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SETTING BAIL FOR PUBLIC SAFETY

Curtis E.A. Karnow



ALL FOR ONE: A REVIEW OF VICTIM-CENTRIC JUSTIFICATIONS FOR CRIMINAL PUNISHMENT

Adam J. MacLeod



A CITE-CHECKER'S GUIDE TO SEXUAL DANGEROUSNESS

Franklin E. Zimring and Chrysanthi S. Leon

CALIFORNIA ANNUAL REVIEW AN ANNUAL SURVEY OF DEVELOPMENTS IN STATE CRIMINAL LAW AND POLICY

A Cite-Checker's Guide to Sexual Dangerousness

Franklin E. Zimring† and Chrysanthi S. Leon‡

INTRODUCTION

In June 2006, the *U.C. Davis Law Review* published an article by Professor Ruby Andrew arguing for two measures of penal change for offenders convicted of child sex abuse where the victims were related to the offender by blood or marriage.¹ Consistent with the current fashion in the United States, Professor Andrew urged larger measures of penal confinement and rejection of community-based rehabilitation efforts.² Beyond this, Andrew argued for rejecting any differentiation between persons convicted of intra-familial child sex abuse and those convicted of child sex abuse where the victim is a stranger or non-related acquaintance.³ In her argument against separate policies for intra-familial child abusers, Professor Andrew set out to persuade her readers that fathers and stepfathers who sexually abuse relatives present the same level of both moral culpability and danger to the community as non-familial child abusers, and that their related victims are best protected through rigidly punitive control policies.⁴

We agree with Andrew that familial victims are no less deserving than the victims of strangers.⁵ But it does not follow that the best way to help children victimized by relatives is by mandating imprisonment, or requiring the public

† William G. Simon Professor of Law and Wolfen Distinguished Scholar, University of California, Berkeley, School of Law.

‡ Assistant Professor, Sociology and Criminal Justice, University of Delaware.

1. Ruby Andrew, *Child Sexual Abuse and the State: Applying Critical Outsider Methodologies to Legislative Policymaking*, 39 U.C. DAVIS L. REV. 1851 (2006).

2. *Id.* at 1875, 1882.

3. *Id.* at 1869, 1874-75.

4. *Id.* at 1875.

5. There is a dark legacy of overlooking child abuse by familiars, especially when the offenders were pillars of the community who did not match the criminal stereotype. See Chrysanthi Leon, *Compulsion and Control: Sex Crime and Criminal Justice Policy in California, 1920-2007* (2007) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author).

humiliation of the family created by community notification.⁶

While we disagree with the general conclusion of Andrew's article, the reason for this note is a more specific concern about questions of fact in legal scholarship. On a question at the heart of the penal response to sex offenders—the relative dangers of sex recidivism for incest and non-incest child abusers—the article leaves a demonstrably false impression about current empirical research and, unwittingly or unwittingly, ignores scores of published researched studies involving many thousands of subjects in several countries.⁷

But why didn't the world-famous cite checking process by the law review editors alert them to what was, at minimum, a gigantic scholarly sin of omission? One problem is that law review editors may not have any background in specialized fields. If an article's author does not mention an entire empirical literature, there may be no way for a second year law student to discover the truth about sexual dangerousness or the geography of the Golan Heights or low temperature physics. After a brief tour through Andrew's article and the empirical literature on incest and sexual recidivism, we will return to the institutional problems of inspecting for the integrity of literatures from specialized fields.⁸

I. THE ELEPHANT IN THE LIVING ROOM

When discussing the appropriate punishment for criminal offenses, a preliminary distinction should be made between desert and dangerousness. First, the moral gravity of an offense and the symbolic significance of a criminal justice response may provide philosophical foundations for punishment in general. Second, concern about community protection provides the motive for the future incapacitation of specific offenders. Both are important when considering the proper punishment for sex offenders, but there are in the current discourse about sex offenders in the United States powerful indications that worry about the future dangerousness of sex offenders in the community is the primary motive for most public policy changes. Certainly nothing but the danger of future sexual offending can justify civil commitment programs which twenty states have passed for what are called "sexually dangerous predators."⁹ And future sexual danger must also be the rationale for

6. J.S. Levenson & L. P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49 (2005).

7. We will discuss some of these studies, which include recent sex offender recidivism research in countries including Canada, the U.K. and Norway.

