

When the Child Abuser is a Child: Investigating, Prosecuting and Treating Juvenile Sex Offenders in the New Millennium*

by

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I. INTRODUCTION

One hundred years ago, Illinois became the first state to formally establish a juvenile court.² Today, all fifty states have a court specially designated to address the needs of children.³ Juvenile court can be civil in nature and define a child committing a delinquent act as being in “need of protection or services.”⁴ The court can also be a delinquency court that takes on characteristics of a criminal proceeding.⁵ According to

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²The text of the Illinois statute is reprinted in: *The Illinois Juvenile Court Act of 1899*, 49 *JUVENILE AND FAMILY COURT JOURNAL* 1 (1998).

³ See, e.g., MINN. STAT. § 260.015 (1998). The history of dependency court is summarized in Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, 49 *JUVENILE AND FAMILY COURT JOURNAL* 17 (1998).

⁴ The civil and criminal components of the juvenile court are not a recent innovation. As formed in 1899, the juvenile court in Illinois had separate tracks for dependency and delinquent children. See *supra* note 2. See also LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 163-166, 413-417 (1993) (containing an excellent history of juvenile justice reform in the 19th and 20th centuries).

⁵ Some argue the juvenile court has assumed the mantle of an adult criminal court to such a degree that juveniles should have their full panoply of Constitutional rights including the right to a jury trial. According to University of Minnesota law professor Barry Feld, the “justifications to deny juveniles this fundamental right are based on either an historical vision of an informal, rehabilitative juvenile court that is inconsistent with contemporary reality or political expediency that sacrifices the rights of young offenders.” Barry Feld, *Minnesota Supreme Court Advisory Task Force on the Juvenile Justice System: Final Report*, 20 *WM. MITCHELL L. REV.* 595, 684 (1994). Professor Feld sees the juvenile court as “little more than a scaled-down, second-class criminal court for young people.” *Id.* at 685. As evidence, he cites a Minnesota statute claiming the purpose of juvenile delinquency court is “to promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior...” *Id.* at 685 (citing MINN. STAT. § 260.011(2) (1992)). The same statute, however, instructs the juvenile court to aid the delinquent in “developing individual responsibility for lawful behavior” and to pursue this purpose “through means that are fair and just, that recognize the unique characteristics and needs of children, and

Minnesota Supreme Court Justice Sandra Gardebring, the three-fold aim of the juvenile court is as follows:

1. To provide a system with rehabilitation as its primary objective and with punishment as its secondary goal;
2. To have a highly individualized response focusing on a disposition tailored to the needs of the offending child as opposed to the seriousness of the offense; and
3. To give the juvenile court judge great discretion in designing the disposition order and to keep the juvenile court proceedings secret “to protect offenders from lifelong stigma associated with an adolescent error in judgment.”⁶

A workable definition of the purpose of the juvenile court system, however, may be illusory. While most juvenile court practitioners agree the purpose of the system is rehabilitative, there is a lack of consensus on the meaning of rehabilitation. Though Justice Gardebring distinguishes between rehabilitation and punishment, others argue that punishment *is* rehabilitation.⁷ According to juvenile prosecutor Larry Abrahamson, “(t)here is probably no greater rehabilitation approach to behavior modification than a good healthy dose of real fear... (i)t is time to get back to the basics by realizing that, only when the fear of the consequence outweighs the pleasure of the benefit, will crime stop.”⁸ Judge Benjamin Barr Lindsey, the first juvenile court judge in Denver, recognized the role of punishment in the juvenile system. Noting that while the primary purpose of the

that give children access to opportunities for personal and social growth.” Moreover, the punitive aspect of the juvenile court is as old as the court itself. For instance, the Illinois legislature of 1899 allowed juvenile court judges to commit delinquent boys and girls to state reform schools. *The Illinois Juvenile Act of 1899*, *supra* note 2, at 3.

⁶ Sandra S. Gardebring, *An Introduction to Essays on Juvenile Justice*, 20 WM. MITCHELL L. REV. 589, 589-590 (1994).

⁷ See generally, Larry R. Abrahamson, *The Need to Get Back to Basics in Juvenile Justice*, 33 THE PROSECUTOR 28 (March/April 1999). But cf., Paul Wake, *Juvenile Prosecutors Are Not Criminal Prosecutors*, 35 THE PROSECUTOR 29. In response to Larry Abrahamson’s article, Paul Wake wrote that “It may make more sense to remember that juvenile prosecutors work in a separate justice system and should usually spend more time getting concerned than getting tough.” *Id.* at 29.

⁸ *Id.* at 32.

juvenile court was not to punish but to save children, Lindsey said that if children “could be saved only by punishment, it (the juvenile court) would punish...”⁹

Some offenders, and some offenses, have been deemed so heinous that the juvenile system has opted out, claiming it lacks the resources to rehabilitate or punish effectively. As a result, many states have enacted statutes making it easier to reference some juvenile offenders to adult court. This trend reflects the sentiment that one purpose of the law is community protection. If the juvenile court cannot reform a juvenile satisfactorily, the community must nonetheless be protected from those who would do ill.

The lack of consensus on dealing with child offenders is particularly pronounced when it comes to responding to a juvenile sex offense. The confusion stems in part from the fact that only recently did juvenile sex offenses get referred to the juvenile court and only recently has society begun to “treat” these offenders. In 1982, the United States had only twenty programs specifically designed for the treatment of juvenile sex offenders.¹⁰ Today, juvenile sex offender programs exceed eight hundred.¹¹ The fledgling status of these efforts means that the juvenile court has many more questions than answers in dealing with this burgeoning population.

⁹ Patrick Yewell, et al., *The Road to Court Improvement in Child Protection Cases*, 49 JUVENILE AND FAMILY COURT JOURNAL 6 (1998). For an innovative approach to juvenile offenses, See Kathleen Burge, Prosecutor Tackles School Crime, Boston Globe, January 31, 2001. This article describes how Liza Hanley is Suffolk County’s first school violence prosecutor. By working directly with the schools, Hanley “is able to make the wheels of justice grin a little faster and a little easier- and, sometimes, a little more compassionately.” Because Hanley prosecutes only school-related crimes, “she is able to see things in a fuller context: whether the student might be having problems at home, or with schoolwork, or with drug or alcohol addiction.”

¹⁰ Judith V. Becker, *What We Know About the Characteristics and Treatment of Adolescents Who Have Committed Sexual Offenses*, 4 CHILD MALTREATMENT 317 (1998) (citations omitted).

¹¹ *Id.* at 317.

In this article, the topic of juvenile sex offending is addressed at the investigation, prosecution, and treatment stages. Analyzing current research and practices, the article offers suggestions and guidelines to address the needs of juvenile sex offenders, their victims, and society. The blueprint offered in the article is best viewed as a snapshot proposal for dealing with this moment in history. To be effective in the new millennium, child abuse professionals must be vigilant in reminding ourselves of our imperfect knowledge and be willing to grow and change course as better information and practices develop.

II. JUVENILE SEX OFFENDERS, THEIR CRIMES, AND VICTIMS

A juvenile sex offense is a sexual act which violates the criminal code and is committed by someone below the age of 18 *at the time of the offense*. Although a precise definition is illusory, the offenses of greatest concern to society are chronic and compulsive sexual acts which may be categorized as paraphilias.¹² The sexual acts themselves run the gamut of human behavior and are limited only by the child's sexual desires and creativity. Juvenile offenders may engage in "fondling, frottage, dry

¹² Earl F. Martin & Marsha Kline Pruett, *The Juvenile Sex Offender and the Juvenile Justice System*, 35 CRIMINAL L. REV. 279, 292 (1998). See also Grant M. Johnson & Raymond A. Knight, *Developmental Antecedents of Sexual Coercion in Juvenile Sexual Offenders*, 12 SEXUAL ABUSE: A JOURNAL OF RESEARCH & TREATMENT 165 (2000). A "juvenile sex offender is defined as an individual age 18 or younger who commit a sexual offense against a victim of any age" *Id.* at 166. See also Joyce F. Lakey, *The Profile and Treatment of Male Sexual Offenders*, 29 ADOLESCENCE 755 (1994). A juvenile sex offender is a "youth ranging from puberty to the age of legal majority who commits any sexual interaction with a person of any age against the victim's will, without consent, or in an aggressive, exploitive, or threatening manner." *Id.* at 755

humping, vaginal or anal penetration, or any other type of aggressive sexualized behavior.”¹³

Juvenile sex offenders fall between the ages of 5-19 with the median age being 14-15.¹⁴ Over 90% of the known juvenile sex offenders are male.¹⁵ The victim is typically known to the offender. Indeed, over 90% of juvenile sex offenses are perpetrated against a youth known to the offender.¹⁶ The relationship may be that of an acquaintance, babysitter, or relative.¹⁷ The median age of the victim is seven and females are three times more likely than males to be the victim of a juvenile sex offender.¹⁸ It may, however, be that male victimization is under-reported to a greater extent than female victimization. A study of 561 incarcerated sex offenders found that men who sexually target girls average about 20 victims before being caught.¹⁹ However, men who

¹³ *Id.*

¹⁴ Henry R. Cellini, *Assessment and Treatment of the Adolescent Sexual Offender*, in SCHWARTZ AND CELLINI, *THE SEX OFFENDER* 6-2 (1995).

¹⁵ *Id.* at 6-2. Because so much of the adolescents’ life space is spent in the context of the family, to obtain a better understanding of the adolescent sex offender, it is helpful to look at traits that characterize their families. See Gary P. Bischof et al., *Family Environments of Adolescent Sex Offenders & Other Juvenile Delinquents*, 30 *ADOLESCENCE* 157 (1995) reporting that “one adolescent sex-offender program found that the families were either very rigid and enmeshed, or very chaotic with a great deal of role confusion.” *Id.* at 159. IN addition, researchers Smith and Monastersky proposed two primary distinguishing features of families of adolescent sexual offenders: denial of sexual tensions and a paucity of sexual knowledge or education.” *Id.* at 166. See also Stephen W. Smallbone & Mark R. Dadds, *Attachment & Coercive Sexual Behavior*, 12 *SEXUAL ABUSE: A JOURNAL OF RESEARCH & TREATMENT* 3 (2000). These researchers noted that “empirical research together with clinical observations provide evidence that disruptive or dysfunctional family-of-origin experiences appear to exist commonly in the childhood background of sexual offenders. Examples of such experiences are poor or nonexistent paternal relationships, familial chaos and marital discord and severe and inconsistent punishment by parents” *Id.* at 4.

¹⁶ *Id.* at 6-2. See also Alexis O. Miranda & Colette L. Corcoran, *Comparison of Perpetration Characteristics Between Male Juvenile & Adult Sexual Offenders: Preliminary Results*, 12 *SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT* 179 (2000). These researchers found that Juvenile sex offenders committed intrafamilial sexual abuse more frequently than adult sexual offenders. Miranda and Corcoran hypothesized that “it is possible that the higher incidence of intrafamilial sexual abuse committed by juvenile sex offenders derives from the time shared in play or caretaking responsibilities.” *Id.* at 185

¹⁷ *Id.* at 6-2.

¹⁸ *Id.* at 6-2.

¹⁹ Gene G. Abel et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 *J. INTERPERSONAL VIOLENCE* 3, 17 (1987).

target boys average about 150 victims before being caught.²⁰ This study suggests it is easier to hide male victimization in our society. Perhaps fear of being labeled a homosexual causes boys not to report. Not wanting to appear weak, a boy concerned about retaining his machismo aura may not want to reveal an inability to repel a sexual assault.

As a whole, juvenile sex offenses may be more serious than adult offenses. More than 60% of juvenile sex offenses involve penetration.²¹ Over 1/3 of juvenile sex offenses involve physical force.²² In comparison to adult offenders, juveniles are more likely to have intercourse or other forms of invasive sexual contact with their victims, to cause their victims physical injury, to expose their victims to pornography, and to directly threaten their victims with a weapon as a means of gaining compliance.²³ Adolescent offenders are also more likely to employ force or threats as a means of keeping the victim silent after the abuse is completed.²⁴

There are several theories as to why adolescents may be more invasive and more threatening in their sexual contact with victims than are adults. First, diverse practices

²⁰ *Id.*

²¹ Cellini, *supra* note 14, at 6-2. *See also*, Peter Hummel et al., *Male Adolescent Sex Offenders against Children: Similarities and Differences between those Offenders with and those without a History of Sexual Abuse*, 23 *JOURNAL OF ADOLESCENCE* 305, 314 (2000). Hummel and his colleagues postulate “that it is possible that the sexual abuse committed by adolescent sex offenders is of a more expressive nature, i.e. it would not so much serve to achieve sexual gratification but represent a sexualized form of violence.” *Id.* at 314

²² *Id.*

²³ Keith L. Kaufman et al., *Factors Influencing Sexual Offenders’ Modus Operandi: An Examination of Victim-Offender Relatedness and Age*, 3 *CHILD MALTREATMENT* 349, 356-357 (1998).

