

AN EMPIRICALLY-BASED  
APPROACH FOR PROSECUTING  
JUVENILE SEX CRIMES

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## WHAT SHOULD WE DO ABOUT JACK?

Jack is a 17 year old male. The allegations are that at a party in the home of a high school acquaintance he asked Jill, 14, to come into one of the bedrooms to talk to him. Jill would later report that after talking a little, Jack kissed her. She kissed him back at first "you know, just to be friendly." But as he continued to kiss her she resisted and tried to pull away. Jack, she said, then pulled her down onto the bed with him. She said she asked to leave. He continued to kiss her, and started to remove her blouse and fondle her breasts. He then started to move one hand down her pants. Jill said she squirmed away from him and ran out the door. She did not tell anyone at the party what happened.

The following day Jack called Jill and apologized, asking her not to tell anyone. He said, "If you tell anyone, it would ruin me, and then I would kill you."

Two days later Jill's mother finds her blouse in the laundry with a button ripped off. Confronted by her mother, Jill tells her the facts above and her mother also observes Jill has a small, finger-like bruise on her upper left arm.

When police contact Jack he tells them, "I do know Jill. But, you know, I have watched all those tv shows and I know that the smart thing to do is to not say anything to you guys. So, with all due respect, no comment."

This referral is sent to you, as the prosecutor in charge of juvenile sex crime cases.

### INITIAL CONSIDERATIONS:

The answer to that question...in this case and for all the "Jacks" that come onto your caseload...has enormous ramifications. They impact Jack for life, they can impact Jill, and they can impact potential future victims.

Taken in one direction, Jack might be convicted of a felony-level sex offense, required to register as a sex offender; he might be expelled from school, compromising his opportunities to attend college or pursue various avenues of employment. Many career paths will be effectively blocked. He might be incarcerated. Taken in another direction, Jack could go on to prey upon and harm scores of other young women.

### WOULD IT MATTER IF JACK:

- Was a nerdy kid who was told at the party by his friend Peter that Jill wanted to have sex with him?
- Was an honor student, already accepted to Harvard?
- Was the captain of the high school football team?
- Had no prior sex related incidents but had been arrested twice: Once for vandalizing a candy machine and once for trespass at a movie theatre.
- Had been accused of being sexually aggressive toward girls three times before?
- Was trying to have sex with Jill as part of a gang initiation?

- Admits that what he did was wrong, but thought Jill was consenting, up until the very end when she left. Jack later says, "I just misread her reactions and misread the situation. I feel terrible. I had never been with a girl before."
- Said Jill and he had consensual sex and that it was at her initiation. He explains that a mutual friend later told him that Jill said she made up the story of force to explain the ripped blouse to her mother.

## WOULD IT MATTER IF JILL:

- Had sex with two other people at the party earlier that night?
- Was a naive, innocent girl who had never had a boyfriend?
- Was the daughter of the city's mayor?
- Admitted that she thought Jack was cute, enjoyed kissing Jack and having him fondle her breasts, but wanted to stop before they "went further." As for the threat to "kill her" she didn't take him seriously, believing he was embarrassed and scared and took it as just a figure of speech.

Adolescents account for more than one-third of all known sexual assaults against minors<sup>1</sup>; yet 80-95% of adolescents who have engaged in abusive sexual behavior do not sexually reoffend, even without formal therapeutic interventions.<sup>2</sup> Most adolescents will desist from engaging in sexually abusive behavior after having contact with the criminal justice system. Specialized, quality treatment programs for adolescents with behavioral issues have shown significant reductions in recidivism.<sup>3</sup> Those statistics, supported by decades of research, suggest that adolescents who have engaged in sexually abusive behavior do not pose a substantial risk for sexual re-offense, in general. While that is unquestionably true, it is equally true that about half of adults who have sexually offended report that their criminal sexual offenses began when they were adolescents.<sup>4</sup>

Taken together, the empirical research teaches us that adolescents who sexually offend are a large scale issue, but the risk of sexual re-offense appears significantly skewed to a very small minority.

Some interventions have been demonstrated to be extremely successful in reducing recidivism; but as discussed below, other interventions are not only unsuccessful, but have proven to be counter-productive and may actually exacerbate risk of future aggressive behavior.

Is it proper, then, for a prosecutor to ask: Which group is Jack in? Is he part of the 80-95% who will not reoffend; or part of the group which will go to reoffend as an adult? Is he someone who would benefit from participation in specialized treatment; or someone who might become a greater risk to reoffend if directed to engage in a treatment or intervention which is inappropriate for him? Should the questions about Jack, and Jill, raised above matter to a prosecutor's charging decision; or should all "Jacks" be treated alike?

And what about the impact on Jill? The short and long term consequences of being an adolescent victim of sexual assault are well documented.<sup>5</sup> The filing of criminal charges against an assailant can bring some comfort to a victim because it indicates she has been believed and there will be official efforts to impose responsibility and consequences.

<sup>1</sup>Finklehor, D., Ormrod, R. and Chaffin, M. (2009) *Juveniles who commit sex offenses against minors*. *Juvenile Justice Bulletin*. Office of Justice Programs.

<sup>2</sup>Rothman, D. (2016) *Early detection and intervention for adolescents at risk for engaging in abusive sexual behavior: A case for prevention*. In Laws, D.R. and O'Donohue, W. (Eds.) *Treatment of Sex Offender: Strengths and weaknesses of assessment and intervention*. (pp 191-222). New York: Springer.

<sup>3</sup>*Sexually abusive adolescents who have participated in specialized treatment to address their sexual offending are approximately 12% less likely to reoffend sexually than youth who have not participated in such treatment*. Worling, J., Littlejohn, A., and Bookalam, D. (2010) *20-year prospective follow-up study of specialized treatment for adolescents who offended sexually*. *Behavioral Sciences and the Law*. 28, 46-57.

<sup>4</sup>Abel, G., Becker, J., Mittleman, M., Cunningham-Rathner, J., Rouleau, J. and Murphy, W. (1987) *Self-reported sex crimes of nonincarcerated paraphiliacs*. *Journal of Interpersonal Violence*. 2, 3-25.

<sup>5</sup>See, for example: Walsh, K., Danielson, C., McCauley, J., Hanson, R., Smith, D., Resnick, H., Saunders, B. and Kilpatrick, D. (2012) *Longitudinal trajectories of posttraumatic stress disorder symptoms and binge drinking among adolescent girls: The role of sexual victimization*, *Journal of Adolescent Health*, 50, 54-59. *The psychological consequences may vary for each individual and it sometimes may be difficult to distinguish the impact of the act(s) of interpersonal violence itself as opposed to other traumas or disorders which may have been a sequela of the exposure to the interpersonal violence*.

Also see, Putnam, F. (2003) *Ten-year research update review: Child Sexual Abuse*, *Journal of the American Academy of Child and Adolescent Psychiatry*, 42:3.

Should the prosecutor's decision as to whether (and how) to prosecute Jack be influenced by the impact that decision may have on Jill? No one should ever be charged with a crime solely because the filing may bring comfort to the alleged victim. The process of prosecutorial decision-making, however, should be considerate of the impact of that decision on the victim. Prosecutors making charging decisions in these cases must be cognizant of trauma informed procedures to be able to better understand the evidence as presented and to minimize the adverse effects of trauma on victims and their families<sup>6</sup>. They should act in ways which supports the healing and recovery of victims. Alleged crime victims must at all times be treated with dignity, respect and sensitivity.

Does the prosecutor assigned to Jack's case know the empirical evidence? If the prosecutor is aware of these various research outcomes, and wants to make the proper decision regarding Jack, does he or she<sup>7</sup> have the ability under existing State law to do so? Does her office have policies which allow her to exercise her discretion in that way? If she has that authority, are there tools available within the community to guide her ability to seek the right information and make the right choices. What information does she need? How does she know if it's reliable? And if the best options are not available in her community, what can she do to identify them and try to build them. In total: What should prosecutors know about juvenile sex offenders – and should we even call them that; or instead the more accurate *adolescents who have engaged in sexually abusive behavior*<sup>8</sup>- and what gets in the way of making the best possible decisions?

In the fact pattern presented, what if Jack was not 17, but 15 or 14 or 11? Would that – should that - age difference matter? Should 11 year old Jack be treated the same as 14 year old Jack and 17 year old Jack? Would the legal consequences of those age differences matter under your state law? What is the right thing to do? What is the proper paradigm for prosecutors to use in making the best decisions: For Jack, for Jill and for the community?

## PURPOSE AND SCOPE OF THIS PAPER

Prosecutors – good prosecutors – respect two basic rules:

1. Follow the evidence
2. Do the right thing.

*Follow the evidence*, of course, means that prosecutors can – and must – go only where the evidence allows them. Hunches, instincts, wants, feelings, general beliefs may be tempting to rely upon, but in the end good prosecutors can only pursue cases, defendants and theories which are supported by reliable evidence.

*Do the right thing* is the constant reminder that prosecutors are ethically and morally compelled to always consider not just what they *can* do, but what they *should* do. In pursuing cases and making decisions prosecutors should be mindful of basing those decisions upon the reliable existing evidence, and distinguishing that from doing what they *could* do based upon their instincts, hunches, beliefs, or most troubling, their outrage.

To that end, this paper offers a summary of the existing reliable evidence regarding the prevalence and recidivism risk of juvenile sexual offending and the evidence regarding the benefits, efficacy and consequences of various common treatment modalities and other post-adjudication interventions. It offers a review of articulated rationales for the creation of significant legal and social policies regarding juvenile sex offenders with an examination of the empirical evidence which challenges or supports those policies.

<sup>6</sup>See generally, Conradi, L. and Wilson, C. (2010) *Managing traumatized children: A trauma systems perspective. Current Opinion in Pediatrics*, 22, 621-625.

<sup>7</sup>Of course both men and women are prosecutors. But writing with the "he or she" pronoun or "his or her" becomes cumbersome to write and equally cumbersome to read. I am hereafter choosing to pick one pronoun to define all prosecutors. Simply because the juvenile sex offender prosecutor I most worked with was female, I am choosing to use the pronoun "her" from now on. I trust that no reader will take offense to this, as none is intended.

<sup>8</sup>This is the term adopted by the Association for the Treatment of Sexual Abusers (ATSA) in their 2017 *Adolescent Practice Guidelines*. Those guidelines define the best practices, based upon the most current, reliable empirical evidence as guidance for practitioners in the field. ATSA defines itself, in those Guidelines, as the world's leading "multidisciplinary organization that is committed to preventing child sexual abuse by promoting sound research, developing effective practice guidelines for individuals who have engaged in sexually abusive behavior and advancing informed policy." For the sake of full disclosure, the author was a member of the Board of Directors of ATSA from 2003-2005 but had no role in the development of those Guidelines. Another term frequently used in the literature is "adolescents with illegal sexual behavior." (See, e.g. Righthand, S., Baird, B., Way, I. and Seto, M. (2014) *Effective intervention with adolescents who have offended sexually: Translating research into practice*. Brandon, VT: Safer Society Press.) This term is meant to incorporate sexual behavior by adolescents which is illegal, even if it is not abusive. I have chosen to use the term adopted by ATSA but recognize that researchers and practitioners may reasonably debate which is most appropriate.

This monograph is presented with the hope that prosecutors, armed with the proper empirical evidence and a fuller understanding of the strengths and weaknesses of various interventions either currently used or available for youth with sexual behavior problems, can focus their attention on the most relevant questions and issues in these cases, and be in a position to do the right things to hold juvenile offenders responsible, impose appropriate sanctions and therefore, best protect the community.

## THE DEFINING CHARACTERISTIC OF ADOLESCENCE

In the progression from childhood to adulthood comes that strange, angst filled, hormone pumping, identity seeking, confidence lacking journey. It is generally an oxymoronic search for independence while simultaneously trying to fit in. It is often filled with acts of defiance while also conforming to the things your friends do. It is influenced by three powerful external forces: The quality of caregiver supervision; peer pressure and; the choice of proper role models.

