

# Sex Offender Law Report

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## Legal Developments

### HIV Status and Related Legislation, Part III

by Roslyn Myers, J.D.

*Editor's Note:* As the AIDS virus has spread, the question for lawmakers and health officials has become how to prevent the spread of the disease and to what extent to place the responsibility for containing the virus on those who are carriers.

Under U.S. law, knowingly transmitting HIV to a sexual partner is treated under murder/manslaughter statutes, in some circumstances likening the disease to a weapon. Canada has taken another approach. The Supreme Court of Canada, in *R v. Cuerrier*, 1998 Can. Sup. Ct. LEXIS 43 (Supreme Court of Canada, Mar. 27, 1998; Sept. 3, 1998), that court's first case dealing with the criminal prosecution of an HIV-positive person for engaging in sexual activity without disclosing his status, ruled that when sexual activity poses a "significant risk of serious bodily harm," the carrier has a duty to disclose his or her status to the partner, and failure to adhere to this duty constitutes a "fraud" which renders a sexual partner's consent to the activity legally invalid, thereby making the otherwise consensual sex an "assault" under Canadian criminal law.

Because knowledge or belief that one is HIV-positive, which is required under any anti-transmission statute, imparts a significant disclosure duty that brings with it the possibility of stigmatization, ruined relationships, and potential "outing" by those with whom the information is shared, one has to ask: What is the upside of testing?

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### Therapeutic Jurisprudence and Sex Offender Policies, Part II

by Leonore M.J. Simon, J.D., Ph.D., and Kristen Zgoba, Ph.D.

*Editor's Note:* In Part I of this series, Simon and Zgoba introduced the concept of using a therapeutic jurisprudence (TJ) analysis of sex offender policies because of its therapeutic objectives, which include the goals of preventing sex crimes and promoting the well-being of children. (Leonore M.J. Simon, J.D., Ph.D., and Kristen Zgoba, Ph.D., "Therapeutic Jurisprudence and Sex Offender Policies, Part I," 6 SLR 6 81 (Oct./Nov. 2005).)

Part II, below, examines data on sex crimes, kidnappings, and sex crime/kidnappings and uses a TJ framework to examine the assumptions and effects of sex offender policies. Simon and Zgoba state that policies should be enacted to reflect the differing specific risk factors for males and females and that the failure to publicize cases of male victimization and the resultant policy omissions of gender-specific preventive measures may facilitate the commission of new sex offenses against young boys.

The data, based on police reports of crimes, are from the National Incidence-Based Reporting System (NIBRS) for the year 2000. In contrast to the UCR, the NIBRS includes detailed data on sex crimes and kidnappings. (R. Rantala and T.J. Edwards, *Effects of NIBRS on Crime Statistics* (2000).)

#### Characteristics of Sex Crimes, Kidnappings, Sex Crime Kidnappings

For the year 2000, NIBRS shows that 42,357 sex crimes and 7,647 kidnapping were reported to law enforcement agencies. Of the 50,004 cases of sex crime and kidnappings, 2% (N = 855) of the incidents involve both

a sex crime and a kidnapping, indicating that, although such incidents are highly publicized by the media and catalysts for new policies, they are rare occurrences. Moreover, of the 50,004 cases, only three of the sex crimes and 17 of the kidnappings involved death of the victims. Cases of sex crime kidnappings account for only one death.

As Table 1 indicates, a major difference between the sex crimes, kidnappings, and sex crime kidnappings is the victim age, with children constituting almost 80% of the victims of sex crimes compared to 42% of kidnapping victims and 24% of sex crime kidnapping incidents. Consequently, sex crime incidents are mainly crimes against children whereas the majority of kidnapping and sex crime kidnappings target adult victims. (See Table 1: Characteristics of Sex Crimes and Kidnappings.)

Moreover, females, juvenile and adult, constitute the majority of all victims in all three crime types:

- 82% of juvenile and 94% of adult sex crimes are perpetrated against females;
- 62% of juvenile and 94% of adult kidnappings target females; and
- 94% of juvenile and 98% of adult sex crime kidnappings victimize females.

Stranger offenders account for a small proportion of all three crimes:

- 16% of juvenile and 21% of adult sex crime victims;
- 38% of juvenile and 35% of adult kidnapping victims; and

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•47% of juvenile and 44% of adult sex crime kidnapping victims are victimized by strangers.

The majority of sex crimes and kidnappings are committed by family members and acquaintances.

An unexpected finding is that a large proportion of the adult females tend to be victimized by intimate partners ranging from a high of almost 51% of female kidnap victims, 25% of sex crime kidnappings, and 15% of sex crime incidents. Whereas sex crimes are crimes against children by people they know, kidnappings (and to a lesser extent sex crime/kidnappings) are crimes against adult women by intimate partners and are a form of domestic violence.

