

An American Tragedy: Legal Responses to Adolescent Sexual Offending

by Franklin E. Zimring

EXECUTIVE SUMMARY

In New Jersey in 1995, a ten-year-old child known as J.G. pled guilty in juvenile court to the second-degree sexual assault of his cousin, an eight-year-old girl. The state apparently did not view J.G. as a threat: the prosecutor recommended a suspended sentence on the condition that J.G. attend a family counseling program and not be left alone with young children. The agreement seemed to be a success, and J.G. got into no further trouble.

But sixteen months later J.G. was notified that he had been classified as a moderate-risk sex offender under New Jersey's "Megan's Law."¹ He would have to register with the local police as a sex offender, and schools and day-care centers in his community would be notified so they could take protective measures against the danger he might present.

During the 1990s, all 50 states enacted new laws aimed largely at protecting children against sexual predators. Under many of these laws, adult sexual offenders are regarded as more dangerous—and controlled more severely—if their victims are very young. This seems rational when dealing with adults who prey on young children. But in enacting laws aimed at adult sexual predators, legislators, whether deliberately or thoughtlessly, often used language broad enough to encompass offenders in early adolescence.

Should a child or young adolescent who commits a single act of sexual aggression against another child be treated the same way as a 30-year-old man who assaults an 8-year-old girl? Legal scholar Franklin Zimring calls it a tragedy of justice—a policy that ignores the developmental stage of young sex offenders in determining their legal fate.

¹ Megan Kanka was seven when she was raped and killed by an adult neighbor who had previously been imprisoned for sexual crimes against children. Her name has been given to a variety of laws, enacted in the wake of her killing, requiring registration and community notification for convicted sex offenders.

In An American Tragedy: Legal Responses to Adolescent Sexual Offending Zimring argues that Megan's Laws and other responses to these youths are based on certain assumptions about adult sex offenders—assumptions that don't apply to adolescents. He finds there has been virtually no scholarly

literature or research on the topic of adolescent sex offending: few scientific studies of sexual misconduct among children and adolescents, no rigorous assessments of strategies that address it, no dialogue among legal scholars or judges. Zimring's book organizes the knowledge that does exist and considers the implications for policy and for further research—"a down payment on the debt scholarship owes the topic."

An image breeds an industry

Adult sex offenders—especially those who use force and those who prey on children—are viewed by the public with special outrage and fear. Even professionals consider many of them a breed apart from other criminals, with very particular characteristics: fixed, abnormal sexual proclivities; a focus on sex offenses to the exclusion of other crimes; at high risk of repeating their offenses. It is this image, controversial but widely held, that underlies Megan's Laws and related policy.

This pathological image has now been extended to adolescent offenders as well, giving rise not only to new laws but to an industry of specialized treatment programs for sexually abusive youth. While juvenile sex-offense arrests have remained remarkably stable over the past two decades or more, the number of treatment programs has mushroomed: from 20 in 1982 to several hundred today.

Many of these programs take a unique approach to therapy. In place of the core mission of the juvenile justice system—to serve the child’s best interests—their primary goal is prevention of sex crimes. Therapists in these programs consider their client to be not the youth but the community, and they form an adversarial relationship with the adolescent offender. The therapist serves as investigator, prosecutor, and probation officer; her tools include polygraphy and confrontation, and she has no obligation to protect the youth’s confidentiality.

The adversarial approach grows out of a report issued in 1993 by the National Adolescent Perpetrator Network, a vocal and well-organized network that is part mental health treatment group, part victims’ rights lobby. The report, published in *Juvenile Judge’s Journal*, was the longest publication devoted to juvenile sex offenders in at least half a century. At its center are 387 unproven assumptions about adolescent behavior, dangerousness, appropriate justice system responses, and the impact of various interventions on long-term development and life opportunities. The Task Force behind the report included no physicians, no specialists in program evaluation and policy analysis, no experts in juvenile justice, and only one attorney, a former prosecutor. Yet the report has stood for more than a decade, virtually uncriticized and tremendously influential.

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Who is the juvenile sex offender?

The NAPN’s report draws a picture of the adolescent sex offender that often seems similar to the image of the adult offender described earlier: deviant, recidivist, and a continuing danger to the community. The report advises treating all juvenile sex offenders as though they fit this image. It calls for prosecution in all cases, maintaining that prosecution and conviction themselves have therapeutic value for the offender. It defines all illegal sexual behaviors as abusive, regardless of the age of the child or the circumstances of the behavior. And it would send most of the “abusers” into the kind of therapy described above.

