

Youth Sex Offenders in Court: An Analysis of Judicial Sentencing Remarks

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Abstract

Sexual offending by young people is increasingly viewed as a social problem that requires a strong response, but there is little research on the legal treatment of youthful sex offenders. On the one hand, these youths may be viewed as potential future sex offenders; on the other hand, because of their youth and immaturity they may be considered more reformable than adults and their behaviour more excusable. This paper builds on an archival study of 385 sexual offence cases, which were disposed in court and by conference and formal caution, in South Australia from 1995 to 2001. Drawing on the transcripts of 55 cases sentenced by judges (i.e., the most legally serious offences), we analyse sentencing discourses and outcomes using both the explicit and latent content of the sentencing remarks. Specifically, we explore the judges' orientations and aims when sentencing adolescent sex offenders, how judges reconcile the seriousness of offending and the youthfulness of offenders, and how they balance the competing interests of victims and offenders. Two major findings emerge. First, the cases fell in a three-way typology patterned by the victims' age, the context of the offence, and the offender's criminal history. Second, our study suggests that while youth court judges consider sexual offending against children as very serious and are concerned by future offending, they do not adopt a punitive approach, but rather a therapeutic and rehabilitative perspective at sentencing.

Keywords: Youth court; Sentencing; Sexual assault

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INTRODUCTION

Up until the early 1980s, youth sexual violence¹ was largely ignored, but today it is increasingly viewed as a social problem that requires a strong legal and clinical response (Letourneau and Miner, 2005; Martin and Kline Pruett, 1998). Compared to the demonization of adult sexual violence, especially when victims are children (Hinds and Daly, 2001; Roberts et al., 2003; Simon, 1998; Zimring, 2004), the reactions to adolescent sex offenders are more ambivalent. On the one hand, the youths may be viewed as budding adult sex offenders, whose offending will become more serious in time, unless there are strong legal and treatment interventions (Chaffin and Bonner, 1998; Martin and Kline Pruett, 1998). On the other hand, because of their age and immaturity, they may be viewed as more reformable than their adult counterparts; and their behaviour may be seen as more excusable, less culpable, or as ‘experimenting’ with sex.

The literature on youth sex offending focuses mainly on the character and varieties of offending, the youths’ socio-demographic profiles, explanations for offending, and predictors of re-offending (see, e.g., Allan et al., 2002; Barbaree and Marshall, 2006; Martin and Kline Pruett, 1998; Vizard et al., 1995). By comparison, we know little about how such cases are handled in youth or juvenile courts. On this point, Zimring (2004: 112) suggests that ‘what one encounters is not so much a paucity of scholarly literature ... [but] a void’. Our paper seeks to address this void by analysing judges’ sentencing remarks for 55 cases of youth sex offending, which occurred from

1995 to mid-2001 in the South Australian Youth Court. We examine the ways in which the judges characterize the sexual offences and how they justify and explain their sentences. Among the questions we explore are these: How do judges balance the seriousness of sex offending and the youthfulness of offenders? Do they view the offenders as ‘experimenters’ or as potentially serious ‘sex offenders’? Do they minimize or emphasize the seriousness of the behaviour? What kinds of penalties are imposed, and how are these justified?

Our aim is to contribute to the literature on youth crime and its treatment in the courts, and to the specific ways in which sexual violence is handled in youth, juvenile, or children’s courts.² In analysing judges’ speech in the courtroom, ours is the first study to examine judicial justifications and interactions in sentencing youth sex offenders. From it, we may learn not only about how judges make sense of and respond to youth sex offending, but also about decision-making patterns in these cases.

The paper has four parts. In the first, we review current debates and the relevant literature on shifts in justice system practices, public attitudes toward those who sexually abuse children, and responses to sexual violence. Next we outline the study methods and describe the sample of cases. The third part presents the results: the ways in which judges characterize the cases and speak to offenders, their justifications for the sentences imposed, and their sentencing philosophies. Finally we discuss the findings and consider how they relate to the research literature.

CRIMINAL AND YOUTH JUSTICE RESPONSES TO SEX OFFENDING

Three bodies of literature are relevant in analysing justice system responses to youth sex offending: apparent shifts in criminal and youth justice, public attitudes toward those

who sexually abuse children, and justice system responses to adult and youth sexual violence.

Toward increased punitiveness?

A general view in the literature is that over the past several decades, there has been an ideological shift away from penal welfarism, toward increased punitiveness, along with the application of actuarial justice and risk-oriented approaches in responding to adult and youth crime (Feeley and Simon, 1994; Garland, 1996; Pratt, 1999; Roberts et al., 2003). While evidence for such a shift is apparent in the response to adult crime (although it varies across and within nations), the evidence is more mixed for youth crime.

For the United States, the introduction of transfer policies, which permit the prosecution of youths in adult courts, in almost all the states is indicative to some of a punitive trend in youth justice (Feld, 1999). However, from his study of youths sentenced in adult courts in New York City, Kupchik (2004) found that the sentencing judge viewed the youths as less culpable, even as the judge stressed the youths' responsibility for crime by admonishing them.³ For Canada, based on media reports and parliamentary debates and legislation, it appeared to Hogeveen (2005) that the youth justice system was becoming more punitive and imposing detention more often. However, Doob and Sprott (2006) offer another perspective: they argue that while political discourses in Canada evince a 'tough on juvenile crime' stance, youth justice legislation enacted in 2003 did not contain tougher measures for young offenders, but aimed instead to reduce incarceration. In Australia, rates of youth imprisonment have declined by over 50% in all jurisdictions from 1981 to 2004 (Veld and Taylor, 2005:

14). On balance, then, youth justice may be barking a similar ‘get tough on crime’ message as adult criminal justice, but the bite of youth justice may be considerably less (Muncie, 2005; see also Matthews, 2005).

Likewise, although many claim that an ideological shift occurred in youth justice during the 1970s and 1980s from a ‘welfare’ model with a forward-looking emphasis on rehabilitating the person, toward a ‘justice’ model with a backward-looking emphasis on accountability for and punishment of a crime,⁴ the shift appears to be only partial. Elements of both models are present in legislation and practice (Cunneen and White, 2002; Newburn, 2002; O’Connor and Cameron, 2002; Seymour, 1997; Warner, 1997). Based on the evidence to date, there is a need to examine not only youth justice legislation and *political rhetoric* toward youth crime, but also the *actual practices* in youth courts. Vignaendra and Hazlitt’s (2005) study of the New South Wales Children’s Court is a case in point. They found that while stated policies in youth justice shifted toward retribution and accountability, the court’s primary practices were oriented toward rehabilitation and a commitment to provide care and guidance to young offenders.