## Bivariate Findings

Table 2 presents bivariate findings of sex crimes, kidnappings, and sex crime kidnappings by age and gender of the victim. As the table shows, in all three types of incidents, although males are the minority of victims, their risk of victimization is higher prior to age 12 than it is for females. Thus, males who are victimized are almost three times as likely as females to be molested or kidnapped, and almost six times as likely to be molested and kidnapped under the age of six compared to females. Moreover, males who are victimized are more than twice as likely to be molested or kidnapped, and seven times as likely to be molested and kidnapped as are females. In adulthood, the patterns change with female victimization rates greatly exceeding those of the males in all three crime types. (See Table 2: Per-

Table 1: Characteristics of Sex Crimes and Kidnappings

Sex Crime Victims	Kidnapping Victims	Sex Crime Kidnappings
79% are juveniles	42% are juveniles	24% are juveniles
mean age = 16, SD = 11	mean age = 22, SD = 14	mean age = 26, SD = 11
81% are white	71% are white	68% are white
18% are males	29% are males	3% are males
31% of victims injured	25% of victims injured	46% of victims injured
94% of adults are female	77% of adults are female	98% of adults are female
82% of children are female	62% of children are female	94% of children are female
2% are kidnapped	11% are sexually victimized	100% involve both
3 cases of death of victim	17 cases of death of victim	1 case of death of victim
<b>Offenders</b>		
mean age = 28, SD = 14	mean age = 31, SD = 11	mean age = 30, SD = 11
75% are white	60% are white	52% are white
26% are juveniles	5% are juveniles	8% are juveniles
96% are male	82% are male	99% are male
29% are arrested	39% are arrested	38% are arrested
<b>Victim-Offender Relationship</b>		
parents = 11% adult/15% juv	parents = 13% adult/28% juv	parents = 0% adult/1% juv
intimates = 15% adult/6% juv	intimates = 51% adult/7% juv	intimates = 25% adult/3% juv
family = 12% adult/14% juv	family = 3% adult/4% juv	family = 2% adult/2% juv
acquaint's = 48%/49% juv	acquaint's = 20%/23% juv	acquaint's = 35%/47%
strangers = 21%/16% juv	strangers = 35%/38% juv	strangers = 44%/47% juv
<b>Offense</b>		
70% force/weapon	74% force/weapon	86% force/weapon
96% involve one crime	71% involve one crime	100% involve one crime
85% involve one victim	76% involve one victim	94% involve one victim

centage of Sex Crimes, Kidnappings, and Sex Kidnappings by Age and Gender of the Victim.)

## Logistic Regression Analysis of Correlates of Probability of Arrest in Sex Crimes

The arrest rate for all three crime types is low considering the public and media focus on such cases. Arrest rates range from 29% of sex crimes, 38% of sex crime kidnappings, and 39% of kidnappings. The results

of a logistic regression analysis of the factors affecting the probability of arrest are presented in Table 3. The kidnapping and stranger categories are used as reference groups in the analysis. (See Table 3: Factors Affecting the Probability of Arrest.)

The logistic regression analysis indicates that sex crimes against male victims increase the probability of arrest. Factors decreasing the probability of arrest include sex crimes by family members and acquaintances, sex crimes involving victim injury, sex crimes

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involving younger victims, and sex crimes committed with force or a weapon.

**Modify Policies, Laws to Maximize Therapeutic Outcomes**

TJ suggests that the law itself functions as a therapist or a therapeutic agent. Legal policies, legal rules, legal procedures, and the roles of legal actors may act as social forces that sometimes yield beneficial or detrimental consequences. TJ suggests using empirical data to identify relationships between legal arrangements and therapeutic outcomes. Subsequently, TJ suggests modifying policies and laws to maximize therapeutic outcomes and minimize negative ones.

A TJ approach raises important empirical questions regarding sex offender policies. The data presented indicate that sex crimes are numerous and warrant special policies. However, the policies needed to enhance the well-being of children and prevent sex crimes need to conform to the empirical realities of sex crimes and kidnappings.

**Stranger Offender Bias.** Current sex offender policies have an antitherapeutic effect on victims of sex crimes and kidnappings. The policies are aimed at the rare stranger offender who makes up 16% of juvenile sex crime, 38% of juvenile kidnappings, and 47% of juvenile sex crime kidnappings. The bias of the policies for stranger offenders can be seen in the police decision to fail to arrest family members and acquaintances who commit sex crimes even when the victim sustains an injury and force or a weapon is used. Such police decisions have negative effects on victims of non-stranger sex crimes whose cases are treated less seriously than those involving stranger offenders. TJ would suggest maximizing the therapeutic effects on the victims by creating policies to increase the arrest rates of sex criminals known to and trusted by the victims.