8. For an overview of historical criticism of the law review system, see Bernard J. Hibbits, *Last Whites? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615 (1996) (describing concern since the 1980s about the lack of oversight for student editors and the impact on the quality of legal scholarship).

9. See generally K.J. Terry et al., Sex Offender Registration and Community Notification: A "Megan's Law" Sourcebook (2006), available at <http://www.civicsresearchinstitute.com/meg.html>.

registration and community notification under the Megan's Laws of fifty states and the federal government,¹⁰ because they too are characterized as civil in nature.

It is sexual danger that is the central theme in the special fear of sex offenders. So it is obviously also sexual dangerousness that is at heart of the case for or against the distinct response to intra-familial child sex abusers. There is evidence in her own article that Professor Andrew knows this. The question of sexual dangerousness is the elephant in the living room throughout her article, but the way in which the author dances around the issue provides strong circumstantial evidence of intentional misrepresentation of known facts.

Andrew's article locates its discussion of the relative danger of incest abusers in what is billed as a critique of treatment professionals. (Andrew labels these treaters as apologists for incest offenders because they profit from keeping abusers in community settings.¹¹ We assume, by the way, a similar profit motive would also extend to treatment for non-incest offenders, but this isn't discussed in her article.) It is these apologists, we are told, who "promote the idea that child sex offenders can be differentiated into distinct groups and that related offenders pose a lesser danger to the community."¹²

Having raised the issue of community danger for the first time two-thirds of the way through her article, Andrew then states, "Empirical studies suggest that both of these propositions are false," referring to the distinctiveness of the group and the "lesser danger to the community."¹³ The reader is guided to the authority for this proposition by a footnote (note 121), but the article cited in that note¹⁴ concerns only whether related sex offenders should be considered specialists or generalists and does not provide data on observed community dangerousness. The cited article in the note also is not the "empirical study" that the text has promised.¹⁵

There is only one straight forward method for testing the relative dangerousness of intra-familial child abusers as opposed to other types of sex offenders—and that is to follow up groups of different types of sex offenders after they have been identified and processed. This type of recidivism study is pretty straightforward—it is not rocket science. It has been a staple item in criminological research for almost a century in the United States and all over the developed world.¹⁶ But Professor Andrew does not guide the reader in her

10. For information about the state and federal Megan's Laws, see generally Saul J. Faerstein, M.D., Sexually Dangerous Predators and Post-Prison Commitment Laws, 31 LOY. L.A. L. REV. 895 (1998).

11. Andrew, *supra* note 1, at 1873-74.

12. *Id.* at 1874.

13. *Id.*

14. Chester Brit, *Versatility*, in THE GENERALITY OF DEVIANCE 173 (Travis Hirschi & Michael R. Gottfredson eds., 1994).

15. See *id.*

16. See, e.g., M.D. Maltz, RECIDIVISM (1984).

text or her footnotes to *any* such recidivism studies of the class of offenders who are the subject of her article.

She does, however, present some other empirical data that she alleges is relevant to the dangerousness of intra-familial child abusers. She supports her assertion of danger by arguing that incest offenders are just as likely as other sex offenders to have deviant arousal patterns,¹⁷ because one study found that a group of thirty-nine institutionalized intra-familial child abusers showed deviant patterns of sexual arousal.¹⁸ A collection of studies using interrogation with lie detection equipment has shown that persons convicted of intra-familial sex crimes report having committed other sex crimes as well in the years before being caught.¹⁹ If either a diversified sex offending history or a pattern of deviate sexual arousal is relevant to the future dangerousness of incest offenders, however, these tendencies should increase the recidivism rate of such offenders after treatment or release. On this, Andrew's article has nothing to say. Well, almost nothing. While no studies of sex offender re-arrests or adjudication are mentioned, there is one extraordinary sentence at page 1874 that demands scrutiny: "Second, claims about lower rates of recidivism in related offenders overlook the fact that intra-familial child sexual abuse perpetrators are less likely to be caught a second time in comparison to stranger offenders."²⁰ There is no authority cited for this "fact" and there is nothing in the literature on criminal justice to lend it any plausibility.²¹ This peculiar sentence appears in the middle of a section where Andrew is arguing that the principal recidivism targets for family offenders in the future will be non-

17. Andrew, *supra* note 1, at 1874.

18. Ian Barsetti et al., *The Differentiation of Intrafamilial and Extrafamilial Heterosexual Child Molesters*, J. INTERPERSONAL VIOLENCE 275 (1998) (comparing the erectile responses of thirty-nine child molesters with eighteen non-offender men recruited from the community and finding that all of the molesters, whether their past victims were intra- or extra-familial, were aroused by audiotapes that did not arouse the non-offenders).

