

ESSAY: JUVENILES WHO ENGAGE IN SEXUALLY HARMING BEHAVIOR—A RESTORATIVE JUSTICE SYSTEM

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It is time for a rational response to youth who engage in sexually harming behavior. The notion of a unique juvenile system was raised in my 2003 article for the *William Mitchell Law Review*.¹ At that time, I suggested a mental health court format for youth engaging in sexually harming behaviors.² The proposal I make today shifts focus back to the behavior itself and is clearly delineated only for sex-specific interventions. In only two years, the need for an alternative system has become even more urgent. There is an increasing divide between our understanding of child development and our beliefs about people who sexually harm others.

The last two years show an increasing national public movement toward more severe and long-lasting consequences for youth sexual offenses. In September 2005, the U.S. House of Representatives passed a bill requiring lifetime registration and notification on a national website for anyone, including juveniles, convicted of or adjudicated on a sexual offense.³ Minnesota statutes can even require that an eleven-year-old child report as sexual offender for the remainder of his life.⁴ The U.S. Senate

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1. Janis F. Bremer, Essay: *Juveniles, Rehabilitation, and Sex Offenses: Changing Laws and Changing Treatment*, 29 WM. MITCHELL L. REV. 1343 (2003); see also David L. Burton, *Were Adolescent Sexual Offenders Children with Sexual Behavior Problems?*, 12 SEXUAL ABUSE: J. RES. & TREATMENT 37-48 (2000). See generally Mark Chaffin et al., *Adults, Adolescents and Children Who Sexually Abuse Children: A Developmental Perspective*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT (John E. B. Myers ed., 2d ed. 2002).

2. Bremer, *supra* note 1, at 1364.

3. Children's Safety Act of 2005, H.R. 3132, 109th Cong. § 1 (2005).

4. See *In re Welfare of J.R.Z.*, 648 N.W.2d 241, 247-49 (Minn. Ct. App. 2002) (interpreting MINN. STAT. § 243.166 (2004)), *review denied*, No. C4-01-1358, 2002 Minn. LEXIS 585 (Minn. Aug. 20, 2002).

recently passed a version of the bill that ultimately excludes juveniles from the registration requirement after extensive lobbying by experts in the field.⁵

In Minnesota, the legislature has considered lifetime registration for juveniles, requiring that certain offenses be automatically waived to adult court, and requiring other severe legal consequences applicable to anyone committing a sexual offense, regardless of age. We appear to have joined, without a great deal of deliberation, the competition for the state with the most stringent sex-offender-containment laws. We should take the opportunity, with this centenary celebration of Minnesota's juvenile court, to choose a different road for our children.

On the one hand, developmental psychology is making great strides in defining the human maturation process. There is an increasing base of research indicating that cognitive development continues into the early twenties.⁶ Adolescent brains are immature, particularly in terms of cognitive executive functioning, the component that allows for planning.⁷ Neuropsychology research is firmly defining the functional neurological impact of many mental health diagnoses. There is increasing neurological evidence that certain psychological conditions impact brain function.⁸ All post-traumatic stress disorders, attention deficit disorders, and mood disorders differently impact the brain's ability to effectively use higher cortical functions.⁹

Additionally, attachment-style research shows that early attachment patterns create maps that are the basis for all future relationships, resulting in inadequate social responsiveness when there is no early secure attachment.¹⁰ This same research shows that the development of interactive, empathetic relationships is

5. To Improve the National Program to Register and Monitor Individuals Who Commit Crimes against Children or Sex Offenses, S. 1086, 109th Cong. § 1 (2005).

6. See Joel V. Oberstar, Elise M. Anderson, & Jonathan B. Jensen, *Cognitive and Moral Development, Brain Development, and Mental Illness: Important Considerations for the Juvenile Justice System*, 32 WM. MITCHELL L. REV. 1051, 1056-57 (2006). See generally DAVID WALSH & NAT BENNETT, *WHY DO THEY ACT THAT WAY?: A SURVIVAL GUIDE TO THE ADOLESCENT BRAIN FOR YOU AND YOUR TEEN* (2004).

