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**Plea Negotiation Practices  
in Sex Offense Cases  
December 2002**

## **Prosecutorial Perceptions in Sex Offense Cases**

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The topics of sex offenses and sex offenders continue to elicit marked concern among policymakers, correctional personnel, researchers, clinical practitioners and the general public alike (Flowers, 2001; Schwartz & Cellini, 1995). While improvements in broad community responses to sex offenses have been noted in recent years, there are perhaps few issues that garner such heated and intense political and public responses than that of the systemic addressing of sex offenses (Thomas, 2000). Sex offenses may be considered in and of themselves *mala in se* offenses, those offenses that are wrong in and of themselves in a moral sense considering pervasive cultural standards and mores (Holmes & Holmes, 2002). The present condition of policies and practices related to sex offenders is given substantial attention in public media, and the nature of such offenses facilitates public responses that often serve to inform political decisions without the presence of substantiating research and empirical support (Carter & Prentky, 1993; Schwartz & Cellini, 1995).

Partly in response to perceptions of an increase in the frequency and severity of sex offenses in the state, the Utah Legislature passed Senate Bill 26 in 1996, which rescinded mandatory minimum sentencing practices for sex offenses against children. Additionally, this legislation offered a non-mandatory prison offense category of attempted aggravated sexual abuse of a child. This offense, while a 1<sup>st</sup> degree felony offense, still retained a lifetime maximum sentence. While much has been written regarding sex offender characteristics, issues around recidivism and related predictor variables, and best practices for clinical and correctional treatment professionals (see Holmes & Holmes 2002; Prentky & Burgess, 2000; Schwartz & Cellini, 1995;

West, 1994), relatively little attention has been given to the legal *processes* that are involved in the apprehension, charging, and convicting of individuals considered to have committed a given sex offense. While the speedy application of judicial procedures and ostensibly inordinately confining punitive measures appear to temper and assuage broad public response to sex offenses, researchers and practitioners concerned with what actually happens in the process between initial investigation and final adjudication are becoming increasingly concerned with the paucity of empirical information informing the prosecutorial and judicial processes (Sampson, 1994; Schwartz & Cellini, 1995).

There are numerous problematic concerns inherent in evaluating plea negotiation processes related to sex offender cases. Of initial interest is the myriad of factors associated with what is actually defined as a sex offense, and there is some disparity among and within states in this regard (Flowers, 2001; Holmes & Holmes, 2002). Additionally, most states have mandatory sentences for sex offenses, and often require the convicted offender to be identified on a sex offender registry in the public domain (see National Conference on Sex Offender Registries, May 1998; also Walsh & Cohen, 1998). This ostensibly provides pronounced impetus for individuals charged with a sex offense to emphasize plea negotiation processes in an attempt to avoid such a stigma. Prosecutors may also be under conflicting and inextricable pressures to weigh public and victim perspectives with what can actually occur under current legal constraints, as well as provide a medium for obtaining comprehensive alleged offender assessments to inform judicial dispositions (Sampson, 1994; Schwartz & Cellini, 1995). The process and content of plea negotiation is multi-faceted and multi-dimensional, and subject to a wide array of contextual and subjective applications which serve to decrease the uniformity with which it can be assessed. These include the theoretical possibility of subjective influences and an array of offender, victim, and system-oriented variables.

An argument can be made that prosecutorial practices and discretion in plea negotiation processes are the most influential factors in determining the course of a sex offense case. In addition to analyzing statistical data from corrections and court databases, it would seem useful to engage in an interview format that would serve to bring to light some of the processes and dynamics that prosecutors perceive are an integral part of their work with sex offense cases, as well as serve as a beginning toward understanding the logistics of plea bargaining in the State of Utah since marked legislative changes in 1996. To that end, prosecutors were interviewed for this study with the following overarching question guiding what was asked, with the complete question list supplied in Appendix A:

- How do prosecutors view their role in plea negotiating sex offense cases, with particular attention to what factors are involved in the initial determination of a charge or charges, plea negotiation strategies including either reducing or dropping charges, the effect of prosecutorial experience and resources (e.g. urban v. rural contexts), and what are perceived as gaps in the system with regard to effective prosecution and effective treatment of alleged sex offenders?