But adolescents are not merely younger versions of adults. Adolescence is a period of transition, both sexually and behaviorally, and sexual misconduct among juveniles is both more varied and more complicated than among adults. Empirical evidence distinguishes three types of juvenile sex offenders:

- **Status offenders.** These are children and teens whose sexual behavior is consensual and with partners close to their age; it is unlawful only because they or their partners are under the age of consent. While this is illegal on the books, millions of teens violate such laws every year. They are seldom prosecuted except in institutional settings such as group homes—a double standard with potentially lifelong legal consequences.
- **First offenders involved in abusive conduct.** The majority of juveniles arrested for sex offenses are those who are much older than their partners or who have used force or coercion. The re-arrest rate for this group is quite low, however, and currently unpredictable: tests used by researchers to identify individuals at risk for recidivism have a false positive rate of more than 80 percent when used with adolescents.
- **Repeat offenders.** Perhaps 4 to 8 percent of juveniles arrested for sex crimes fall into this category. Some may become dangerous adult sexual predators, while others may outgrow the problem before they become adults. It’s impossible to say who or how many fall into either group because no research exists on the number of repeat offenders or their later careers.

Clearly, the image of the adult sexual predator is a poor fit for the vast majority of adolescent sex offenders. These youths are, for the most part, neither sexually abnormal nor sexually dangerous to the community. And far from being focused exclusively on sex crimes, they are likely to be involved in the same mix of delinquent behaviors as other young offenders. In fact, studies comparing juvenile sex offenders with other juvenile offenders have found them to be very similar, suggesting it would make sense to deal with them similarly.

Still, we know that some adult sex offenders violate the law during adolescence, and some of these juveniles may come to the attention of police and juvenile courts. Can we single out those young people in the system who will go on to commit future sex crimes? How can we identify the characteristics that differentiate the dangerous few?

Three goals for research

Singling out sexually dangerous youth from other young sex offenders is a problem that can only be addressed by focused research. Three specific research programs are essential for policymakers to develop an appropriate and effective response to child and adolescent sex offenders:

- **Measure the real risk of recidivism.** Most published studies of juvenile sex-offense recidivism either have not looked at representative samples of arrested youth or have followed the subjects for too short a time. In this research vacuum, it has been easy to base perceptions of danger on false analogies with adult models and adult probabilities. The field needs a solid data base before it can suggest developmentally specific policies for adolescent sex offenders.

- **Uncover the determinants of future danger.** Whatever the differences between adolescent and adult patterns of sex offending, we know that some of the 15,000 youths arrested for sexual offenses each year will commit future offenses, and some pose a risk for the most serious sex crimes. But because these sub-groups are so small, it would be a waste of time and resources to provide extensive treatment to all juvenile first offenders. How can we determine which youths to treat? Predicting the future behavior of sexually high-risk youth has so far been a failure, and the research necessary to determine if we can predict sexual dangerousness will be complex and costly. But without good research the only options are over-treating large numbers of youths or failing to intervene with the dangerous few. Neither is good public policy.

- **Put treatments to the test.** How effective are existing treatment programs in preventing recidivism among juvenile sex offenders? There has been no rigorous evaluation of the impact of juvenile sex offender treatment programs; the fact that they have nevertheless been institutionalized in American juvenile justice is a scandal. It is certainly possible to assess the relative effectiveness of treatments—especially those programs that take place in community settings—with controlled experiments. This is particularly important for the more extreme forms of intervention, which should be used only when the risk of recidivism is high and the efficacy of the treatment is well established. Controlled experiments are a first step toward creating a rational continuum of treatment programs for juvenile sex offenders.

A new framework

Despite the gaps in our current understanding, there is much we do know. The distinctive patterns of adolescent sex offenses—the differences between juvenile and adult offending—have been well documented for sixty years. Yet in policy we ignore what we know and rely on flawed analogies between behavior in adolescence and behavior in adulthood. Such policies serve neither justice nor public safety.

How can we build on existing knowledge to construct a better legal response to juvenile sex offenders? Four general policies, based on the known patterns of juvenile sex offending, provide a framework:

- **Division of responsibility in the juvenile justice system.**

The power to decide whether and how juveniles accused of sex offenses will be prosecuted and adjudicated should be shared by judges and prosecutors—just as it is for juvenile burglars, robbers, and drug offenders. Treatment professionals should not serve as investigators—a position that only encourages offenders not to cooperate—but should maintain the traditional client-therapist relationship, including protection of confidentiality about past (but not planned) acts.