Child psychologists recognize that the social ecology in which adolescents grow up is generally the most significant influence on the child's development. Ideally the child's parents are loving and able to act as good teachers, protectors and role models. Having high quality caregiver supervision and worthy role models is often critical to the development of a healthy individual. The lack of such supervision, on the contrary, can be enormously problematic. That is perhaps why so many misbehaving children are the product of dysfunctional households. In the absence of supervision and healthy role models at home, children typically turn to others. Sometimes those are teachers, coaches, clergy, neighbors who instill good values, provide proper guidance and offer a sense of love and support. Other times they are already-misbehaving youth, gang members or predatory adults who provide the charade of support but are abusive and destructive.

This journey and struggle is made at the same time that the adolescent brain is still developing. Adolescent judgment is, by definition, often impaired and incomplete. It is marked by poor impulse control and undeveloped social reasoning. This reality is not just recognized in the fields of adolescent development and brain research<sup>9</sup>, it has been acknowledged and accepted by the United States Supreme Court: "a lack of maturity and an underdeveloped sense of responsibility are found in youth...these qualities often result in impetuous and ill-considered actions and decisions."<sup>10</sup>

Perhaps the prevailing characteristic of adolescence is that youth typically do not fully appreciate the effects and consequences of their actions.

It is this combination of factors which will have influenced virtually every adolescent whose case is presented to a prosecutor for consideration, because they have made a poor, and sometimes horrific, decision.

<sup>9</sup> Steinberg, L. and Scott, E. (2003) *Less guilty by reason of adolescence: Developmental immaturity, diminished responsibility and the juvenile death penalty*, *American Psychologist*, Vol. 58, No 12 (1009-1018. ) American Psychological Association.

<sup>10</sup> *Roper v. Simmons*, 543 U. S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). *Court's decisions to prohibit imposition of death penalty upon juveniles. The Court noted, "In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent."*

## WHO ARE THE OFFENDERS? WHAT DO WE KNOW ABOUT THE ADOLESCENTS WHO HAVE ENGAGED IN SEXUALLY ABUSIVE BEHAVIOR.

Adolescents account for more than one-third of all known sexual assaults against minors.<sup>11</sup> The peak age at which juveniles sexually offend against children under age 12 is when the offender is 13-14 years old.<sup>12</sup> The offenders are predominately male.<sup>13</sup>

It's been said that the defining characteristic among sexually offending youth is that there is not a reliable, single defining common characteristic, other than the offenders are predominately male. It is generally accepted that most adolescents who sexually offend fit broadly within these, not necessarily exclusive, subgroups:

- (1) Persistent delinquent youth who criminally offend generally,
- (2) those who offend situationally or out of experimental behavior, and
- (3) a very small number of youth with true paraphilic preferences.<sup>14</sup>

Thus in understanding how to identify, respond to, sanction and treat adolescents who have engaged in sexually abusive behavior, prosecutors need to start with the recognition that "juvenile sex offenders" are not a distinct taxonomic group. The most striking commonality of the adolescents who offend sexually is their similarity to those who engage in general delinquent behavior.<sup>15</sup> As two leading researchers summarized it: "...the empirical evidence supports the view that juvenile sex offenders, as a group, are similar in their characteristics to other juvenile delinquents and do not represent a distinct or unique type of offender."<sup>16</sup>

As important as recognizing the difficulty of defining what "juvenile sex offenders" are, it is perhaps more important to recognize what they are not. Juvenile sex offenders are not merely younger versions of adult sex offenders.

The motivations for adolescents are often sexual exploration, rather than sexual exploitation. Adolescents more often act impulsively, rather than compulsively. Adolescents are more likely to offend openly, in school or social settings, than in carefully chosen secluded, isolated places as typically selected by the adult offender.

For many of these youth, sexual misbehavior and offending is not their only problem. Some might be mimicking their own victimization experiences. Some will have serious mental health issues, some have early onset neurological issues, some have already become substance abusers. Alone, or in some combination, these youth often are impulsive, immature and self-centered. Some juvenile sexual offenders are otherwise intelligent, productive well-functioning youth.

As one leading researcher explained, "...youth captured under the sex offender label, although presumed to share common features, are actually incredibly diverse, and may have little in common with each other aside from their administrative classification under law and policy."<sup>17</sup>

He expounded:

*Youth labeled as juvenile sex offenders include... persistently delinquent teens who commit both sexual and nonsexual crimes; otherwise normal early-adolescent boys who are curious about sex and act experimentally but irresponsibly; generally aggressive and violent youth; immature and impulsive youth acting without thinking; so-called Romeo and Juliet cases; those who are indifferent to others and selfishly take what they want; youth misinterpreting what they believed was consent or mutual interest; children imitating actions they have seen in the media; youth ignorant of the law or the potential consequences of their actions; youth*

<sup>11</sup> Finklehor, D., Ormrod, R. and Chaffin, M. (2009) *Juveniles who commit sex offenses against minors. Juvenile Justice Bulletin. Office of Justice Programs.*

<sup>12</sup> Finklehor, D., Ormrod, R. and Chaffin, M. (2009) *Juveniles who commit sex offenses against minors. Juvenile Justice Bulletin. Office of Justice Programs. See also, Bureau of Juvenile Statistics, Sexual assault of young children as reported to law enforcement: Victim, incident, and offender characteristics. U.S. Department of Justice, Office of Juvenile Programs (July, 2000).*

<sup>13</sup> Approximately 7% of juvenile teenagers accused of sexually illegal behavior are girls. Snyder, H. (2002) *Juvenile arrests 2000. OJJDP Juvenile Justice Bulletin. U.S. Department of Justice. Washington, D.C.*

<sup>14</sup> Most adolescents who have engaged in sexually abusive behavior do not exhibit sexual arousal to prepubescent children. Seto, M., LaLumiere, M. and Blanchard, R. (2000) *The discriminative validity of a phallometric test for pedophilia interests among adolescents sex offenders against children. Psychological Assessment, 12, 39-53.*

<sup>15</sup> Caldwell, M. (2002) *What do we know about juvenile sex offender risk. Child Maltreatment, 7, 291-302.*

<sup>16</sup> Letourneau, E., and Miner, M. (2005) *Juvenile sex offenders: A case against the legal and clinical status quo. Sexual Abuse: A Journal of Research and Treatment, Vol. 17, No. 3, 293-312.*

<sup>17</sup> Chaffin, M. (2008) *Our minds are made up don't confuse us with the facts: Commentary on policies concerning children with sexual behavioral problems and juvenile sex offenders. Child Maltreatment, Vol. 13, No. 2, 110-121.*

*attracted to the thrill of rule violation; youth imitating what is normal in their own family or social ecology; depressed or isolated teens who turn to younger juveniles as substitutes for agemates; seriously mentally ill youth; youth responding primarily to peer pressure; youth preoccupied with sex; youth under the influence of drugs or alcohol; youth swept away by the sexual arousal of the moment; or youth with incipient sexual deviancy problems.*

Each of these youth, once adjudicated as “a juvenile sex offender” is apt to be treated equally under existing law and policy. The reality, of course, is that with proper analysis and assessment – which can only be possible with appropriate and informed prosecutorial oversight – each of these youth might require a different set of interventions and management needs. Why do we care about those particularized management needs? Because if prosecutors, and the professionals within the juvenile justice system, truly care about risk reduction and the prevention of sexual recidivism, then identifying the most effective interventions and treatment needs is necessary to accomplish that goal.

## WHAT DO WE KNOW ABOUT JUVENILE SEX OFFENDER RECIDIVISM?

Given the diversity of the offenders, as described above, it is perhaps not surprising that when re-offense by youth does occur, the vast majority involves non-sexual offenses. That is, adolescents adjudicated of sexual offenses are much more likely to repeat delinquent, non-sexual, behavior than they are to recommit criminal sexual behavior.<sup>18</sup> Multiple studies have demonstrated that the sexual re-offense rate for adolescent sex offenders is in the single digits, typically in the 3-10% range.<sup>19</sup> Even if that is considered an unacceptably high rate of re-offense, recognize that the vast majority (some 80-85%) of all sex crimes committed by once incarcerated teens are committed by those without prior sexual offenses.<sup>20</sup> That is: future sex crimes are much more likely to be committed by a previously non-sex offending juvenile, than by a previously adjudicated juvenile sexual abuser.

Sexually abusive behavior by children and adolescents rarely persists into adulthood. “... most adolescents who have engaged in sexually abusive behavior do not continue to sexually abuse and are not on a life trajectory for repeat offending.”<sup>21</sup>

The importance of this research to prosecutors is this: The vast majority of the adolescents who will come onto your juvenile sex offender case load are not unyielding sex offenders who are juveniles; they are instead generally delinquent offenders who have also committed an offense with sexual connotations. This distinction is vital in understanding the youth’s motivation, and more important, in directing them to the most effective interventions.

Some troubled and delinquent youth will persist in their criminal behavior. They may have first been identified by the system for property or non-sexual offenses, but continue to engage in illegal and harmful behavior, to include sexual offenses. Certain members of this troubled and persistent population undoubtedly include those first identified with a sexual offense. However, the overwhelming share of those brought into the juvenile justice system because of a sexual offense will not sexually reoffend.<sup>22</sup> There are multiple reasons for non-reoffense, including, self-correction due to the fact of capture, the efficacy of interventions received, a forced recognition that what they did was wrong, enhanced family supervision, and the mere maturing process. Again, the research shows that the rate of their re-offense is considerably smaller than the offense rate by juveniles who have been previously adjudicated of a non-sexual offense.

<sup>18</sup> Caldwell, M. (2002) *What do we know about juvenile sex offender risk. Child Maltreatment*, 7, 291-302.

<sup>19</sup> Caldwell, M. (2016) *Quantifying the decline in juvenile sexual recidivism rates. Psychology, Public Policy and Law* Vol. 22, No. 4, 414-426. See also, *ATSA Practice Guidelines Assessment, Intervention and Management with adolescents who engaged in sexually abuse behavior. (2017) Association for the Treatment of Sexual Abusers. Beaverton, OR.*

<sup>20</sup> Caldwell, M. (2016) *Quantifying the decline in juvenile sexual recidivism rates. Psychology, Public Policy and Law*. Vol. 22, No. 4, 414-426.

<sup>21</sup> *ATSA Adolescent Practice Guidelines (2017).*

<sup>22</sup> “... juvenile sexual recidivism has very low bases rates: the fact is that the vast majority of youth adjudicated for a sexual offense will not sexually reoffend, even across decades-long follow-up. (citations omitted)...(one of the reasons is) the extensive developmental change that occurs during adolescence. Adolescents experience the onset of sexual impulses and the intensification of other appetitive impulse, undergo tremendous changes in social reasoning and susceptibility to social influences, and develop a greater capacity for impulse control and mature social reasoning.” Letourneau, E. and Caldwell, M. (2013) *Expensive, harmful policies that don't work or how juvenile sexual offending is addressed in the U.S. International Journal of Behavioral Consultation and Therapy*, Vol. 8, No 3-4, 23-29.



That said, of course a small percentage of juveniles with a sexual offense history will re-offend. That is the group which should form the primary focus of a prosecutor's concern.

For prosecutors, however, this has been made difficult due to over-reacting legislators and policy makers who have too often relied on folklore and select horrific cases to guide them. In an arena where nuance, thoughtfulness and empirical data are required, juvenile sex crime policy has generally been built on fervor and fear.

## THE INFLUENCE OF FEAR, FOLKLORE AND FISCAL INTEREST ON JUVENILE SEX OFFENDER POLICY

The preoccupation with sexual behavior instead of a focus on adolescent development has led to political overreaction which for a long time outpaced the empirical research.