## Background Information

A total of twenty-four prosecutors were interviewed for this study, all of whom were

identified as having experience with sex offense cases. Eight of these prosecutors were located within urban areas (Salt Lake, Utah, and Weber counties), with the remainder from rural jurisdictions. Six of the prosecutors were female. The average time spent as a prosecutor was 11.4 years, with a range of 1.5 to 28 years. Similarly, when asked how many years they had prosecuted sex offense cases, the average number of years was 6, with a range of 1 to 27 years. In response to estimating the number of sex offense cases they had prosecuted, many of those interviewed responded with a range. Approximately 211 sex offense cases prosecuted was the average, with a range of 10 to 1000 cases. As the study was conceptualized, it seemed important to represent rural and urban areas within the state so as to delineate possible disparate perceptions and practices. While the rural participants tended to report a significantly longer time period as a prosecutor, they also reported relatively fewer sex offense cases when compared to those who worked in urban areas.

### **Participants**

- \*24 prosecutors
- \*8 from urban areas
- \*16 from rural areas
- \*6 female
- \*Average time spent as a prosecutor-11.4 years
- \*Average time spent prosecuting sex offense cases-6 years
- \*Average number of sex offense cases prosecuted-211

### **Determining an Initial Charge**

#### *Process and Related Factors*

The most widespread factor involved in the process of determining an initial charge was based strictly on evidentiary motives. While some prosecutors reported that the nature of sex offense cases had both an overt and covert impact on the way they viewed the defendant, almost all cited that there was a relatively straightforward process in comparing the topography of the offense with appropriate statute and offense categories. As one prosecutor stated, "The legislature lays it out for me and says these are the, you know, the elements, and if the facts meet the elements, then that's what I charge." Others seem to concur with this perspective. "I'll get out my statutes and my law books, and I'll just look through different statutes until I find one that seems to most accordingly ... is most closely related to the facts that we're faced with." On the face of things, a majority of prosecutors indicated an initial process of reviewing the evidence provided by law enforcement agencies (and in some instances information from human services agencies such as the Division of Child and Family Services) and developing an approach in filing charges from that base. A few others also indicated a preference for prosecutorial interviewing of the defendant and victim or victims. Such an intermediate step was felt to be important in an effort to more fully understand the scope and severity of the alleged offenses.

Given the widespread acceptance of this evidentiary perspective, there seemed to be some notable

of those in urban areas seemed to indicate a two-tiered approach in determining initial charges and filing. One prosecutor stated,

"...that's almost strictly just the evidence ... the facts of the case ... whether to file. We have standards as prosecutors, ethical standards and office standards, as to when we file a case, and we're not allowed to file a case unless ... well, there are two... there's the one - there has to be, you know, probably cause to believe that the perpetrator committed the crime. And that's sort of a minimum standard; and then we have an office standard, where there has to be reasonable likelihood of conviction of the charge that you file."

While the standard of "reasonable likelihood of conviction" was a pervasive theme throughout the interviews, urban prosecutors appeared to espouse it more directly as a framework from which they viewed the filing process. Prosecutors in more rural areas, however, seemed more apt to acknowledge other variables associated with the process of determining an initial charge. While an assessment of the defendant's history seemed an integral component to most prosecutors' practices in filing, some indicated that there were offender characteristics that influenced the determination of charges. As one prosecutor suggested,

"So, really, we've got a lot of discretion as prosecutors, when we file our cases. If we think that somebody is particularly, you know, horrendous and a predator, and we really need to make sure we handle them, sometimes we do charge a lot more than we would if it was, you know ... it really depends on the case."

The issue of multiple counts in initial filing was an arena where wide disparity among prosecutors was noted. On one side of the spectrum was a majority of prosecutors who felt that due to the nature of these cases, the number of charges filed initially was often a subset of the total number of offenses or incidents. Several cited the need to illustrate the nature of the crime. "We won't file all charges, but we'll file a representative amount. We always file the worse charge," one prosecutor stated, echoing the perspective of many who additionally felt there was a point of diminishing returns in charging multiple counts. One rural prosecutor stated, "...and then you start looking at, 'Okay, well how much bang for the buck am I going to get here? Do I need to charge up 75 counts? Is that going to get a greater sentence?'" This seemed more prevalent with those prosecutors who had a more extensive history in the system.

A few other prosecutors indicated that they file as many charges as possible, given the evidence, even if it seemed excessive to some. As one stated, "What I do, I try to charge every single act committed or perpetrated on a victim ... some prosecutors will look at a single event in the night and say, 'That's it. That's the only one.' I don't. I tend to look at everything that happened to a victim." More often than not, this was in large part guided by a perceived sense of responsibility to the victim and the community. This perspective was slightly more evident in rural areas, although one urban prosecutor stated, "We're supposed to charge a case for what it's worth, but I think everybody, being candidly, finds themselves at some point thinking, 'Well, I don't think I can prove this. That's not the strongest ... but, I'm going to charge, in hopes that they'll be willing to take a plea bargain.'"