Public attitudes toward those who sexually abuse children

If there is any offence that inspires the greatest degree of ‘public condemnation and desire to punish’, it is sexual violence and abuse of children (Roberts et al., 2003: 129). In the wake of celebrated cases of the rape and murder of children during the 1990s, legislation was passed to increase penalties for such offences and to impose greater controls on paroled offenders in all of the five countries surveyed by Roberts et al. (2003) (i.e., the United States, United Kingdom, Australia, New Zealand, and Canada).

Further, Roberts et al. (2003) suggest that during the 1990s, there was a shift in the ways in which the public conceptualized 'the sex offender' (that is, the adult who has sexually abused children). In the 1980s, the child protection movement focused mainly on intra-familial abuse of children, and appropriately so, since these are the typical contexts in which children are victimized. Beginning in 1989 and during the 1990s, with a series of highly publicized sex offence cases involving young children in Washington State, Minnesota, and New Jersey, media and legislative attention shifted to 'stranger danger', and new laws were passed to extend incarceration for certain sex offenders (the 'sexual predator' laws), to register convicted sex offenders with the police, and to provide a variety of forms of community notification when sex offenders completed their sentences (Hinds and Daly, 2001; Roberts et al., 2003; Simon, 1998).

Although there has been a good deal of commentary and analysis of legislative and justice system responses to adults who sexually abuse children, far less is known about the justice system responses to youth sexual offenders. For legislation, in the United Kingdom and United States, adolescents convicted of sexual offences can be subject to community notification for extended period of times (Brownlie, 2003; Richardson, 2002; Zimring, 2004). As of December 2004 in Canada, youths convicted of sex offences and sentenced in adult court must participate in a national system of registration with the police. At present, we are aware of no such legislation for youths in Australia or New Zealand. However, in Australia and New Zealand, where almost all youth justice systems have court diversionary conferences, most jurisdictions exclude sexual violence cases from eligibility for conferencing.⁵

Responding to sexual violence

Adult courts

While research on the legal treatment of *youth* sexual offending is scant, several findings from research on *adult* sexual offending are relevant to our study. Studies find a high degree of attrition from victims' reports to the police to court conviction (for reviews, see Daly and Curtis-Fawley, 2006; Koss, 2006). Qualitative studies of the prosecution of sexual violence and the treatment of victims at trial show that legal procedure and evidentiary standards, coupled with social attitudes about gender and sexual violence, foster a legal re-victimization of both adult and child victims (see e.g., Eastwood and Patton, 2002; Kelly, 2001; Koss, 2006; New South Wales Department for Women, 1996; Smart, 1989), especially when the offences involve acquaintances rather than strangers. When relations between victim and offender are close, legal authorities tend to disbelieve the woman's story and assume she consented to the sexual interaction (Estrich, 1987; McGregor, 2004). For example, from their analysis of trial judgments and sentencing decisions in sexual assault cases with adult offenders and victims⁶ in British Columbia during 1986 to 1994, Coates and colleagues (1994, 2004) found that legal officers often transformed a violent and coercive event into a mutual sexual encounter. By contrast, MacMartin and Wood's (2005) analysis of sentencing decisions in sexual assault cases with adult offenders and child victims in Ontario during 1993 to 1997 came to a different conclusion. They found that when adults sexually offend against children, judges did not excuse or minimize an offender's behaviour; rather, they denounced the offender's exploitation of vulnerable victims.

The literature for adult sexual violence cases shows that the legal response is largely contingent on victim-offender relations and offence contexts. It is unclear,

however, how such victim-offender relations and contexts affect adolescents who are prosecuted for sexual violence, especially given the high likelihood that the victims of youth offenders are children who know the offenders.

Youth sexual violence

Although ours is the first study of how youth sexual violence is characterized in court, there is a considerable literature on the profiles and patterns of youth sexual offending. Commentators are unanimous in saying there is no 'typical' juvenile sex offender (Martin and Kline Pruett, 1998: 294; see also e.g., Allan et al., 2002; Barbaree and Marshall, 2006; Nisbet et al., 2003; Soothill et al., 2000). Rather, it is a heterogeneous group, with a similar profile of social and individual problems as other youthful offenders, including having experienced sexual and physical abuse themselves (see, e.g., Allan et al., 2002; Masson and Morrison, 1999; Rayment-McHugh and Nisbet, 2003; Vizard et al., 1995; Zimring, 2004). Typically, the victims of youth sex offences are younger than those of adult sex offenders. Like adult sex offending, it is important to distinguish youths who sexually offend against young children and those who offend against their peers. Depending on the age of the offender and victim, such offending can range from consensual underage sex to serious forms of coercive, violent behaviour.

A major debate in the literature concerns whether youth sex offending is a springboard to adult sex offending. While Martin and Kline Pruett (1998: 288) suggest there is a 'very real concern that many young offenders will grow into older, more dangerous predators', others have failed to find a link between youth and adult sex offending (Nisbet et al., 2004) or have challenged this view from studies of re-offending (Zimring, 2004). These and other scholars suggest that youth sex offending is part of a

general pattern of antisocial behaviour, and they note that future offending is far more likely to be for non-sexual than sexual offences (Association for the Treatment of Sexual Offenders, 1997; Letourneau and Miner, 2005; Smallbone and Wortley, 2001; Soothill et al., 2000). Although most scholars today reject the view, widely held up to the early 1980s, that youth sex offending is a harmless form of sexual ‘experimentation’ (Martin and Kline Pruett, 1998: 283), there remains uncertainty about how to view this form of offending and its trajectory: is it something that youths will grow out of, or does it signal the start of a pattern of sex offending that will continue to adulthood? (Brownlie, 2003).

In sum, the literature on the youth and adult justice systems’ handling of sexual violence cases, especially those involving child victims, does not give clear guidance on what we might expect to find in the judges’ sentencing remarks. In both social and legal contexts, sexual violence cases involving child victims are generally considered more serious than those involving adult victims. One wonders, then, how will this play out in the youth court, where nearly all the victims of sexual assault offences⁷ are minors? In general, we see that while there is a symbolic and political commitment in youth justice toward a justice model of accountability for offending, with a backward-looking approach to punishing the crime, actual court practices suggest continued interest to retain rehabilitative approaches in helping youths to change and reform. We would expect to see elements of both welfare and justice models in sentencing youth sex offenders, but it is uncertain which model will be given greater emphasis and how judges will justify punishment in more serious cases of sex offending.