**Kidnapping.** The focus of publicity and policy on sex crimes and kidnappings of girls by strangers ignores the fact that such cases are extremely rare. Instead, only 2% of sex crimes cases involve kidnapping. Moreover, the majority of sex crime kidnappings are committed by people known to the victim instead of complete strangers. The fear of the stranger kidnapper ignores the true nature of kidnapping. The kidnapping of children is most often committed by non-custodial parents and people who assist them. They are presumably motivated by love for the child and are not inclined to hurt him or her. The kidnapping of adults tends to be the kidnapping of women by intimate partners whose objective is to hurt them.

**Table 2: Percentage of Sex Crimes, Kidnappings, and Sex Kidnappings by Age and Gender of the Victim**

	Sex Crimes (N = 42,357)			Kidnappings (N = 7,647)			Sex/Kidnappings (N = 855)		
	f	females	males	f	females	males	f	females	males
	100%	85%	15%	100%	72%	29%	100%	97%	3%
1-5	12	10	27	13	9	24	0.8	0.7	4
6-11	19	16	36	13	9	23	3.4	3	21
12-17	41	43	26	16	16	16	24	25	21
18+	29	32	11	58	66	38	71	72	54

**False Sense of Security.** Current sex offender policies have a goal of preventing sex crimes by strangers. This focus has detrimental effects because the fear of the stranger allows victims to use less caution in their dealings with family members and acquaintances and opens them up to victimization by known offenders.

The data described in this article suggests that current sex offender policies have antitherapeutic effects on children and their parents. For example, community notification statutes require law enforcement to advise communities about a sex offender either moving into the neighborhood or already residing in their midst. Given that, at most, only 16% of all molestations are carried out by strangers, how does community notification protect children from family members and acquaintances? Yet community notification statutes would seem to provide a false sense of security to parents who may think that the stranger moving into the neighborhood presents the greatest danger to their children. Moreover, the constant media bias in reporting sensational, stranger child molestations may be seen by many naive consumers as educating them about the dangers to their children. If media coverage is a family's sole information provider of the dangerous conditions for their children, most parents would be attempting to protect their children from stranger-danger, resulting in their children being unprotected from dangers presented by trusted family members and acquaintances.

**Revamp Current Statutes to Conform With Data.** Law reform can enhance therapeutic effects and diminish harmful consequences to children and their parents by revamping current sex offender statutes to conform with the available empirical data. Legislation could be devised that would focus on nonstranger danger. For example, the policy of community notification is typically used in stranger molester cases but may not prevent child molestations. Instead, community notification could be used in nonstranger molestation cases where the community could be advised that an offender who has in the past molested his daughter is a neighbor and could, given the opportunity, molest another child. Such

information would allow community members to take precautions against the offender and limit his opportunities to reoffend.

NIBRS data indicate that sex crimes reported to police are numerous and are five and a half times more prevalent than are kidnappings and 50 times more prevalent than sex kidnappings. Many of the publicized cases of sex crimes against children involve kidnapping. The data suggest that, contrary to the image of publicized sex kidnappings, they constitute only 2% of all sex crime cases. Deaths of victims are even more rare, with only 20 deaths out of 50,004 cases. Consequently the intense media publicity of such cases and the resulting policies to prevent future sex kidnappings have antitherapeutic effects on society because they create fear in the minds of parents about the rare cases and fail to educate parents about the common dangers to children.

Sex crimes and kidnappings have some striking similarities. Although 18% of all sex crime and 28% of all kidnapping victims are males, males have a heightened risk victimization by both crimes under the age of 12 compared to girls whose victimization begins to exceed that of males in the teen years for sex crimes and in adulthood for kidnappings. Although policies are gender-neutral, they arise mostly from highly publicized cases involving young females. Policies should be enacted to reflect the differing specific risk factors for males and females.

*See THERAPEUTIC, next page*

**Table 3: Factors Affecting the Probability of Arrest**

**Factors Increasing the Probability of Arrest**

sex crime against male victims

**Factors Decreasing Probability of Arrest**

sex crimes by family members and acquaintances

sex crimes where victim injured

sex crimes against younger victims

sex crimes committed with force or a weapon

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The failure to publicize cases of male victimization and the resultant policy omissions of gender-specific preventive measures may facilitate the commission of new sex offenses against young boys.

**Probability of Arrest.** Despite the frenzied media and policy focus on sex crimes (26%) and kidnappings (39%), very few of these crimes result in an arrest. Moreover, the logistic regression analysis indicates that sex crimes against males increase the probability of arrest. This finding may be the result of the relative rarity of cases involving male victims and determinations by law enforcement that male victims are more credible than female victims. The failure to arrest in cases of female sex crime victims may increase the already detrimental effects of victimization such as self-blame, guilt, and powerlessness.