A few prosecutors noted some utility in a formulaic approach to determining counts and charges. One would charge up to 10 counts, one 2 counts for each act, and another 1 count for each victim up to 5 counts. Most of the prosecutors interviewed noted the complexity of sex offense cases as compared to other offenses when it came to the issue of filing multiple charges. Often victims (particularly children) are uncertain as to the frequency and duration of the offenses perpetrated on them, according to many prosecutors. The tension between fact-based

filing and the variety of victim responses led many to rely on general representations of crime categories. This became more salient when attempting to identify criminal episodes. Along these lines, one prosecutor stated,

"Usually, victims remember a time that it happened. They don't really remember what happened the rest of the day, but they remember what happened that particular time. I charge that-and then each type of activity during that incident, I charge...you don't want to charge every single incident, and so you just see which ones the victim can remember the best, the ones that can be tied down the best to certain dates or times of year."

Additionally, some expressed frustration at the nature of sex offenses against children, and noted that often when a child had been perpetrated on once or twice, those incidents were clearly defined and remembered, but when a child was perpetrated on repeatedly, those incidents tended to run together, making it more difficult to charge specific counts. Issues around victim presentation, credibility, and perceptions became more relevant in the post-filing plea negotiation process.

When asked if there were any assessments of offender risk that played a part in determining initial charges, a vast majority stated there were not. This seemed to refer to formal risk assessments, which most often occurred after the initial filing. However, many prosecutors observed an informal process of assessing an offender's risk that did, in fact, play a role in determining an initial charge. Some prosecutors often informally evaluated an offender's state of mind, particularly in regard to issues of motivation and perception during the alleged offense. Additionally, many of these relied on their own perceptions of the offender's dangerousness (in addition to the perceptions of law enforcement personnel) as a factor in determining an initial charge. Such variables as number of victims, relationship between offender and victim, the perceived "boldness" of the offender, past sex offense history, and other possible aggravating and mitigating factors were said by some to play a part, albeit indirectly, in the determination of an initial charge. There were many, however, that felt that any type of assessment of offender risk was inappropriate at this stage of the legal process, as illustrated by one's comment "...that a charge is just a charge. You're still presumed innocent. You have no right, in my mind, to assess from the front end of things what might happen."

A minority of those interviewed reported that one factor in determining an initial charge was the possibility of plea negotiating after the filing. This, it seemed, was influenced by prosecutors' assessment of what they wanted out of the case in terms of a final disposition. Certain pragmatics played a part as well, including the consideration that multiple charges assisted defense counsel in sometimes "selling" a plea option further in the process to a defendant. Also, the possibility of going to trial on a case was a consideration to some in the initial filing process. One prosecutor suggested that they "go through and start looking to see what kinds of evidence you're going to be able to present to the jury, that would go more into the psychology of the victim, if the victim is willing to testify, their age, they're going to be helpful, or they don't want the case prosecuted." Similarly, another indicated that "the victim's appearance, demeanor, how candid they are, all those types of things..." are considerations in determining an initial charge, as the possibility of presenting the case before a jury was perhaps something to be considered even at the initial filing. A small number of those interviewed indicated that they file "as if we have to prove every element of the case to a jury." Most of these considerations, however, were cited as relevant more often in the plea negotiation process.

**Potential offender registration on the sex offender registry was almost universally considered to be irrelevant to the process of determining an initial charge.** Additionally, for the most part, prosecutors did not consider the treatment associated with length of prison stay to

be a factor in what charges were initially filed. Some appeared to focus directly on the nature of the offense and related evidence, as suggested by the statement, "I don't really think my job is to decide whether they have treatment or not, when I file the charges." Several appeared to be interested in a convicted offender receiving treatment, although they considered the treatment offered in the correctional system (and particularly in the prison setting) to be appropriate. As one prosecutor suggested, "I know that the state prison, before any sex offender can be released, they have to go through a treatment that the prison provides, so ... treatment is always something that I try and give the defendant, but it's not necessarily something that comes into the thought process of charging." The sentiment of a few others were expressed by one's comment that, "...I don't want this to sound callous ... once they get to prison, I don't care what happens to them. That's up to the prison's responsibility." Many who felt that generally speaking treatment associated with prison time was not a consideration seemed to qualify this perspective when it came to misdemeanors or instances when they felt that the court might not sentence a defendant to prison in spite of the initial or final charges.