Legislators chose to believe that adolescent sexual behavior foreshadowed adult sexual assault, and that teens who committed sex crimes were no different, and no less dangerous, than adults, despite a wealth of research to the contrary. Politicians and tough talking lawmen called them "Super-predators". And sure enough, every now and then some teenager would commit a heinous act of sexual violence which would test the bounds of all human understanding. Politicians and the media would again have a poster child for all that is wrong with our youth and our criminal justice system.

But while abhorrent individuals might make for a fine poster child for those seeking to score political points, and for a media needing an easy story, it is equally true that reliance on isolated sensational cases makes for terrible public policy.

Let's be clear: Acts of sexual violence against a child are reprehensible and intolerable. They rightfully scare us, anger us, call on us to demand justice. And justice should be meted out, with all appropriate harshness as deserved. A proper society should also want – and demand - that all reasonable efforts be made to prevent sexual crimes and crimes of violence against children.

But for too long the reactions to the heinous have done a disservice to prevention. And thus a disservice to the public. For too long, public policy has been governed by fear and by folklore to create a system which frequently has made things worse.

It is even more troubling than just that. Once new policies or legislation is put in place, systems and entrepreneurs (some well-intended, some not so much) can develop financial or ideological interests in maintaining those systems. Those self-interests often lead to their purveyors disseminating information supporting their views, and dismissing evidence to the contrary, to maintain the status quo.

This point was well stated by Chaffin. Reflecting in 2008 on 10 years of evolving juvenile sex offender policy, he noted the scientific field had come a long way: "The good news," he wrote, "is that the facts, by which I mean scientific data, are considerably more robust and lend themselves to firmer conclusions. The bad news is that the facts have hardly mattered at all in the public policy arena. Public policy has continued to move in the direction feared in 1998, despite an increasing accumulation of data to suggest that the reasons cited to justify these policies are no longer merely unproven or unexamined assumptions, but are flatly at odds with the facts as we know them." Chaffin, M. (2008) Our minds are made up don't confuse us with the facts: Commentary on policies concerning children with sexual behavior problems and juvenile sex offenders. *Child Maltreatment*, Vol. 13, No. 2, 110-121.

Chaffin called for a sweeping review of juvenile sex offender policy to insure it was fact-based but also to prevent needless, politically inflicted harm on our children.

This concern was shared by ATSA in their 2017 Adolescent Practice Guidelines: “public health and public safety are both jeopardized by ineffective or misguided public policy and criminal justice efforts.” (Section H, Public Policy: Promoting the Development of Effective Policy. Overview.) (Adding later, in Appendix D, “no one is served by poor policy.”)

Perhaps more pointed was the observation of Letourneau and Caldwell that “...the accumulated scientific evidence to date has demonstrated that when applied to juveniles (the predominant public policies) fail to achieve their stated goal of improving community safety.” In their critique they also note, “these policies have a wide array of damaging collateral effects.”<sup>23</sup>

Which brings me to the major point of this paper: If we care about the victims of crimes at the hands of juvenile sexual abusers; if we care about preventing sexual crimes and reducing recidivism by the adolescents who have committed them; then lawmakers must make policy based upon evidence and research and not fear, folklore or other’s financial interests. But if – and sadly, when – the politicians fail to do that, or fail to correct their errors or over-reactions, or even compensate for the unintended consequences which ensued, and when entrenched practitioners put their fiscal and ideological interests above the adoption of quality research and current state of the art thinking, then it is the prosecutors who must be guided by the very best research and the very best understanding of the empirical evidence. Prosecutors must also do so with full awareness of the financial interests of those involved, and completely cognizant of the implications of their decisions on the offender, on the victim and on society. Prosecutors’ decisions about how to respond to each allegation of sexually abusive behavior by an adolescent must be made not only with full knowledge of the facts of the individual case, but also with an appreciation for the consequences which will flow from those decisions.

To do otherwise, is to commit a great act of irony. It would permit prosecutors to make significant decisions without a full understanding and awareness of the consequences of their actions, in holding juveniles responsible for their significant decisions, when the juveniles had lacked a full understanding and awareness of the consequences of their actions.

## REACTIONARY LEGISLATION AND MISGUIDED POLICY: BEFORE WE TRY TO FIX THE PROBLEM, LET’S BE SURE WE RECOGNIZE AND UNDERSTAND IT

I observed above that fear driven public policy regarding juvenile sexual offenders has not only failed to properly address prevention issues, but has actually often made things worse. Let me offer a few examples:

What happened to children like Adam Walsh or the child victims of Wesley Dodd and Earl Shriner<sup>24</sup> are acts as reprehensible and despicable as the imagination could allow. In reaction to those horrific crimes, well-intended legislation was enacted. Much of this legislation was designed and crafted by thoughtful, informed policy makers. The goal was to protect the community from predatory sex offenders.<sup>25</sup> Those laws have led to various unforeseen, unintended and unfortunate consequences as it relates to the prosecution of juveniles accused of sexual offenses.

In 1991 Washington became the first state in the nation to create and mandate a sexual offender registry and community notification and to enact a Sexually Violent Predator law. The idea was that registration of sex offenders would be beneficial to law enforcement and that community notification would allow parents and the

<sup>23</sup> Letourneau, E. and Caldwell, M. (2013) *Expensive, harmful policies that don't work or how juvenile sexual offending is addressed in the U.S. International Journal of Behavioral Consultation and Therapy, Vol. 8, No 3-4, 23-29.*

<sup>24</sup> *These two horrific offenses against children, plus another involving the kidnapping and murder of a woman by a sex offender in work release, are what led Washington State to enact the first Sexually Violent Predator law, community notification and registration statutes, together known as the Community Protection Act.*

<sup>25</sup> *This paper addresses the consequences of these laws only as it relates to juveniles. No comment is made here about the effectiveness or appropriateness of these laws as they pertain to adults, although the author has written about that elsewhere.*

community to make informed and thoughtful decisions about how best to protect their children. By 2006 the Adam Walsh Act was passed by the U.S. Congress mandating all states to require registration of sex offenders including those aged 14 and older.

## AN OVERVIEW OF THE FAULTY PREMISE OF THESE LAWS AS THEY APPLY TO JUVENILES: AND WHY THIS MATTERS SO MUCH TO PROSECUTORS

Much of the legislation enacted over the past two decades, including community notification and sex offender registration was motivated by the criminal acts of adults. We have seen how adolescents who have engaged in sexually abusive behavior are a diverse group, with little commonality of motive or characteristics and generally a very small risk of sexual re-offense. The laws, however, have been applied to juveniles seemingly without an appreciation or respect for those differences or their general low sexual recidivism risk. The laws, designed primarily in response to the acts of adult sexual predators, or isolated, high profile blood-curdling crimes, have been directed to juveniles with little nuance.<sup>26</sup>

Some have criticized this movement as overly punitive and carried out with “particularly aggressive zeal.” Reviewing the evolution of sexual crime legislation in the United States, Letourneau and Caldwell noted, “...there is simply no other democratic nation in which youth adjudicated as minors for sexual offenses face penalties as severe as those found in the U. S.”<sup>27</sup>

Setting aside the discussion about how much zeal is overly “aggressive” zeal, the issue for prosecutors is to maintain their focus on what we “should do”, not what we “can do”.

The number of juveniles who are sent to detention, or the number of months of incarceration obtained should not be used by prosecutors as some kind of professional scorecard.

That can be a particular challenge in the prosecution of juvenile sex cases, because frequently the assignment of prosecutors to juvenile court is treated as a stepping stone to adult felony prosecutions. That is, often the prosecutor tasked with handling juvenile sex cases is a younger prosecutor. Promotions to what are often seen as more prominent positions, such as handling homicides or violent crime cases, are made only after the administration has faith in that person. In prosecution, that faith is frequently measured in the metrics of aggressiveness: Is she willing to take on tough cases, does she fearlessly go to trial, does she obtain a sufficient number of convictions and get stiff sanctions imposed?

This sets up a terrible predicament: What is good for individual career advancement might not be good for community safety.

This is one reason why, below, I call for the prosecutor assigned to handle juvenile sex crime cases to be a senior level prosecutor. It should be someone who is already secure in their position, secure in their career path and experienced in difficult decision making. The goal in this arena is to make the right decision. More specifically, the goal is to make the right decision for the right reasons. In dealing with adolescents who have engaged in sexually abusive behavior, making the wrong decision, either being too harsh or too lenient, can lead to severe, even catastrophic consequences. Having less experienced prosecutors making these decisions is difficult enough, having them do it at a stage when their careers may be being measured by their level of aggressiveness is rife with complications. It is a formula for conflicting interests which can lead to decisions that are bad for the offender, bad for the prosecutor and bad for the community.

<sup>26</sup> *The United States Supreme Court has been able to draw a distinction between adult offenders and juveniles: “the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed...youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage...” Roper v. Simmons, 543 U. S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).*

<sup>27</sup> *Letourneau, E and Caldwell, M (2013) Expensive, harmful policies that don't work or how juvenile sexual offending is addressed in the U.S. International Journal of Behavioral Consultation and Therapy, Vol. 8, No 3-4, 23-29.*

To be clear, this is not a call for leniency for juvenile sex offenders, nor an urging for prosecutors to be soft, empathetic or even sympathetic to the offenders. It is merely a call to be smart.

Let me review next why over-aggressive prosecution can sometimes be more dangerous than lenient prosecution. To appreciate that we need to examine how what I have called fear based, financially motivated, false claims stack up to the accumulated empirical data.

## MISPERCEPTION THAT THERE IS SOMETHING “SPECIAL” ABOUT ADOLESCENTS WHO HAVE ENGAGED IN SEXUALLY ABUSIVE BEHAVIOR THAT REQUIRES “SPECIAL” TREATMENT

I previously noted that there is no common characteristic among adolescents who have engaged in sexually abusive behavior. The most common aspect is they are typically juvenile delinquents who have offended sexually, and not sexual deviants who have offended as juveniles. That distinction cannot be disputed.

As delinquent adolescents, most will gain maturity, impulse control, empathy and an improved understanding of consequences that comes with the natural process of brain development. Others will stop their misbehavior by the adoption of better role models and the choice of healthier peers. For some, participation in appropriate, effective therapeutic treatment can bring about sufficient change to curb the abusive and delinquent behavior.

For only a small percentage is the reason for their sexually abusive behavior a paraphilic preference or a deviant sexual preoccupation.<sup>28</sup> And yet a common response to juveniles adjudicated of a sexual offense is to send them into a prolonged sexual deviancy treatment program typically modeled after those used for adults.

Specialized treatment programs for adolescents who have engaged in aggressive sexual behavior have been widely available for more than three decades.<sup>29</sup> As Letourneau and Borduin explain, they “were modeled after those designed for adult sexual offenders, with few adaptations for juveniles.”<sup>30</sup> More than 80% of these treatment programs are based on cognitive behavior therapy (CBT) or relapse prevention models, designed originally for adults.<sup>31</sup> Despite their questionable appropriateness for juveniles, these adult-modeled treatment modalities remain the predominant choice of practitioners throughout North America who treat juveniles who have committed sexual crimes.

The concern is that for most of the adolescents who have engaged in sexually abusive behavior, it is not ingrained sexual deviancy which is the driver of their offending actions, but the multitude of developmental, ecological and maturation issues which have been the primary contributors to their conduct. Nevertheless, many juvenile sex offender treatment programs are typically designed to target the “deviancy” and not the ecology.

Thus the most frequently used treatment is fashioned to fix a problem that may not exist, at the expense of thoughtfully addressing the issues which do exist.

That is why researchers who recently conducted a thorough review of the treatment outcome literature concluded: “... the available literature provides limited support for the effectiveness of CBT with youth who have engaged in sexual behaviors.”<sup>32</sup> This should not be surprising. In any field, treatments which are not focused on the problem are not apt to be successful.

<sup>28</sup> Seto, M., LaLumiere, M. and Blanchard, R. (2000) *The discriminative validity of a phallometric test for pedophilia interests among adolescents sex offenders against children*. *Psychological Assessment*, 12, 39-53.