19. In footnote 124, Andrew first cites Kim English's work on the use of polygraph assessments to learn more about offenders in treatment. See Andrew, *supra* note 1, at 1875 n.124 (citing Kim English et al., *Sexual Offender Containment: Use of the Postconviction Polygraph*, in ANNALS OF THE N.Y. ACADEMY OF SCIENCES 411 (2003)). The English et al. article presents findings from 180 convicted sex offenders undergoing treatment. English et al., *supra*.

Andrew next cites Peggy Heil's work on crossover offenses based on polygraph assessments and record reviews of over 500 convicted sex offenders undergoing treatment. Andrew, *supra* note 1, at 1875 n.124 (citing Peggy Heil et al., *Crossover Sexual Offenses*, 15 SEX ABUSE 221 (2003)).

Finally, she cites Mark Weinrott's work on self-reports from ninety-nine convicted sex offenders mandated into treatment, finding a large number of undisclosed offenses, of which rapists had the most. Andrew, *supra* note 1, at 1875 n.124 (citing Mark Weinrott & Maureen Saylor, *Self-Report of Crimes Committed by Sex Offenders*, 6 J. INTERPERSONAL VIOLENCE 286 (1991)).

20. Andrew, *supra* note 1, at 1874.

21. Presumably Andrew refers to the literature which suggests general under-reporting of sex crimes—but there is no research, to our knowledge, which addresses the reporting of subsequent offenses by an identified offender. As we discuss below, we would not expect any such research to exist.

related children. Andrew's specific argument here is that low punishment of family offenders leads to lower child victim morale and less reporting of future violations. But if the same family member assaults the same victim again, other family members, law enforcement and social service staff are also on notice of the threat and should maintain surveillance.²² Whether or not the child initiates a report, repeat victimization under the nose of social service and law enforcement seems to us a more difficult crime to commit without detection than the victimization of a new unfamiliar child. Offenders who seek out strangers must be identified by victims who do not know them and control systems which may not be on notice. How it will be easier to catch those stranger assaulters than a predatory recidivist relative is Ruby Andrew's secret.²³

The second remarkable feature of the sentence under scrutiny is that it lets the cat out of the bag. Professor Andrew shows some awareness of what she calls here the "claims about lower rates of recidivism in related offenders."²⁴ Her failure to cite any of these studies seems to us to be an attempt to deny her readers the access to decades of studies of sex offense recidivism in several countries. These studies are ignored because they report what Al Gore (in another context) called "An Inconvenient Truth."²⁵

II. DATA ON RECIDIVISM

What do follow-up studies of familial child abusers and other varieties of sex offenders tell about the relative dangerousness of various offender categories? And how hard is it to locate this data? We answer the second question first by confessing to conducting the ultimate lazy person's empirical research. Reader, we googled it. We searched using the phrase "recidivism of incest offenders" in Google and Google Scholar and then downloaded and reviewed all studies on the first four pages of results that reported sex recidivism rates for different types of sex offenders including familial child abuse if the download was available without charge.²⁶ There was plenty to find, as the reader can confirm by repeating our method.

22. Many of these same surveillance mechanisms could also identify any new victims of the familial assaulter—another concern of Andrew's. Of course, these institutions may not in practice live up to their mandates; social service agents in particular are known to be overworked and often unable to follow up effectively on their caseloads. Our argument is merely that known offenders who re-victimize the same children are more—not less—likely to be detected than offenders who choose new victims.

23. While we will bend over backwards in Part III to excuse law review editors who might not know recidivism studies, the student editor who let this sentence see print did not discharge a cite-checker's mandate.