A few others interviewed felt that the treatment associated with prison time was, in fact, a consideration during the process of determining an initial charge. A rural prosecutor suggested,

"Treatment is a very important component in my consideration, but I don't know if it's the most important ... You got notions of retributive justices, that we punish people for certain crimes, and rehabilitative justice, that we sort of try to rehabilitate criminal actions, and the criminal person, so that they can contribute productively to society. Well, on a serious case, like sex offense cases, the first thing I'm looking at is retributive justice ...I think sex offenders belong in prison for a time, and there's a couple reasons I think that. One reason is that -I think they need to be punished. I think punishment is, in fact, part of the healing process, or can be part of the healing process. The second thing is that I think we need them out of our way for a while. We need them out of society until they can, hopefully, get some kind of treatment... We hope that there can be some treatment that will help them to face their potential problems or tendencies, and help them to overcome them."

One prosecutor found it somewhat difficult to reconcile his perspective that treatment was important for sex offenders with the notion of retributive justice, particularly as evidenced by other prosecutors. "The problem - and this is one of my things - one of the things that I'm having trouble with ... is the punishment. I mean, you can look at the statute and it says what's supposed to happen to a certain perpetrator, you know with a certain charge

## **Plea Negotiating**

### *Dismissing or Reducing*

In evaluating prosecutors' perspectives on plea negotiation, it seemed important to examine their perceptions on whether it was more common to dismiss a charge or charges, or lower the level of offense in plea negotiation. Overwhelmingly most prosecutors stated that what happens most often in practice is the dismissing of several counts if a defendant pleads to the most severe or restrictive count of the highest charge. However, the nature of dropping or lowering a charge was in large part affected by victim-related variables, such as the nature of the evidence and the occasion where the victim was opposed to testifying for a host of reasons.

When asked what might account for those instances when all charges were dismissed on a given case, almost all cited problems with evidence, particularly problems with victims and/or

witnesses. While relatively few of those interviewed expressed that they had any experience with dismissing a totality of charges, four prosecutors interviewed cited the possibility that a prosecutor might become convinced that the defendant was in fact not guilty of the alleged offense. This was due, in theory, to issues around the changing credibility of a victim. As an indication of this, one prosecutor suggested "...through the process of that case and your handling of that case, you've become convinced that the perpetrator's not guilty, that the victim's lying, that it didn't happen the way that they said it did..." Another expressed,

"...my general assumption would be that during the course of litigation sometimes you discover evidence that changes the way you view a case. Ah, and it may be that, it may be that a prosecutor has given their victim a truth test and they failed, or it may be that the defense attorney has given the perpetrator a truth test and he or she passed, or it may be a combination of those two. Or it may be that during a preliminary hearing, the victim's testimony was completely incredible, and they ... their story changed from what the prosecutor had learned from them at first, and the prosecutor maybe decided that, 'I don't think this happened, and I can't prosecute.' Part of the problem is ... that you have a duty to try and protect the public, and you have a duty to prosecute crimes, but ... the standard for conviction is that the evidence must show, beyond a reasonable doubt, that in fact that the crime had been committed ... and that's a high standard. So, if your case starts to look shaky, and you're not convinced beyond a reasonable doubt that it happened, and your wondering yourself, the question of the prosecutor is, 'Is it right for me to put this case in front of a jury? Do I believe there's a strong likelihood that this happened?' Part of the difficulty of having prosecutorial discretion is that you actually have to make some decisions according to your conscience..."

Other evidence problems were commonly cited as a reason for a case being dismissed. These included victims recanting, victims leaving the area without notice, and charges initially filed prematurely. The practical effect of these is to allow for the questioning of a case's evidence, and most prosecutors felt that they would dismiss all charges if they did not have a likelihood of a conviction for lack of evidence.

Interestingly, another reason cited for dismissal of all charges was lack of resources available to a prosecutorial team, as evidenced by an increasingly unmanageable caseload. A form of case "triaging" occurred, where sometimes a case might be dismissed if, in combination with evidence issues, a prosecutor could not adequately follow it to completion.

Some other mitigating factors that might account for total charge dismissal were suggested. These included the defendant's agreement to pursue counseling, the defendant's agreement to leave the jurisdiction, and the developmental status of the defendant (e.g. mental retardation), overt suicidality of a victim, and the consideration of significantly increased trauma to a victim through involvement in the court system. One prosecutor also suggested that the database might indicate a dismissal on cases where there was a plea in abeyance or diversion.