²⁴ *Id.* at 357. *See also* David Finkelhor & Patricia Hashima, *The Victimization of Children & Youth- A Comprehensive Overview in HANDBOOK OF YOUTH & JUSTICE* 29 (White et al., eds., 2001). “In addition to physical injury, there is growing literature documenting that victimization has grave short-and long-term effects on children’s mental health as well. For example, sexually victimized children appear to be at substantially increased lifetime risk for virtually all categories of psychiatric disorder.” *Id.* at 67.

may reflect a need or desire for sexual experimentation. Second, immaturity, lower cognitive ability, and closeness in age to the victim may make it more difficult for the juvenile offender to entice the victim with gifts and desensitization efforts. Force or threats may be the only realistic means to accomplish the act and to maintain the victim's silence.²⁵

In addition to being more serious than adult offenses, juvenile offenses may also be more common. Brother-sister sexual contact may be five times as common as father-daughter incest.²⁶ A survey of 796 New England College students revealed that 15% of females and 10% of males had a sexual experience with a sibling.²⁷ In another study, 56% of the child sexual abuse cases referred to a Washington D.C. hospital involved juvenile perpetrators.²⁸ Studies estimate that 20-30% of rapes and 30-50% of child molestations are committed by adolescents.²⁹ Given the "tender age of the offender and in many cases his social familiarity with the victim," juvenile sex offenses are likely under-reported.³⁰

²⁵ These and other theories are discussed by Kaufman et al., *supra* note 23. See also Thomas Keenan & Tony Ward, *A Theory of Mind Perspective on Cognitive, Affective, and Intimacy Deficits in Child Sexual Offenders*, 12 *SEXUAL ABUSE: A JOURNAL OF RESEARCH & TREATMENT* 49 (2000). These researchers reviewed the literature "on the etiology of sexual offending suggested that intimacy deficits, empathy deficits, and cognitive distortions all point to a lack of awareness of other peoples' beliefs, desires, perspectives and needs, what is commonly referred to in developmental literature as a theory of mind." *Id.* at 49.

²⁶ VERNON R. WIEHE, *SIBLING ABUSE* 50 (1990).

²⁷ *Id.* at 50.

²⁸ Nicholas Groth & Carlos M. Lored, *Juvenile Sex Offenders: Guidelines for Assessment*, 25 *INTERNATIONAL J. OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY* 31 (1981).

²⁹ See Cellini, *supra* note 14, at 6-1 (citing G. Davis & H. Leitenberg, *Adolescent Sex Offenders*, 101 *PSYCHOLOGICAL BULLETIN*, 417-427 (1987)); P. Fehrenback et al., *Adolescent Sexual Offenders: Offender and Offense Characteristics*, 56 *AM. J. OF ORTHOPSYCHIATRY* 225-233 (1986); R. Matthews, *Female Sexual Offenders: Treatment and Legal Issues*, Report by Phase Program of Genesis II, Minneapolis, MN.

³⁰ Groth & Lored, *supra* note 28, at 31.

Many juvenile sex offenders continue deviant sexual practices into adulthood. One study of offenders found that, as the offenders became adults, the number of sexual offenses committed increased fifty fold.³¹ In one study, 47-58% of adult sex offenders committed their first offense during adolescence.³² In another study, 71% of adult offenders subjected to polygraph tests during therapy admitted their sexual offenses began while they were juveniles.³³

The likelihood that most *adult* offenders began their sexual deviancy as juveniles does not mean that most *child* offenders will necessarily become adult offenders. As stated in a position paper of the Association for the Treatment of Sexual Abusers, “poor social competency skills and deficits in self-esteem can best explain sexual deviance in juveniles, rather than the paraphilic interests and psychopathic characteristics that are more common in adult offenders” and that “there is little evidence to support the assumption that the majority of juvenile sexual offenders are destined to become adult sexual offenders, or that these youths engage in acts of sexual perpetration for the same reasons as their adult counterparts.”³⁴

III. INVESTIGATING JUVENILE SEX OFFENDERS

³¹ Cellini, *supra* note 14, at 6-2 (citations omitted).

³² *Id.* at 6-1 – 6-2 (citing Henry Cellini et al., *Child Sexual Abuse: An Administrator’s Nightmare*, SCHOOL SAFETY UPDATE, NATIONAL SCHOOL SAFETY CENTER (1993)).

³³ See Jan Hindman, *Research Disputes Assumptions About Child Molesters*, 7 N.D.A.A. BULLETIN 1 (1988).

³⁴ Mark Chaffin & Barbara Bonner, “Don’t Shoot, We’re Your Children”: *Have We Gone Too far in Our Response to Adolescent Sexual Abusers and Children with Sexual Behavior Problems?*, 3 CHILD MALTREATMENT 314 (1998). At the same time though, researchers Knight and Prentky found that “33 % of a sample of adult sex offenders with no charges for juvenile sex offenses reported that they had, in fact, committed, such offenses in adolescence. This finding is consistent with clinical literature, wherein it is reported that about 50% of all adult sex offenders disclose some form of sexually deviant behavior in adolescence.” See Robert Prentky et al., *An Actuarial Procedure for Assessing Risk with Juvenile Sex Offenders*, 12 SEXUAL ABUSE: A JOURNAL OF RESEARCH & TREATMENT 71 (2000), *Id.* at 72.

The complex dynamics of a child sexual abuse case present myriad problems for an investigator. In order to competently interview a child victim, the investigator must be skilled in linguistics, child development, and the factors which inhibit children from disclosing abuse.³⁵ In a case where the child abuser is also a child, the obstacles multiply. If the child abuser is also a victim of abuse, should the investigator treat the offender as a victim or a delinquent child? If a social worker is involved in the investigation and views the offender differently than does the police investigator, how can this conflict be reconciled?

In many cases, the police investigator must first determine if the child offender's conduct is normal sexual behavior common among young children or whether the conduct is abnormal and should be treated as an offense.³⁶ The officer may also have to consider whether the conduct indicates the abuser may also be a victim and whether the officer should cross-screen for this possibility.³⁷ Constitutional rights of child suspects may differ from the Constitutional rights of adult suspects.³⁸ The subtle difference in legal rights must be thoroughly understood if the evidence the officer seizes is to survive a suppression motion. These and other dilemmas are explored below.

³⁵ John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 27 PAC. L.J. 1 (1996). See also David Finkelhor et al., *Juvenile Crime Victims in the Justice System*, in HANDBOOK OF YOUTH & JUSTICE, 11 WHITE ET AL., EDS., 2001. Some of the questions that are raised when the sexual offender is a juvenile are: (1) are "victims entitled to compensation when offenders are juveniles? (2) Are they informed of the disposition of offenders and change in status? (3) Are there avenues for being heard as part of sentencing?" *Id.* at 16

³⁶ For a discussion of abnormal and normal sexual behavior among adolescents, see generally SHARON K. ARAJI, *SEXUALLY AGGRESSIVE CHILDREN, COMING TO UNDERSTAND THEM*, 2-45 (1997).

³⁷ See generally Araji, *supra* note 36, at 47-49.

³⁸ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that children are entitled to the same fourth amendment protections as adults). *But cf.* *In re Millican*, 906 P.2d 857, 860, (Ore.Ct.App. 1995) (noting that children are not necessarily entitled to a trial by jury (citing *State ex rel Juv. Dept. v. Reynolds*, 857 P.2d 842 (1993))).

A. *Many investigations do not involve a coordinated response*

Most jurisdictions have adopted the team approach to handling the investigation of child abuse cases. Indeed, 33 states require by law that child abuse cases be investigated as part of a “team” effort.³⁹ When a case involves a juvenile sex offender, however, it appears that many local authorities do not have a coordinated response.⁴⁰ Part of the difficulty may be that police officers and social workers view juvenile sex offenders differently. According to one study, “(c)hild protection specialists...felt that juvenile abusers should be seen as victims, and the police and juvenile justice workers...felt that they should be seen as offenders.”⁴¹

The process of developing a multi-disciplinary team to respond to cases of child abuse is fully explored in other articles.⁴² Agencies who have adopted a MDT must make sure the team approach is in place for child abuse cases in which the offender is a juvenile. If this is not possible,⁴³ a team specially designated for juvenile offenses should be developed.

³⁹ Jerome R. Kolbo and Edith Strong, *Multidisciplinary Team Approaches to the Investigation and Resolution of Child Abuse and Neglect: A National Survey*, 2 CHILD MALTREATMENT 61 (1997).

⁴⁰ Robert M. Sanders and Usha Ladwa-Thomas, *Interagency Perspectives on Child Sexual Abuse Perpetrated by Juveniles*, 2 CHILD MALTREATMENT 264 (1997).

⁴¹ *Id.* at 269.

⁴² See, e.g., Major Joseph V. Treanor III, *Orchestrating the Successful Prosecution of Child Sexual Abuse Cases*, 39 A.F. L. REV. 277 (1996); Suellen Scarnecchia, *An Interdisciplinary Seminar in Child Abuse and Neglect with a Focus on Child Protection Practice*, 31 U. MICH. J. L. REF. 33 (1997); Victor I. Vieth, *In My Neighbor's House: A Proposal to Address Child Abuse in Rural America*, 22 HAMLINE L. REV. 143 (1998).

⁴³ See Sanders & Ladwa-Thomas, *supra* note 40, at 264. Sanders and Ladwa-Thomas conclude a diversity of view points, values, ethos, and expectations among agencies can hinder dealing with juvenile sex offenders in the best way. *Id.* at 270. Even though a “harmony” of sorts has developed between social service agencies and the police in dealing with other cases of sexual abuse, a divergence of perspective on

The value of a coordinated response to an allegation of child abuse is well-documented in the literature.⁴⁴ In a nationwide survey, two-thirds of the members of MDTs cited one or more benefits to a coordinated response to a report of child abuse.⁴⁵ Benefits include better communication, better informed decisions, and better investigations, treatments, and delivery of services.⁴⁶

If society is to improve the investigation of juvenile sex offenders and to provide proper treatment for these offenders and their victims, the national commitment to MDTs must be extended to juvenile cases. It may be that legislatures will need to intervene and mandate a coordinated response to juvenile cases. State legislation does have a correlation with the growth of MDTs in cases of abuse involving adult offenders.⁴⁷

B. B. Many juvenile sex offenses are not taken seriously

Often-times, juvenile sex offense cases are viewed as lacking serious or significant allegations. As one commentator notes, “all too often such behavior is dismissed as merely sexual curiosity or experimentation, situational in nature, and due to the normal aggressiveness of a sexually maturing adolescent with the result that, what should be a priority in our efforts to combat the serious social problem of sexual

whether a “juvenile sexual abuser is to be dealt with first as an offender and second as a victim or vice versa,” can destroy the effectiveness of an interagency approach. *Id.* at 270.

⁴⁴ See *supra* note 42, and accompanying text.

⁴⁵ Kolbo & Strong, *supra* note 39, at 67.

⁴⁶ *Id.* at 67.

⁴⁷ *Id.* at 69

victimization, is neglected.”⁴⁸ As a result, “no intervention is made at a crucial stage in the early development of the sexual offender, at a point when he first begins to exhibit the symptoms of his pathology and a time when his assaults have not become an ingrained behavior pattern and when he still may be accessible and responsive to treatment and rehabilitation.”⁴⁹

Although it is easy to say in the abstract that juvenile sex offenses must be taken seriously, the fact is that many of these cases involve an element of “childish” behavior or horseplay.⁵⁰ If an investigator focuses on the “horseplay” aspect of the conduct, the serious, underlying problem may be overlooked. A victim in her 40’s recounted the following example of her sexual exploitation by an older brother:

I was about six years old. My brother persuaded me to lie down on the bathroom floor. There were some neighbor boys in the house. He promised not to let them in. He got me on the floor with my pants down and then opened the door. He laughed about it.⁵¹

Assuming the above-referenced incident had been reported to the authorities, police and social service investigators exercising their discretion would have several options. An investigator may view the bathroom incident as the first step in an effort by

⁴⁸ Groth & Loredo *supra* note 28, at 31.

⁴⁹ *Id.* at 31.

⁵⁰ For example, is “moonning” a sexual act that should concern authorities? “Moonning” is an act in which the buttocks are exposed to another party. In many cases, this is done as an expression of hostility. In approximately 80 AD, Flavius Josephus recorded the first known incident of moonning. When Roman soldiers marched past the Jerusalem temple with banners bearing the insignia of the imperial eagle, temple priests and elders began to pelt the soldiers with stones. Josephus describes the Roman response as follows: “a centurion stopped and faced the Jews. He then, turning in the opposite direction, raised his tunic, lowered his loincloth, bent over, and bared his hindermost parts to the priests and elders.” JOHNNY CASH, *MAN IN WHITE* 4 (1986).

⁵¹ Wiehe, *supra* note 26, at 55.

the offender to groom the child as a victim. With this view, the investigator may take the allegation seriously and, even if delinquency charges are not appropriate, consider filing a dependency petition or at least offering services to the family. On the other hand, if the investigator sees the incident as a childish attempt at a practical joke, the investigator may consider the matter to be exclusively a family problem to be resolved by the parents of the siblings. If the investigator had a crystal ball to look into the future, she would know which course to take. If she knew up front the victim would eventually be subjected to egregious sexual acts at the hand of her brother, the investigator would intervene at this early juncture. If, however, the investigator knew at the outset that this was merely an adolescent prank never to be repeated, the investigator would not waste a moment of the system's time on the case. Unfortunately, clairvoyance is not a trait common to police or social service investigators. Accordingly, the investigator must look elsewhere for guidance in handling such a difficult scenario.