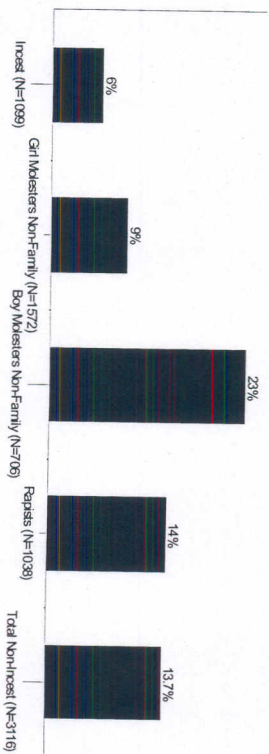
24. Andrew, *supra* note 1, at 1874.

25. AN INCONVENIENT TRUTH (Paramount Classics 2006).

26. The availability of articles may depend on the access provided by the searcher's institution (some articles are in proprietary databases). But students at UC Davis and other law schools certainly have this kind of access.

We will first report on the best of the meta-analyses we encountered in the flood of results, then present details on several individual studies. Figure 1 is taken from a Canadian Government Report authored by Harris and Hanson, titled "Five Year Sexual Recidivism for Offenders in 10 Samples."²⁷

Figure 1. Five Year Sexual Recidivism for Offenders in 10 Samples (n=4115)²⁸



Source: Harris and Hanson 2004²⁹

The ten studies combined for this five-year follow-up come from Canada, two U.S. states, England and Wales.³⁰ Many but not all the samples were released from locked institutions and the rest from probation and community treatment.³¹ The sex recidivism rate for 1099 incest offenders was six percent in the ten-sample aggregate.³² The sex recidivism rate for non-incest offenders was 13.7%, 2.3 times the incest rate.³³ Since times of exposure and other risk factors will vary from group to group, the sexual dangerousness multiple—the extent to which one group is more likely to re-offend sexually than another (in this study, 2.3 for non-incest over incest offenders)—is one easy way to create comparability in different studies.

A second Canadian study examined only child molesters and broke down the victim offender relationship into three family types (biological child,

27. Andrew J.R. Harris & R. Karl Hanson, Sex Offender Recidivism: A Simple Question 2004-03 (2004), available at http://www2.ps-sp.gc.ca/publications/corrections/200403-2_c.asp.

28. *Id.* at 8.

29. *Id.* at 8.

30. *Id.* at 3.

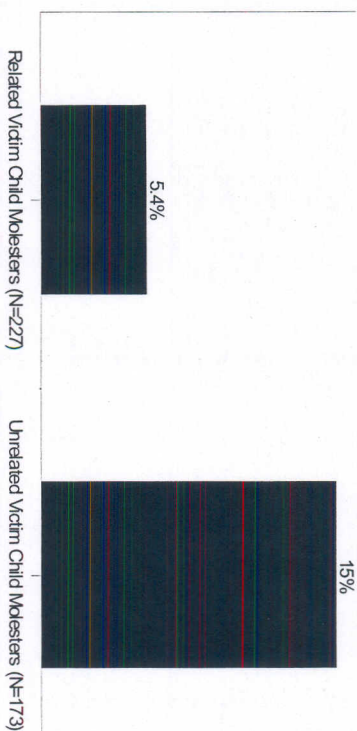
31. *Id.*

32. *Id.* at 4.

33. Figure 1 reproduces Harris and Hanson's data, except that we combined their reported offender sub-sample and recidivism info in their Appendix II to show that the non-incest offenders totaled 3116 and had a 13.7% recidivism rate.

stepchild, and more distant family) and two non-family categories.³⁴ Figure 2 compares the family versus non-family child molesters by recidivism rate after an average of 7.16 years.

Figure 2. Recidivism Rates of Family Versus Non-Family Child Molesters³⁵



The offenders in the Greenberg group were convicted but not yet sentenced so that the severity of the crimes (and perhaps records) was not as high as in the samples reported in Figure 1. But here again, the non-family sex recidivism rate (fifteen percent) is 2.7 times the familial rate (5.4%).

Table 1 reports an analysis by Marshall and Barbaree of the findings reported in published studies of recidivism by five types of sex offenders. The ranges reported in Table 1 illustrate how recidivism statistics are dependant on the definition of the event and the length of the follow-up.³⁶ But there is also a clear pattern by type of offender. The lowest rate found for incest was lower than all other types of offenses, with the lowest reports for other offenders ranging from seventy-five percent higher (rape) to ten times as high (exhibitionists).³⁷ At the high end of reported recidivism, the ten percent result

34. David Greenberg et al., *Recidivism of Child Molesters: A Study of Victim Relationship with the Perpetrator*, 24 CHILD ABUSE & NEGLECT 1485 (2000), available at <http://www.science-direct.com> (search for "Recidivism of Child Molesters"; then follow hyperlink for article).