<sup>29</sup> Knopp, F. H., Rosenberg, J. and Stevenson, W. (1986). *Report of nationwide survey of juvenile and adult sex-offender treatment programs and providers*. Orwell, VT: Safer Society.

<sup>30</sup> Letourneau, E. and Borduin, C. (2008) *The effective treatment of juveniles who sexually offend: An ethical imperative*, *Ethics and Behavior*, 18 (203), 286-306.

<sup>31</sup> *Ibid*.

<sup>32</sup> Dopp, A., Borduin, C., Rothman, D. and Letourneau, E. (2016) *Evidence-based treatments for youths who engage in illegal sexual behaviors*. *Journal of Clinical Child and Adolescent Psychology*. Advance online publication.

What adolescents who have engaged in sexually abusive behavior typically have in common is they are a lot like adolescents who have engaged in generally delinquent behavior. "Youths who engage in illegal sexual behaviors...share many risk factors at individual, family, peer, school and neighborhood levels with youths who commit non-sexual offenses."<sup>33</sup> As discussed below, that is why treatments which effectively target ecological causes and contributors of delinquency are more effective.

The treatment outcome data confirms the observations and data of the researchers in this field: Most adolescents who have engaged in sexually abusive behavior are not some "special" group of offenders. Treating them as "special" offenders, needing "special" treatments will not bring about the change that prosecutors, courts and probation officers desire. Ineffective treatment also comes at the expense of providing more valuable, developmentally appropriate, interventions, which would focus on risk factors for general delinquency.<sup>34</sup>

When resources and efforts are spent to provide treatments that are ineffective, based upon a misbelief of the offender's "specialness", public safety is harmed, not enhanced.

## MISPERCEPTION OF THE RISK OF RECIDIVISM

The truth is: the risk of sexual recidivism by juveniles is extremely low. That is, left alone or exposed to appropriate, quality treatment, very few juvenile sex offenders reoffend. The truth is: for most juveniles who engage in sexually aggressive behavior, it is not the start of a lifelong pattern.<sup>35</sup>

Another truth is: various policy makers refuse to accept this truth or just don't like it. In 2008, Chaffin noted the "low future sex crime rates among juvenile sex offenders in the United States are a well-replicated, robust, and long-standing scientific finding."<sup>36</sup> Chaffin was appalled when the official then in charge of implementing a policy of lifetime juvenile sex offender registration under the Adam Walsh Act nevertheless publicly claimed the scientific findings of juvenile recidivism risk were "inconclusive". That left Chaffin wondering: "It is difficult to know whether the statement is disingenuous or simply misinformed."<sup>37</sup>

It is a time-tested winning political strategy to ratchet up fear. Across virtually all industries, from pharmaceuticals, to insurance to self-protection, fear motivates and fear sells.

Prosecutors certainly know this; we are experts at selling defendants as fearful individuals. But prosecutors' decision-making should be influenced by empirical evidence, not fear.

The data, as noted above, is robust and replicated. The most comprehensive review of that data, published in 2016, examined 106 studies spanning more than 75 years and covering 33,783 cases of adjudicated juvenile sexual offenders. The result: "This suggests that the most current sexual recidivism rate is likely to be below 3%."<sup>38</sup>

<sup>33</sup> Dopp, A., Borduin, C., Rothman, D. and Letourneau, E. (2016) Evidence-based treatments for youths who engage in illegal sexual behaviors. *Journal of Clinical Child and Adolescent Psychology*. Advance online publication.

<sup>34</sup> To be clear, some juvenile sexual offenders do have serious deviancy issues or pose other atypical risks which do require specialized and focused treatment interventions. That is discussed later in this paper.

<sup>35</sup> Caldwell, M. (2016) Quantifying the decline in juvenile sexual recidivism rates. *Psychology, Public Policy and Law*, Vol. 22, No. 4, 414-426.

<sup>36</sup> Chaffin, M. (2008) Our minds are made up don't confuse us with the facts: Commentary on policies concerning children with sexual behavior problems and juvenile sex offenders. *Child Maltreatment*, 13, 110.

<sup>37</sup> *Ibid.*

<sup>38</sup> Caldwell, M. (2016) Quantifying the decline in juvenile sexual recidivism rates. *Psychology, Public Policy and Law*, Vol. 22, No. 4, 414-426.

## MISPERCEPTION ABOUT THE EFFICACY OF INCARCERATION: WHAT'S WRONG WITH "WE NEED TO BE TOUGH ON CRIME AND LOCK 'EM UP"?

Some juveniles need to be incarcerated. Some are truly terrifying, dangerous young men who are very apt to inflict great harm on innocent people if not incapacitated. That, fortunately, is the exceptional minority of adolescents who will come onto your juvenile sex crime caseload.

Incapacitation has its functions. Beyond incapacitation, it can reflect the seriousness of the offense; or send a message to the community about prosecutorial priorities; or be a gesture which may feel empowering to the victim. To a certain degree some or all of those rationales might be present in individual cases. But prosecutors in juvenile court need to be careful about locking adolescents up to send a message or empower a victim. Our job is to hold people responsible, obtain appropriate sanctions, and in the special realm of juvenile court, the goal is also to try to rehabilitate the offender when possible.<sup>39</sup> Most important, we should want to do this in a way which can best protect the community from future harm.

Thus incarceration of adolescents who have engaged in sexually aggressive behavior should be looked at not as a metric of how tough we can be, but as a measure of how smart we can be.

Detention or incarceration can provide a strong and memorable deterrent effect. It can have a deterrent effect on others in the same social network. A loss of freedom, like other unpleasant sanctions also comes with certain risks. Incarceration of adolescents who have engaged in sexually aggressive behavior will also introduce the juvenile to a new crowd of misbehaving youth. Given that adolescents are enormously influenced by their peer group, we generally do not want the worst of misbehaving youth to become the new role models for the first offenders. It is not surprising, then, that increased incarceration has been linked to increased recidivism.<sup>40</sup>

## WHAT DOES THE EMPIRICAL EVIDENCE TEACH US ABOUT THE SUCCESS OF THE PRINCIPLE COMPONENTS OF JUVENILE SEX OFFENDER POLICY?

As discussed, the principle components of current juvenile sex offender policy are those first laid out in Washington's Community Protection Act and later adopted in various other legislation typically named after children who were victims of horrific and appalling crimes: The Adam Walsh Act, Megan's Law and the Wetterling Act, as examples. The basic tenets were: Sex offender registration, community notification and, in 21 states, the District of Columbia and the federal government, the creation of the Sexually Violent Predator law.

Sufficient time has now passed to have permitted researchers to examine the efficacy of these laws, as they pertain to juveniles. How has the promise and intent of those laws stood up to their practice?

<sup>39</sup> Perhaps the case for rehabilitation can best be made by example. When Alan was a juvenile he was charged with arson on federal lands for trying to burn a war relocation structure. In a separate event he and his same age friends shot up mailboxes with rifles, shot at government roading equipment and one shot killed a cow. Probation followed, but during his probationary period Alan got into a fight in a pool hall. When police responded, Alan later admitted, he "belted the cop." In reflection, Alan described himself as "I was a monster." In a society that reflectively responds to locking up juvenile "monsters" Alan could have just been another troubled youth. However, since 1978 most people came to know Alan as Senator Alan Simpson of Wyoming, who served in the U.S. Senate for 18 years. (See: Brief of Amicus Curiae in support of Petitioners, in *Graham v. Sullivan*, In the United States Supreme Court, Cases 08-7412 and 09-7621. (July 23, 2009).

<sup>40</sup> McCarthy, P., Schiraldi, V. and Shark, M. (2016) *The future of youth justice: A community-based alternative to the youth prison model. New Thinking in Community Corrections.* October 2012, No. 2.

## THE BENEFITS AND COMPLICATIONS OF SEX OFFENDER REGISTRATION OF JUVENILES AND COMMUNITY NOTIFICATION OF THEIR RELEASE FROM CUSTODY

The two fundamental rationales for sex offender registration and community notification laws were (a) "...to assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies..." and (b) "if the public is provided adequate notice and information, the community can develop constructive plans to prepare themselves and their children for the offender's release." RCW. 9A.44.130. (legislative findings).

The federal Adam Walsh Act of 2006 directed all states to mandate that juveniles 14 years of age and older, convicted of certain sexual offenses, register as sex offenders. States which refused to comply with that mandate faced sanctions by way of a loss of certain federal funding.

Certainly, the goal of consolidating available, but difficult to access, information about those who had sexually offended against children, and making it available to law enforcement and the public was a well-intended strategy. Law enforcement can generally respond better when they have more information, and parents have a right to information which can help them protect their children.

But it hasn't exactly worked out that way.

A study of juvenile sex offender registration in South Carolina found that "registration increased the risk of youth being charged with a new sex crime, but no increase in the rate of conviction."<sup>41</sup> Researchers concluded: "...not only does registration fail to reduce recidivism, it also appears to be associated with increased risk of new charges that do not result in new convictions."<sup>42</sup>

Perhaps the increase in new charges, but not convictions, merely reflects the inherent difficulty in prosecuting child abuse cases. And perhaps the increased rate of charging, which would have at least required a judicial finding of probable cause, suggests the registered youth were subject to enhanced surveillance by law enforcement, and that, of itself, might be a good thing. Besides, having law enforcement and the general public know where these juvenile sex offenders are must have independent benefit.

Except for the unintended consequences.

When juveniles register as sex offenders, and are subject to community notification, the community typically does respond. The response may include banning those youth from certain locations, barring them from certain types of employment, denying them various social opportunities and perhaps expelling them from school.

These prohibitions might make good public policy if the youth subjected to them posed an enhanced risk to reoffend, or if they had the impact of reducing recidivism. But, as noted, the recidivism rates for this population are exceptionally low, in fact lower than the rates of sexual offending by youth not subject to registration and community notification. Meanwhile, registration showed no decrease in recidivism.<sup>43</sup>

Then there are those unintended consequences:

The most effective treatments with the population of adolescents who have engaged in sexually abusive behavior are those which involve working with the adolescents' family and community.<sup>44</sup> A frequent consequence of community notification and registration is to disassemble that community. In the response to criminal misbehavior, which may have been influenced by a poor peer group and

<sup>41</sup> Letourneau, E., Bandyopadhyay, D., Sinha, D., Armstrong, K. (2009). *The effects of sex offender registration policies on juvenile justice decision making. Sexual Abuse: A Journal of Research and Treatment*, 21, 149-165.

<sup>42</sup> Letourneau, E. and Caldwell, M. (2013) *Expensive, harmful policies that don't work or how juvenile sexual offending is addressed in the U.S. International Journal of Behavioral Consultation and Therapy*, Vol. 8, No 3-4, 23-29.

<sup>43</sup> Sandler, J., Freeman, N. and Socia, K. (2008) *Does a watched pot boil? A time-series analysis of New York State's sex offender registration and notification law. Psychology, Public Policy and Law*, Vol. 14, No. 4, 284-302.

<sup>44</sup> Dopp, A., Borduin, C., Rothman, D. and Letourneau, E. (2016) *Evidence-based treatments for youths who engage in illegal sexual behaviors. Journal of Clinical Child and Adolescent Psychology. Advance online publication.*

bad role models, community notification and registration often provides the indirect consequence of removing the adolescent from locations where he has access to positive role models and more socially appropriate peers.<sup>45</sup>

One of the most damaging repercussions for youth occurs when the sanctions imposed for their offense lead, directly or indirectly, to their expulsion or suspension from school. Higher school suspension rates are closely correlated with increased dropout and delinquency rates. Those lead to a variety of negative consequences which have significant economic costs to the individual student and society.<sup>46</sup> Setting aside all issues of social stigmatization, loss of peers and increased isolation, a compromised education is a common gateway to diminished employment opportunities. Increasing the probabilities of chronic un- or under-employment is not only a heavy price to pay for a youth's offense, but does not advance the long term best interests of the community. Those consequences increase risk of future crimes. Again, a misguided policy intending to punish, or isolate, frequently results in diminishing, not enhancing, community safety.