In evaluating the seriousness of a child's sexual behavior, investigators must be thoroughly familiar with research which differentiates between "normal" and "abnormal" sexual behavior among young children.⁵² This information will assist investigators in evaluating many complex scenarios. For example, a school may report a case of a kindergarten boy grabbing the penis of another boy. In addition to considering what, if any, legal action to take against such a young offender, the investigator must determine if such behavior is indicative that the juvenile offender may also be the victim of abuse. Young children engage in a number of normal sexual practices. Indeed, non-abused children "exhibit a wide variety of sexual behaviors at relatively high frequencies, e.g.,

⁵² See *supra* notes 53-54 and accompanying text.

self-stimulatory behavior and exhibitionism.”⁵³ There are, however, a number of sexual behaviors that are not normal during childhood. The behaviors *least* often seen in non-abused children are:

1. Placing the child’s mouth on a sex part
2. Asking to engage in sex acts
3. Masturbating with an object
4. Inserting objects in the vagina/anus
5. Imitating intercourse
6. Making sexual sounds
7. French kissing
8. Undressing other people
9. Asking to watch sexually explicit television
10. Imitating sexual behavior with dolls⁵⁴

If the child’s conduct falls within the category of abnormal behavior, the investigator should deal with the conduct as a behavior in need of being addressed. This may mean the child will need to be offered services, that a child protection action will be filed, or that a delinquency petition will be filed with the court. These and other charging options are explored elsewhere in the article.⁵⁵ If “non-abusive” explanations for the behavior, such as watching pornography are ruled out, the sexual behavior is “a good marker of sexual abuse.”⁵⁶ In this event, the investigator will need to cross-screen for child abuse. At a minimum, the child should be interviewed not only about his conduct but the conduct of others toward him.

⁵³ JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 516 (1998), (citing William Friedrich et al., *Child Sexual Behavior: An Update with the CSB-3*, 9 THE APSAC ADVISOR 1 (1995)).

⁵⁴ Myers, *supra* note 35 (citing William Friedrich et al., *Normative Sexual Behavior in Children*, 88 PEDIATRICS 456, 462 (1991)). *See also* William N. Friedrich, *Behavioral Manifestations of Child Sexual Abuse*, 22 CHILD ABUSE AND NEGLECT 523 (1998).

⁵⁵ See §§ IV(B) 1-3.

⁵⁶ Myers, *supra* note 53, at 519.

In investigating an adult for an act of sexual abuse, investigators should cross screen for the possibility of sibling abuse. It is not uncommon for a sexually maltreated juvenile to prey on other siblings in his or her own home. A large number of juvenile offenders report a history of child abuse.⁵⁷ One study finds that 78% of female juvenile offenders and 34% of male juvenile offenders reported a history of sexual abuse.⁵⁸ When interviewing the children in the home, then, an investigator should not only ask about the alleged abuse committed by the adult but whether or not the children have been touched inappropriately by anyone else. When asked directly, a child victimized by an adult may also acknowledge victimization at the hands of a sibling. When an investigator fails to ask directly, some family secrets will remain intact. Many children simply will not disclose genital touching unless asked directly.⁵⁹

C. Some juvenile sex offenders may be taken too seriously

Although the system does not always respond to sexual acts which may be serious, it may also be that the system over-reacts to other cases. According to child protection professionals Chafin and Bonner, “(f)ifteen years ago, our battle was getting

⁵⁷ Becker, *supra* note 10, at 321.

⁵⁸ *Id.* at 321.

⁵⁹ Karen J. Saywitz et al., *Children's Memories of a Physical Examination Involving Genital Touch: Implications for Reports of Child Sexual Abuse*, 59 J. CONSULTING & CLINICAL PSYCHOL. 682 (1991). (Studying 72 girls. One-half of the girls were five-years-old and the other half were seven-year-olds. Each girl received a physical exam and, for half of the girls, the physical included a genital exam. For girls receiving the genital exams, 78% failed to mention this fact in free recall questions. However, 86% disclosed this fact when asked directly.).

the system to take cases seriously. We may have been too successful.”⁶⁰ As anecdotal evidence for their position, Chafin and Bonner provide the following examples:

- children as young as 10 subjected to sex offender registration laws
- 10 year old children “coercively interrogated”
- 7 year old child not returned to parents after two incidents of genital fondling of a 5 year old sibling
- intensive treatment of teens who are required to admit being a pedophile and that they can never be cured⁶¹

There are two inherent problems in relying on anecdotal evidence to support a proposition. First, when the anecdote is not supported with a citation to documents, the author’s biases and interpretations of the evidence cannot be analyzed. Second, and most importantly, even a large number of anecdotes may mean little in terms of the big picture. Even if an author can accumulate 100 accurate anecdotes of a system gone awry, this means only that the system went awry in at least 100 cases. If the system deals with thousands of cases, we know nothing about the vast majority of offenses and how the system handled them. Relying exclusively on negative anecdotes to claim the system is faltering would be as irresponsible as relying exclusively on positive anecdotes to claim the system is excelling.

Nonetheless, practitioners should be slow to judgment in cases of juvenile sexual conduct. Immaturity, curiosity and other factors may account for some misconduct and we should not assume that each juvenile offender is doomed to a life of deviance and

⁶⁰ Chaffin & Bonner, *supra* note 34, at 315. The authors ask, “(i)s a 12-year old who has experimentally touched a child on a single or a small number of occasions suddenly transformed into a pedophile for life? We would suggest, “No.” Although Chafin and Bonner’s point is well-taken, this does not mean the system should not react to such an incident, but rather that the system should not over-react.

⁶¹ *Id.* at 315

incarceration.⁶² Juvenile sexual misconduct is very individualistic behavior and the system should respond on a case by case basis. In this vein, we should be careful in applying labels to juvenile offenders. As researcher Judith Becker notes:

Labeling young children as *child rapists* or *pedophiles* has the potential to stigmatize youth and to isolate them further from peers, adults, and potential sources of social and psychological support. Consideration should be given to being much more descriptive when we are discussing minors and using terminology such as ‘children with sexual behavior problems’...In the case of postpubertal juveniles, the same caution is issued.⁶³

To assist in making an informed interpretation of a juvenile’s conduct, the investigator must gather as much information as possible. This means interviewing the offender, the victim, the parents and others who may have knowledge of the parties involved in the sexual act. What, if any, testing has the school done on the child perpetrator? Low IQ’s and some mental illnesses are believed to contribute to sexual acting out.⁶⁴ Past sexual behavior may help determine the juvenile’s intent in the present case.

D. *Adequately train investigators concerning juvenile legal rights*

⁶² See Chaffin & Bonner, *supra* note 34, and accompanying text.

⁶³ Becker, *supra* note 10, at 317. Some commentators are concerned that psychologists are too politically correct in the labeling of offenders. See, e.g., Debra Saunders, *Apparition of a Lolita Nation?* WASHINGTON TIMES B3 March 28, 1999 (condemning a study in the American Psychological Association suggesting there is not widespread harm from adult-child sexual contact and that researchers should not automatically refer to these cases as “abuse” but rather as “adult-adolescent sex.”)

⁶⁴ Some researchers and treatment providers suggest that, “for a subset of adolescents, limited cognitive abilities may result in sexual offending.” Barbara Bonner, et al., *Assessment of Adolescent Sexual Offenders*, 3 CHILD MALTREATMENT 374, 375 (1998).

When investigating the juvenile sex offender, investigators must be cognizant of pertinent case and statutory law governing the investigation. Juveniles do have constitutional rights the interpretation of which is more complex than when dealing with adults. For example, juveniles who will be charged in delinquency court have a fifth amendment right against self-incrimination.⁶⁵ In determining whether an accused has waived his rights, courts believe “the waivers of constitutional rights by children merit closer scrutiny...”⁶⁶ In considering the totality of the circumstances, courts consider the juvenile’s age, prior experience with the law, physical and mental condition at the time of the interrogation, the absence or presence of counsel, the absence or presence of parents or other supportive adults during the questioning, the duration of the interrogation, and the conditions imposed upon the accused during interrogation.⁶⁷

In applying this rule, some jurisdictions take the cautious route and always read a juvenile his rights even if he is not in custody.⁶⁸ In addition, a cautious jurisdiction will always have parents present for the interview and will also require parents to indicate their waiver of the child’s rights.⁶⁹ Although the cautious approach will increase the chance of any confession being deemed voluntary by a reviewing court, this approach may hamper the investigation and impair the officer’s ability to protect the victim *and* the juvenile offender.⁷⁰ Given the high level of sex offender denial, parental presence may

⁶⁵ See *In re Gault*, 387 U.S. 1 (1967).

⁶⁶ ROBERT M. HOROWITZ AND HOWARD A. DAVIDSON, *LEGAL RIGHTS OF CHILDREN* 478 (1984).

⁶⁷ *Id.* at 478-479.

⁶⁸ See *e.g.*, N.C. Gen. Stat. § 7B2101 (1999) (mandating that “any juvenile[s] in custody must be advised prior to questioning.”).

⁶⁹ See, *e.g.*, N.Y. C.L.S. Family Ct. Act § 724 (2000).

⁷⁰ The purpose of the juvenile court is to rehabilitate the offender. See *supra* notes 6-9 and accompanying text. If law enforcement can successfully identify a juvenile offender and force the child into treatment, the chance of the juvenile becoming an adult offender may be reduced.

make it more difficult for the child to admit responsibility for his conduct.⁷¹ If there is concern the juvenile offender may also have been a child victim at the hands of a parent, the presence of the parent may further complicate the interrogation. Fearful the child's conduct will lead back to the adult offender, the parent may prohibit the child from speaking with the investigator.⁷² For these reasons, it may be better to reject the overly protective approach and deal with juvenile offenders, particularly juvenile sex offenders, on a case by case basis. If there is a good faith basis to believe the child can understand and waive his rights, interrogation outside the presence of parents may be the better approach. Although some are critical of police efforts to gain the upper hand on any suspect, much less a child suspect,⁷³ there are two reasons why the good faith approach is ethical if not ideal. First, the job of police officers and prosecutors is to find the truth. A confession clearly serves this end.⁷⁴ Investigators' search for truth is often at odds with wrong-doers' vested interest in withholding the truth. So long as the officer does not coerce a confession, and the end result is to obtain the truth, society prevails. Second, and most importantly, the purpose of the juvenile system is to rehabilitate wrongdoers before they mature and face adult sanctions for their conduct.⁷⁵ This purpose can never be achieved unless investigators are accorded some tools by which to uncover the truth. Failing this endeavor may guarantee a juvenile will grow into an adult criminal with a life

⁷¹ See Gail Ryan, *Treatment of Sexually Abusive Youth: The Evolving Consensus*, 14 J. INTERPERSONAL VIOLENCE 422, 424 (1999) (noting that while some organizations coming into contact with juveniles (e.g., child welfare, child protection, placements, family, school, etc.) are supportive of the treatment process, others support "minimization and denial on behalf of the offender.").

⁷² Adult offenders do not threaten their victims to the same extent as juvenile offenders do. Mere words and the expression of their authority in the family may suffice. See generally, Kaufman et al., *supra* note 23.

⁷³ See Chaffin & Bonner, *supra* note 34.

⁷⁴ According to Supreme Court Justice Byron White, "The defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Bruton v. United States*, 391 U.S. 123, 139 (1968).

⁷⁵ See, e.g., *In re Gault*, 387 U.S. 1, 59 (1967).

of incarceration before him. Those who profess the sanctity of the juvenile's "rights" may unwittingly condemn the child to the right of prison and even execution.⁷⁶

As a protection against improper coercion, officers may wish to audio and/or videotape their interrogation of juvenile suspects. If the officer fails to make such a recording, and the juvenile later claims the confession was coerced, the absence of a recording could be used to attack the officer's credibility in his or her account of the interrogation.

Fifth amendment issues may be less pronounced when a multi disciplinary team views the juvenile's conduct as a child protection matter appropriate only for the filing of a civil petition to address the child's need for services. In many states, a young offender cannot be charged with delinquency.⁷⁷ Since the child cannot "incriminate" himself in this situation, fifth amendment issues may not come into play. Indeed, in a civil action, the prosecutor can call the child offender to the witness stand and require the juvenile to answer questions under oath.

If a juvenile is at an age where he can be charged with a delinquent act, the investigator may wish to confer with the prosecutor before interrogating the child. If the

⁷⁶ In Louisiana, for example, it is presently lawful to execute a sex offender who rapes a victim below the age of 12. LA. R. S. 14:42.A(4) (2000). The Louisiana Supreme Court has upheld the constitutionality of this statute. See *State v. Wilson*, 685 So.2d 1096 (La. 1996). For a discussion of the Louisiana law see Susan S. Kreston, *The Death Penalty for Rape of a Child: Is it Cruel and Unusual?* 10 Number 9 Update (published by American Prosecutors Research Institute's National Center for the Prosecution of Child Abuse).