Invariably, when cases were dismissed, they were dismissed without prejudice, with only a very few dismissed with prejudice. Some of those interviewed felt that there was a "without prejudice" assumption given in any dismissal, while others suggested that the issue of prejudice did not apply in these situations. Still others made it a point to recommend dismissals specifically with or without prejudice.

When asked if they felt it was more common to dismiss charges or to reduce the level of severity of initial charges, a slight majority stated that they were aware of the system-wide employment of both strategies at approximately equal rates. Additionally, the varying nature of

the cases was a factor in what was done. Many seemed to follow the practice of one attorney, who stated,

"Both ... Generally speaking, you'll take the top count, if you've got a great case with a confession, you have to plea to the top count. There's no reduction. If you don't have a confession, and you're going to have to put a kid through a trial, you take the top count and you drop it maybe one degree. Or take the top two counts, and drop the one degree and then dismiss the rest."

Several also pointed to the practice of combing both approaches in a single case with multiple counts, as evidenced by one prosecutor's contention that, "If there are multiple counts, generally you can resolve it by pleading to one, and dismissing one or more," although another noted that there were more than a few times when multiple 1<sup>st</sup> Degree felonies were charged, and a reduction in all of them was offered. In terms of person preference, the perspective of one seemed to represent that of many, with the comment, "It's a matter of style, really. And it also depends upon the case.. I do both, really. Sometimes I' dismiss counts and have them plead to the most serious count. Other times I reduce for offenses."

The desire to obtain a favorable disposition in the case was the driving force for all prosecutors interviewed. Many spoke of an "art" in analyzing the entire case, and predicting potential obstacles that might be encountered in trying the case. Most also referred to the seemingly overt nature of the *quid pro quo* approach integral to the negotiation process. One stated the sentiment of many with the comment,

"Well... you're negotiating, you're resolving a case, and to resolve a case with the other side, you have to give them something. That's the way it works. They give you a guilty plea. They acknowledge guilt. They convict themselves. They don't make you go to trial. They don't make your victim testify, so you've got to give them something in exchange for that."

A significant number of those interviewed indicated that they preferred to reduce levels of charges rather than drop charges. The rationale for most was a consideration of the potential sentencing options that multiple charges afforded. As one prosecutor stated, "I don't like one charge, because I like to ask for consecutive sentencing, so that we get as much time as we can. So that the Board has the most leeway." Several noted that the plea arrangements that were most attractive to defendants were those that excluded mandatory prison. In an effort to negotiate a plea, reducing the level of severity was often considered. "Coming off "of a 1<sup>st</sup> Degree Felony charge, reducing the level of severity, was most notably influenced by the case.

"At times we'll have a case that we fully believe that the crime had occurred, but we recognize, either because of the way the defendant, or the victim, interviewed, or other factors, that there's going to be potential problems with the case at trial... But after I consult with the victim, and after the case goes on, and we see more how it's going to play out, then we start looking at that [reducing level of severity]."

A few others noted that they felt it was far more common to dismiss charges than to reduce the level of severity. Most who cited this mentioned the mandatory minimums associated with at least one 1<sup>st</sup> Degree Felony conviction, as suggested by the statement, "If you charge someone with five 1<sup>st</sup> Degree Felonies, that could carry `minimum mandatory commitment,' you get a plea on one, you're going to get out of them the exact same thing that you would if you

convict them of all five, and you don't have to put the victim through trial." Another noted an office policy that seemed to keep 1<sup>st</sup> Degree Felony charges at that level, with an emphasis on dismissing rather than reducing. Citing a rape charge example, this prosecutor stated,

"Our office has a policy of once you file a felony, you can't reduce it by more than one degree, unless there's substantial problems with forensics or legal issues. And when you start talking about a rape, even if you charge 'Attempted Rape,' the language within the rape statute actually contemplates 'attempted rape.' And I've never felt comfortable, and I think it's a ... such an ugly legal.. it's a fraud to say you've attempted and attempted rape. So I guess for those reasons, we don't [reduce charges]."

All of those who noted dismissing as more common also stated a personal prosecutorial preference for the practice.