It is certainly understandable why school administrators (and more probably their legal counsel) might want to exclude "a convicted sex offender" from access to other children. It is equally understandable that the parents of those other children may have intensely heightened concerns.

Conversely, if the adolescent is unable to attend school, he has to fill his own time. That typically triggers the need to create a new set of associates. The available companions are those who have also been removed from school, and are prone to be an even less well-functioning group of peers. This is unlikely to enhance the troubled teen's peer group, but may instead provide an invitation to associations with already misbehaving youth, or even gang membership.

If the out of school adolescent manages to stay away from that crowd he is frequently choosing social isolation. Such solitary time is often filled with things like video games, which are not typically designed to enhance how adolescents perceive women or engage in respectful decision making, and, of course, the age old substitution for interpersonal interaction: pornography.

None of which is to suggest that misbehaving youth not be punished, not be incarcerated, not be removed from school. But a one-size-fits-all policy without an appreciation for the specific risks and needs of the individual child and the consequences of various interventions has the potential to worsen, not remedy, a problem.

Balancing those legitimate concerns is a challenging and difficult task. Sound public policy, grounded in established empirical evidence and aided by a prosecutor's input which accounts for all party's needs, would be warranted in this area.

That is why I call below for the regular use of quality assessments of adolescents who have engaged in sexually abusive behavior, to help evaluate their level of risk and their needs. Making thoughtful and evidence informed decisions about each individual adolescent will yield better results for the individual youth and for enhancing community safety, than the routine application of existing one-size-fits-all policies.

Researchers have found "a host of other negative consequences" of current legal policies.<sup>47</sup> These have included: Isolation, depression, increased suicidal ideation and increased suicide attempts, denied access to education, fear for their own safety. One study surveyed 265 professionals who provided clinical services to adolescents who had engaged in sexually abusive behavior and found 87% of them endorsed the view that these youth "have less hope for the future."<sup>48</sup>

<sup>45</sup> *The removal from school or social opportunities for example might include prohibiting playing team sports, participating in a band, play or artistic pursuit or joining education clubs. These are all pro-social activities that, typically provide avenues for growth and, in the case of misbehaving youth, self-correction through better role modeling. There are those who suggest that a consequence of juvenile offending, instead of barring youth from these programs, we should be mandating their participation. That is a debate for another day.*

<sup>46</sup> *For a general discussion of these issues, see Loren, D. (2015) Closing the school discipline gap: Equitable remedies for excessive expulsion. New York: Teachers College Press.*

<sup>47</sup> *Letourneau, E. and Caldwell, M. (2013) Expensive, harmful policies that don't work or how juvenile sexual offending is addressed in the U.S. International Journal of Behavioral Consultation and Therapy, Vol. 8, No 3-4, 23-29.*

<sup>48</sup> *Ibid. Also see Human Rights Watch (2013) Raised on the registry: The irreparable harm of placing children on sex offender registries in the US. Washington, D.C.*



It could be advanced that these negative consequences are acceptable as part of the punitive cost of sexual offending against children. Except they don't make our community safer.

In an effort to evaluate the effectiveness of juvenile registration requirements, researchers examined the recidivism rate of registered and non-registered male juvenile sex crime offenders in South Carolina. South Carolina requires lifetime registration for offenders convicted of specific sexual assault crimes, regardless of the offender's age. Examining cases for an average follow-up period of four years, Letourneau and her colleagues found a sexual offense reconviction rate of less than 1%.<sup>49</sup> When the researchers went back years later to see how these laws were evolving, they found something even more troubling for community safety.

Apparently aware of the host of negative consequences that flow from sex offender registration and community notification, especially as weighed against its putative benefits, prosecutors had significantly increased their willingness to plea bargain or redefine juvenile sex offense charges to those which would carry no registration and notification requirements.<sup>50</sup> They found "a 124% increase in plea bargains leading to non-sex offense charges from the period predating registration to the period following initial enactment of registration, and another 50% increase in plea bargains following enactment of online registration notification."<sup>51</sup>

In other words: The consequences of the effort to provide enhanced public information about the location of adolescents adjudicated of sexual offenses led to lesser proper labeling of the offender's crimes. The consequences of the effort to learn more, led to the community learning less.

This redefining of criminal acts to avoid community notification and registration requirements creates another problem which has the potential to diminish community safety. Recall that the third prong of the Community Protection Act, and sex offender policy which followed, was the creation of the Sexually Violent Predator laws which have been adopted federally and in 21 states. These laws are designed to target the very "worst of the worst" and when used properly are successful in being very selective.<sup>52</sup>

The successful evaluation of these cases, and the successful prosecution of these cases, requires prosecutors to understand the full histories of the individual being considered. When the unintended consequences of overly broad community notification and sex offender registration cases leads to a pattern of relabeling the offender's conduct, prosecutors may be denied information about the histories of the most serious of offenders: The very kind of offenders that motivated the creation of these laws in the first place. That does not enhance community safety.

## AN ADDITIONAL COST: WHEN WE DO THINGS THAT DON'T WORK, IT MEANS WE LOSE THE OPPORTUNITY TO DO THINGS WHICH DO WORK.

It's not that researchers and informed clinicians don't know what to do with most adolescents who have engaged in sexually abusive behavior. Interventions are known which show substantial effectiveness with this population.

<sup>49</sup> Letourneau, E. and Armstrong, K. (2008) Recidivism rates for registered and nonregistered juvenile sexual offenders. *Sexual Abuse: A Journal of Research and Treatment*, 20, 393-408.

<sup>50</sup> How much of this is due to prosecutors' initiative and awareness, or more intransigence by the defense bar to avoid the consequences of these laws, is hard to tease out. A defense strategy that is prepared to challenge more cases, necessitating more trials, and thus requiring more victims to come to court certainly could play a role in reaching compromise resolutions. The researchers offered their view that "prosecutors became significantly less likely to move forward on cases". Either way, the result was the same, and there was a significant increase in the relabeling of charges to avoid sex offender registration requirements.

<sup>51</sup> Letourneau, E., Armstrong, K., Bandyopadhyay, D. and Sinha, D. (2013). Sex offender registration and notification policy increases juvenile plea bargains. *Sexual Abuse: A Journal of Research and Treatment*, 25, 189-207.

<sup>52</sup> An early analysis of the filing process in Washington State showed that approximately only 2% of all incarcerated sex offenders facing release were closely investigated by the assigned administrative agency for appropriateness of filing a SVP petition; of those barely half were forwarded to prosecutors for consideration of filing, and from that, only about one-third had petitions filed against them. Schram, D. and Milloy, C.D. (1998) Sexually violent predators and civil commitment: A study of the characteristics and recidivism of sex offenders considered for civil commitment but for whom proceedings were declined. Washington State Institute of Public Policy, Olympia, Wa.

Multisystemic therapy (MST) is a family and community-based treatment model that “integrates structural and strategic family therapies, behavioral parent training and cognitive behavioral treatment aspect to reduce adolescent antisocial behaviors.”<sup>53</sup> The adaptation of MST for the treatment of youth with illegal sexual behaviors is known as MST for Problem Sexual Behaviors: MST-PSB.<sup>54</sup>

We have discussed the nature of most adolescents who engage in sexually aggressive behavior. The research has identified them as more like other generally misbehaving youth, rather than as miniature versions of adult sex offenders. The predominant external forces on these youth are the quality of caregiver supervision, pro-social peer groups and positive role models (which combine with their undeveloped impulse control and moral decision making). MST-PSB seeks to target those external forces.

MST-PSB is described as “an intensive, holistic treatment delivery system which involves rigorous quality assurance system...the overarching goal of MST-PSB is to empower caregivers (and other important adult figures) with the skills and resources needed to address the youth’s sexual behaviors and other behavior problems.”<sup>55</sup>

It is not surprising, then, that a review of the studies of the effectiveness of MST-PSB on this population “demonstrated significant reductions in posttreatment sexual offense rates in two randomized clinical trials.”<sup>56</sup>

MST-PSB is a community based treatment. Researchers have also found effective treatments for those adolescents who have demonstrated too great a risk to remain in the community and have been incarcerated.

Mendota Juvenile Treatment Center (MJTC) is a facility in Wisconsin established “to treat aggressive, severely behaviorally disordered delinquent boys who were unmanageable in other secure corrections settings...it was designed to treat aggression and severe behavioral disorders.”<sup>57</sup> Several studies have evaluated the effect of MJTC treatment. The research documented that MJTC treated youth are charged with violence offenses at less than half the rate of matched but untreated comparison youth.<sup>58</sup> In addition, the treatment effect appears to specifically alter specific interpersonal exploitation characteristics in treated youth with psychopathic features.<sup>59</sup> That is, the treatment was effective at positively impacting characteristics most likely to contribute to acts of sexual violence.

The identification of these two treatment programs, one community based and one custodial, specifically designed for otherwise unmanageable youth, are offered as examples of intervention programs that work with adolescents who engage in sexually aggressive behavior. They are by no means the only two treatments that work, and their inclusion here is not to suggest the exclusion of others. But these two programs have one thing in common: They are evidence based. They are grounded in proven scientific principles and subjected to careful oversight and supervision. They have been studied and reviewed and found to be effective.

Despite years of concern and focus on juvenile sexual offenders, most commonly used interventions fail to meet those standards: “...recent estimates (are) that only 5% of serious juvenile offenders receive an evidence-based treatment...(citations omitted)...it seems likely that the vast majority of youths with illegal sexual behaviors are treated with interventions that lack such support.”<sup>60</sup>

<sup>53</sup> Dopp, A., Borduin, C., Rothman, D. and Letourneau, E. (2016) Evidence-based treatments for youths who engage in illegal sexual behaviors. *Journal of Clinical Child and Adolescent Psychology*. Advance online publication.

<sup>54</sup> Bourdin, C., Henggler, S., Blaske, D and Stein, R. (1990) Multisystemic treatment of adolescent sexual offenders. *International Journal of Offender Therapy and Comparative Criminology*, 34, 105-114.

<sup>55</sup> Dopp, A., Borduin, C., Rothman, D. and Letourneau, E. (2016) Evidence-based treatments for youths who engage in illegal sexual behaviors. *Journal of Clinical Child and Adolescent Psychology*. Advance online publication.

<sup>56</sup> Ibid.

<sup>57</sup> Caldwell, M. (2011) Treatment-related changes in behavioral outcomes of psychopathy facets in adolescent offenders. *Law and Human Behavior*, 35, 275-287.

<sup>58</sup> Caldwell, M. and Van Rybroek, G. (2005) Reducing violence in serious juvenile offenders using intensive treatment. *International Journal of Law and Psychiatry*, 28, 622-636.

<sup>59</sup> Caldwell, M. (2011) Treatment-related changes in behavioral outcomes of psychopathy facets in adolescent offenders. *Law and Human Behavior*, 35, 275-287.

<sup>60</sup> Dopp, A., Borduin, C., Rothman, D. and Letourneau, E. (2016) Evidence-based treatments for youths who engage in illegal sexual behaviors. *Journal of Clinical Child and Adolescent Psychology*. Advance online publication.

# WHAT DOES THIS MEAN FOR PROSECUTORS? A PROPOSED PARADIGM FOR EVALUATING AND PROSECUTING ADOLESCENTS WHO HAVE ENGAGED IN SEXUALLY ABUSIVE BEHAVIOR

## PART I: ASSESSMENT

The major problem of the existing policies regarding juvenile sex offenders is that they generally provide a “one-size fits all” remedy. In well-intended efforts to guard against the risky, the policies have adversely impacted an entire group, much of which poses little risk. Existing policies appear to presume that the majority of adolescents who have engaged in sexually abusive behavior are high risk, despite the research which shows the majority to be low risk. The consequences of these misguided beliefs have raised the specter of impeding the effective rehabilitation of these youth, which does not serve the community well.