⁷⁷ In Minnesota, for example, a child below the age of ten cannot be charged with a delinquent act. Instead, the government's only recourse would be to file a petition alleging the child is in need of protection or services. See MINN. STAT. § 260.015(2)(a)(10) (2000). Taken to its extreme, this means a nine-year-old child cannot be charged for an offense even if the act constitutes murder. *Id.*

prosecutor and investigator are confident that, based on the evidence gathered to date, the child will not be charged with an offense, the officer may be freer to speak with the child in a manner which is less adversarial. Indeed, if the child is told he will not be charged, the juvenile may feel more at ease to discuss his conduct and, in turn, the authorities will be better armed to prove their case in civil court in an attempt to help the offender.

Great caution should be exercised, however, before informing a child he will not be charged with a delinquent act. First, the interrogation and investigation may produce additional, more serious allegations that may warrant legal action. Second, the juvenile may have committed offenses in more than one state. A prosecutor in one jurisdiction has no power to negotiate resolution of an offense that took place in another county or state. Perhaps the best approach is to be candid with the child and state that, based on what is presently known about the case, the prosecutor feels no need to file a delinquency action.

If a child may be charged and law enforcement authorities deem it necessary to read the child his *Miranda* rights,⁷⁸ the officer must understand that simply reading the warning may be insufficient. A defense attorney may argue that although his client articulated an understanding of the warning, the child's age, cognitive development, and emotional status prevented him from truly understanding the warning. To insulate against this attack, the investigator may want to read a portion of the warning, stop, and then ask the child if he understands what was read to him. If the child says he does understand, ask the child to explain it in his own words.

⁷⁸ See *Miranda v. Arizona*, 384 U.S. 436 (1966); see also *Dickerson v. United States*, 120 S. Ct. 2326 (2000).

For example, the officer may begin by saying, “you have the right to remain silent. Do you understand this right?” If the child says, “yes,” the officer may then ask, “tell me what this right means to you.” If the child responds with, “it means I don’t have to talk to you,” the officer can have some confidence the child understands the right. If the child suspect cannot articulate an understanding of the warning, the officer should explain the phrase in language the child can understand. For this reason, officers who work with children should have some training in child development and linguistics.⁷⁹

Children also have a fourth amendment right against unreasonable searches and seizures.⁸⁰ However, parents are generally allowed to consent to a search of a child’s room or property.⁸¹ When in doubt, investigators should get a search warrant. Even if a parent can and does give consent, the parent may not be a cooperative witness when the constitutionality of the search is later challenged. Unless there is an immediate need to obtain the evidence, the better practice is always to obtain a search warrant. A search warrant places the burden of proof on the juvenile who maintains the search was illegal.⁸²

⁷⁹ An excellent resource on interviewing children is ANN GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN, A LINGUISTIC PERSPECTIVE, 2D ED. (1999).

⁸⁰ See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

⁸¹ Horowitz & Davidson, *supra* note 66, at 481.

⁸² See, e.g., *Louisiana v. Miskel*, 748 So.2d 409, 411 (La. 1999), citing La. Code Crim. P. Art. 703(D); *New York v. Mercado*, 24 A.D.2d 609 (N.Y. App. Div., 1965) (noting “the burden of proof in controverting a search warrant...is on the defendant.”) *But see also* *State v. Slaughter*, 315 S.E.2d 865 (Ga., 1984) (noting that the burden of providing the lawfulness of a search warrant is on the state, and that burden never shifts.)

Police officers in small, rural communities are, by necessity, general practitioners who must handle everything from speeding to murder.⁸³ As a general practitioner, a given officer may not be knowledgeable on all the vagaries of the law applicable to dealing with juvenile offenders. In these jurisdictions, police chiefs and sheriffs must ensure that all their officers are adequately trained or, in the alternative, set up special units to deal with juvenile offenses and ensure the adequate training of this “select” team.⁸⁴

E. *Cutting a “deal” with a juvenile offender*

When investigating a case of child abuse inflicted by an adult on a young child, there is a real possibility that any older sibling in the home was also abused and may himself have become a perpetrator. If the investigator interviews the older sibling and he denies any knowledge of abuse, the officer may wish to consider contacting the prosecutor and then offering the child a “deal.” An officer taking this approach may tell the child:

Listen, kid, I've been in this business a long time and I know that sexual abuse gets discovered eventually. Your sister has told us she was abused and I believe her. Given what I know about the dynamics of these cases, there's a good chance you were abused also. Because abuse is a learned behavior, there's a good chance you eventually perped on your sister as well. If that didn't happen, great, you have nothing to worry about. If it did happen, I'll find out about it eventually

⁸³ See generally Victor I. Vieth, *In My Neighbor's House: A Proposal to Address Child Abuse in Rural America*, 22 HAMLINE L. REV. 143 (1998).

⁸⁴ For a thorough discussion of training and developing multi-disciplinary teams in rural communities, see Vieth, *supra* note 42.

and then you'll be charged either as a juvenile delinquent or as an adult. If, though, you talk to me about it today, the prosecutor won't charge you. We'll recite the agreement on the tape recorder or, if you prefer, we'll put it in writing.

There are several problems with this approach. First, the credibility of any witness who testifies pursuant to a deal is always subject to attack. In the case of a juvenile, this may be more true. The defense attorney may argue the child is particularly vulnerable and unable to withstand the pressure of the police officer. If the case proceeds to trial, the defense attorney will certainly argue that the older sibling revealed information only to avoid charges in juvenile or criminal court. This scenario may also enable defense counsel to contend the older sibling is projecting his own perpetration onto an innocent party and thus mitigating his own abusive conduct.

Second, the scenario posed above is open ended. The child may have abused multiple victims and may have done so in particularly cruel ways. If these facts were known up front, the officer and the prosecutor may very well have charged this child with a delinquent act. Under the terms of the deal, this possibility may be lost. To avoid this latter possibility, the authorities may wish to get the child an attorney who can serve as an intermediary. The attorney can summarize what the child will say if the deal is accepted and the prosecutor can determine if he or she wishes to plea bargain away the possibility of charges in exchange for the juvenile's testimony against the adult offender.

The advantage of the deal is that it may get all family secrets out sooner and thus facilitate services and family healing. Though the older juvenile's statement may be

subject to attack at trial, he will not be standing alone in his accusation if the younger siblings also revealed abuse and were not part of a “deal.” Moreover, the older child’s statements may, when combined with the younger children’s statements, be enough to get the perpetrator to confess and thus reduce the possibility of any trial. The older child may also be able to lead the investigators to physical evidence such as pornography, drugs, letters, and other items that can bolster the state’s case. In addition, the proposed deal does not foreclose the possibility of filing a civil child protection action to offer the child services to deal with his victimization and offending. Since most juveniles will not realize the state’s ability to file a civil action, this possibility must be made clear to the child at the time of the deal. Otherwise, the child may subsequently seek to dismiss the civil action as a violation of the agreement.

IV. PROSECUTING JUVENILE SEX OFFENDERS

The recent discovery by the criminal justice system of juvenile sex offenses means that even experienced prosecutors are likely unaccustomed to handling these cases.⁸⁵ Prosecutors dealing with juvenile offenders face myriad obstacles and options that are not present in cases involving adult offenders. Jurisdiction issues, charging considerations, and the exercise of prosecutorial discretion are among the matters confronting the juvenile prosecutor.

⁸⁵ See Ryan, *supra* note 71, at 422 (“Prior to the 1970’s, references to sexual offenses committed by juveniles were rare.”).

F. *Jurisdiction questions*

Juvenile delinquency court does not have jurisdiction over all children. Most states have upper and lower age limits on the jurisdiction of juvenile courts. The minimum age is typically between the ages of 6-12.⁸⁶ Some states have no statutory minimum age but require the child to “display sufficient intellectual and emotional maturity to justify a criminal conviction.”⁸⁷ The maximum age in most states is eighteen.⁸⁸ However, in most states *all* children are subject to the state’s civil child protection statutes. To the extent unusual sexual practices endanger the community or warrant treatment which is not being provided, these civil statutes can be invoked as a means of obtaining jurisdiction over a child.⁸⁹

G. *Charging considerations*

A prosecutor handling a case of child sexual abuse involving a perpetrator who is also a child, has at least four charging options. Each option assumes, of course, the prosecutor believes an offense was committed that warrants the government’s time in going forward with a a prosecution. If the evidence does not reveal conduct worthy of a

⁸⁶ Martin & Pruett *supra* note 12, at 316.

⁸⁷ *Id.* at 316.

⁸⁸ *Id.* at 317.

⁸⁹ In Minnesota, for example, a child in need of protection or services includes a child whose “behavior, condition, or environment is such as to be injurious or dangerous to the child or others” or who “has committed a delinquent act before becoming ten years old.” MINN. STAT. § 260.015(2)(a)(9) - §260.015(2)(a)(10) (1998). Under this language, a child engaging in sexually inappropriate contact could be declared in need of protection or services on the basis that the conduct is dangerous to the child or others or that the child’s conduct would, if the child was old enough, constitute a delinquent act.

delinquency or child protection action, the prosecutor cannot proceed ethically.⁹⁰ If, however, the conduct rises to a level where the prosecutor believes the rehabilitative or punitive sanctions of the juvenile or adult systems are called for, she may consider the following alternatives.

1. *Diversion*

The prosecutor can divert the case from the court system altogether. The diversion can be conditioned on whatever terms the prosecutor and the child can agree on. At a minimum, the diversion agreement should be conditioned on the offender's successful completion of treatment.⁹¹ The agreement must allow the prosecutor to monitor the child's progress in therapy. In order to avoid subsequent litigation over the terms of the agreement, the phrase "successful completion of treatment" should be defined.⁹² If the prosecutor is confident in the judgment of the treatment provider, the document may simply define success as successful discharge from the program as determined by the therapist. The agreement can also require restitution, community work service, a letter of

⁹⁰ See A.B.A. Criminal Justice Standard 3-3.9(b) ("The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are: (i) the prosecutor's reasonable doubt that the accused is in fact guilty; (ii) the extent of the harm caused by the offense; (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender; (iv) possible improper motives of a complainant; (v) reluctance of the victim to testify; (vi) cooperation of the accused in the apprehension or conviction of others; and (vii) availability and likelihood of prosecution by another jurisdiction.").

⁹¹ See generally Becker, *supra* note 10 (noting that studies of treatment programs to date suggest that successful treatment is related to a decrease in recidivism, although researchers note more studies are needed).

⁹² See e.g. *People v. Birdsong*, 958 P.2d 1124 (Colo. 1998) (Defendant's probation revocation was upheld for failing to admit in treatment that touching of daughter was for sexual gratification). See also *Morstad v. State*, 518 N.W.2d 191 (N.D. 1994) (Judge's ambiguous comments regarding treatment component of probation should be construed in favor of defendant).

apology to the victim to be approved by the prosecutor and mailed to the victim only if the victim desires it, and good behavior and academic standing at school. If a prosecutor diverts the case, she should require the juvenile offender to admit the offense and provide a factual basis for the record. Ideally, the child should speak about the offense on the record in the courtroom. If this is not an option, have an investigator take a tape recorded statement from the juvenile as part of the diversion agreement. Have the tape recording transcribed and ask the juvenile to review it and sign a document acknowledging under oath the accuracy of the transcript.⁹³ Another option is to hire a court reporter to record the statement. Transcribe the statement and, again, have the child sign a notarized admission that the transcription is complete and correct. A juvenile should also complete a document acknowledging his right to a speedy trial and his waiver of that right for the duration of the period of diversion.

There are several disadvantages to a diversion agreement in a case involving a juvenile sex offender. First, unless the agreement is filed with and approved by the court, judges may be unwilling to enforce its provisions. For instance, a term of the agreement may be no contact between the offender and the victim. If the juvenile reneges on the agreement, the prosecutor can initiate charges but he likely does not have the option of asking the court to apprehend the juvenile for violating the provision governing contact.

Second, a diversion agreement done outside the court system is less likely to generate a paper trail which future investigators may find helpful if the child re-offends.

⁹³ Many tape recordings have a limited life span. If the recording is the only account of the child's admission, it may not be available as prior bad act evidence years later if the juvenile commits additional offenses.

The juvenile's offense will not be entered into a state or national computer registry. In a number of states, juvenile sex offenders must submit a sample of blood to the state's bureau of criminal apprehension.⁹⁴ This is unlikely to happen if the case is diverted from the system.

Third, a diversion agreement involves the prosecutor in duties tantamount to those performed by a probation officer. Many prosecutors simply lack the time to monitor treatment progress, restitution payments, and other provisions of a diversion agreement. If "restitution" payments are being funneled through the prosecutor's office, this creates additional management duties and potential problems if the money is lost, mishandled, or if a juvenile offender simply makes the claim of impropriety. It may be possible in some jurisdictions to have the probation officer monitor diversion agreement terms just as would be done if the case had been adjudicated and a court ordered disposition was entered. Such an arrangement gets the cases to the probation officer more quickly and at a time when the offender may be more amenable to treatment.