"Personally, I'd rather dismiss charges. I, you know, and there are the exceptions, but for the most part, a child sex offender - I want to have a 1<sup>st</sup> Degree Felony, and so usually I'm dismissing other charges, agreeing not to file other charges, whatever, to get them to plead to a 1<sup>st</sup> Degree Felony ...I prefer to dismiss other charges, because if you get a 1<sup>st</sup> Degree Felony, you can get ... guaranteed they're probably going to go to prison. You can guarantee the Board of Pardons is going to look at them harder, and they're going to be a convicted felon, now a registered sex offender, and could be on parole for the rest of their life. And I think the Department of Corrections goes to great lengths to make sure they're rehabilitated before they release them back out, and then if they mess up, they can sit and play that game with them the rest of their lives."

### *Factors*

Plea negotiation by its very nature is multifaceted and complex. From the subjective experience of the prosecutors interviewed, processes related to plea negotiation were particularly multidimensional when it came to sex offense cases. Figure 1 displays a schematic view of the broad categories of factors reported by those interviewed. It is important to note that while a number of considerations were considered when negotiating a plea, of primary importance were the issues of evidence (with attenuate witness considerations) and a desire to avoid trial (which was also often associated with evidentiary considerations).

Evidentiary issues were considered by most prosecutors to be the most salient factor in plea negotiation processes and practices. One prosecutor expressed frustration around evidentiary dimensions in plea negotiations with, "so there are some evidentiary shifts that will lead us to think we need to frankly dump the case and get out quick so we can get something on them, because we won't be able to. ..because of the evidentiary problems." Most problems with evidence weakened the prosecutorial position in the plea negotiation process, and most prosecutors seemed to indicate that this became most relevant when it came to the avoidance of a trial. One suggested,

"The biggest...I mean the biggest problem is evidence ... is a lot of the cases that we prosecute are quote, 'he said -she said' cases, and even when you try to argue to a Jury that, you know, sex offenders don't sell tickets and have an audience, it's just really hard, and I think people are so 'acculturated' into the TV mentality,

that unless they have, you know, a picture of the event or, you know, bloody sheets or bloody this or bloody that, they just can't believe that it happened."

Some spoke of the difficulty in identifying what factors are salient in determining what is effective in regard to a jury, as evidenced by the statement, "You get a feeling for what is going to be a case that a jury will find somebody guilty and what a jury will not, and it's hard to articulate that."

More than a few prosecutors considered a combination of the evidence, judicial characteristics, and the victim's wishes when assessing the practicality of avoiding a trial. One prosecutor suggested,

"I mean, if suddenly you're getting ready for trial, and you find out something that you didn't have before, or your victim's memory is really hazy ... which can happen. Some of these cases are two years old by the time they actually get tried. That certainly is a factor of the quality of evidence we have. Um...sometimes, depending upon, you know, which Judge you do have for trial, if you know he or she is pretty much disposed ... predisposed to send this person to prison regardless of whether they plead to a 3rd or a 2nd, that does factor in. You think, 'Okay, what do I really need to get out of this case?' And some of that comes from the victim. We'll just ask them, 'What are you looking for? Do you want this person to simply get help? Do you want them to be punished? Do you want a combination of the two?' And we don't let the victim's preference on that be the completely driving factor, but it's something that we do consider.

Of particular note by many prosecutors was the issue of avoiding trial in rape cases, where most agreed that they often had limited conviction rates. One urban prosecutor reported that,

"Juries in Utah ...I think it's extremely difficult to get a conviction on a rape case. In fact, our conviction rate on this team ... and we have excellent attorneys on this team ... is about 50%. That's half of all our cases that we take to trial, we lose. So when people tell us, 'Why do you plea bargain?' Well, because that's one less person that's going to be on the street... it's better to get a guilty plea to a lesser charge and get them off the street, than it is to take it to trial and take a 50% shot that he's going to be out there doing it to somebody else."

A few others concurred with the statement that, "I have found that sex abuse cases, for me, have the lowest success rate in front of a jury."

More often than not, prosecutors cited lack of resources to more fully and adequately pursue cases toward the jury state, and time and time again reiterated that most cases were resolved through plea negotiations. One prosecutor expressed the sentiments of many with the statement, "Your caseload is such that it's absolutely impossible to try every case."