METHODS

Our analysis of the 55 sentencing remarks is part of a larger project, the Sexual Assault Archival Study (SAAS). The broad aim of SAAS is to examine the appropriateness of restorative justice in cases of youth sexual violence (Daly, 2006; Daly et al., 2005; Daly and Curtis-Fawley, 2006). The initial dataset contained all youth sex offence cases, which were finalized by police formal caution, family conference, or in the Youth Court during a 6.5-year period (1 January 1995 to 1 July 2001). Of all youths charged by the police with a sexual offence in South Australia during a 6 ½ year period (1995 to 2001), 29% were charged with rape or attempted rape; 10% with unlawful sexual intercourse with a child under 12 years, including incest; 42% with indecent assault; 14% with ‘non touch’ sexual offences; and 5% with unlawful sexual intercourse (Daly et al., 2005). The South Australia Youth Court deals with all criminal cases except murder for young people under 18 years of age. It has the option of transferring youthful defendants to the adult court when their offences are particularly serious, but this happens rarely. During the period 1999 to 2004 no youth under 18 who was charged with a sexual offence was dealt with as an adult in the South Australian District Court (OCS/OCSAR, 2000-2005).⁸

The SAAS dataset has 385 cases: 226 court cases, 118 conference cases, and 41 caution cases. Case attrition during the legal process was high: in only about half of the 226 court cases was a sexual offence proved and sentenced by a magistrate or judge.⁹ Judges typically sentenced the more serious major indictable offences such as rape, unlawful sexual intercourse, and incest. Magistrates’ remarks are not formally documented or readily available; thus, our sample consists of 55 judicial sentencing remarks.¹⁰ In addition to the sentencing remarks, we had other key documents: the

Police Apprehension Report, which contains the victim's and offender's version of what happened as reported to and documented by the police; the youth's criminal history; and the court's Certificate of Record, which lists charges and documents the journey of the case through the court process.

Sentencing remarks

The sentencing remarks are a verbatim transcript of what the judge said at the sentence hearing. They vary in length, ranging from just over 100 words to nearly 3,000 words, with an average of about 1,000 words. In the remarks, judges typically discuss the offence and its effects on the victims and their families, and on the youthful offender. Then, they outline and justify factors they consider relevant to the sentence, citing aggravating or mitigating circumstances, before announcing the sentence. They often conclude by admonishing the young person in much the same way as Kupchik (2004) observed, and by emphasising the serious legal consequences of future offending. The remarks are longer when victims are under 12 years, and they are shortest when the judges assume the offence is consensual underage sex between those of a similar age.

The 55 cases: demographics, offences, and penalties

Offenders and victims

A striking feature of the cases is their gender structure. In all but one case, the offender was male, but for three-fourths, the victim was female. The offenders' mean age was 16.8 years. A quarter of offenders were 18 or over at the time of sentencing (but had committed their offence when they were under 18); 38% were 16 or 17; 24%, 14 or 15; and 13%, under 14. About a third had a history of previous offending (defined as an

admission to an offence or a proved court case), which in three cases included a sexual offence. In over half the cases, the judges mentioned at least one problem in the youth's history. Among the problems were having been abused while growing up (physically, sexually, or emotionally), having a mental or intellectual impairment, abusing alcohol or drugs, suffering from mental health problems, or having a troubled family background.¹¹

Almost all victims were under 18, and half were under 12.¹² The victims' mean age was 11.5 years. Of the 12 male victims, a high share (83%) was under 12 years, whereas of the 43 female victims, just 42% were under 12. Those under-12 were more likely to be victims of intra- rather than extra-familial offences.¹³ Almost all the victims knew the offender in some way, either as a family member, a friend, a neighbour, or an acquaintance. Only two cases involved strangers.

Offences and the legal process

The sentenced offences were rape or attempted rape (18%), unlawful sexual intercourse with a victim under 12 (27%), unlawful sexual intercourse with a victim aged 12 to 16¹⁴ (24%), indecent assault (25%), incest (2%), and indecent behaviour (4%). In 12 cases, non-sexual offences were sentenced at the same time as the sexual offence and may have been perceived by the judge as more serious (e.g., robbery was considered more serious than unlawful sexual intercourse). Charge bargaining was most frequent for the cases initially presented as rape; youths in these cases were more likely to be convicted of a lesser charge. Of the 55 cases, two were convicted at trial; the rest were finalized by a guilty plea.¹⁵

Penalties imposed

Table 1 shows the penalties imposed. The most typical outcome was an order to 'be of good behaviour' (86%),¹⁶ which was often joined with supervision by a Families and Youth Services worker (67%). Next in frequency was referral to Mary Street, which is a therapeutic programme that specializes in the treatment and prevention of adolescent sexual offending (58%). (Mary Street is an outpatient facility where young people attend regular appointments with their therapists, normally for a year; see further Daly et al., 2005: 79 and Mary Street website at:

<http://www.wch.sa.gov.au/services/az/divisions/mentalhealth/asapp/index.html>).

Youths were also referred to education or job training programmes (22%) or to other forms of therapy such as drug or alcohol abuse programmes (15%). Some were ordered to perform community service (15%); few were fined (6%). Detention was imposed in 33% of cases, but was suspended for all but two cases. In three cases, no penalty was imposed at all. These sentencing outcomes suggest a court orientation that is largely welfare or rehabilitation oriented, with relatively less emphasis on punishment.

Analytical approach

Content analysis

The content of what judges said was analysed using a combination of deductive and inductive approaches (Berg, 2004: 272-73). Drawing from debates and findings in the research literature, five broad categories of analysis were identified:

- (1) characterization of the seriousness of the offence and harm to the victim,
- (2) characterization of the youthful offender, (3) attributions of the offender's responsibility and the causes of offending, (4) how the sentence was imposed and

justified, and (5) the character of the moral communication and admonishment.¹⁷ A detailed coding schedule was prepared to systematically read, interpret, and code the remarks (for further information on the coding process see Bouhours, 2006: 28-30 and Appendix C). The coding was not limited to the manifest content of the text (i.e., the words used by the judges), but extended to the latent content (i.e., the meaning conveyed by the message). The remarks were delivered by five different judges, who used somewhat different linguistic styles and rhetoric.¹⁸

Table 1. Penalties imposed

Penalties ^(a)	N=55 % (N)
Good behaviour order (median length, 52 weeks)	86% (47)
Family and Youth Services supervision	67% (37)
Mary Street therapeutic programme	58% (32)
Other therapeutic programmes	15% (8)
Education/job training	22% (12)
Community service (median length, 200 hours)	15% (8)
Fine (median amount, \$200)	6% (3)
Detention imposed ^(b) (median length, 26 weeks)	33% (18)
Detention suspended (of N=18 cases with detention imposed)	89% (16)
No penalty	6% (3)

Notes:

^(a) In N=12 cases, other offences were sentenced at the same time as the sexual offence. In three of these cases the judges imposed a global penalty that dealt with the case as a whole.