Fourth, a diversion agreement may make it harder to provide services to the offender. Some treatment programs may not accept a child who has not been adjudicated as an offender. Insurance or government programs may not pay for treatment which is not court ordered.

Fifth, a diversion agreement may unwittingly assure the victim the case is over and he or she will not have to testify against the accused. If the juvenile violates the

⁹⁴ See *e.g.*, A.R.S. § 13-4438 (2000).

agreement and charges are later initiated, the victim may feel betrayed by the system. To lessen this possibility, the prosecutor must fully explain the diversion agreement to the victim and the victim's parents.

There may also be advantages to a diversion agreement. First, a diversion agreement may quickly resolve the case for the victim. Second, the agreement may get the offender into treatment more quickly. The filing of charges, preparation for trial, the trial itself, and the disposition of a case all take time. Third, a diversion agreement may guarantee a result the prosecutor might not attain if the case went to trial. The burden of proving a case beyond a reasonable doubt is heavy. If a prosecutor's case rests exclusively on the testimony of a young victim, the prosecutor may worry about her chances of success at trial.⁹⁵ Though not perfect, a diversion agreement may be preferable to an acquittal.

2. *Filing a child protection petition*

The option of filing a civil action alleging the child is in need of protection or services has several advantages. First, the burden of proof is typically lower than in a juvenile delinquency proceeding.⁹⁶ Second, the civil proceeding alleges the child's need for *protection* or *services* and thus may be viewed by the offender as less accusatory than a delinquency proceeding alleging a violation of the criminal code. In the context of a

⁹⁵ See John E.B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L. REV. 873 (1994) for a great discussion of the difficulties of successfully prosecuting sexual abuse where the victim and only witness to the abuse is a very young child.

⁹⁶ See e.g., MINN. STAT. §260C.163 (1999) (“...allegations of a petition alleging a child to be in need of protection or services must be proved by clear and convincing evidence.”).

civil action, it may be easier for the offender to admit responsibility and accept services. Third, the prosecutor can call the offender to the witness stand as well as the child's parents. Although the child may retain his fifth amendment right in a civil case, the finder of fact may be able to draw an adverse inference from the assertion.⁹⁷ Fourth, the trial can still take place should the responding party fail to show up.⁹⁸ This would not be possible in a juvenile delinquency proceeding. Fifth, the state may have to prove fewer and broader issues than in a delinquency proceeding. Instead of having to prove the elements of a crime, the state may only have to prove the child's sexual behavior was such as to be injurious to himself or others.⁹⁹ Accordingly, the state will not have to prove traditional elements of a sexual assault such as the juvenile's sexual or aggressive intent.¹⁰⁰ If the state is alleging the child is *abused*, the state will only be required to prove the abuse, not the identity of the abuser.¹⁰¹ When abuse is proved, many juvenile courts are able to shift the burden of proof and require each parent seeking custody or contact with the child to prove he or she is not the perpetrator.¹⁰²

There may also be disadvantages to filing a child protection petition. The civil action may suggest to the offender that his conduct was not serious. In not being

⁹⁷ See, e.g., *Giltner v. Stark*, 219 N.W.2d 700 (Iowa, 1974) (holding the trial court was correct in refusing to give an adverse inference instruction to the jury because, "...the court is not required to give a cautionary instruction dealing with the drawing of adverse inferences from the assertion by a party in a civil case that an answer to a question propounded would violate his privilege against self-incrimination guaranteed by amendment 5 of the federal constitution...")

⁹⁸ See for example the Minnesota Juvenile Court Procedure Rules governing the procedures in a juvenile protection case. These rules point out the right of the child to be present throughout the proceedings, but go on to note the case can proceed without the child. MINN. JUV. CT. PROC. RULE 39.01, 50.01 (1999).

⁹⁹ See, e.g. MINN. STAT. § 260C.007 (1999) (defining a child in need of protection as one who has been "a victim of physical or sexual abuse."). Cf. MINN. STAT. § 609.342 (1999) (defining the crime of sexual assault.).

¹⁰⁰ See, e.g. MINN. STAT. §609.341 (1999).

¹⁰¹ See *supra* note 99 and accompanying text.

¹⁰² See MYERS at 387. See also *West Virginia Dep't. of Health and Human Resources v. Doris S.*, 475 S.E. 2d 865, 878 (W. Va., 1996).

adjudicated delinquent, the juvenile offender may not be subject to registration laws and may not have to give a blood sample for the state's crime lab profiling system.¹⁰³ If the juvenile does grow into an adult offender, the failure to give a blood sample may make it more difficult to apprehend him or her. In filing only a civil action, the juvenile may not be able to access some treatment programs reserved for adjudicated delinquents. The court may also lose punitive disposition options such as reform schools and locked detention facilities. The court may have fewer options in dealing with a juvenile who fails whatever treatment plan the court orders him to attend. The court may not, for instance, be able to threaten the child by sending him or her to a reform school, detention facility or work camp. Public safety is a legitimate concern in dealing with juvenile sex offenders and a judge, even in a civil action, should have recourse to place a child in a secure facility if necessary or to otherwise sanction a child for failing to comply with treatment. The sage prosecutor will fully explore the treatment options available in civil court before this option is selected and the hands of the judge are unwittingly tied.

3. *Juvenile delinquency charges*

There are myriad advantages to filing delinquency charges against a juvenile sex offender. First, the semi-criminal nature of the proceeding may send a message to the juvenile that his conduct is serious. Second, the juvenile court may have more treatment options. Some in-patient sex offender programs will not take an offender unless there has been an adjudication of delinquency. Third, the court may have more options in enforcing its order in a delinquency as opposed to civil child protection proceeding. If

¹⁰³ See *supra* note 94.

successfully completing treatment is part of the court's order, failure to comply can lead to a revocation of probation. The court may be able to commit the juvenile to a locked detention facility, work camp, or other program as a consequence for failing to comply with the court's order. The mere threat or possibility of the consequence may cause some offenders to comply with the court's order.

Next, the delinquency action may create a paper trail that can follow the juvenile into adulthood and assist in prosecuting the offender if he continues to offend years down the road. The paper trail may be used to show prior bad acts.¹⁰⁴ In addition, some states require juvenile sex offenders to be subject to registration laws and to give samples of their blood.¹⁰⁵ This information can be used to apprehend the offender if future crimes are committed. A juvenile adjudication can also be used as evidence in a future petition to commit an offender as a sexually violent predator.

Finally, the juvenile court still retains a focus on privacy and rehabilitation. Juvenile proceedings are typically closed to the public and thus may be less traumatic to the offender and also the victim. In small towns, a public accusation of child abuse often results in the victim being teased and ostracized in the community.¹⁰⁶ In a trial in juvenile court, the offender may not have the right to a jury trial.¹⁰⁷ Accordingly, if the

¹⁰⁴ See *State v. McRae*, 979 P.2d 911 (Wash. Ct. App. 1999) (affirming the trial court's inclusion of prior juvenile acts to enhance the sentences of three adult defendants.)

¹⁰⁵ See ALASKA STAT. §12.63.100 (2000); CAL. PEN. CODE §290 (2000); and WASH. JU. C.R. 7.7 (1999).

¹⁰⁶ See generally, Victor I. Vieth, *In My Neighbor's House: Confronting Child Abuse in Rural America*, 22 *HAMLIN LAW REVIEW* 143 (1998).

¹⁰⁷ See *In re Perham*, 184 A.2d 449, 451 (N.H. 1962); and *In re Millican*, 906 P.2d 857, 860 (Or. Ct. App. 1995) (citing *State ex rel Juv. Dept. v. Reynolds*, 857 P.2d 842 (Or. 1993)).

child victim must testify, she will not have to do so in front of a large group of adult strangers.

A prosecutor may have several concerns about filing a juvenile sex offense case in delinquency court. First, the burden of proof is higher than in a civil action.¹⁰⁸ Second, the juvenile enjoys many constitutional rights including protection from double jeopardy.¹⁰⁹ If the prosecution fails to prove its case on the first try, the juvenile may be insulated from further prosecution even if he subsequently confesses or additional evidence is uncovered.¹¹⁰ Third, the increasingly punitive consequences of the juvenile system may, according to some commentators be harmful to juveniles.¹¹¹ Whether or not this is true, a prosecutor may not feel that a given juvenile should have to register as an offender or give a blood sample. Nonetheless, states adopting such provisions may impede a prosecutor's ability to discard these options as part of a plea agreement. In moving toward a more punitive system, legislatures may be forcing prosecutors to try more of these cases and/or to handle more cases in civil court.

4. *Reference to adult court*

Many jurisdictions are adopting reference statutes which make it easier to try juvenile sex offenders as adults. In some cases, this is done by petitioning the court for a transfer. The age of the child, the number of victims, whether the offense involved

¹⁰⁸ For example, in Minnesota, the state must prove the allegations in a juvenile delinquency proceeding "beyond a reasonable doubt." MINN. JUV. CT. PROC. RULE 13.06 (1999).

¹⁰⁹ See *Breed v. Jones*, 421 U.S. 519 (1975).

¹¹⁰ In this scenario, though, it may be possible for the prosecutor to subsequently file a civil action alleging the child is in need of protection or services.

¹¹¹ See generally *supra* note 34.

violence, and the child's previous involvement with the legal system and treatment programs are factors courts commonly consider in referencing a child to adult court.¹¹² In some cases, including homicide and certain sex offenses, a reference to adult court is automatic.¹¹³ In other cases, the prosecutor has the discretion to file certain cases either in adult or juvenile court.¹¹⁴

There may be several advantages to referencing a juvenile sex offender to adult court. First, the juvenile court may not be able to effectively treat an older serious offender before the system loses jurisdiction. In some states, the juvenile court loses jurisdiction over a child when she turns eighteen¹¹⁵ or nineteen.¹¹⁶ Second, incarceration may be a better option than treatment in some cases. Researchers have not yet been able to determine if treatment is a viable option at the present time.¹¹⁷ In the absence of hard data concerning the effectiveness of treating juvenile sex offenders, perhaps incarceration is the best option to protect the public. This is not a new approach. The juvenile court has historically treated older juveniles committing serious offenses more harshly. Indeed, the Illinois Juvenile Court Act of 1899 applied only to children under the age of

¹¹² See *Kent v. United States*, 383 U.S. 541 (1966).

¹¹³ See, e.g., Senate Bill No. 1293, Act 73, Public Acts of 2000, 2000 Idaho Sess. Laws 73 (2000).

¹¹⁴ See, e.g., BURNS IND. CODE. ANN. § 31-30-3-4 (1999) (allowing the juvenile court to waive jurisdiction in murder charges where the prosecutor has brought a motion to that effect, and certain other criteria are met.)

¹¹⁵ See MONT. CODE ANNO. § 52-5-101 (1999).

¹¹⁶ See C.R.S. § 16-11-311 (1999).

¹¹⁷ See, e.g., John Q. LaFond, *Sexually Violent Predator Laws and Registration and Community Notification Laws: Policy Analysis: The Costs of Enacting a Sexual Predator Law*, 4 PSYCH. PUB. POL. AND L. 468, 472 (1998). But see also Alexander Brooks, *Critical Perspectives on Megan's Law, Protection vs. Privacy*, 13 N.Y.L. SCH. J. HUM. RTS. 1, 133 (observing that new studies show significantly better results in treating sex offenders (citing Robert J. McGrath, *Sex Offender Treatment: Does it Work?*, Perspectives 24 (1995))).

sixteen.¹¹⁸ Third, committing a juvenile to adult court does not necessarily mean prison or the abandonment of rehabilitation efforts. The juvenile, just as an adult, may receive a stayed sentence and be ordered into treatment as a condition of probation. Indeed, the treatment options in the adult system may be superior to those in the juvenile system and may be more appropriate for older juvenile offenders.

There may also be disadvantages to referencing a child to adult court. First, it may be more difficult for the prosecutor to prove his case in adult court. The prosecutor may now have to convince twelve jurors as opposed to one judge in a bench trial. Jurors may be sympathetic to a child offender and be concerned with the consequences of finding the juvenile guilty. This sympathy factor may not result in a conscious effort at jury nullification, but it may mean the prosecutor will have a tougher task of convincing the jury than he would in prosecuting an adult who jurors clearly believe is responsible for his conduct.¹¹⁹

Second, the juvenile system may have harsher consequences and be better equipped to reign in a juvenile sex offender than the adult court is. In Minnesota, for example, it takes four convictions for criminal sexual misconduct in the second degree involving the touching of a non-family member before the court can send the offender to prison.¹²⁰ Even then, the prison sentence consists of only fourteen months actual

¹¹⁸ *The Illinois Juvenile Court Act of 1899, reprinted in* 49 JUVENILE AND FAMILY COURT JOURNAL 1 (1998).

¹¹⁹ *See, e.g., Vieth, supra* note 83, at 150-151 (discussing the way in which a community will often ostracize a sexual abuse victim, while offering an outpouring of sympathy to an accused offender.)

¹²⁰ *See* MINN. SENT. GUIDE. IV-V (1999).

incarceration.¹²¹ It may be preferable to retain juvenile court jurisdiction and send the offender to an inpatient treatment program.