35. For Figure 2, we used Greenberg et al.'s offense samples as reported on page 1487, combined them into related and unrelated categories and used the re-offense rates reported on page 1490 to calculate the percentages for related and unrelated offenders. *See id.*

36. Throughout our discussion of recidivism, readers should be aware of the very inclusive measure of sexual recidivism. Greenberg, for example, counts a new charge as a new offense (it is common in other areas of criminology to measure recidivism by conviction). Greenberg et al., *supra* note 34, at 1488.

37. Marshall & Barbaree, *supra* note 40.

for incest was about one-third the rate found for molesters and rapists.³⁸ Both the minimum and maximum rates for incest were much lower than for any other category reported.³⁹

Table 1. Reported Sexual Recidivist Rates by Type of Initial Offense⁴⁰

	Lowest Rate	Highest Rate
Incest	4%	10%
Rape	7%	35%
Female Child Molestation	10%	29%
Male Child Molestation	13%	40%
Exhibitionism	41%	71%

From the standpoint of future likelihood of sex offending, the incest group is usually less than half as dangerous as other forms of sex offender. This is one obvious reason why the legal system might be more inclined to incarcerate other types of sex offenders more often than incest offenders and for longer periods.⁴¹

38. *Id.*

39. *Id.*

40. William L. Marshall & Howard E. Barbaree, *Outcome of Cognitive Behavioral Treatment, in HANDBOOK OF SEXUAL ASSAULT* 370 (William L. Marshall, D.R. Laws, & Howard E. Barbaree eds., Springer 1990).

41. Sex offenders in general have low rates of recidivism. Hanson and Bussiere's 1998 meta-analysis of numerous recidivism studies found that even after following offenders for an average of four to five years, "[o]n average, the sex offense recidivism rate was 13.4% (n =

None of these data are mentioned in the article that is our current concern. Is it possible that student editors cite checked the text and footnotes of this piece without noticing that differential sexual danger was an issue that should concern an article urging undifferentiated penal responses to intra-familial child abusers? Perhaps. They might not have known about the extensive literature just a Google click away.

III. SINS OF OMISSION

By failing to mention or reference any studies of recidivism of incest offenders, the article published by the *U.C. Davis Law Review* provides no clear indication that all the statistics mentioned in the previous section exist. A dutiful cite-checker who has no background in the subject makes sure that every article that Professor Andrew mentioned has not been inaccurately characterized and considers the job done. The cite-checker who does note the rather problematic allegation in the published article that related sex offenders do not "pose a lesser danger to the community" without any mention of recidivism studies, may think no such studies exist. Andrew's failure to acknowledge a literature might keep that material beyond the reach of an uninformed cite-checker. And the *Review's* readers can be misled as well. We seem to be more concerned about this than the two editors of the *U.C. Davis Law Review* with whom we have corresponded.⁴²

The obvious way to fix this sort of problem is for student editors at

23.393; 18.9% for 1,839 rapists and 12.7% for 9,603 child molesters)." R.K. Hanson & M.T. Bussiere, 66 *J. CONSULTING & CLINICAL PSYCH.* 348, 351 (1998). Sex offenders also have low rates of recidivism when compared to other offenders. The Bureau of Justice Statistics published recidivism data on two-thirds of all the inmates released from prison in 1994 based on a three-year follow up and found that 46.9% were reconvicted in state or federal court for a new crime (felony or misdemeanor). PATRICK LANGAN & DAVID LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (2002), available at www.ojp.usdoj.gov/bjs/pub/pdf/rp94.pdf. By offense, "unspecified" drug offenders had the highest recidivism rates (60.5%); and of violent offenders, robbers had a 46.5% recidivism rate compared with a 22.3% reconviction rate for "other sex offenses"—the category used for child molestation and other non-rape offenses. *Id.* at 8. Considering that the recidivism rates were for non-sexual offenders followed for even shorter periods than those described above for sex offenders, and that we compare the Bureau of Justice Statistics reconviction rates with sex offender studies which sometimes use even broader measures like arrests, the low sex offender recidivism rate is especially striking. *Id.*