^(b) In one case, home detention was imposed, and this was coded as detention.

Coding was an iterative process, which necessitated many readings of the remarks to expand and complete the coding schedule. For example, we found that some themes

in the literature on sentencing adult offenders were not relevant for youths, and these were discarded. At the same time, we identified new themes, which were incorporated in the coding schedule. The text of the remarks was coded for frequency (e.g., the degree to which an element was present or not), direction (positive or negative comments), and intensity (e.g., the degree to which the judge moralized). Bearing in mind MacMartin and Wood's (2005) injunctions that analyses of speech in the courtroom must be situated, not abstracted, we took care to code and interpret the findings as part of a sequenced and constructed activity.

Interviews with key legal officers and youth workers

To better understand the prosecution and sentencing of youth offenders in this jurisdiction and to clarify preliminary results, we interviewed key legal officers and clinical or social welfare workers in Adelaide, South Australia. These included two of the five judges who sentenced the cases, the state-wide police Juvenile Justice Coordinator, a therapist working in the Mary Street programme for adolescent sex offenders, and a Families and Youth Services worker.¹⁹ From the legal officers, we learned about what occurs during case prosecution, including the process of plea negotiation, as well as the factors considered relevant at sentencing. From the Mary Street therapist, we learned about the programme and how the young people are referred to it prior to or after sentencing. From the Families and Youth Services worker, we learned more about the meaning of the various penalties imposed by the court and how the department works with, monitors, and supports the youths.

RESULTS

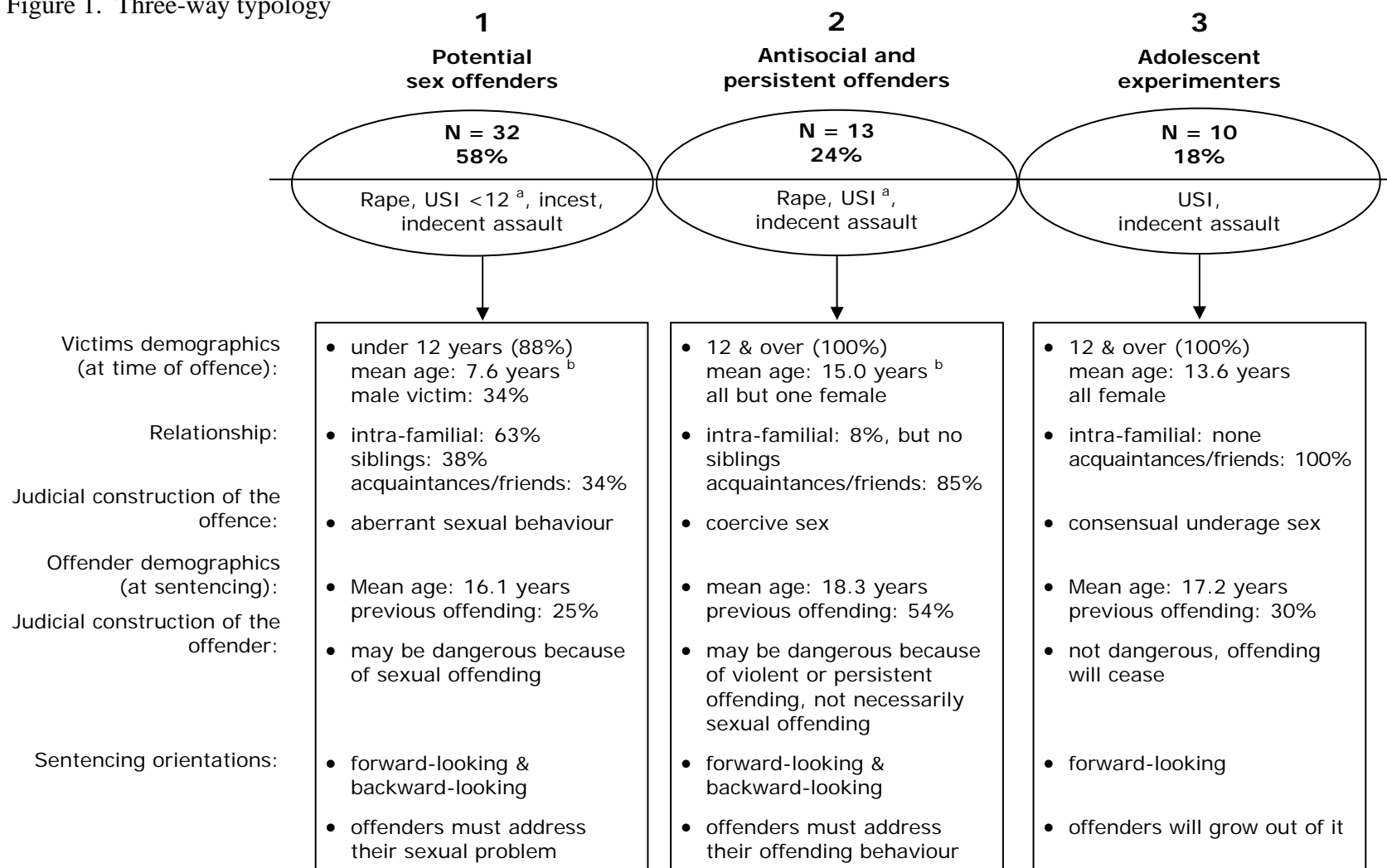
Three categories of cases and offenders

After reviewing the remarks many times, a striking result emerged: the cases fell into three discrete categories. Although a range of offences was involved in each category, the judges' sentencing discourse reflected a different set of ideas about the cases. This three-way typology structures the major findings of our study (see Figure 1). Category 1 youths were perceived by the judges as potential sexual offenders. Category 2 youths were viewed as antisocial and persistent offenders, who caused judicial concern not because of their sexual offending, but their criminogenic lifestyle. Category 3 youths were viewed as adolescent experimenters, who were likely to mature out of their offending, and whose offending was perceived as least serious.²⁰ This typology is reminiscent of Emerson's (1969) court categorization of delinquents into *disturbed*, *criminal-like*, and *normal* youths. We elaborate on the similarities and differences between the typologies in the discussion section.