5. *Alford pleas*

Named after a United States Supreme Court decision, an *Alford* plea is one in which the defendant accepts a plea bargain, pleads guilty but maintains his innocence.¹²² Instead, the accused simply asserts that he believes the judge or jury would find him guilty and thus he wants to take advantage of the plea agreement.

There are many problems with accepting an *Alford* plea in a case involving an allegation of sexual abuse. First, the plea may make it harder to provide treatment to the offender. Though some programs will admit offenders who have tendered an *Alford* plea, many others do not. This is because treatment providers believe they cannot work with an offender who remains adamant in denying the offense.¹²³

Second, some judges take the position they *cannot* accept an *Alford* plea in a juvenile case.¹²⁴ This is because the purpose of the juvenile court remains

¹²¹ *Id.*

¹²² North Carolina v. Alford, 400 U.S. 25 (1970).

¹²³ As succinctly stated by one expert: "The importance of requiring the offender to admit to his sexual assaults is well known to therapists who specialize in the treatment of sex offenders. As long as he denies his offense, no meaningful sex offender therapy can occur. A recent survey of therapists in four states demonstrated that therapists universally require the child molester's candid acknowledgment of sexual assaults before they permit him to enter their programs for treatment." ERIC LEBERG, UNDERSTANDING CHILD MOLESTERS 54 (1997).

¹²⁴ In the years I had the honor of appearing in his courtroom, Minnesota District Court Judge Bruce Gross took this position. Judges who do not take this position may move a troubling case from their court calendar only to saddle treatment providers, probation officers, and other professionals with a difficult, if not impossible situation.

rehabilitation.¹²⁵ Arguably, the juvenile cannot fulfill its obligation of treatment and rehabilitation of a child who claims to have done nothing wrong.

Third, an *Alford* plea may not give the victim the comfort of knowing an offender has accepted responsibility in a meaningful way. Even if a victim assents to an *Alford* plea, the assent may be premised on the present need to avoid the stress of a trial. The victim may not fully appreciate the long-term consequences of allowing the perpetrator to continue denying the act. This is particularly true when the abuse is within the family unit. How, for example, can a sister victimized by her brother continue to interact with the abusive sibling for a lifetime without feeling anger at his inability to take responsibility? The problem will be pronounced if the other family members support the brother in his denial and blame the victim for the prosecution.

Fourth, the jurisdiction of the juvenile court is limited and typically ends when the offender attains adult status. Accordingly, time is of the essence and it may be prudent to insist on an admission of responsibility up front in order to expedite the treatment of the offender.

6. *Multiple filings*

In addition to filing a delinquency petition, consider filing a civil protection case on behalf of the offender, the victim, or both. Unlike many delinquency actions, the civil

¹²⁵ See ARIZ. ST. JUV. CT. P. R. 19 (2000); CAL. WEL. & INST. CODE §625 (2000); and UTAH CODE ANN. §78-3a-603 (1999).

case allows the prosecutor access to the entire family unit and can assist in making sure the victim's needs are being attended to. The filing of a civil action is particularly important in cases of intra-familial abuse where reunification may be considered at some point. In cases of extra-familial abuse, it may be helpful to file a civil action against the offender in an effort to involve his or her entire family in the rehabilitation of the juvenile. This should be done whenever the delinquency action is insufficient to gain jurisdiction over the juvenile offender's immediate family.

In small, rural communities, the prosecutor assigned to the civil child protection action may also be handling the delinquency petition. This scenario can create ethical dilemmas for the prosecutor. A prosecutor cannot use a criminal action to gain leverage in a civil action.¹²⁶ Accordingly, the prosecutor cannot offer to dismiss the quasi-criminal, delinquency action in exchange for an admission to the civil child protection action. If, however, the defense attorney representing the child in both proceedings makes such an offer, the rules do not appear to prohibit the prosecutor from accepting the defense offer.¹²⁷

If the case cannot be resolved without a trial, other ethical qualms may develop. Can the prosecutor use civil discovery rules to obtain information that could also be advantageous in the delinquency action? For example, could the prosecutor request a deposition of the juvenile offender in the civil action even though he could not demand such an inquiry in the delinquency action? Even if the deposition is not a subterfuge for

¹²⁶ See, e.g., MINN. R. PROF. CONDUCT 1.7-1.9 (1999) (discussing conflicts of interest).

¹²⁷ See, e.g., MINN. R. PROF. CONDUCT 3.8 (1999) (outlining the special responsibilities of prosecutors).

violating the juvenile's fifth amendment rights, it would certainly give the government an unfair advantage in the delinquency case. If, on the other hand, the prosecutor cannot issue discovery demands so long as the delinquency action is pending, this may give the juvenile offender an unfair advantage in the civil case. Under this scenario, the best option may be to expedite the delinquency action and then proceed to trial in the civil case. Some limited discovery, such as witness lists may be allowed in the civil case with the understanding that more complete discovery will be allowed at the completion of the delinquency action. Just as the prosecutor should not be allowed to use the civil action to gain an unfair advantage in the delinquency action, the defense attorney should not be permitted to use the delinquency action to gain an unfair advantage in the civil action. For example, the defense attorney should not be allowed to needlessly delay the delinquency action as a means of gaining a tactical advantage in the civil case.

7. *Juvenile offense not detected until offender is an adult*

On occasion, a child will commit a serious offense which is not detected until the child is an adult. Given the offender's age at the time of detection, the juvenile court may no longer have jurisdiction. When this happens, some states will allow the offender to be charged as an adult. The Minnesota Supreme Court, for example, has said "(w)e believe it would be ridiculous to say that if a person of 16 or 17 years of age commits a murder and escapes *detection* or apprehension...until after he has reached 18 years of age...he

could no longer be proceeded against in the Juvenile Court or tried by the District Court.”¹²⁸

8. *Create and allow access to juvenile court records for future use*

In charging and pleading these cases, view the matter long term. Many juveniles will re-offend as adults¹²⁹ and may eventually be considered for commitment under a state sexually violent predator statute.¹³⁰ If a state does not allow for the long term preservation of juvenile records or does not allow juvenile records to be accessed for sexually violent predator purposes, consider working with the legislature to amend the juvenile statutes.¹³¹ Children can waive confidentiality of their juvenile records as part of a plea bargain, at least to the extent the records can be accessed by law enforcement, prosecutors, therapists, and for sexually violent predator purposes.¹³² The child can be made to articulate on the record his understanding of the waiver, and have the court approve the waiver on the record.

9. *Dealing with a child who is both an offender and a victim*

Where a child is adjudicated delinquent for offending against a younger sibling, and that same child is also a witness who will testify as a victim in adult court against a

¹²⁸ *In re S.V.*, 296 N.W.2d 404 (Minn. 1980).

¹²⁹ See *infra* note 167 and accompanying text.

¹³⁰ For a review of sexually violent predator statutes, see Brian K. Holmgren, *Sexually Violent Predator Statutes – Implications for Prosecutors and Their Communities*, 32 THE PROSECUTOR 20 (1998).

¹³¹ *Id.* at 32-33.

¹³² See, e.g. MINN. JUV. CT. PROC. RULE 64.02 (1999) (detailing the protocol regarding availability of juvenile court records). See also Ryan, *supra* note 71, at 425 (finding a consensus among those who work with juvenile sex offenders that waiver of confidentiality is essential).

caretaker, many courts will allow the delinquency adjudications to be used for impeachment.¹³³ The juvenile's offender status should be mentioned in the opening statement and on direct examination when the child testifies as a victim in adult court. It should be pointed out that offending behaviors are consistent with the child's victimization by an adult, and in this way the prior offenses enhance, rather than detract from, the child's credibility. The point can be made that this child is honest and willing to tell the truth not only about his caretaker's abuse, but also about his own offenses.

An expert may be called to testify that certain sexual behaviors are consistent with being a victim of abuse.¹³⁴ Although the expert cannot say that because the child became a perpetrator, he is automatically a victim, the expert can be used to educate the jury that being a victim *and* offender is not uncommon.¹³⁵ Be sure to carefully examine state law before calling an expert witness, however, as many jurisdictions severely limit what an expert can say.¹³⁶

H. *Prosecutorial discretion*

The juvenile court gains jurisdiction over juvenile sex offenders "the same way [it] gains jurisdiction over all juvenile criminal misconduct – by reference to adult penal

¹³³ See *Davis v. United States*, 415 U.S. 308 (1973) (holding defendant has the right to use the juvenile record of a prosecution witness for impeachment purposes).

¹³⁴ William Friedrich et al., *Normative Sexual Behavior in Children*, 88 PEDIATRICS 456, 462 (1991).

¹³⁵ For a discussion of the relationship between sexual victimization and sexually abusive behavior, see SHARON K. ARAJI, *SEXUALLY AGGRESSIVE CHILDREN* 58-60 (1997).

¹³⁶ Pennsylvania, for example, has the most restrictive position on admissibility of expert testimony in child sex abuse cases in the nation. Lisa R. Askowitz, *Restricting the Admissibility of Expert Testimony in Child Sex Abuse Prosecutions: Pennsylvania Takes It To the Extreme*, 47 U. MIAMI L. REV. 201, 206-207 (1996) (summarizing the approach to expert testimony taken in several different jurisdictions).

statutes.”¹³⁷ The ability of this type of system to get at the offensive conduct depends, then, on the inclusiveness of the penal code in defining sexual offenses against children.¹³⁸ An all-inclusive statutory scheme makes it a crime to have sexual conduct with a child below a certain age.¹³⁹ The policy decision behind this type of scheme is that children of a certain age cannot legally consent to any form of sexual contact, and no consideration is given to the age difference between victim and offender, nor to the mental faculties of the offender.¹⁴⁰

A less inclusive approach requires the offender to be a certain minimum number of years older than the victim.¹⁴¹ Although this approach leaves very little gray area in defining who qualifies as a juvenile sex offender, there is a gap in coverage that allows some acts deserving of coverage to slip through.¹⁴² While a hybrid approach can narrow this gap, no statutory system is perfect in dealing with juvenile sex offenders.¹⁴³

Discretion in prosecution is a time-honored way of finding flexibility in the process of choosing which juveniles will face adjudication and which will not.¹⁴⁴ Prosecutors should start by taking allegations of sex abuse seriously, and taking care not to adopt the “boys will be boys” approach of the past.¹⁴⁵ Stereotyping should be avoided,

¹³⁷ Martin & Pruett, *supra* note 12, at 317.

¹³⁸ See Martin & Pruett, *supra* note 12, at 317-325, for a more thorough discussion of gaining jurisdiction over juvenile sex offenders, and the inclusiveness of different statutory schemes.

¹³⁹ Martin & Pruett, *supra* note 12, at 318 (citing WIS. STAT. ANN. § 938.02(3m), (10m) (West Supp. 1996).

¹⁴⁰ *Id.* at 319.

¹⁴¹ *Id.* at 319-320 (citing WASH. REV. CODE ANN. § 13.40.020(15) (West Supp. 1997)).

¹⁴² *Id.* at 320.

¹⁴³ *Id.* at 322.

¹⁴⁴ *Id.* at 322-323 (citing Nicolas Bala & Ira Schwartz, *Legal Responses to the Juvenile Sex Offender*, in *The Juvenile Sex Offender* 25 (Howard E. Barbaree et al. eds., 1993)).

¹⁴⁵ See Sander N. Rothchild, *Note & Comment: Beyond Incarceration: Juvenile Sex Offender Treatment Programs Offer Youths a Second Chance*, 4 J.L. & POL’Y 719, 720 (1996).

as juvenile sex offenders are a heterogeneous group.¹⁴⁶ Prosecutors can make the statutory scheme more responsive by considering several relevant factors, including the age difference between the offender and victim, the mental faculties of the offender and victim, any prior bad acts by the offender, the sexual content of the conduct, and where, along a continuum of sexual acts, this particular offense falls.¹⁴⁷

The prosecutor's job is further complicated when a juvenile offender is of an age otherwise protected by statute, for example, where a 13-year-old boy molests an 11-year-old girl. Prosecuting these juveniles has withstood constitutional challenge on due process and equal protection grounds.¹⁴⁸ The prosecutor should use all information available, as well as the characteristics of the offender and the offense itself to reach the best decision in each case.¹⁴⁹ The goal is to construct a system that will "provide the juvenile system with its greatest reach and flexibility."¹⁵⁰

I. *Disposition and treatment*

Treatment, rather than incarceration, is an increasingly popular disposition for juvenile sex offenders, especially as more becomes known about the pathology of sexual

¹⁴⁶ See generally, Sharon K. Araji, *Sexually Aggressive Children: Social Demographics and Psychological Characteristics in SEXUALLY AGGRESSIVE CHILDREN* 47 (1997).

¹⁴⁷ Martin & Pruett, *supra* note 12, at 324-325.

¹⁴⁸ Martin & Pruett, *supra* note 12, at 323 (citing Kole, Annotation, *Statute Protecting Minors in a Specified Age Range From Rape or Other Sexual Activity as Applicable to Defendant Minor Within Protected Age Group*, 18 A.L.R. 856, 865-66 (1994) (taking care to note that a minority of jurisdictions have ruled in favor of the juveniles who have challenged prosecutions under such statutes).