Policies which seek to examine each adolescent individually rather than as a member of a heinous group, to be feared, will better serve the community and the youth. Policies which seek to match the offender with the proper intervention, in a meaningful way, will better serve the youth and the community.

Prosecutors can make that happen.

We generally prefer doctors who diagnose before they treat. We like plumbers who evaluate before they rip into walls. We clearly like police officers who thoroughly investigate before they arrest.

Diagnosis, evaluation and investigation are sound, smart prerequisites before action. In working with adolescents who have engaged in sexually abusive behavior, those terms combine into one: Assessment.

A comprehensive, professional assessment of the juvenile can assist the prosecutor, and the Court, in matching each adolescent’s risks and needs with the most appropriate available intervention.

Professional assessments of adolescents include such things as: An understanding of the youth’s history, home situation, caregiver support, school performance and disciplinary history, prior involvement with child welfare, community interventions, family or community support systems, nature of his peer group, socioecological situation, co-occurring psychological or behavioral disorders, learning disabilities, intellectual deficits, substance abuse status, how the youth uses his leisure time, general attitudes, values and beliefs regarding family, authority and crime. This is an illustrative, hardly exclusive listing.

Standards for assessment of adolescents who have engaged in sexually abusive behavior have been set by ATSA.<sup>61</sup> In 2017 ATSA published Practice Guidelines for the Assessment, Intervention and Management with Adolescents Who Have Engaged in Sexually Abusive Behavior. Prosecutors are urged to obtain those guidelines<sup>62</sup> and become familiar with them. More significantly, prosecutors are urged to make sure all who assess and evaluate<sup>63</sup> adolescents are familiar with them.

That said, those who assess these adolescents need not be – and some would argue should not be – exclusively sex offender treatment specialists. Recall that most of the adolescents who engage in sexually aggressive behavior are most similar to adolescents who engage in general delinquent behavior, and are not ingrained sexual abusers. While an understanding of adolescent sexual behavior is important, focusing on that to the exclusion of general adolescent behavior and development is limiting.

<sup>61</sup>As noted previously, ATSA is the Association for the Treatment of Sexual Abusers. It is the world’s leading multidisciplinary organization that is committed to preventing child sexual abuse by promoting sound research, developing effective practice guidelines for individuals who have engaged in sexually abusive behavior and advancing informed policy.

Other thoughts and considerations are offered in Grisso, T. (2013) *Forensic Evaluation of Juveniles*, 2nd Edition, Sarasota, FL: Professional Resource Exchange.

<sup>62</sup>See [www.atsa.com](http://www.atsa.com).

<sup>63</sup>Prosecutors must also be aggressive in making sure judges, who ultimately impose sanctions and conditions on these youth, are made familiar with these standards and the existing research.

Well trained professionals, grounded in child development issues, with an understanding of delinquency, juvenile justice issues, and knowledgeable of child and adolescent sexual behavior, who are also familiar with the ATSA Guidelines, are the ideal for doing these assessments.

Over the past two decades exceptional work has been done to create actuarial risk instruments which are now in common use for adults, particularly in Sexually Violent Predator cases. In general these are research-identified, empirically supported, predominately static factors which have demonstrated a correlation to enhanced risk to reoffend (for example, age at first offense, number of failures on past supervision, time free of a new offense<sup>64</sup>). These are sometimes modified by dynamic factors, that is, things which can change (like current age or participation in treatment) which have been shown to also significantly influence risk. (There remains some debate about the reliability and appropriate influence of dynamic factors with adult actuarial instruments, but that is beyond the scope of this paper.)

Structured risk assessment tools have been developed specifically for adolescents. It is generally agreed that these instruments are an improvement over unstructured clinical judgment in offering assessments of future risk. The role of the dynamic factors appears to be more significant with the adolescent population (for the reasons discussed previously; adolescent's behaviors are significantly influenced by their social environment and concurrent brain development, which are fluid events.) These instruments are not "stand-alone" assessment measures and are to be used in conjunction with a thorough assessment of the adolescent's needs and risks. Evaluators (and prosecutors) need to be aware of the most appropriate, current and empirically supported risk assessment measures and have an appreciation for their strengths and limitations.

As important as understanding what these assessments address, it is vitally important to also recognize what they should not be used for.

These are to be used to assess the troubles, strengths, risks, motivators and needs of the youth. They are not to make judgments about the accuracy of the allegations.

As the ATSA Guidelines make clear: "Practitioners recognize that assessments cannot prove or disprove that sexual abuse has occurred, and this is not the role of an assessment, or predict with certainty that such behavior will or will not reoccur, and should educate referral sources accordingly." (Guideline 2.10). There is one other limitation in these assessments.

## USE OF POLYGRAPHS AND PLETHYSMOGRAPHS IN THE ASSESSMENT AND TREATMENT OF JUVENILES: DON'T.

The reliability of polygraphs has been debated in the legal community since at least 1923 (Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923)).<sup>65</sup> Nevertheless its use in adult sex offender assessment and treatment had been routine in the United States for decades. This article does not seek to address polygraph use with adults.

A 2009 survey of 373 juvenile sex offender treatment programs in the United States reported that 50% of them used polygraph interrogations as part of their protocol.<sup>66</sup> Yet polygraphs are rarely used and often banned from juvenile sex offender treatment programs in other countries, and are rarely used in other aspects of juvenile delinquent treatment.<sup>67</sup>

<sup>64</sup> Hanson, R., Harris, A., Letourneau, E., Helmus, L. and Thornton, D. (in press) *Reductions in risk based on time free in the community: Once a sexual offender, not always a sexual offender. Psychology, Public Policy and Law.*

<sup>65</sup> For more see: National Research Council (2003) *The polygraph and lie detection*, Washington D.C.: The National Academies Press, Committee to Review the Scientific Evidence on the Polygraph, Division of Behavioral and Social Sciences and Education.

<sup>66</sup> McGrath, R., Cumming, G., Burchard, B, Zeoli S. and Ellerby, L. (2009) *Current practices and emerging trends in sexual abuser management: The Safer Society 2009 North American Survey*. Brandon, VT: Safer Society Press.

<sup>67</sup> Chaffin, M. (2011) *The case of juvenile polygraphy as a clinical ethics issue. Sexual Abuse: A Journal of Research and Treatment.* 23, No. 3, 314-328.

Chaffin vociferously argued that polygraphs have no place in juvenile sex offender assessment or treatment.<sup>68</sup> He maintained that the various issues of reliability and a risk-benefit analysis made polygraph use with alleged juvenile sex offenders a breach of ethical practice.

That position was posthumously adopted when in February, 2017 ATSA amended their Guidelines to foreclose the use of polygraphs and plethysmographs for that population. ATSA adopted this standard:

*Polygraph and plethysmography are physiological measurements designed for use with adults. Their use was extended to adolescents (and younger children) without establishing their scientific validity and without full consideration of their potential for harm. In particular, no research has subjected either measurement to controlled evaluation with relevant comparison groups including adolescents who have not offended sexually or otherwise. There are, therefore, no “norms” against which to compare measurement results, which severely limits their interpretability. More generally, neither measurement has been shown to improve treatment outcomes, reduce recidivism, or enhance community safety. Neither measurement is regularly used outside of the United States. Indeed, some countries have banned the use of one or both measurements with minors. Ethical concerns raised for both measurements include the potential for coercion and for engendering fear, shame and other negative responses in adolescent clients. Further ethical concerns relate to the prospect of basing impactful decisions (including those relevant to such things as legal restrictions and/or family reunification) on the results of measurements that are largely unsupported, empirically. Separately, plethysmography involves the ethically concerning practice of exposing adolescents to developmentally inappropriate sexual material. **Without a clearly identified benefit and with a potential for harm, ATSA recommends against using polygraph or plethysmography with adolescents under age 18.***

(emphasis added.)

The use of the polygraph and the plethysmography have no place in the assessment or treatment of adolescents alleged to have engaged in sexually abusive behavior. Prosecutors must be insistent in relying only on reliable, valuable and ethically obtained data. Polygraphy and plethysmography use with juveniles fail to meet that threshold and prosecutors should not be seeking nor accepting such testing. Those practitioners who insist on their use may be in violation of their profession's standards, and prosecutors should be skeptical as to whether they are advocating the use of these tools for financial and not empirical interests.

## WHEN SHOULD THESE ASSESSMENTS BE DONE?

I have advocated for the use of thorough assessments of adolescents accused of sexually abusive behavior. These assessments can help identify the individual's risks and needs so as to be able to best match those with the most effective interventions and the imposition of appropriate sanctions. A logical question follows: When in the process should these be done, pre-adjudication or post-adjudication?

Like determining the best interventions and treatment modalities to be utilized in each individual jurisdiction, my answer is “it depends”. There are advantages and disadvantages of conducting these assessments at either time in the proceedings. My urging is that each community understand the merits of each alternative and engage in a multi-disciplinary discussion which incorporates an appreciation of the available resources within the community. The existing and available professional labor force, coupled with factors such as geographic, cultural, and fiscal realities and limitations, will combine with prevailing procedures, evolving community philosophies and reliance on the empirical evidence, to develop best practices.

There are several arguments for conducting the evaluations post-adjudication. Certainly one major consideration is financial. There will be a smaller pool of evaluations needed if they are done only on those who have already been

<sup>68</sup> *Ibid.*

adjudicated and not on all those who have been charged with sexual crimes. That is a practical reality. Further, while some evaluators are skilled at focusing their work on developing an appropriate risk assessment and treatment plan, without resolving the issue of whether the individual “did it or not”, others find it difficult to do a thorough evaluation without first obtaining an admission (or some declaration) from the youth about what conduct they had engaged in which led to the charges. Evaluators might also find it necessary to determine the extent of any prior inappropriate behavior by the adolescent. These data points could obviously be significantly prejudicial to the juvenile if disclosed prior to adjudication. As a practical matter, if these evaluations were to include a requirement of an admission and/or a discussion of past acts, the youth’s attorney may seek to prevent the assessment, making this process moot. Prosecutors, of course, will be loathe to afford immunity for disclosure of unknown past events.

There are arguments for conducting these evaluations pre-adjudication. As a practical matter, the more information prosecutors have about the juvenile, the better they can consider redefining the charges to best label the youth’s conduct and to create (or prevent) various sentencing alternatives. With an informed understanding of the youth’s motivations, the causes of his illegal behavior and a thoughtful risk assessment a prosecutor might more easily be persuaded to reduce charges or seek lighter sanctions.

If the assessments are done after the juvenile has been adjudicated, the charge has already been defined and, as noted, in many states it is the charge itself which controls the sanctions to be imposed. A pre-adjudication assessment gives the parties the best chance to shape the best desired outcome for all concerned.

Additionally, the earlier in the process that the adolescent’s treatment needs can be identified and a risk management plan developed, the faster appropriate safeguards and interventions can be put in place.

Each community should debate the pros and cons of the timing of these evaluations, and decide what information is most needed and when it is best to receive it. Determining the timing of these evaluations will be a part of the prosecutor-led community discussions about developing the best response to sexual crimes committed by adolescents.

I have noted this earlier, but it bears emphasis: It is not appropriate for evaluations (pre- or post- adjudication) to offer opinions on the accuracy of the specific allegations or, more specifically, the guilt or innocence of the individual.

## BEWARE FINANCIAL INTERESTS AND IDEOLOGY

I have earlier noted the concern that some policies and practices may be influenced by financial interests. Prosecutors are very familiar with this phenomenon. The realm of juvenile sex offender evaluators and treatment providers is no different. That there are some who “invent” tests and practices which have little benefit to anyone except their own pocketbook, is not news to prosecutors used to dealing with expert witnesses. Prosecutors have been schooled on methods to expose and cross examine irresponsible expert witnesses.<sup>69</sup>

The basic methodology for exposing those experts is to develop a firm understanding of what they believe; and why they believe it. When prosecutors understand the reasons the expert endorses to support his or her opinions, prosecutors can arm themselves with the knowledge to challenge the scientific and logical validity of those reasons, and then skillfully attack the underpinning of the opinions.