42. The elder of us contacted David Richardson, then Editor-in-Chief of the *U.C. Davis Law Review*, with our reservations about the Andrew article shortly after it appeared. Mr. Richardson was not subtle in his response: "I appreciate your comments about both Andrew's article and the law review editorial process. I am interested in publishing a response from you on the former, but not the latter." E-mail from David Richardson, Editor-in-Chief 2006, *U.C. Davis Law Review*, to Franklin Zimring, Professor of Law, University of California, Berkeley, School of Law (Jul. 22, 2006) (on file with author). We nevertheless presented in writing this note and were more diplomatically informed by the then-current *U.C. Davis Law Review* Editor-in-Chief that "the Davis Law Review cannot publish 'A Cite-Checker's Guide to Sexual Dangerousness' because we have already closed our submissions for the year." E-mail from Megan Kintze, Editor-in-Chief 2007, *U.C. Davis Law Review*, to Franklin Zimring (Sept. 24, 2007) (on file with author).

university law schools to seek out the advice of subject matter experts. The result of this kind of consultation would not be the censorship of editorial opinion in legal scholarship but rather forcing authors to acknowledge information and explain its relevance. If Professor Andrew really wants to believe that consistent results from scores of studies are wrong about the relative sexual danger of incest offenders, that is her business. But if her article fails to disclose the existence of substantial research to the contrary of her hypothesis, the student editors of the *Review* owe their readership a more careful editorial review process.

Andrew gets the data wrong about sexual dangerousness—and the *U.C. Davis Law Review* editors did not catch her gross misrepresentations. In order to make policy recommendations about sexual dangerousness, we need to look at re-offense rates and we need to compare sexual and non-sexual offending. Andrew does neither. A simple Google search shows that there is good reason to preserve (or re-introduce) discretion in sentencing and in inclusion in registration and notification schemes for sex offenders. Sex offenders in general have low recidivism rates; those with related victims have even lower rates.⁴³

The data Andrew cites do not support the points she makes. This basic error highlights two problems. First, it contributes to the perpetuation of popular sex offender policies based on false assumptions. Laws to “close the incest loophole,”⁴⁴ are just one instance of a much larger trend toward removing discretion in order to appease an anxious public without any empirical grounding.⁴⁵ Second, the law review process does not protect against bad scholarship that misleads readers about evidence available unless citations to appropriate data are provided. But what law review readers do not know *can* hurt them. We would hope that a peer-review process in which experts were consulted would have caught Andrew’s false claims. But short of that, law

43. Marshall & Barbaree, *supra* note 40.

44. California passed Senate Bill 33, the “incest loophole” closure legislation in 2005 as pushed by the national PROTECT organization. Press Release, Office of the Governor, Governor Schwarzenegger Highlights Important Legislation Taking Effect January 1 (Dec. 29 2005), available at <http://gov.ca.gov/index.php?press-release/1129>; PROTECT, Circle of Trust Campaign, <http://protect.org/california/cacOTCampaign.shtml>. Senate Bill 33 includes one provision about charging an intra-familial sex offense as a felony instead of less. S.B. 33 2005-2006 Leg., Reg. Sess. (Cal. 2005) (enacted Oct. 4, 2005), available at http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_0001-0050/sb_33_bill_20051004_chaptered.html. It also removes a judge’s discretion to give a suspended sentence pending treatment—this removes the “stick” to encourage treatment compliance in favor of sending to prison where no treatment is possible. *Id.* The rest of the changes to the penal code are about the prosecutor’s charging decisions, guiding prosecutors away from diverting some offenders without compel them to do anything. *Id.* Prosecutors who want to divert still can, but perhaps without the formal support for diverting to treatment. *Id.* See also R.M. Morgenhan, *Real Protection for Our Children*, N.Y. TIMES, Dec. 4, 2005, at 13 (New York District Attorney noting the largely empty symbolism of these laws).

45. For the long historical view of California’s love affair with populist punitiveness focused on sex offenders see Leon, *supra* note 5.

students or lay people who checked her citations using the universally-accessible search engine provided by Google could have easily caught this problem.

The editors contacted Professor Andrew, soliciting her reply and offering to publish it herein. However, she declined to submit a reply.