laws
x			x				
x	x		x				
x			x				
x			x			x[2]	
x			x			m	
x			x				
x			x				
x			x				
x			x			x	v
m	m		m	m			
x			x				
x			x				
x			x				
x			x				
x	v		x[4]			v[5]	
x			x			v[6]	

Iowa	IA ST § 726.2	CHAPTER 726 PROTECTION OF THE FAMILY AND DEPENDENT PERSONS, with Bigamy	x			x		
Kansas	KS ST 21-5604	with bigamy - offenses against family	x			x		
Kentucky	KY ST § 530.020	with bigamy - offenses against family	x	x	x	x		x
Louisiana	LSA-R.S. 14:89.1	Closer to bigamy	x			x		
Maine	ME ST T. 17-A § 556	with bigamy - offenses against family	x			x		
Maryland	MD CRIM LAW § 3-323	with sexual offenses	x		m	x		m
Massachusetts	MA ST 272 § 17	with morality offenses (not sexual offenses)	x		x	x		x
Michigan	MI ST 551.3, MI ST 750.520b, MI ST 750.520e	with sexual conduct	x		x	x		x
Minnesota	MN ST § 609.365	with bigamy - offenses against the family	x	v		x	v	
Mississippi[9]	MS ST § 97-29-5	with bigmay - crimes against moral decency	x	x	x	x		x
Missouri	MO ST 568.020	with bigamy - offenses against family	x	x	x[10]	x	x	
Montana[11]	MT ST 45-5-507	with sexual offenses - offenses against the person	x	x	x	x		
Nebraska	NE ST § 28-703	closer to bigamy	x			x		
Nevada	NV ST 201.180	with bigamy	x			x		
New Hampshire	NH ST § 639:2	with bigamy - offenses against the family	x	x	x	x		x
New Jersey	NJ ST 2C:14-2	under sexual assault	v			v		
New Mexico	NM ST § 30-10-3	with bigamy - offenses against the family	x			x		
New York	NY PENAL § 255.25	with bigamy - offenses against the family	x			x		
North Carolina	NC ST § 14-178	with offenses of public indecency	x	x	x	x		

x			x			v	
x			x			v	
x			x			m	
x			x[7]				
x			x			v[8]	
x			m				m
x			x				x
x			x			x	x
x	v		x			v	
x			x			x	
x			x			v	
x			v			v	
x			x				
x			x			x	
x			x	x		v	
v			v				
x			x				
x			x				
x			x				

North Dakota	ND ST 12.1-20-11	under sexual offenses (as is bigamy)	x			x		
Ohio	OH ST § 2907.03	with sexual battery	x	x	x	v		
Oklahoma	OK ST T. 21 § 885	closer to bigamy	x		x	x		
Oregon	OR ST § 163.525	with bigamy - offenses against the family	x	v		x	v	
Pennsylvania	PA ST 18 Pa.C.S.A. § 4302	with bigamy - offenses against the family	x	x		x		
Rhode Island	RI ST § 8-10-43	domestic relations	x		x	x		x
South Carolina[13]	SC ST § 16-15-20	Offenses Against Morality and Decency	x		x	x		x
South Dakota	SD ST § § 22-22A-2, 22-22A-3	Offenses against the family	x	v		x	v	
Tennessee	TN ST § 39-15-302	with bigamy - offenses against the family	x	x	x	x		
Texas	TX PENAL § 25.02	Offenses against the family	x	x	x	x	x	
Utah	UT ST § 76-7-102	Offenses against the family	x	x	x[14]	x		
Vermont	VT ST T. 13 § 205	with bigamy	x			x		
Virginia	VA ST § 18.2-366	Offenses against the family	x[16]	x	x	x[17]	x	x
Washington	WA ST 9A.64.020	with bigamy	x			x		
West Virginia	WV ST § 61-8-12	with bigamy	x	x	x	x		
Wisconsin	WI ST 944.06	with bigamy	x			x		
Wyoming	WY ST § 6-4-402	Offenses against the family	x	x	x	x		
	TOTALS		52	21	26	52	11	13
		(inclusive of misdemeanors and void)	v (1)- NJ	v (3)- MN, OR SD	m (2)- DE, MD	v (2)- NJ, OH	v (4) - IL, MN, OR, SD	m (2)- DE, MD
			m (1)- DE	m (1)- DE		m (1)- DE	m (1)- DE	

x			x			x	
v			v			v	
x			x			x[12]	
x	v		v	v		v	
x			x				
x			x				x
x			x				x
x	v		x	v		x	
x	x		x				
x	x		x	x		x	
x			x			x[15]	
x			x				
x	x		m				
x			v			v	
x			x			v	
x			x			v[18]	
x			v			v	
52	9		52	5		27	6
v (2)- NJ, OH	v (4) -IL, MN, OR, SD		v (6)- MT, NJ, OH, OR, WA, WY	v (2)- OR, SD		v (15)	v (1) DC
m (1)- DE	m (1)-DE		m (3)- DE, MD, VA	m (1)- DE			m(1) MD
						m-AR, KY	

[1] While the marriage that creates the relationship exists.
[2] Can marry if over 65 or if under 65 with a cert that says they won't reproduce.
[3] Hawaii specifically includes relationships created by domestic partnerships.
[4] Includes great aunt/uncle/niece/nephews.
[5] Can marry if over 50 or if a physican can say one party is permanently sterile.
[6] Can marry if over 65.
[7] This relationship is punished less severely than other incestuous relationships.
[8] Can marry first cousins if they have a physicians cert of genetic counseling.
[9] A man cannot marry his son's widow.
[10] While the marriage that creates the relationship exists.
[11] Consent is a defense to incest with a stepson or stepdaughter if they are 18 or older.
[12] Recognizes this marriage if it was done out of state.
[13] Incest is only a misdemeanor (fine and/or under one year imprisonment)
[14] While the marriage that creates the relationship exists.
[15] Can marry if over 65 or if under 65 with a cert that says they won't reproduce.
[16] Punished more severely.
[17] Punished more severely.
[18] Can marry if over 65 or if under 65 with a cert that says they won't reproduce.