Category 1: potential sex offenders

The 32 youths in Category 1 were viewed by the judges as posing a potential threat as sexual offenders in the making. Although the sentenced offence charges varied, *all* the youths were referred to the Mary Street programme. Judges depicted the sexual behaviour as aberrant (that is, not acceptable and not normal), when they reflected upon the victim's young age, relationship to the offender, and to some degree, gender (see Figure 1).

Figure 1. Three-way typology

*Notes:*

^a USI <12 = unlawful sexual intercourse with a person under 12 years, USI = unlawful sexual intercourse with a person aged 12 to 16.

^b Two cases of indecent behaviour, one each in Categories 1 & 2, involving a victim whose age was estimated to be in the late 30s were excluded.

Category 1 contains *all* the cases with victims under 12 and *all* the cases where victims and offenders were siblings. Compared to the other categories, the Category 1 cases were more likely to have male victims and intra-familial offences. The average age difference between the offender and the victim (about 8 years) was the largest of the three categories. Victims in Category 1 were never described as having consented to the sexual interaction. In fact, nothing was mentioned about consent in three-fourths of the cases. When consent was mentioned, the judges said that it was irrelevant because young children cannot consent to sex. The character of the sexual behaviour in these cases was definitely viewed by the judges as unacceptable and not normal. Rodney's case is an example:²¹

I consider it desirable, Rodney, not only that you undergo continued counselling, I consider it not only desirable but virtually essential, if you are to go through life with a right minded attitude to sexual behaviour... Hopefully, with such intervention ... you will not be interested in little girls like [the victim, aged 3], but will have a normal sexual outlook.

Offenders in Category 1 were one or two years younger than those in Categories 2 or 3 (see Figure 1). Most were described as having a variety of problems, which were related to prior victimization, family dysfunction, mental or intellectual impairment, and substance abuse (Table 2). One-fourth had an official criminal history predominantly for non-sexual offences; but it was their potential sexual danger to others that the judges frequently commented upon. Although noting the youths' potential sexual danger, the judges also expressed the belief that through their participation in the Mary Street programme, the youths could be reformed. Indeed, in half the cases, the judges

explicitly stated their optimism that the youths would not re-offend sexually. Category 1 cases posed great concern to judges, and they attracted significantly longer remarks.²²

Table 2. Judges' assessment of offenders' dangerousness and reformability for the three categories

	Category 1 Potential sex offenders N=32	Category 2 Antisocial/ Persistent offenders N=13	Category 3 Adolescent experimenters N=10
Judges say youth has problems such as: having been abused, mental or intellectual impairment, alcohol or drugs abuse, mental health problems, or a troubled family background ^(a)	69%	62%	20%
Judges say youth may be dangerous to others ^(b)	84%	23%	0%
Judges say youth is unlikely to re-offend	47%	39%	70%

Notes:

^(a) Judges mentioned mental impairment more often in Category 1 cases and alcohol/drug abuse more often in Category 2 cases.

^(b) Sexual danger predominates in Category 1 cases; general violence danger, in Category 2 cases.

Category 2: antisocial and persistent offenders

Thirteen cases are in Category 2. Although the judges viewed these cases as serious, they did not believe the youths required the Mary Street programme. However, in one-third of cases, they referred the youths to a therapeutic programme for substance abuse or mental health. In contrast to Category 1 youths, whose actions were viewed as aberrant sexual behaviour, Category 2 youths were viewed as having general antisocial behaviour. Victims in these cases were older (on average, 15 years old), and all but one

were female (Figure 1). Apart from one victim who was a relative of the offender and one, who was a stranger, the victims in these cases were friends or acquaintances of the offender.

The Category 2 cases have a variety of sexual and non-sexual offences. For two-thirds, the most serious sentenced offence was a sexual one. Not surprisingly, the victim's lack of consent was central to the three cases in which the youth was convicted and sentenced for rape. However, even for those youth who were convicted of unlawful sexual intercourse with a person aged 12 to 16 years (which legally implies sexual relations with a minor, see footnote 14), the judges said in court that the offenders had coerced the victims and exploited their vulnerability. For one-third of cases, a non-sexual offence (such as robbery) was sentenced, and it was viewed as more serious than the sexual offence, which, in some cases²³ was consensual sex between minors. Over half the youths in Category 2 had a serious prior criminal history, and many abused alcohol or drugs. Thus, the sexual offence was considered in the context of a criminogenic lifestyle, which may explain why detention was imposed in nearly half of these cases.

Phillip is typical of those in Category 2. He had a history of violent offending, and the judge described his life in grim terms:

You didn't have much potential at all. If you had any, it was being lost in a world of alcohol and drugs, and in offending. You were leading an aimless lifestyle, abusing drugs and alcohol, in a relationship, which it seems, was going nowhere, basically on a path to nowhere except, in all likelihood, to detention or jail. ... It might well be said [that] you have been given more than one chance in the Youth Court and why should you be given another, especially for such serious crimes?

The notion that the youth presented some danger to the public was expressed in a quarter of these cases, but the concern was with violent and dangerous offending in general, not sexual offending in particular.

Category 3: adolescent experimenters

Category 3 has ten cases, and these were viewed by the judges as far less serious than the others. All the victims were female, aged 12 or over, who were friends or acquaintances of the offenders. In most cases, the sentenced offence was unlawful sexual intercourse, which the judges characterized as adolescent experimentation and underage sex between consenting peers, giving no hint that the victims were coerced. Yet, in eight cases, the victim initially reported to the police that she had been raped; thus the judges' version did not match the victim's experience of the offence. In Category 3 cases, the judges' emphasis was on sanctioning the violation of legal norms rather than the harm caused to the victim. There was no expressed concern with alarming or aberrant sexual behaviour, or entrenched criminality. Judges depicted the offenders as immature and wayward, and they did not think a therapeutic or punitive intervention was required. They hoped that the youths had learned from their experience in court and had matured enough to stop offending.

The judicial address to Elliot is typical of the way judges dealt with Category 3 cases. The judge attributed the offence to Elliot's youthfulness and impulsivity, but expressed confidence that Elliot had grown up:

However much it might seem like a good idea at the time, you have got to think beyond that. ... You have learned a lesson from it. I am sure that ... there is no

reason to think that you will either do anything like that again or, I would think, break the law again.

Less than a third had offended previously, and few had serious personal problems.

These elements may have contributed to the judges' confidence that there would be no further offending.