Some cited the nature of juries, in their experience, to give defendants "the benefit of the doubt," particularly in "he-said/she-said" cases. One prosecutor mentioned this, along with evidentiary expectations of juries in rural areas, with the comment,

"...within about a half an hour, and I went and talked to the Foreman of the Jury, who was a businessman that I respect, and he said the same thing. He says, 'You just didn't have the evidence.' There was ... you know, we didn't have any medical

evidence, we didn't have any, you know, of the scientific kind of evidence that Jury's, I guess, are coming to expect, and my feeling was... `Hey, if there's a young lady that credibly is saying what happened to her ... even if she's had a troubled past, and the defendant isn't even going to take the stand...' and so that's the kind of problem we deal with, in sex offenses. And I had another sex case go ... it was a case where the defendant had fondled ... essentially, it was a friend of his daughter. I can't remember if she was over baby-sitting or something ... but a teenage girl ... had fondled her breasts taking her home. And it was another one of these `his word against her word.' I had put on evidence which I hoped showed that he was not credible, you know, that he had ... had been inaccurate or lied about things he said. The Jury came back, "Not Guilty." I talked to one Juror, who ... she told me that, `We thought they were both lying.'"

Related to this was a seemingly common perception indicated by the following observation,

"We have the same problems with Juries in sex offense cases, as we do in death penalty cases and pornography cases. You take off all the ones that have strong feelings about it. ...And so you're left with people who, you know, don't care, never thought about it, or whatever. Um ...I think in Utah County, what I see is our biggest problem is people don't want to be seen as judging someone ... don't want to look at someone and say, "We just don't believe you. We think you're a liar." It's easier for them, a lot of times, to go, `Well, we think there's reasonable doubt.'"

Another pressing issue, and a pronounced impetus for avoiding a trial, was related to the credibility of the victim. A small number of prosecutors suggested that by the very nature of sex offense cases, particularly against children, the victims are often traumatized and begin to act out, which in turn has an effect on their credibility to a jury. As cited by one rural prosecutor, "...one of the problems you find is that a person who, once as a child has been molested ... they tend to act out in different ways, which has an effect on the credibility [of the case]" Another rural prosecutor suggested, " A victim's credibility is what the Jury's going to particularly weigh once they have heard that opening argument ... opening statement, if you will, and then move to the point, "Okay, tell me what happened." Juries can be very critical of victims, and they do weigh considerably, the victim's credibility, as far as the appearance on the day of trial, the way they handle themselves. It can be very ... it can be a tough position to put that victim in again. It may even be the third time they've had to tell the story." The issue of avoiding a trial for reason: related to the victim was oft repeated in the interviews. An urban prosecutor commented that,

"That, and also, you look at your victim. I mean, there are good victims, and there are bad victims; and you get kids in here that are just terrible witnesses, and you think, `I can't put this person on the stand. They're not going to be believed,' and then you get other kids that are just ... they're amazing ... in their ability to recall, and you know, remember the events, and talk about it ... so a lot, when we meet with them, we think, `Is the Jury going to like 'em? And how are they going to be able to do on the stand?' Because 99 ... well, I should say all of our cases ... by the time they get to trial, they're nearly ... they're never as strong as they originally were, and kids never are as good on the stand in front of a courtroom full of people, as they are talking to you alone, or when you're in court practicing that."

Some prosecutors cited a number of useful techniques in addressing the unique needs of young victims, particularly interviewing strategies that ask questions and described scenarios in language that is age-appropriate to the victim and often on closed-circuit television or video. Others pointed to a "retraumatization" of the victim in a trial setting that many prosecutors attempted to avoid, as suggested by because you don't know how the victim's going to do. In the hope ...I hope the attitude ... in getting the case, is to put as much pressure on the defendant to plea, without going to Trial, and a lot of times a plea bargain is based upon that, because I really honestly believe that you're punishing the victim when you put her through that. It depends on who the victim is, but a lot of times, they're being victimized again and again through the legal system..."

Related to evidentiary issues and the general avoidance of the unpredictability and resource-expenditure of a trial was sometimes the overarching need to resolve the case, as exemplified by one prosecutor's statement, "Ali...In my mind, although multiple counts are often brought ... there is typically one or two offenses that are the most egregious, that are the most serious, that cause the most harm, and I always look for a plea to those offenses. The lesser offenses ... yeah, I'm willing to dismiss as part of the greater good. The greater good is ... obtaining a conviction."

When asked about the role of demographic variables in plea negotiation process, most responded that demographics did not play a role in plea bargaining. They often returned to the contention that sex offenses occurred across racial, ethnic, religious, and socioeconomic dimensions. However, some noted that demographic characteristics did, in fact, play a role in plea negotiations. This happened in both covert and overt ways.