7. See generally WALSH & BENNETT, *supra* note 6.

8. *Id.*

9. See generally BESSEL A. VAN DER KOLK, *PSYCHOLOGICAL TRAUMA* (1987).

10. See CREATING CAPACITY FOR ATTACHMENT: DYADIC DEVELOPMENTAL PSYCHOTHERAPY IN THE TREATMENT OF TRAUMA-ATTACHMENT DISORDERS 7 (Arthur Becker-Weidman & Deborah Shell eds., 2005).

based on a secure attachment as the first relational experience.¹¹ Lastly, the attachment research also shows that the ability to self-regulate emotions is based on that secure attachment.¹²

On the other hand, public outrage at highly publicized adult sex offender cases has driven the legal system to stricter, more punitive responses to sexual offenses.¹³ A wide net has been cast that includes juveniles and, in some states, even young children.¹⁴ Again, the 2005 House bill is the most recent example of this—including in a national web-based registry anyone, regardless of age, convicted of or adjudicated on a sex offense.¹⁵

When considering how to handle the juvenile sex-offending population, sex-offense recidivism is typically considered definitive information. A 1996 sample of 1600 juvenile sex-offense cases from ninety programs in thirty states yielded a 4% rate of recidivism.¹⁶ Individual studies of juvenile sex-offense recidivism report varying results, with the highest rate of recidivism being about 12%.¹⁷ Delinquency rates are much higher, typically more than 30%.¹⁸ In early 2005, researchers synthesized published and unpublished data from thirty-three studies regarding the effectiveness of juvenile sexual-offender treatment and recidivism rates in a juvenile sexual-offender population.¹⁹ The abstract summary for the study states:

11. *Id.* at 9.

12. *Id.* at 12; see also 2 JOHN BOWLBY, ATTACHMENT AND LOSS ch. 21 (1973); RICHARD KAGAN, REBUILDING ATTACHMENTS WITH TRAUMATIZED CHILDREN: HEALING FROM LOSSES, VIOLENCE, ABUSE, AND NEGLECT ch. 1 (2004); ROBIN KARR-MORSE & MEREDITH S. WILEY, GHOSTS FROM THE NURSERY: TRACING THE ROOTS OF VIOLENCE 184 (1997); K. Creeden & J. Howland, Integrating Trauma and Attachment Theory into the Treatment of Juvenile Sexual Behavior Problems, Presentation at the ATSA Annual Conference, San Diego, California (2000); D. L. Epperson et al., Development of the Juvenile Sexual Offense Recidivism Risk Assessment Tool (J-SORRAT), Presentation at the Conference of the Minnesota Association for the Treatment of Sexual Abusers, Minneapolis, Minnesota (Apr. 2005).

13. John M. Stuart & Amy K.R. Zaske, *What Does a "Juvenile Adjudication" Mean in Minnesota? Some New Answers After a Century of Change in Juvenile Courts*, 32 WM. MITCHELL L. REV. 920, 944 (2006).

14. See, e.g., *In re Welfare of J.R.Z.*, 648 N.W.2d 241, 247-49 (Minn. Ct. App. 2002) ("Registration as a predatory sex offender may seem to be a harsh collateral consequence for an eleven year old boy . . . [but] it is not an unduly harsh consequence in this case."), *review denied*, No. C4-01-1358, 2002 Minn. LEXIS 585 (Minn. Aug. 20, 2002).

15. Children's Safety Act, H.R. 3132, 109th Cong. § 1 (2005).

16. Gail Ryan et al., *Trends in a National Sample of Juvenile Sexually Abusive Youths*, 35 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 17, 17-25 (1996).

17. *Id.*

18. *Id.*

19. Lorraine R. Reitzel & J. L. Carbonell, *The Effectiveness of Sex Offender*

Overall, the total recidivism rates for sexual, non-sexual violent, non-sexual non-violent crimes, and unspecified non-sexual were as follows: 11.87%, 22.59%, 28.99%, and 22.30%, respectively (N = 5335, 4805 male), based on an average 56-month follow-up period. The difference in sexual recidivism rates for treated (8.60% sexual recidivism, n = 3730, 29 studies) versus untreated (i.e., in no treatment control groups or in recidivism only studies, 19.44% sexual recidivism, n = 1605, 8 studies) offenders was statistically significant. Results on the effectiveness of sexual offender treatment yielded an average weighted effect size of 0.43 (N = 2986, 9 studies, CI = 0.33-0.55), indicating a statistically significant effect of treatment on sexual recidivism.²⁰

When we consider the effects of ten years of more widespread attention to juveniles and more sophisticated tracking systems, the slight difference between the average recidivism rates (given the large populations involved) indicates that very few of these youth require a more significant response from our legal and social systems.