¹⁴⁹ See Ryan, *supra* note 71, at 424. Ryan finds that as the age of the perpetrator decreases, and the age difference between victim and perpetrator gets smaller it becomes increasingly difficult to define abuse of one child by another. A lack of consent, lack of equality, and/or the use of coercion should all inform the judgment about abusive interactions. *Id.* at 424.

¹⁵⁰ *Id.* at 325.

offending.¹⁵¹ Research has shown that many adult sex offenders committed their first sexual offense as a juvenile,¹⁵² and that juvenile sex offenders are at a high risk to commit new sexual and non-sexual offenses.¹⁵³ Attempts at treatment and rehabilitation early on may prevent juvenile sex offenders from offending again, and can “prevent countless future victims of sex crimes.”¹⁵⁴

The developmental level of the juvenile offender, the type and severity of the sex offense, the number and gender of the victims involved, as well as the age and relationship of the victim to the offender, must all be considered before a treatment decision can be made.¹⁵⁵ The goals of treatment should be to teach offenders to accept responsibility, control deviant sexual urges, and to re-socialize and re-educate the

¹⁵¹ See Rothchild, *supra* note 144, at 736 (noting that juvenile sex offenders have been considered untreatable, because of the high rate of recidivism among adult sex offenders.) For example, while in 1982 only 22 treatment programs for juvenile sex offenders were identified, by 1991 that number had exploded to 600, 480 of which were community based. See Henry R. Cellini, *Assessment and Treatment of the Adolescent Sexual Offender in The Sex Offender 6-7* (Barbara K. Schwartz & Henry R. Cellini eds., 1995) (citations omitted). See also, Joyce F. Lakey, *The Profile & Treatment of Male Adolescent Sex Offenders*, 29 *ADOLESCENCE* 755 (1994). Lakey captured the effort that juvenile sex offenders must put into their treatment efforts when she quoted David Berenson, Clinical Director of the Ohio Department of Youth Services, who said- “The best way I can suggest to come in touch with it (the demanding dimensions of treatment) is to think in your mind what it would take for you to commit sex offenses.” *Id.* at 759.

¹⁵² Jean Peters-Baker, *Challenging Traditional Notions of Managing Sex Offenders: Prognosis is Lifetime Management*, 66 *UMKC L. REV.* 629, 674 (internal citations omitted).

¹⁵³ Lucinda A. Rasmussen, *Factors Related to Recidivism Among Juvenile Sexual Offenders*, 11 *SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT* 69 (1999). See also, Paul Valliant & Tracy Bergerson, *Personality & Criminal Profile of Adolescent Sexual Offenders, General Offenders In Comparison to Nonoffenders,*, 81 *PSYCHOLOGICAL REPORTS* 483 (1997). These researchers found that “juvenile sex offenders emerged as more assaultive, more socially introverted, more resentful, less indirectly hostile and less thought disordered than the general offender group.”*Id.* at 487. Thus, because juvenile sex offenders possess these character traits, it is necessary to address them to insure that the juvenile sex offender does not perpetrate again.

¹⁵⁴ Peters-Baker *supra* note 152, at 674. For an excellent comprehensive overview of the available literature concerning the treatment of juvenile sex offenders and the efficacy of such efforts, see SUE RIGHTHAND & CARLANN WELCH, *JUVENILES WHO HAVE SEXUALLY OFFENDED: A REVIEW OF THE PROFESSIONAL LITERATURE* (2001) (published by the Office of Juvenile Justice and Delinquency Prevention, Washington, D.C.).

¹⁵⁵ Rasmussen, *supra* note 153, at 70.

offender.¹⁵⁶ There are a variety of treatment theories, therapies, and programs designed with these goals in mind. While some focus specifically on the juvenile sex offender, others were designed for adult sex offenders, and adapted for use by juveniles. The juvenile sex offender must be “assessed” before he can be “treated.”¹⁵⁷ Ideally, the assessment should be completed before a dispositional order is made. When a judge orders a child to be assessed and to simply follow the recommendations of the assessor, the court uses minimal information to make a decision that could have grave consequences to the victim, the perpetrator, and to society.

There are several “tests” designed to assess sexual behavior and sexual interest in juveniles, but these tests are of questionable validity and should be used with caution.¹⁵⁸

¹⁵⁶ Rothchild, *supra* note 145, at 751-52 (citing Fay Honey Knopp, THE YOUTHFUL SEX OFFENDER: THE RATIONALE & GOALS OF EARLY INTERVENTION & TREATMENT 12 (1985). *See also* Lakey, *supra* note 151, at 759. Lakey explains that treatment takes many forms-“lectures, discussions, exercises, instructional videos, movies, written and oral treatment plan assignments, role playing, and keeping daily journals.” *Id.* at 759. Lakey, for example, explained how role playing can be “a powerful therapeutic tool for breaking denial and beginning disclosure.”*Id.* at 759. In addition, “hearing and reading testimonials from victims of crime, especially sexual assaults, discussing lifelong pain and damage to them and their families, reviewing the continuing anguish of both perpetrators’ and victims’ families-all are intended to arouse sensitivity to the expression of feelings and to ignite empathy and remorse.” *Id.* at 759

¹⁵⁷ *See* John A. Hunter, Jr. & Aurelio Jose Figueredo, *Factors Associated with Treatment Compliance in a Population of Juvenile Sexual Offenders*, 11 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 49 (1999). Hunter and Figueredo address the concerns those in the criminal justice and mental health fields have with finding the most appropriate disposition for juvenile sex offenders. The researchers note this decision is complicated by the fact that youthful offenders vary on a number of important dimensions, including, “manifest level of delinquency/criminality; nature and extent of sexual maladjustment and deviancy; and capacity for, and interest in, forming and maintaining healthy interpersonal relationships.” *Id.* at 50. A range of intelligence, social class, economic, and racial boundaries further influence the decision. *Id.* at 50. At the same time though, researchers have found that there are certain character traits that tend to distinguish juvenile sex offenders from their normally developing peers. *See e.g.* Joyce F. Lakey, *The Profile & Treatment of Male Adolescent Sex Offenders*, 29 ADOLESCENCE 756 (1994). As evidence, Lakey cited Davis who noted that there were several factors of etiological importance that characterize juvenile sex offenders including “feelings of inadequacy; low self esteem; fear of rejection and anger toward women; atypical erotic fantasies; poor social skills; having been sexually abused; and exposure to adult models of aggression, dominance and intimidation” *Id.* at 756.

¹⁵⁸ *See, e.g.*, Henry R. Cellini, *Assessment and Treatment of the Adolescent Sexual Offender in THE SEX OFFENDER* 6-4 (Barbara K. Schwartz & Henry R. Cellini eds., 1995) (noting that “...the absence of validated research instruments and assessment protocols means that attempts to differentiate among types of offenders and their offenses should only be used in the treatment planning and placement phase.”).

However, researchers agree that broad personality tests, like the MMPI, are helpful in assessing offenders.¹⁵⁹ Some researchers suggest intelligence testing, while others rely on polygraph and plethysmograph testing.¹⁶⁰ However the juvenile is assessed and monitored, the process should be ongoing as the youth moves through the criminal justice and social service systems.¹⁶¹ Extensive follow up with the adolescent increases the benefits of therapy and further reduces behavior problems in juvenile sex offenders.¹⁶²

There are several theories of treatment for the sex offender, some adapted with more success than others to the juvenile sex offender.¹⁶³ The theories can be grouped into at least three major treatment models.¹⁶⁴

1. *Biological*

Biological, or pharmacological, therapy uses medications to control a juvenile offender's impulses.¹⁶⁵ So-called "chemical castration" can be either voluntary or

¹⁵⁹ See Hunter & Figueredo, *supra* note 157, at 53. See also, Gloria Losada-Paisey, *Use of the MMPI-A To Assess Personality of Juvenile Male Delinquents Who Are Sex Offenders & NonSexOffenders*, 83 PSYCHOLOGICAL REPORTS 115 (1998). Losaida Paisey stated that the "psychometric study of personality characteristics of populations of offenders has been important to forensic settings in classifying offenders by type and developing relevant treatment programs." *Id.* at 115. In her study, Losaida Paisey found that "scores on Psychopathic Deviate and Schizophrenia scales contributed most to the juveniles being classified as sex offenders." *Id.* at 115.

¹⁶⁰ See Peters-Baker, *supra* note 152, at 662-65. Peters-Baker describes the methodology involved in using plethysmograph and polygraph testing, and the limitations of these tests. Both tests have limits with respect to adult offenders, which can be compounded when dealing with a juvenile offender. *Id.*

¹⁶¹ Cellini, *supra* note 158, at 6-4.

¹⁶² John Q. LaFond & Bruce J. Winick, *Sex Offenders and the Law*, 4 PSYCH. PUB. POL. AND L. 3, 10 (1998) (summarizing research done by William D. Pithers & Alison Gray, as reported in *The Other Half of the Story: Children with Sexual Behavior Problems*, 4 PSYCH. PUB. POL. AND L. 200 (1998)).

¹⁶³ See Ryan, *supra* note 71, at 426. Ryan's article *Treatment of Sexually Abusive Youth* notes that the view of intervention regarding a youthful population was altered from the view regarding adult offenders to "remember that the sexually abusive youth is still growing and to view the offending behavior in the context of a more holistic developmental approach." Ryan at 426.

¹⁶⁴ See Martin & Pruett, *supra* note 12, at 306 (categorizing a variety of treatments and therapies into three distinct treatment models).

involuntary and, in some states, is used as an alternative to surgical castration.¹⁶⁶ Issues of informed consent and medical supervision make it difficult, if not impossible, to apply these therapies to juveniles.¹⁶⁷ The constant state of hormonal flux that defines adolescence is another reason this therapy is not ideal for the juvenile sex offender.¹⁶⁸

2. *Cognitive-behavioral/social learning*

The cognitive-behavioral, or social learning theory assumes that “sexually coercive behavior has been learned, observed, or experienced, and changing behavior will require new ways of thinking and new responses to distressing feelings and conditions.”¹⁶⁹ The cognitive model deals with (1) a lack of empathy in the sex offender; (2) objectification of the victim; (3) viewing sex as something done to another person, and not something done for mutual pleasure; (4) a lack of remorse by the offender; and (5) a general acceptance of violence as a part of life.¹⁷⁰

¹⁶⁵ Rothchild, *supra* note 145, at 750.

¹⁶⁶ For an in-depth discussion of chemical castration, see Peters-Baker, *supra* note 152, at 652-53.

¹⁶⁷ Nicolas Bala & Ira Schwartz, *Legal Responses to the Juvenile Sex Offender in THE JUVENILE SEX OFFENDER* 25 (Howard E. Barbaree et al., eds., 1993).

¹⁶⁸ Martin & Pruett, *supra* note 12, at 306-307 (“Because the bodies of adolescents are in a constant state of hormonal flux, antiandrogens are used on a restricted basis, generally only with adolescents sixteen years or older who manifest serious sexually deviant behavior.”).

¹⁶⁹ *Id.* at 307. See also Valliant & Berenson, *supra* note 153 at 487. These researchers “found that adolescent sex offenders possess the cognitive ability to acknowledge their sexually inappropriate and deviant thoughts but the inability to inhibit their sexually deviant impulses.” *Id.* at 487.

¹⁷⁰ Judith V. Becker & Meg S. Kaplan, *Cognitive Behavioral Treatment of the Juvenile Sex Offender in THE JUVENILE SEX OFFENDER* 264 (Howard E. Barbaree et al., eds., 1993). See also, JUDITH S. BECK, *COGNITIVE THERAPY: BASICS & BEYOND* 1 (1995). Beck explains the tenets of Cognitive Therapy. She states that “the cognitive model proposed that distorted or dysfunctional thinking (which influences the patient’s mood and behavior) is common to all psychological disturbances. Realistic evaluation and modification of thinking produce an improvement in mood and behavior. Enduring improvement results from modification of the patient’s underlying dysfunctional beliefs.” *Id.* at 1.

Cognitive treatments center around individual and group therapy, and can include treatments designed for juveniles, such as sexual education and value clarification.¹⁷¹

These treatments are popular, being used in over 95% of sex offender treatment programs.¹⁷² However, not every behavioral treatment is appropriate for adolescents.¹⁷³

As with other treatment models, the unique developmental concerns of juveniles must be taken into consideration before choosing a program.

3. Relapse Prevention

Relapse prevention theory is an increasingly common treatment model.¹⁷⁴ This program is designed to help offenders strengthen their ability to control deviant urges.¹⁷⁵

¹⁷¹ See Cellini, *supra* note 158, at 6-8. See generally Martin & Pruett, *supra* note 12. See Lakey, *supra* note 151 at 758. Lakey stated that “therapy must delicately distinguish between the offender and the offense so the offender recognizes and acknowledges his human potential to change.” *Id.* at 758. Further, the “offender must understand the connection between events, his thoughts, and his feelings, all of which triggered his offending behavior.” *Id.* at 758. See also, Peter Hummel et al., *Male Adolescent Sex Offenders against children: similarities and Differences between those offenders with and those without a history of sexual abuse*, 23 JOURNAL OF ADOLESCENCE 305,313 (2000) This task (the juvenile sex offender’s recognition of his ability to change) is particularly challenging for the juvenile sex offender because he is already stressed with regard to many developmental characteristics. “Both in the perception of their parents or step-parents and in their perception of themselves as a whole, they have little chance of gaining the benefits of social contacts.” *Id.* at 313.