**Domestic Violence Crimes.** The increased probability of arrest in cases involving male victims seems at odds with the univariate data that indicate that females, young and old, constitute the majority of all victims in all three crime types. Moreover, a large proportion of each crime type is committed by an intimate partner and constitutes domestic violence. Policies should reflect the facts that sex crimes and kidnappings are generally crimes against females and are often domestic violence crimes. Current sex offender policies do not emphasize the predominance of female victims in all three crime types or the domestic violence component these crimes. Such omissions have negative consequences for the victims whose cases police officers may not view as true victimizations because of attitudes toward female victims and skepticism about domestic violence crimes.

**Juvenile Offenders.** Other findings indicate that juveniles constitute 26% of sex crimes

offenders compared to 5% of kidnappings. Sex offender policies do not generally target underage molesters whose images of youth and naivete contrast sharply with the monster-like depictions of registered sex offenders. Policies that target only adult sex offenders may have antitherapeutic effects on victims of younger molesters because they may not have anticipated the possibility of sexual assault at the hands of a juvenile or developed protective measures to avoid victimization. For example, parents and the public do not generally associate the concept of sexual predators with brother-sister incest and may not take preventive measures to prevent exploitation of a younger child by an older sibling. It is not clear whether sex offender policies like community notification are used in cases of juveniles. However, it is foreseeable that a convicted juvenile sex offender could victimize another child if presented with unsupervised contact with younger children of unsuspecting families.

Another finding in the logistic regression analysis of correlates of arrest indicates that sex crimes committed against younger victims are less likely to result in arrest. Sex crimes committed against younger victims may not result in arrest in cases where the victims are infants and toddlers and otherwise would not make competent witnesses. However, police could develop strategies to increase arrests in these cases where parents or caretakers have the sole responsibility for the care of the children. Arrest in these cases with vulnerable victims who may not yet be old enough to talk may be essential to preventing further victimization by the same caretakers against the same victims.

### Decrease Antitherapeutic Effects of Current Policies on Victims, Society

This article used a TJ framework to exam-

ine the assumptions and effects of sex offender policies using empirical data on sex crimes, kidnappings, and sex crime kidnappings. Current sex offender policies are not informed by empirical data on the reality of sex crimes, kidnappings, and sex crime kidnappings. The current policies target the rare stranger offender and have antitherapeutic effects on society when they fail to prevent new sex crimes by an offender who has been subject to the procedures of those policies. The Groene case is an example of the limits of current sex offender policies in incapacitating sex offenders or preventing new sex crimes by convicted, registered sex criminals. Instead of targeting the rare stranger offender and risking such failure, sex offender policies need to address the majority of cases that involve sex crimes by family members and acquaintances. Sex offender policies need to be revamped to incorporate empirical facts about sex crimes and kidnappings. Revamping sex offender statutes will maximize therapeutic effects and decrease antitherapeutic effects of current policies on victims and society.

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The first installment of this article discussed HIV transmission statutes and summarized several highly publicized cases that were brought under the transmission law. (Roslyn Myers, J.D., and Jorge Jacobo, J.D., "HIV Status and Related Legislation, Part I," 6 (5) SLR 67 (Aug./Sept. 2005).) Part II briefly summarized underlying public policy arguments and set forth the categories of criminal laws used to prosecute intentional transmission of the virus. (Roslyn Myers, J.D., "HIV Status and Related Legislation, Part II," 6 (6) SLR 88 (Oct./Nov. 2005).) Part III, below, continues the enumeration of criminal laws under which the transmis-

sion, or attempted or reckless transmission, can be prosecuted, and synthesizes cases that reflect the boundaries of the laws. Although not all the cases are sexual assaults, the parameters and standards of proof are applicable to analogous fact patterns, barring other distinguishing features. Part VI, to appear in a future issue of SLR, explores the debate about the efficacy of HIV-related laws.

### General Criminal Statutes

General criminal statutes that may be relevant to the prosecution of intentional transmission of HIV include:

- Murder;
- Attempted murder;

- Manslaughter;
- Reckless endangerment (see, e.g., **In Davis v. State**, 196 Ga. App. 390 (1990) (holding that defendant's conviction for attempted reckless conduct by HIV-infected person was supported by defendant's statements to the victim; failure to disclose infection; and his actions in the vehicle into which he had forced the victim));
- Assault with a deadly weapon (HIV); and
- Simple assault. (Zita Lazzarini, Sarah Bray, and Scott Burris, *Evaluating the Impact of Criminal Laws on HIV Risk Behavior: A State of the Art Assessment of Law and Policy* 4 (Jun. 19, 2002).)

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