- **Decriminalization of non-predatory peer sex.** A fourteen-year-old boy engaged in consensual sexual activity with his fourteen-year-old-girlfriend should not be judged on the same basis as an adult involved with the same girl. At the same time, policy needs to recognize that even consensual activity between young adolescents carries a risk of serious harm—pregnancy, disease, emotional injury—and society has a responsibility to protect these youths. Rather than imposing criminal penalties, two options are possible: remove the juvenile court completely from intervening in consensual sex cases, or put such cases in the category of “minor in need of supervision” while ruling out interventions (such as secure confinement) that do more harm than good.

- **No prediction of dangerousness for first offenders.** We know that the vast majority of adolescent first offenders will

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not sexually re-offend. We also know that we cannot currently predict which youths *will* re-offend. Therefore, an important principle is that, unless there is a clear, sustained, and unusual pattern of multiple offenses, predictions of a first offender’s future sexual dangerousness should not determine either the type or the duration of penal sanctions. This does not mean that serious offenses involving older teens should be treated leniently; rather, it recognizes that a single sex offense by an adolescent is not evidence of a fixed sexual inclination or permanent sexual pathology.

• **Careful procedures for predicting pathology and danger in repeat sex offenders.** A second justice system involvement of a previously adjudicated juvenile sex offender justifies tighter monitoring and other measures to lower the risk of another offense. Yet this small group of repeat sex offenders is currently an unknown quantity: we don't know who these youths are, how heterogeneous the repeat-offender category is, or what links, if any, there are between adolescent repeat offending and adult patterns. In any juvenile justice hearing where an offender's current pathology or future sexual risk is at issue, the court should make available to him an expert witness of his own.

Underlying the last recommendation is an important question: Do repeat sexual offenders belong in juvenile or criminal court? If the goal is to provide these youths with treatment and a chance to live a normal adult life, the juvenile court system is better prepared to handle them. But for the most serious and persistent cases, society may demand punishment beyond the mission of the juvenile courts. Rather than compromise that mission, it might be best to transfer these cases to criminal court. That doesn't mean the criminal courts should treat these youth as though they were adults, however; it's still important that the courts recognize the developmental context of adolescent sex offending and the diminished culpability of immaturity.

Justice for J.G.?

Return for a moment to the case of J.G., the ten-year-old child who pled guilty to a sex offense and found himself publicly branded a sex offender, subject to registration and community notification. How might his case be handled in our new policy framework?

J.G. fell victim to a policy aimed at adults who prey on children under the age of 13—a policy that becomes absurd, if not tragic, when applied to a 10-year-old child whose victim could be several years older. We have already seen that assumptions about adult sexual predators don't apply to the overwhelming majority of young offenders, and that we cannot now tell which young offenders will re-offend. To impose on one-time juvenile offenders a permanent identity as a sexual predator is a travesty that strikes at the heart of the juvenile justice system—a system established to act in the best interest of the child.

It is possible to design a registration system that doesn't conflict with the priorities of the juvenile justice system. At the very least, such a system would require separate rules for classifying the sexual behavior of adolescents and children; those rules would not have made J.G., a first-offender, a candidate for registration. Better still would be to exclude all behavior adjudicated in juvenile courts from registration and notification requirements.

Legislation could allow the release of juvenile records when an adult is convicted of a serious sex offense; under this provision, information about juvenile sex offenses would still be available for classifying the risk of the adult offender.

Such reforms require legislative action and public debate; they will not come quickly. In the meantime, the juvenile justice system can take steps to resolve the inevitable conflicts between its own objectives and the registration provisions in many states. One option is to convict the juvenile sex offender of a non-sex crime such as assault. The disadvantage is that this distorts the record, permanently erasing the sexual content of the offense.

A better option for the majority of young offenders is to suspend the proceedings while the youth participates in a supervision or treatment program; if he successfully completes the program, the charges would be dismissed. This kind of procedural diversion has ample precedent in the juvenile courts—indeed, diversion from the worst harms of criminal sanctions is the major emphasis of American juvenile justice. It is also compatible with later information-sharing. For J.G. it would have secured the benefits of supervision and family treatment (as in the original plea agreement) while avoiding the stigma of being labeled a sex offender.

Cases like that of J.G. show the American legal system at its unreasonable worst. But they can also serve a positive goal. They can be a wakeup call to everyone who is concerned with the welfare of youth—a springboard for launching more rational and humane policies for young sex offenders.

Ordering Information:

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