¹⁷² Rothchild, *supra* note 145, at 747-48 (internal citations omitted). See Lakey *supra* note 151 explaining why group therapy “is the treatment of choice for adolescent sex offenders” because a “group mobilizes peer pressure as a powerful agent of change in pressing for disclosure and confirmation.” *Id.* at 759-760.

¹⁷³ See Cellini, *supra* note 158, at 6-7 to 6-10 (noting that the use of a plethysmograph, already controversial with adult offenders, is complicated by ethical and developmental concerns when used with adolescent offenders. Other techniques have not been researched on female offenders, and many techniques may not be effective at all with adolescents.).

¹⁷⁴ Martin & Pruett, *supra* note 12, at 307-308. See *supra* note 34, at 73. “Kahn and Chambers followed up 231 juvenile sex offenders with an average exposure period of 20.4 months. Although almost 45% of their sample was convicted of a subsequent offense, only 7.5% recommitted a sexual offense. In general, the small group of sexual recidivists were more likely: (a) to have victimized a stranger, (b) to have victimized a child rather than a peer, (c) to have therapist -identified deviant sexual arousal patterns, (d) to have used verbal threats in the commission of their offenses, and (e) to have blamed their victims for their crimes.” *Id.* at 73. In addition, although juvenile sex offenders are characterized by deficits in social and interpersonal skills, “there is no empirical evidence that deficits in social and interpersonal skills are related to reoffense risk.” *Id.* at 74.

Relapse prevention is premised on the belief that “offense precursors can be identified and addressed” before the behavior occurs again.¹⁷⁶ The success of the model lies in the explicit attention given to both internal and external influences on the juvenile sex offender, with a focus both on the individual and on the family.¹⁷⁷ A youth’s particular vulnerabilities are shared with a prevention team in the final stages of treatment to minimize the risk of regression.¹⁷⁸

In recommending a treatment option, prosecutors must keep in mind that treating juvenile sex offenders is a relatively new endeavor, and that no one can say with complete confidence that one approach is more effective than another.¹⁷⁹ Although the prevailing view is that lengthy, offense specific peer group therapies are needed to effectively treat adolescent sex offenders, “there is not one shred of evidence to support this stand.”¹⁸⁰

¹⁷⁵ Rothchild, *supra* note 145, at 748 (citing William L. Marshall et al., Handbook of Sexual Assault 6 (1990)). Marshall notes relapse prevention therapy teaches, among other things, coping responses and escape strategies for dealing “with unexpected situations that may precipitate a deviant sexual offense.” *Id.*

¹⁷⁶ Martin & Pruett, *supra* note 12, at 307-308.

¹⁷⁷ *Id.* at 307-308.

¹⁷⁸ *Id.* at 307-308.

¹⁷⁹ Gail Ryan writes in her article *Treatment of Sexually Abusive Youth* that “youths who engage in sexually abusive behavior probably can be separated into three categories:” (1) those who will commit a single (or very few) sexual offenses in childhood, and then stop offending without any intervention; (2) those who will offend as juveniles but will not continue with the abusive behavior if intervention is timely and successful; and (3) those whose abusive behaviors will continue throughout their lifetime, regardless of intervention (although Ryan notes that even for this population, intervention may lower the number of offenses.) Ryan, *supra* note 71, at 428. Ryan notes that as there are currently no empirical measures for distinguishing these three groups, the safest decision, and the one made by the treatment community, has been to treat all juvenile offenders. *Id.* at 428.

¹⁸⁰ M.R. WEINROT, SEXUAL AGRESSION: A CRITICAL REVIEW (1996). See also Cellini, *supra* note 158, at 6-6 (noting that peer groups are the “preferred method of treatment.”).

It does seem clear that *some* type of treatment must be tried.¹⁸¹ Most commentators find the need for “early therapeutic intervention in juvenile and adolescent sexually aggressive behavior [to be] clear and compelling.”¹⁸² The *type* of facility chosen is crucial, as it can influence the rate of re-offending.¹⁸³ Current literature supports a “multi-systemic” approach, suggesting that those involved in multi-systemic therapy are less likely to recidivate.¹⁸⁴ In one study, 12.5% of juveniles treated in a multi-systemic manner re-offended as compared to 75% of those receiving only individual treatment.¹⁸⁵ The multi-systemic model considers the interaction of a group of factors which may facilitate a juvenile acting-out in a sexual manner.¹⁸⁶ The focus is on cognitive processes as well as family and peer relations, and school performance.¹⁸⁷

When choosing a treatment plan for a juvenile sex offender, consider the character of the program. Is the facility in-patient or out-patient? Is group therapy as well as individual therapy offered? Does the program offer a polygraph component to monitor the offender’s truthfulness? Is the program designed to treat juvenile sex offenders? What treatment “theory” does the program follow?¹⁸⁸ The answers to these

¹⁸¹ Gail Ryan notes that “[t]he optimism driving the juvenile field reflects the belief that earlier interventions may prevent patterns from being reinforced and becoming habitual,” thus allowing juvenile offenders to grow up to be adult offenders. Ryan, *supra* note 71, at 423. She finds a consensus in the research on juvenile sex offenders that youths seem to be benefiting from the varied aspects of different treatment programs. *Id.* at 424.

¹⁸² Rothchild, *supra* note 145, at 750-51 (citing FAY HONEY KNOPP, THE YOUTHFUL SEX OFFENDER: THE RATIONALE & GOALS OF EARLY INTERVENTION & TREATMENT 12 (1985)).

¹⁸³ Rasmussen, *supra* note 153, at 70.

¹⁸⁴ *Id.* at 71. See also Cellini, *supra* note 158, at 6-8.

¹⁸⁵ Martin & Pruett, *supra* note 12, at 312 (citing Eileen Vizard et al., *Child and Adolescent Sex Abuse Perpetrators: A Review of the Research Literature*, 36 J. CHILD PSYCHOL. & PSYCHIATRY 731, 747-748 (1995)). Martin & Pruett are careful to point out, however, that these results cannot be over interpreted, as the sample size measured only 16. *Id.* at 313.

¹⁸⁶ Cellini *supra* note 158, at 6-8.

¹⁸⁷ Martin & Pruett, *supra* note 12, at 312.

¹⁸⁸ See Cellini, *supra* note 158, at 6-6 to 6-7, for a discussion of these and other factors to consider.

questions, combined with the information gathered in the assessment phase, will help match the offender to a treatment program that is most likely to work for him.¹⁸⁹

Dispositional concerns do not end with selection of a treatment program. When fashioning a disposition for the juvenile sex offender, one should ensure the juvenile's probation officer can freely share information about the juvenile.¹⁹⁰ The probation officer should be able to access therapy records, and discuss the information with the youth's teachers, church, police officers, and others who may have contact with the child. At a minimum, the offender should be denied unsupervised contact with the victim, and have access to other children limited as well. For example, an offender can be ordered to refrain from baby-sitting, teaching Sunday school, or otherwise having a supervisory role over young children. An offender can also be ordered to refrain from using the Internet or to use the Internet only under the supervision of specified adults. In this way, the offender will be less likely to obtain pornography or to gain access to potential victims who may be on line.

Finally, the prosecutor must consider the possibility that the juvenile offender may seek to return home.¹⁹¹ This is especially problematic if the victim is a younger sibling living in the home. It must be determined whether the offender has "successfully" completed treatment before seriously entertaining a request for reunification. In addition to considering the opinion of the offender's therapist, the prosecutor should consult with

¹⁸⁹ "[I]t has been clear that not every sexually abusive youth will need the same treatment, and that not every youth will respond to treatment in the same way. The challenge is to become able to differentiate the treatment needs and measure the response to treatment." Ryan, *supra* note 71, at 428.

¹⁹⁰ For a discussion of the consensus regarding waiver of confidentiality, see Ryan, *supra* note 71.

¹⁹¹ Ryan's summary of the research notes that "...intrafamilial offenses continue to dictate out-of-home placement." Ryan, *supra* note 71, at 426.

the victim's therapists, if any. Ideally, the entire family should be involved with counselors, social workers and other qualified professionals who can formulate a meaningful game plan for the offender's return home.

This game plan may involve several features. First, the offender should not be allowed supervisory powers over the victim. In other words, the offender will not be permitted to baby-sit, pick up from school, or otherwise care for the victim. Second, the victim should have separate sleeping quarters from the perpetrator. If the victim desires a lock on her door, one should be provided. Third, social services must continue to have meaningful involvement with the family to ensure a smooth transition. Ongoing therapy and other services will assist in assessing the impact of reunification on the victim. Fourth, the parents or adult caretakers must be firmly committed to enforcing any rules or regulations established by the judge or social services. The judge should order the parents to enforce these rules and be able to find any parent who breaches one of the rules in contempt of court.

J. Immunity issues

An additional problem in the assessing and treating of juvenile sex offenders is the use of the information the juvenile provides an assessor or therapist. A defense attorney may advise his client to refrain from cooperation with the assessment unless there is assurance that the government will not prosecute the juvenile for other offenses he may

have committed that are revealed to an assessor or treatment provider. When defense counsel takes such a stand, the prosecutor has at least two options.

1. *Grant actual or use immunity*

If the prosecutor grants the juvenile offender actual immunity from prosecution for other offenses he may have committed or, through the grant of use immunity, promises not to use any evidence disclosed in therapy in a subsequent prosecution, this may serve to expedite treatment and cause the offender to cooperate earlier and more effectively. The problem with even use immunity is that the prosecutor may bar himself from future pursuit of cases that cry for justice.

If a prosecutor is considering a grant of immunity, the grant should not be tantamount to a blank check. In other words, the prosecutor should not offer immunity for other offenses unless he knows what those offenses are. The prosecutor should demand some information from defense counsel as to the specifics of what else his client may have done that concerns the juvenile. The immunity should govern only those offenses the offender is willing to acknowledge on the record in open court. If this is not done, the prosecutor may forfeit the right, even the moral obligation, to pursue murder, rape, or other egregious crimes. The prosecutor may be faced down the road with a visit from a previously unknown victim who demands to know why the prosecutor waived the right to charge the offender without even knowing what was done to this additional victim.

2. Develop guidelines for the use of offender information

Rather than routinely granting immunity in these cases, the prosecutor may wish instead to establish guidelines that will govern the use of the information the juvenile offender provides to an assessor or therapist. In developing the guidelines, the prosecutor may wish to seek the input from the local judges and defense attorneys in the hope that the final draft of the policy alleviates major concerns. In the policy, the prosecutor should send three messages. First, the prosecutor should make it clear that honesty will, when possible, be rewarded. If an offender voluntarily discloses additional offenses and victims, this fact will be viewed positively and will not necessarily mean the prosecutor will file additional charges. There is, however, no guarantee. The newly discovered offenses may be so egregious that additional charges are warranted. Charges may be necessary to enforce restitution or other rights of the newly discovered victims or, if not that, to empower the victims to heal and to know the perpetrator is being held accountable for wrongs committed against their bodies and minds.

Even if the prosecutor needs to file additional charges, this does not necessarily mean that additional consequences will be sought. The prosecutor may wish to create a record of the additional offenses for the purposes of restitution, etc, but may not need to seek community service or other forms of punishment against the offender.

Second, the prosecutor should make it known that newly discovered information about the offender's sexual or delinquent past will be used to determine treatment needs.

It may be that the voluntary disclosure of this information means the offender is progressing in therapy and the date of his release can be moved up. On the other hand, it may mean that this particular offender has more issues to work on and treatment will need to be prolonged. In making this determination, the prosecutor may have to rely heavily on the views of the treating therapists and other professionals who may be working with the child. This fact brings home again the importance of working as part of a multi-disciplinary team.

Third, a juvenile who fails to fully cooperate with a treatment provider or assessor is likely not amenable to treatment and the prosecutor is likely to respond by recommending only punishment or community protection options to the court at disposition. In protecting the community, the prosecutor can legitimately make the claim that the most dangerous offender is the one the public knows the least about. To this end, it is in the child's best interests to provide evidence at the disposition hearing that he or she *is* amenable to treatment. A child who fails to provide this information leaves the prosecutor and the judge with little recourse but to assume the juvenile is either a hard-core offender or is otherwise not a candidate for treatment.

V. Conclusion

The investigation, prosecution, and treatment of juvenile sex offenders is, in many respects, uncharted territory. The questions so far exceed the answers that it would be at best impractical to definitively state the best course of action. Instead, the purpose of this article has been to define the investigation, prosecution, and treatment options and to give an overview of the factors worthy of consideration when making decisions involving juvenile offenders.

The guidance offered is merely a blueprint for analyzing, not determining, the path to take with any given juvenile. As prosecutors, we must do the best we can with the little information that is presently available. We must be vigilant in reminding ourselves of our limited, imperfect knowledge and be willing to alter our course when a clearer, better direction develops.