<sup>69</sup> *Recognizing the irony of the placement of this footnote, I can't help but recommend as a resource Stern, P. (1997) Preparing and presenting expert witnesses in child abuse litigation: A guide for expert witnesses and attorneys. Sage Publications.*

To that end, having some grasp of the literature in the field, the empirical evidence which supports or disputes it and a general familiarity with research methodology is essential to successfully confront the irresponsible expert witness.

Beyond challenging the underlying scientific and logical validity, two other forces can play an influential role in why an expert chooses to believe what they believe.

One factor, of course, is money. To be clear, experts in this field should not be criticized or assailed for being compensated for their time and experience. This is a challenging field and we are all better served if it has fiscal rewards sufficient to entice the best minds and skills into the field. But fiscal self-interest should not interfere with the application of best practices. Professionals in this field should be inspired – should be compelled – to follow the best empirical practice. They should not be guided by an interest to reach conclusions favored by their retaining attorney, or by what results might yield the most referrals.

Prosecutors handling cases of adolescents accused of sexual crimes need to be informed (and stay informed) regarding best practices.

Prosecutors must be cautious of evaluators administering or using unneeded or unreliable assessment tools. Prosecutors should be wary of claims by experts that they are merely doing things “because that’s the way we’ve always done it”, as that is usually the single worst reason to do something.

For example, I noted above that ATSA recently declared: “Without a clearly identified benefit and with a potential for harm, ATSA recommends against using polygraph or plethysmography with adolescents under age 18.”

If polygraphy is a regular part of your community’s assessment process with adolescents under 18, that practice has just been severely challenged. If practitioners persist in administering polygraphs to that population, prosecutors rightly must ask: Do you know about the new ATSA Guidelines? Are you aware of the research which was relied upon to approve those guidelines? Do you have a legitimate scientific challenge to those conclusions? If there is awareness and no legitimate scientific challenge, prosecutors must rightly explore - forcibly, and in court as needed - if the reason for continuing that practice is for the financial reward it brings.

This may be true in various aspects of assessments. Why are certain tests administered? What is the scientific reliability of the specific techniques used? For example, as this is written the field of brain scan research and its application to juveniles or delinquent behavior is in the active developmental stage. Information and hypotheses exist, but scientifically valid links and conclusions are far from being generally accepted. Brain scans may be useful in some capacities but unreliable to draw conclusions from in other aspects. Prosecutors need to be aware of those scientific limitations and it is fair to inquire whether certain testing is ordered for sound forensic purposes or financial self-interest.

Similarly, if a treatment program being proposed by either the defense or their evaluator/expert – or even if by the court – is one that has been shown to lack effectiveness, or as is true with some programs, apt to exacerbate a problem,<sup>70</sup> prosecutors must be prepared to challenge those practices. A thoughtful, informed challenge of these programs or protocols also serves as an opportunity for prosecutors to educate judges.<sup>71</sup>

A somewhat more complicated factor to discover is the professional ideology of the expert. Especially in cases involving topics like sexual abuse, children and interpersonal violence, it is not uncommon for personal feelings or professional attitudes about an act or the consequences of that act to influence a viewpoint. Prosecutors should be aware of that potential and be prepared to explore that thinking process.<sup>72</sup>

<sup>70</sup> The Washington State Institute for Public Policy reported, for example, that juvenile “boot camp” programs led to higher recidivism rates compared to juvenile offenders who went through regular juvenile institution facilities. Aos, S., Phillips, P, Barnoski, R and Lieb, R. (2001) *The comparative costs and benefits of programs to reduce crime; Version 4.0.* Washington State institute on for Public Policy. Olympia. Wa.

<sup>71</sup> This is discussed more fully in Stern, P. (1995) *Thoughts on how prosecutors can inform judges on child abuse and neglect issues.* The APSAC Advisor, Vol. 8, No. 1. Spring, 1995. American Professional Society on the Abuse of Children.

<sup>72</sup> I have written on the influence of ideology in the interplay between SVP laws and the drafting of the DSM-V. Stern, P. (2011) *Wollert (2011) demonstrates again how ideology taints scientific debate.* Letter to the Editor, *Archives of Sexual Behavior.* Vol. 40, Issue 6, 1099-1100.

Prosecutors need to be prepared to question why it is that a professional, be they clinician, forensic examiner, physician or any other expert, has chosen to follow a particular practice. If that individual holds to a protocol in spite of empirical evidence which clearly disputes its efficacy, then prosecutors rightly need to know if that is because of a lack of knowledge of the current science, a legitimate dispute about the accuracy of that science, or because the developed empirical evidence challenges, or supports, a particular ideology or their personal profitability.

This is true in all aspects of prosecution. The task of thoughtfully questioning the scientific validity of an expert's processes and conclusions is a routine part of a prosecutor's job.

In cases of adolescents accused of sexually aggressive behavior, the potential consequences to the community and to the youth from mistaken reliance on unreliable data can be severe. Thoughtful, informed consideration of assessment procedures, with an awareness of the possible motives for the expert to use or rely on inappropriate tools is needed. Prosecutors want to do all they can to avoid making an incorrect decision, relying on an incomplete or improper assessment, or endorsing an ineffectual or even harmful treatment or intervention.

This is one more reason why I advocate that the juvenile sex offender prosecution position be handled by a senior lawyer, with the experience and skills to identify these issues and effectively confront inappropriate practices.

## **A PROPOSED PARADIGM FOR EVALUATING AND PROSECUTING ADOLESCENTS WHO HAVE ENGAGED IN SEXUALLY ABUSIVE BEHAVIOR**

### **PART II: INDIVIDUALIZED, INFORMED DECISION MAKING**

Fear based responses to crime tend to focus on the act, not the actor.

The prosecutorial reason for that is understandable: It is the very concept of the blindfolded Lady Justice and the dedication to punish all acts the same regardless of the status of the offender or the victim. But with juvenile sex offense cases, by focusing on the act itself, and not the actor, prosecutors and court systems are prone to impose inappropriate sanctions which may be more likely to enhance, not diminish, the risk of sexual re-offense.

Properly distinguishing between the dangerous juvenile sex offender and the adolescent who has committed sexually aggressive crimes but has done so out of immaturity, impulsiveness or other reasons which can typically be corrected with proper – and often minimal - interventions, is perhaps the most difficult task prosecutors are responsible to undertake. To refuse to take on that role, however, is to take the blindfold off of Lady Justice and put it on the prosecutor. To merely handle each case as if they all present the same indistinguishable, amorphous offender, and present the same indistinguishable recidivism risk, is to needlessly harm juveniles and imperil the community. The right approach takes time, takes study and is difficult. It's hard. But taking the right approach and doing the right thing is what responsible prosecutors do.

The most significant first step in trying to make the right decision is to have the right person making that decision. I have suggested that the decisions made regarding juvenile sex offense cases are the most difficult prosecutors have to make. Those decisions are usually complicated by unfamiliarity with the existing literature, and may be influenced by incorrect information disseminated by an uncritical media, or reliance on misinformed professionals. They are certainly influenced by fear-based policies, and reinforced by dogmas.



The person assigned to handle juvenile sex offender cases must have, as a core function of their professional assignment, the commitment to become familiar with the relevant and reliable literature in this field. I have tried here to lay out a summary of complex scientific research and data in a way that makes it accessible to prosecutors.<sup>73</sup>

Supervisors must provide the time and the opportunities for that study and continuing education. Resources need to be allocated for the education of the prosecutor(s) assigned to juvenile sex crime caseloads. This requires a firm commitment to the juvenile sex crimes position, particularly by large and medium sized offices. That commitment involves permitting sufficient time for the assigned prosecutor(s) to learn, incorporate and be able to thoughtfully apply the research and best practices in this area. Doing so will generally mean a lengthy tenure in that position, as opposed to short term rotational assignments. To accommodate that there must also be a recognition of the emotional nature of these cases and that the often exhausting caseloads can impose a toll on the individual lawyer assigned. Thus, pro-active, flexible policies to guard against burnout and emotional wear are essential.

How to respond to specific sexual offenses committed by adolescents is difficult and of great consequence. The ramifications of making the wrong decision can be catastrophic to the community and to the youth involved. Those decisions should be made by a prosecutor with significant experience in the area.

The assigned prosecutor will need to have a familiarity with the dynamics of sex crimes, issues of victimization, an understanding of the extent and limitations of the medical and scientific evidence available in these cases. The assigned prosecutor will need to possess an appreciation for the ramifications of being a sex crime victim, of what typical reactions are for those victims, and have some skill using trauma focused approaches in working with victims. The prosecutor should understand how best to marshal witnesses and evidence to prove these often one-on-one cases, best practices in presenting children's testimony in court,<sup>74</sup> how to work with and often direct follow-up investigations to search for corroborative evidence, and how to gain skills at presenting this evidence to a fact finder.

Many prosecutors' offices tend to view the juvenile court as a "starting" position. Because juvenile court doesn't involve jury trials, the juvenile unit is often looked upon as a place for young prosecutors to learn their craft: Learning to review and evaluate more complicated reports, and to interact with families, advocates, police and staff. Because the sanctions are typically much less than in adult court, the juvenile court assignment is often viewed as one where no great mistakes can be made. It is sometimes the stepping stone segue from dealing with misdemeanor cases to adult felonies.

That concept of using the juvenile sex crimes position as an "introduction" to felonies is certainly understandable, but I suggest naive. Asking a new(er) prosecutor to learn about handling felony cases, about all the issues discussed above and to possess a comprehensive understanding of the complexity of issues raised above and in this paper is a lot to ask of a young prosecutor. It is asking an inexperienced prosecutor to properly evaluate risk, assess best outcomes, recommend appropriate interventions and recognize that not all offenders who present "as a nail" need to "be hammered". It is asking them to make decisions so that juveniles and community safety are not made worse by just "doing what we've always done."

It is difficult and likely unfair to ask a young lawyer to learn all the skills of aggressive prosecution and negotiation while at the same time teaching them the importance of nuance and the benefits of more therapeutic and less punitive interventions in appropriate cases.

<sup>73</sup> *The limitation of space and the complexity of these issues has allowed me to provide merely a tip of the iceberg: You can see the dangers posed and with that can develop a thoughtful, safe route around the danger. However I acknowledge there is far greater scope and depth of these issues to be explored.*

<sup>74</sup> *Lipovsky, J and Stern, P. (1997) Preparing children for court: An interdisciplinary view. Child Maltreatment, Vol. 2, No. 2, 150-163.*

It is thus strongly advocated that the prosecutor assigned to making decisions on juvenile sex crime referrals should have previous experience with sex crime cases.

For the best outcomes, practitioners need to apply the best practices. It is incumbent on the prosecutor to question existing practice, and to take a leadership role in ending unproven approaches and segueing the community into adopting sounder methodologies and responses. I believe that a well informed and respected prosecutor can have enormous sway in influencing and redirecting community policy. A prosecutor without a significant track record, no matter how right she might be, will likely find that task draws stronger resistance.

The best decision-making processes and most effective outcomes are possible only if all players are working with the same over-arching philosophies. Only by a community-wide adherence to the best empirical practice can existing but ineffectual practices be rejected and replaced or reformed into effective ones.

A multi-disciplinary approach, with all participants sharing a similar goal, is important. That is much easier when all participants share the same empirical understandings. Professionals might disagree on the approach to take based upon the empirical evidence, but they should be able to first find consensus on what the evidence is. As former Senator Daniel Moynihan said: "Everyone is entitled to his own opinion, but not his own facts."

An informed, thoughtful prosecutor can be the community leader in disseminating the empirical evidence in this area and ensuring that all participants are working off of the same data. It is one more reason that a senior, experienced prosecutor, able to bring an existing credibility and stature to the community discussions, is needed in this area.