Justifications for sentencing

The three-way typology structured the judges' general orientations in sentencing youth sex offending. In general, Category 1 offenders were believed to require sex offender treatment; Category 2, punishment and perhaps other kinds of treatment; and Category 3, little if any sanction. Sentencing justifications are, of course, complexly layered and nuanced. We turn to an analysis of how the typology relates to three related features of justifying penalties imposed: attribution of responsibility for the offending behaviour, assessment of an offender's potential to change, and a stance of looking forward to reform the offender or backward to punish the offence. Following this, we analyse the ways in which the judges justified detention.

Attributions of responsibility

In a minority of cases (20%), the judges did not attribute the offending to any specific cause. For most (80%), however, the offending was, with two exceptions, attributed to reasons external to the offender. Although there was some overlap, three types of causal attributions were made. The first related to the youthfulness of the offender and included immaturity, lack of control, and inappropriate sexual experimentation. The second related to disadvantages in the youth's life and included psychological and

mental health concerns, intellectual impairment, victimization, and family dysfunction. The third, which was mentioned as the principal cause of offending in just two cases, related to the inherent character of the youth, specifically, his selfishness and lack of regard for others.

Attributions relating to youthfulness were more likely in the Category 3 cases. For instance, in Emmett's case (Category 3), the judge accepted the youth's ignorance of the legal age of consent, and said, 'you have been genuinely unaware that this was a criminal offence'. Attributions related to disadvantages were more frequent in Category 1 and 2 cases. An example is Carl (Category 1). After pointing out that children need to be protected, the judge said to him: 'Now, unfortunately, I don't think you've had the benefit of that protection in your upbringing, and that, perhaps, explains a lot about why you are where you are today, and why you have done what you have done'. Internal attributions (or citing the inherent character of the youth) were given in two Category 2 cases. Both youths were sentenced for a string of offences in addition to their sexual offence, and they had extensive criminal histories. Their offending was attributed to their antisocial nature, rather than to their youthfulness or disadvantage.

Potential for change

In general, for all youth, the judges attributed the causes of offending to reasons that they expected would disappear with treatment or maturity. They also focused on the youths' reactions after the offence, in an effort to determine whether there were positive changes in their attitude since the offence, or if the youths had taken steps to address their offending. For instance, the judge said to Luke (Category 1):

Now, one of the very important things for me to take into account is your reaction to this offending and how you feel about it now ... It seems that you not only realize how serious all this is, ... but you are now very sorry for what you have done and how it has hurt the other people, and that is very important.

Over 80% of youths in Category 1 had begun attending Mary Street before the sentencing hearing. This occurs because police and legal officers encourage the young people who admit to sexual offences to attend the programme early in the legal process. The judges viewed these youths positively in that they were already taking steps to change. The judges also used information about the youths' current living circumstances to assess their likelihood for change. They were more hopeful when youths had the support of their family, were attending school or work, and had some prospects for the future. For instance, in the case of Mitchell, the judge decided to '... proceed without conviction even though this is a major indictable matter.'²⁴ I do so ... most of all because of the committed efforts that you and others are making to ensure that there is no repetition of this'. Expectedly, judges showed less optimism toward youths with developed criminal histories and those who were characterized as not facing up to their responsibility, as the judicial comments to Spencer (Category 2) illustrate:

Spencer, you are a street drinking, cannabis smoking, freely intercouring youth at only 13 years, so that your experience of life, it would seem, has led you to a stage where you are prepared to behave in public as a much older person and do unlawful things as much older offenders do. ... It is unusual to sentence a 13-year-old ... to a period of detention, but I am going to do that on the basis that I need to make you well aware of the seriousness of your conduct.

Looking forward to reform or backward to punish?

Justifications for penalties were given in 52 cases (three cases had no penalty).

Forward-looking justifications, which the judges used predominantly, addressed the youth's future behaviour, and backward-looking (or retributive) justifications addressed the need to censure or punish the offence.²⁵ Judges sometimes combined both.

Forward-looking justifications featured in all Category 1 and Category 3 cases and over three-fourths of Category 2 cases. Thus, in most cases, the judges wanted to stop the youths from future offending by addressing what they perceived as the underlying causes of offending. The judicial remarks for Jake (Category 2), who had a history of depression, exemplify this stance. The judge said:

[The] history that I read about is a very sad one and a tragic one, and it's clear that you need a lot of support. ... I don't think you are in any real sense a criminal at all. I think your offending is linked very closely with your mental health and drug issues, but I'm sure you understand that they are issues that you have to try and get on top of because there is often a very thin divide between those sorts of problems and committing crime.

Joined with this future-looking stance came a judicial warning: the youths were being offered a chance to change this time, but there would be no other chances. An example is what the judge said to Brian (Category 3): 'That does not mean to say that further offending would get that sort of leniency. Once you have been warned by this Court, you should take into account that those chances fast disappear'.

The backward-looking justification, retribution, was given in about one-third of cases. In these cases, the judges insisted that the seriousness of the offence deserved some punishment. Retributive justifications were more likely in Category 2 cases,

which contained a higher proportion of youths with persistent offending. They were typically reserved for older offenders and those sentenced to detention, a theme that we explore next.

Justifying detention

Detention was imposed in a third of cases, but suspended in all but two cases.

Typically, judges followed a two-step approach. First, they imposed detention with a retributive justification (backward-looking); then, they suspended the detention, using a blend of special deterrence and rehabilitative justifications (forward-looking). For instance, in Tara's case (Category 1, the only female), the judge emphasized the offence deserved some punishment:

The seriousness of the offence cannot be overlooked, even though I have considerable concern for your own well-being and your own development. ...

There is no doubt in my mind that the seriousness of the offence and the circumstances surrounding it call for a period of detention, notwithstanding that this is the first time you have come before the Court.

Then, the judge suspended the detention sentence to allow Tara to receive some therapy:

The grounds for suspending ... detention exist, however, in your age, your prior good record and indeed, your own personal circumstances, which put your offending behaviour in the context of a victim who is now abusing others. I am therefore going to suspend the period of detention upon an obligation of 12 months duration and [with the] condition that you attend assessment and therapy for your abuse both as a victim and as an offender.

Detention was imposed in all but one case of rape. It was also significantly more likely to be imposed for youths with a history of persistent offending, and for those who, the judges explicitly noted, had failed to show remorse or to change their attitude. Expectedly, backward-looking (retributive) justifications featured mainly in the cases in which detention was imposed; however, forward-looking justifications also featured in these cases because the judges were equally concerned with trying to reform offenders, and they wanted to give an offender a reprieve, a last chance to reform. In only two cases, both in Category 2, were the youths to immediately serve time in detention. Both had been sentenced before, but had failed to stop offending, and the judge referenced this in their remarks, as in Sean's case: '... if this were a first offence, I would suspend or consider suspending any sentence of detention, ... but in the light of your history, I do not see it as wise to exercise any discretion to suspend that'.