Are these youth pariahs then? Does the State need to take control and isolate the sex-offending population from the rest of us for significant and perhaps life-long periods? Can we use a more direct and humane approach to reintegrating the majority of these youth into the mainstream and moving beyond a fear-based, retributive containment approach? There are models available that provide alternatives to the current punitive approach to youth with sexually harming behaviors. These can be used to create a system for youth to move forward into a positive and socially responsible lifestyle. One of these alternatives is restorative justice.

Restorative justice is a philosophy that operates on the level of interpersonal relationships.²¹ It involves a set of principles that defines a direction to resolve the impact of harm on all stakeholders, including the victim, the community, and the offender.²² Specific programs or models are developed based on these principles.²³ The restorative justice philosophy may include

Treatment for Juveniles as Measured by Recidivism: A Meta-Analysis (2005) (unpublished doctoral dissertation, Florida State University) (on file with law review).

20. *Id.*

21. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 19 (2002).

22. *Id.*

23. *Id.*

social sanctions, such as physical containment or monitoring, when the stakeholders determine the need for such sanctions.²⁴ Restorative justice is an alternative to punitive or retributive systems but not to structured sanctions in cases when these are imperative in meeting the needs of the stakeholders in an offense scenario.²⁵

With restorative justice, there is an obligation to right the wrongs. The stakeholders define what this actually entails. This process requires defining the harm and addressing the causes of that harm. Howard Zehr—a pioneer in the field of transformative justice—states, “restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.”²⁶

The notion that “crime is fundamentally a violation of people and interpersonal relationships”²⁷ that can only truly be addressed through those people and in those relationships provides a hopeful context for the reintegration of youth who engage in sexually harming behavior. Promoting positive behavior for the future will not be achieved through punishment and isolating practices. Rather, such practices create a negative feedback loop where young people are placed in a one-down, dependent position with no hope of regaining a position of equality in society.

The human and economic tolls of punishment and isolating practices exacerbate rather than resolve the original offense. Given that the overwhelming majority of youth engaging in sexually harming behavior are unlikely to reoffend,²⁸ can we develop a restorative system to reintegrate them as positive contributing members of their communities?

Restorative justice is not a “model” or “program” that is applied to specific crime scenarios or communities. Instead, restorative principles provide a framework for communities to design and define procedures that will work for them. So how can restorative practices help guide responses to youth engaging in sexually harming behavior here in Minnesota?

We can gain insight into the answer to this question by narrowing our focus and looking at one treatment program in the

24. *Id.* at 12, 13.

25. *Id.*

26. *Id.* at 37.

27. *Id.* at 64.

28. Ryan et al., *supra* note 16, at 17-25.

Twin Cities. Project Pathfinder, Inc. (PPI), a St. Paul-based program,²⁹ uses an assets measure (Protective Factors Scale (PFS))³⁰ and a risk measure (Estimated Risk for Adolescent Sexual Offense Recidivism (ERASOR))³¹ to determine the needed level of intervention and to define individual treatment plans in an effort to increase assets and decrease risks.

The PFS considers personal, family, and community assets that support positive behavior and pro-social development in youth. The PFS items address factors for general functioning, as well as sexual behavior. The ERASOR consists of twenty-six items that may contribute to sexually harmful acts. These items account for concerns across personal, family, community, and sexual behavior areas.

Looked at together, these two measures provide an effective tool to determine the type of external structure necessary to maintain personal and community safety while a youth participates in treatment. PPI's outpatient adolescent division treats youth who score in a range indicating the youth's ability to maintain reasonable general behavior and legal sexual boundaries while in treatment.³² Table 1 illustrates the consistent balance between PFS assets and ERASOR risk measures for PPI's young clients.³³

Is the population of youth capable of performing well in the community while receiving outpatient treatment actually doing so? Based on data from the Adolescent Services Research Database of PPI, the answer is yes. In 2003, 81% of the sex-specific peer-group program clients successfully completed treatment. In 2004, 91% were successful.³⁴ For clients in other treatment modalities such as

29. PPI is a private non-profit organization dedicated to the elimination of sexual violence and abuse. Project Pathfinder, Inc., An Overview of Project Pathfinder, <http://www.projectpathfinder.org> (last visited Mar. 9, 2006). The organization's mission is to improve the lives of its clients and their families and protect the interests of the community. *Id.* PPI provides psychotherapy, consultation, research, and training that lead to the prevention of future sexual violence and abuse. *Id.*

30. Janis F. Bremer, The Protective Factors Scale: Assessing Youth with Sexual Concerns, plenary address at the 16th annual conference of the National Adolescent Perpetration Network, Kansas City, Missouri (May 2001).