What would community-wide adherence to best empirical practice look like? I have discussed the need for quality assessments of the offenders to determine their motivation, needs and risks. I have discussed the preference to properly label their conduct, but with sensitivity to the cascade of consequences that are likely to follow adjudication.

That information should help prosecutors, in conjunction with the multi-disciplinary community, direct the juvenile to the best and most appropriate therapeutic interventions. The over-riding twin goals, of course, being accountability and the reduction of future reoffense.

I earlier made note of two treatment protocols: Community based MST-PSB and the institution based Mendota Juvenile Treatment Center model. They were introduced not because they are what your community should adopt, but as examples of how effective programs need to be evidence based and tested.

Every community will have different needs, strengths and complications. While MST-PSB may currently set the gold standard for effectiveness with this population, its implementation within a specific community can be challenging. A particular community might have fiscal, geographic, labor force limitations sufficient to make adoption of this program unfeasible.

The goal for each community – in an effort which can be spearheaded by the prosecutor – is to identify effective, evidence based programs which can successfully treat this population in a way that best enhances community safety, and that can be made available given the range of resources within the community.

Among the approaches which have been identified in the literature as being effective include:

• **Functional Family Therapy.**<sup>75</sup> This is one of the earliest family-based interventions which had demonstrated good results with delinquent adolescents, in multiple studies. The program model focuses on family involvement, improving communications and interaction of the family with the juvenile justice system and other social systems.<sup>76</sup>

• **Multidimensional Treatment Foster Care.**<sup>77</sup> This is designed for youth that cannot remain in the family home, but who do not require a high security setting. The youth are placed with specially trained and supported foster parents and together the child and foster family are engaged in empirically based education and treatment services aimed at family reunification.

• **Oklahoma PSB-CBT for Adolescents.** This program, designed for adolescents 13-18 years old with problematic sexual behavior (PSB) is grounded in behavioral and social learning theory models.<sup>78</sup> The PSB-CBT (cognitive behavior therapy) approach emphasizes the roles of environment, learning, social models, reinforcement contingencies, social ecology and adult guidance on child behavior. It encourages social involvement with same-age pro-social peers and activities and involves caregiver support and engagement. A study of the program demonstrated that over 97% of the participants who successfully completed the program were free from any sex offense arrests or reports at long-term follow-up.

• **The Adolescent Diversion Programs.** Various communities have adopted robust juvenile sex offender diversion programs which report effective outcomes.<sup>79</sup>

While each of these approaches work in different settings and involve their own nuances, there are some commonalities of these programs. They all are grounded in an empirical foundation, work within the existing social ecology, start with quality initial assessments, provide individualized treatment, utilize well-trained, well-supervised staff, apply multi-dimensional approaches, which involve family/caregivers, and employ valid outcome assessments.

To be clear, none of these treatments is “a panacea” and each presents its own difficulties and challenges.<sup>80</sup> The point of this list is not to recommend or endorse any particular program or treatment. That is beyond the scope of this paper. It is offered instead to provide a framework for the community discussion about what evidence based programs for this population exist; which have demonstrated efficacy and which would be appropriate in your particular jurisdiction given the existing skills, personnel, geographic, demographic and fiscal resources and realities.

The goal, then, is to use those resources to design and build the best response and intervention system for each individual community, consistent with the concerns raised within this paper.

It is to be noted that some of these programs, while effective, may not “feel” onerous, or punitive or be of a prolonged duration. Research has taught that in working with juvenile populations, longer interventions are often counter-productive. What works is focus, intensity and fidelity to rigorous evidence based principles.

The goal, it is suggested, is to achieve accountability, and to impose consequences and effective interventions. Consequences without accountability is unsatisfactory. Accountability without thoughtful intervention should be equally inadequate. And punishment, without either, is inappropriate.

<sup>75</sup> Alexander, J and Parsons, B. (1982) *Functional Family Therapy*. Monterey, California: Brooks/Cole.

<sup>76</sup> See generally, Sexton, T. and Turner, C. (2011) *The effectiveness of functional family therapy for youth with behavioral problems in a community practice setting*. *Couples and Family Psychology: Research and Practice*. 1, 3-15. A review is in Caldwell, M. and Van Rybroek, G. (2013) *Effective treatment programs for violent adolescents: Programmatic challenges and promising features*. *Aggression and Violent Behavior*, 18, 571-578.

<sup>77</sup> Chamberlain, P. (2003) *Treating chronic juvenile offenders: Advances made through the Oregon multidimensional treatment foster care model*. Washington, D.C.: American Psychological Association.

<sup>78</sup> Bonner, B. L., Chaffin, M., Pierce, K., Swisher, L., Schmidt, S., and Walker, C. E. (2009). *Treatment manual for adolescent sexual offenders*. Oklahoma City, OK: Authors.

<sup>79</sup> Several organizations publish reports and reviews of various treatment practices. For example, see: *Updated inventory of evidence-based, research-based, and promising practices: For prevention and intervention services for children and juveniles in the child welfare, juvenile justice and mental health systems*. (June, 2016) Washington State Institute for Public Policy: Olympia, WA. [www.wsipp.wa.org](http://www.wsipp.wa.org).

<sup>80</sup> Caldwell, M. and Van Rybroek, G. (2013) *Effective treatment programs for violent adolescents: Programmatic challenges and promising features*. *Aggression and Violent Behavior*, 18, 571-578.

## BUT WHAT ABOUT THE REALLY DANGEROUS YOUTH?

As noted earlier, while most adolescents will not sexually reoffend, there are a small number who do pose significant concerns. What do prosecutors do with those adolescent sex offenders whose risk and needs assessments raise serious warnings of a heightened risk to reoffend or a strong predilection to engage in sexually predatory behavior?

Many researchers in this field believe that good quality, empirically based treatment for adolescents can be effective for almost all youth who have engaging in sexually aggressive behavior. Others recognize that a small number may be beyond the reach of even the most skilled care providers. It is understandable that prosecutor's philosophies may most align with that second group.

High quality custodial treatment programs exist and have demonstrated excellent results with even the most troubling, "hardened" youth. I previously cited the Mendota Juvenile Treatment Center program as an example of how an outstanding custodial based treatment program might be designed. Policy makers should also be appreciative of these programs because not only has Mendota's treatment program been shown to be effective (a three-fold reduction in violent re-offense), it is has also been shown to be significantly cost-effective. A cost-benefit analysis of the program demonstrated that because of the reduction in crime, for every \$1 spent on the treatment programs, taxpayers saved \$7 in future crimes associated costs.<sup>81</sup> Similar programs, if properly administered, should achieve similar long-term financial savings.<sup>82</sup>

In some states procedures exist to permit certain juvenile cases to be transferred to adult court (or "declining" the case out of juvenile court). The adolescent is thereafter treated as an adult and subject to the penalties imposed on adults. Certainly for some offenders and/or for some crimes, this can be a suitable result.

Transfer typically results in the loss of juvenile focused rehabilitation programs and comes with a variety of negative consequences. Those consequences include the introduction of those youth to more violent and predatory adult offenders which can lead to exceptionally poor role modeling and set the youth up for custodial victimization. Given the overall low recidivism rates, the success of various community based treatments, the success of available custodial juvenile treatment programs, and the adverse effects which are likely to follow transfer, only the most select use of transfer power is warranted.

Researchers evaluated the impact of decline procedures in South Carolina. They compared juveniles whose cases were prosecuted as adults, with those having similar backgrounds who had not been declined out of juvenile court. They found they were equally likely to be charged with a new crime against person offense. However, they reported, the juveniles whose cases were transferred to adult court were four times more likely to be *convicted* of a new violent crime than those who remained in juvenile court.<sup>83</sup> Given the similar charge rate but the significantly higher conviction rate, the researchers suggested the difference was based not on the youth's behavior but "rather on the reaction to youth behavior by adults around them." They opined that the transfer led to higher surveillance and targeting of those youth upon release. They suggested this was a "Scarlet Letter" effect; that is once the juvenile had a conviction "as an adult", prosecutors were inappropriately more aggressive with filing future charges against them.

<sup>81</sup> Caldwell, M., Vitacco, M. and Van Rybrock, G. (2006) *Are violent delinquents worth treating? A cost-benefit analysis.* *Journal of Research in Crime and Delinquency*. Vol. 43, No. 2, 148-168.

<sup>82</sup> See generally: Washington State Institute for Public Policy, *Benefit Cost-Results. Juvenile Justice.* [www.wsipp.wa.gov/BenefitCost](http://www.wsipp.wa.gov/BenefitCost)

<sup>83</sup> Rinehart, J., Armstrong, K., Shields, R. and Letourneau, E. (2016) *The effects of transfer laws on youth with sexual or robbery offenses.* *Criminal Justice and Behavior*, Vol. 43, No. 11, 1619-1638.

An alternative explanation might be that prosecutors – and judges in granting the transfer motions – did a skillful job at properly identifying those whose risks and behaviors merited extra concern and focus. The careful, thoughtful and conservative use of decline procedures will help make the latter analysis accurate.

## SO, WHAT SHOULD WE DO ABOUT JACK?

Before prosecutors do anything about Jack, they need to learn about Jack. Were these the acts of someone mimicking their own victimization, or the acts of someone who has a strong preference for sadistic sexual activity? Were these the acts of someone who by immaturity and inexperience completely misread the situation, or did not appreciate the consequences of their conduct, or were the acts committed as part of a gang initiation?

Only by recognizing that adolescents who engage in sexually abusive behavior are not a homogenous group, can smart decisions be made which bring the proper amount of sanction and intervention to the case. The goal remains to determine how to best punish, deter and rehabilitate the offender, while minimizing the risk of re-offense, so as to enhance community safety.

Existing policies which seek to impose one-size-fits-all punishments fail to recognize that the behavior of adolescents who engage in sexually abusive behavior are more like a “dimmer-switch” and not a binary “on-off” function. That is, there are multiple degrees of causes, motivations, influences, risks and needs in this population, and that leads to varying degrees of risk to the community. The answer of what to do about Jack, lies in the recognition of understanding of his individual motivations, needs and risks. While it is a prosecutor’s role to hold offenders accountable, that role requires prosecutors to be able to understand: Accountable for what?

Providing thoughtful and quality interventions is the most effective way to enhance community safety. Sometimes that might be prolonged incarceration. Sometimes that might be community-based treatment or diversion programs. But the most effective path forward begins only when prosecutors recognize that every “Jack” is different and the juvenile justice system response needs to be tailored as much as is practical to each individual.

**Paul Stern** was a prosecutor for 35 years, the last 32 of those for Snohomish County, in Everett, Washington. He retired in September, 2016. For those 32 years he handled predominately cases of sexual assault, crimes against children, homicides, domestic violence and the commitment of Sexually Violent Predators. He tried nearly 200 felony cases.

Mr. Stern served on the Board of Directors for the American Professional Society on the Abuse of Children (APSAC) for six years and on the Board of the Association for the Treatment of Sexual Abusers (ATSA) for three years. He served on the advisory boards of both the community based and the prison based sexual offender treatment programs in Washington State. He was an advisor to the DSM-5 Committee on Sexual and Gender Identity Disorders. Mr. Stern has lectured on issues regarding the prosecution of cases of interpersonal violence in 37 states, eight countries and provided training to the FBI, the Scottish Police College, and the South African Police Service, among others.

He has taught college classes on Crimes Against Children and Crimes of Interpersonal Violence. He served on the founding Boards of Directors for the Big Brothers/Big Sisters in Snohomish County, Wa and in Cumberland County, N.J. He has written more than 20 articles, three book chapters and a book on expert witnesses (Preparing and Presenting Expert Testimony in Child Abuse Litigation, published by Sage in 1997). He also wrote a manual for the Prosecution of Sexual Assault Cases in 1997, dealing predominately with assaults on adult victims.

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