In sum, when justifying the sentences of youth sex offenders in this South Australia court, the judges focused principally on the need to stop further offending and offered a degree of optimism that the youths would change. Although Category 1 offenders were of concern to the judges, they did not stigmatize them; rather, they expressed confidence to the youths that they were able to change. Even in the cases where detention was imposed, it was typically suspended to give youths another chance to reform.

DISCUSSION

A major finding from our study is that judges' orientations to sentencing adolescent sex offenders varied, but were consistently patterned by victims' ages, offence contexts, and the youths' previous offending. Three categories of cases emerged, and each was

associated with a different type of response. The current literature imagines responses to two types of youth sex offenders: the potential sex offender, whose behaviour may escalate in seriousness; and the experimenter, whose sexual delinquency is likely to disappear as they grow older (Brownlie, 2003; Zimring, 2004). Both groups were present in this South Australian court, along with a third.

Consistent with the literature involving adult offenders and child victims (MacMartin and Wood, 2005), the judges considered sexual offending against young children as a particularly serious form of offending. They were concerned that youths who abused children (that is, the Category 1 cases) had the potential to become entrenched sexual offenders unless they received a specialized treatment intervention. By contrast, the judges viewed sex offending between those of similar age (that is, Category 3 cases) as far less serious; these youths were seen as experimenters, whose misbehaviour would disappear with maturity. A third category of cases emerged in the court: youths who were viewed as dangerous because of their violent or persistent offending, but the danger lay in their general antisocial attitude rather than sex offending.

This three-way typology reminds us of the three categories of youths described by Emerson (1969: 90-100) in a US juvenile court. Emerson noted that court staff categorized the youths as 'normal', 'hard-core' or 'criminal-like', and 'disturbed' delinquents. Emerson's 'normal' delinquents are akin to our Category 3 youths who, although they commit what is perceived as minor illegalities, pursue the conventional activities of youth and are not seen as problematic. Category 2 youths are similar to Emerson's 'hard-core' group and have a high degree of involvement in illegal activity. Finally, Category 1 youths, like Emerson's 'disturbed' delinquents, require treatment to

curb their aberrant and irrational behaviour. Although the categories are similar, they are constructed through a different lens: in our study the judges' assessment is driven primarily by the characteristics of the victim, particularly for Category 1 offenders, while in Emerson's study, the groupings emerge from the offences and the offenders. This may be because the youth in Emerson's study were prosecuted for a range of property and violent offences (sex offences were not mentioned specifically). Emerson does not give the proportion of youths in each of his categories, but we suspect the share of Category 1 (or 'disturbed' offenders) is greater in samples of youth sex offenders than in general samples of court youth. Despite some differences, the similarity in Emerson's typology and ours suggests a common set of socially constructed 'types' of offenders and offending, even when there is variation in the offences analysed.

Although judges imposed a term of detention in a third of cases, it was almost always suspended to allow for treatment and rehabilitation. Thus, judges used a retributive approach with serious offences and persistent offenders; their aim, however, was not so much to punish but to warn against further offending while allowing for rehabilitation. Detention to serve was imposed against youths who continued to appear in court.

One question arises from these findings: is the South Australian Youth Court atypical in taking a largely rehabilitative orientation to sentencing youth? The state does have a reputation for being a 'social laboratory' and 'trend setter' in legal reform (South Australian Parliamentary Select Committee Report 1992: 7). It was among the first jurisdictions in the world (arguably the first) to establish a separate court for youth (*State Children's Act 1895*), the first Australian jurisdiction to introduce children's aid panels (*Juvenile Courts Act 1971*), and the first Australian jurisdiction to establish a

statutory-based conferencing scheme (*Young Offenders Act 1993*). Yet, despite these developments, its rate of youth detention is similar to the national average (Veld and Taylor, 2005: 17). Although the usual disclaimers apply in making reliable claims, if we compare the rates of youth detention in Australia with those of Canada (Canadian Centre for Justice Statistics, 2005) and England and Wales (United Nations Office for Drug Control and Crime Prevention, 2002: Table 21.06), we find that Australian custody rates are, on average, slightly higher. Thus, measured by rates of detention, South Australia is no different from other Australian jurisdictions, Canada, or England and Wales. By contrast, the rates are over 12 times higher in the United States.²⁶

It is troubling that most cases in Category 3 were interpreted by the judges as consensual underage sex, whereas victims had reported coerced sex to the police. Although our study did not permit a close-grained analysis of the social processes and interactions that took place in charge or sentence bargaining, we are able to analyse the reduction in the legal seriousness of cases from victims' reports to the police to sentence. Using a measure of 'time at risk', which is the maximum jail time that could be imposed on adult offenders, we find that all 55 cases showed some erosion of legal seriousness from the time of arrest to when the offences were sentenced. The greatest reduction in legal seriousness occurred for Category 3 cases.²⁷ In our interviews with legal practitioners in South Australia, we probed the matter of charge bargaining in cases that began with rape complaints but were proved of a less serious legal offence of unlawful sexual intercourse. They suggested that a victim's initial report to the police may not reflect all of what happened and that the evidence may not stand the test of a trial. Of the three categories of cases, those in Category 3 best exemplify the ambiguities that arise concerning consent and the legal hurdles that confront prosecutors

in proving a victim's lack of consent, when offences involve an offender and victim of similar age and there are no other witnesses. These cases reflect the dynamics typical of adult cases of acquaintance rape in which victim and offender are of similar age, know each other, or met each other at a bar or party.

Conclusion

In our study, the judges' responses to youth sex offending were informed by the seriousness and context of the offence, and the characteristics of victims and offenders. Youths who had offended against children created particular concern and were all referred to a specialized programme. In the most serious cases of rape, in cases where judges perceived little potential for positive change in the offender, and in cases where the youths had persisted in offending, judges imposed detention, but typically suspended it. Their foremost aim was to stop future offending by addressing what they perceived as its causes and by persuading youths to comply with social norms. For almost all the youth sex offenders, the judges' orientation in sentencing was rehabilitative, with a focus on reform, not punishment. Even when the judges used retributive justifications, they joined them with a forward-looking, rehabilitative stance. They wanted to give the youths 'room to reform' (Zimring, 2004: 105) by ordering them to attend counselling and treatment programmes.