31. JAMES R. WORLING & TRACEY CURWEN, ESTIMATE OF RISK OF ADOLESCENT SEX OFFENDER RECIDIVISM (ERASOR) (Version 2.0, 2001).

32. Bremer, *supra* note 30.

33. *See infra* Table 1. Table 1 provides data compiled from Project Pathfinder's outpatient adolescent population during the last five years.

34. PROJECT PATHFINDER, INC., END OF YEAR REPORT (2005) (on file with author).

individual-only or family-only, 100% were successful in 2003 and 88% were successful in 2004.³⁵ The average length of therapy was approximately twelve months in 2003 and thirteen months in 2004.³⁶ Successful completion is defined by the youth who are working on reducing their identified risks and building missing assets into their lives.³⁷

The youth in PPI are primarily from the eleven-county Minneapolis-Saint Paul metropolitan area. Some are from rural Minnesota. However, at this point, PPI cannot claim to fully understand the nature of youth who engage in sexually harming behaviors across the State of Minnesota as a whole. Given PPI's current sample size, PPI can say that the youth who complete outpatient sex specific therapy with a "best practices" framework are unlikely to remain at risk for sexually harming behavior. Accordingly, the following model proposal is offered to serve the best interests of our children and our social fabric.

The Metro Restorative Practices Model (MRPM), illustrated in Chart 1, defines a pathway enabling young people to become socially and sexually healthy.³⁸ MRPM does not minimize the harm done. Finding the causes of sexually harming behavior is painstaking and heartrending work. Listening and responding to the obligations created by harming another person is a difficult, soul-searching process. In many ways, there is deeper meaning in this process than a court sanction, a depersonalized monitoring process, or a workbook-style treatment that excludes other stakeholders.

Restorative practices do the difficult work up front, in order to allow all parties involved to move forward. This does not mean there may not be harsh corrective responses put in place; it means that when the stakeholders determine a different route, it is possible to go down that route. Federal and state laws that mandate lifetime sex offender registration for an adjudicated eleven-year-old do not allow stakeholder management of the situation. When these depersonalized, government-determined consequences predetermine life course limitations, society sets the stage for failure. The stakeholders lose the ability to define needs and obligations for themselves.

35. *Id.*

36. *Id.*

37. Bremer, *supra* note 30.

38. *See infra* Chart 1.

Given the goals of restorative justice, I suggest that our community can successfully resolve sexual harm in a more satisfactory and complete manner for all stakeholders by:

- A. distinguishing between the delinquent and non-delinquent youth;
- B. identifying assets and risks to determine level of intervention;
- C. providing a long-term diversion system; and
- D. following a consistent, valid structure from intake through treatment outcomes to recidivism.

These four steps provide a structure that maintains community safety, holds youth accountable for sexually harming behavior, and creates a pathway by which youth can resolve their sexually harming behavior. It also allows all stakeholders, including those victimized directly and indirectly, to resolve and move forward from sexually harming incidents in a manner that is not possible under today's rigid, punitive-focused laws.

Table 1 – Adolescent Program: The ERASOR and PFS

The ERASOR is scored on a scale of 1 to 3 (3 representing the lowest risk level) and the PFS is scored on a scale of 0 to 3 (0 representing the most assets present). These measures are “mirror images” of each other. The ERASOR represents the risks that suggest the potential for continuing with sexually harming behavior. The PFS summarizes the assets for maintaining a positive, functional lifestyle a youth brings to the table after engaging in sexually harming behavior.

The table below indicates that Project Pathfinder's outpatient population exhibits few risks as measured by the ERASOR. It indicates that PPI's outpatient population has assets in their lives to build upon in order to maintain a safe and harm-free lifestyle.

ERASOR and PFS Averages

	ERASOR Average	Number Taken	PFS Average	Number Taken
2001	2.51	42	1.01	41
2002	2.34	76	1.00	81
2003	2.23	112	0.93	113

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2004	2.28	109	0.95	108
2005	2.36	48	0.92	52
Quarter 3, 2004	2.39	29	0.91	28
Quarter 3, 2005	2.48	17	0.87	20

Number of PFS and ERASOR Inventories Entered into Database

Protective Factors	395
ERASOR	387
Both	383

Chart 1 – Minnesota Metro Restorative Practice Model for Youth with Sexual Behavior Concerns