Our findings confirm other recent studies of youth courts in Western nations (Doob and Sprott, 2006; Kupchik, 2004; Muncie, 2005): despite a political rhetoric of punitiveness, especially in responding to violent and sexual offences, the actual practices toward youth continue to be rehabilitative and reform-oriented (excluding, perhaps, the United States). In saying this, we are aware that in the United Kingdom

and some jurisdictions in the United States, there may be an inappropriate application of community notification and registration policies for youth sex offending. Such policies, Zimring (2004: 116) argues, ‘may have more significant consequences than any of the direct sanctions imposed by the court’. These developments alert us to the need to develop appropriate policies that reflect known differences and variation in the character of youth and adult sex offending.

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NOTES

¹ We use the terms ‘sexual violence’, ‘sexual assault’, and ‘sexual offending’ interchangeably. We are aware that not all sexual offending is violent, but in our dataset, all but two cases of indecent behaviour had some level of violence.

² Throughout this paper we term the court and justice system responses to the criminal offending of minors as youth courts or youth justice, although jurisdictions vary in the names they give.

³ Kupchik's (2004) finding is similar to that observed by Mileski (1971) in her study of a New Haven, Connecticut, court: judges apply 'situational sanctions' (admonishments) to defendants when they do not incarcerate them.

⁴ This shift was depicted across many western countries except Scotland (Bala et al., 2002).

⁵ Two jurisdictions, New Zealand and South Australia, routinely use court diversion conferences for youth sexual assault cases. Queensland does not exclude sexual assault cases, but such cases are infrequently conferenced. This latter approach is also evident from Crawford and Newburn's (2003) study of youth offender panels in England and Wales: sexual offences are not explicitly excluded, but none is shown on the offence list in their study (p. 111).

⁶ The age of victims is not explicitly stated in Coates' several studies, but from the examples given, we assume her sample includes both adult and child victims.

⁷ By comparison, the 'no touch' offences of indecent behaviour or exposure would more likely have adult victims.

⁸ More in-depth information about the context and practices of the youth court jurisdiction in South Australia is given in the *SAJJ-CJ Technical Report No. 3* (Daly et al., 2005).

⁹ Specifically, of the 226 cases, 115 were proved of a sexual offence (51%), eight were proved of a non-sexual offence (4%), 100 were dismissed or withdrawn (44%), and three were acquitted at trial (1%).

¹⁰ Sixty-five cases were sentenced by judges, but the remarks were missing for ten cases. The South Australian Youth Court staff conducted an extensive search in the judges' files and court archives to locate the remarks, but despite their efforts, the remarks could not be found. A comparison of the missing cases with the rest of the sample revealed no major differences between the two groups; however, as defined in the results section, the missing cases had a somewhat higher share of Category 2 cases and a somewhat lower share of Category 1 cases.

¹¹ Only five youths in the sample were Indigenous. This figure was too small to permit any meaningful analyses of the impact of racial classification on case outcomes. The data available to us did not give the racial classification of victims.

¹² Eleven cases involved more than one victim. In these cases we identified a primary victim for coding purposes. The primary victim was the victim of the most serious offence charged or the set of 'facts' associated with the offence charged, if it was the same legal offence. If the cases appeared of equal seriousness, then the youngest victim was selected; and if everything was still the same, then the female victim was selected.

¹³ Intra-familial offences involved siblings and cousins, including step or foster relations, as well as two babysitters. Extra-familial offences involved friends, casual acquaintances, neighbours, and those not known to the victim.

¹⁴ A rape conviction means the victim's lack of consent has been demonstrated. A conviction for unlawful sexual intercourse (USI) with a victim under 12 means that an offender has had sexual intercourse with a child under 12. Both offences carry a life sentence for adult offenders (whose penalty structure is used in this Youth Court). A

conviction for USI, 12-16 years, means (legally) that an offender has had consensual sexual intercourse with a victim who was older than 12 but under the legal age of consent (17 years in South Australia). It carries a penalty of 7 years' imprisonment. Unless the prosecutor believes the victim can be an effective witness at trial, pleas to USI are permitted in pre-trial negotiations with defence.

¹⁵ Of the total of 226 court cases, just 14 (or 6%) went to trial. Of the 14, three were found guilty, three were acquitted, and eight were dismissed.

¹⁶ This means that the youth is potentially subject to further sanctions, should s/he re-offend.

¹⁷ In another paper, we analyse the moral communication between the judges and youth.

¹⁸ Of the five judges, two have since retired, but three still preside in courts in South Australia. We do not analyse differing judicial styles in sentencing, including variation by gender, to preserve judicial anonymity.

¹⁹ This family and child welfare agency has had several name changes in the last ten years. The current name of the service, after a re-organization in 2004, is Children, Youth and Family Services (CYFS).

²⁰ Like all typologies, this one had some cases that did not easily fit into the categories. But on balance, it captured the variation in the cases with a high degree of accuracy.

²¹ Pseudonyms have been used when quoting from the remarks.

²² The average number of words in the sentencing remarks for each category is as follows: 1,173 (Category 1), 949 (Category 2), and 534 (Category 3).

²³ For example, in one case, a boy and a girl, both aged about 14, had consensual sex in the toilets of a railway station. They were discovered by the police who charged them both with unlawful sexual intercourse (USI); thus, each was legally treated as both victim and offender! The girl was dealt with in the Magistrates' Court, but the boy was sentenced by a judge because other offences, including robbery, were dealt with at the same time as his sexual offence. Like Zimring (2004) we note that the adult penalty structure for sex offending, in which USI is intended to protect young people from sexual exploitation by adults, may not be relevant or appropriate to youth.

²⁴ Judges have the option to sentence a youth without recording a formal conviction. This is typically used for offenders who have had less exposure to the court, to avoid the stigma an official conviction would have on their future. This is not an unusual option; in 65% of cases in our sample no conviction was recorded for the sentenced sexual offence.

²⁵ This framework comes from von Hirsch's (1985) classic text on forward- and backward-looking punishment. We use the term 'retributive' to refer to censuring or punishing an offence, in proportion to harm. Retributive justifications need not imply punitiveness, despite the claims of many in the field.

²⁶ For Australia in 2004, the rate is 25.5 per 100,000; for England, 2000, the rate is 18.26; and for Canada in 2004, 8.2. For the US in 2002, it is 326 (Sickmund, 2006: 4).

²⁷ The rate of erosion in legal seriousness for the sexual offences, from arrest to sentencing, and using the median 'time at risk', was 38% for Category 1 cases, 73% for

Category 2 cases, and 88% for Category 3 cases (for more information on the ‘time at risk’ measure, see Daly et al., 2005: 27-8).

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