The seemingly more covert manner in which demographics played a role was in the area of socioeconomic status. As one rural prosecutor observed, "I think more importantly what happens though, is that people who have resources, once they get into the system, they're able to use those to influence the decision-makers and people who influence the decision-makers." Implied in this were not only parole and correctional decision makers, but also legislators. Along these lines, another stated,

"Well, you get ... you get somebody who's a, you know, a teacher or a businessman or somebody in the, you know, in the community ... they have friends. The friends can sign letters, write letters to the Judge or the Prosecutor. They can provide moral support. They can provide financial support. They can support the family when it's going through all of this turmoil. And so ... and if you get somebody who doesn't have that ... some poor person with no connections to the community, they don't have any power to try to influence the outcome. I mean, it happens not just, you know ... it happens at the police level, prosecution level, judicial level, AP&P level, and probably Board of Pardons..."

A very small number of prosecutors also reported a vague sense of demographic variables that were covert but not necessarily related to socioeconomic status. One prosecutor indicated this confusion and uncertainty with the comment, "I also think there's sometimes there's just a subtle ... there's a subtle kind of ... not message, but ... sort of, you know, there's a different way of handling this, and sometimes that influences the Criminal Justice System." This prosecutor went on to suggest, "Well, it's kind of ... you know, there's nothing overt. There's nothing I could say, you know, I could prove this, but there's some cases where you think, 'You know, I wonder what's going on here? I think there's something happening that I don't know about...' It's not necessarily a financial ... it's more if they're in that community, then that community will rally to their support. It doesn't matter if they're ... you know, make a lot of money or don't make a lot of money. I don't ...I don't get the sense that that's that important."

A small minority of prosecutors suggested that the predominant religion of the state, that of The Church of Jesus Christ of Latter-Day Saints (referred to colloquially as LDS or Mormon) was sometimes an issue in plea negotiation practices and considerations. This was sometimes noted (most markedly in the past) on the "front-end" of a particular case, as referred to by, "I think in, you know, in Utah ... the LDS Church ... I think for a while, they had a real problem with an uneven policy, or an uneven practice. Not policy ... an uneven practice of what gets reported and what doesn't get reported."

A few suggested that the LDS issue was more blatant in many cases. One urban prosecutor noted,

"Well, I have a circumstance that was really ... just very, very annoying where the man was an extremely intelligent guy, he was LDS, and immediately his LDS attorney ... they immediately got him in front of LDS Social Services, had an LDS Judge, and it was just ... it was just so obvious. So obvious ... The whole process ... that there was a religious undertone ... under the process ... the idea of forgiveness vs., you know, justice or retribution, and it was just the sickest thing I've ever seen in my life. The whole system played into it, except the prosecution, which wasn't that persuasion ... It can happen a lot more ... especially if the people can get a religious backing and work that ... it only works if the Judge is that religion as well."

Another rural prosecutor stated, "And it is LDS, because we live in an LDS culture, and if everybody on board ... the LDS Judge, the LDS, you know, therapist, the LDS perspective ... it's very sick, and it does happen a lot."

Others, however, noted a more balanced approach in plea negotiation and in the perceptions that judges held of defendants. One prosecutor, noting that there were "presentation issues" that could be associated with demographic dimensions, summarized this with the statement,

"Ah ... Presentation is tremendously important ... Just exhibiting the fact that you haven't got a clue of the gravity of your behavior. So, yeah, it's terribly important. I would like to think that if they're not in nice clothes, or they don't use the English language perfectly, that it didn't necessarily matter, and I believe to a very, very great degree it does not... Judges are very careful to try not to let that impact them. I don't know ... I don't know how to judge, unless the person was either in their Parish, or their Ward, or their, you know, whatever congregation they were in, the Judge wouldn't know somebody's religious background. Might, you know, if somebody ... if somebody was in a prominent position in one of the religions ... and that could absolutely backfire, because say you got a Judge that is a very devout Catholic, and you've got somebody that's high up in the ... I'm not saying Priest or anything ... this isn't Massachusetts, but you get somebody that's very ... you know, very elevated in the Lay Clergy of the Catholic Church ... that may be more offensive to the Judge, because he would hold them to higher standard. I would hope that's [not] how it happens."

An assessment of the general community's reaction to the potential outcome of any given sex offense case was noted by a substantive minority of prosecutors as playing a pronounced role in the plea negotiation process. In "assessment as to community reaction to the disposition," as one prosecutor mentioned, the need to predictive explanatory options was an issue, with "you can explain it best you can...why you made a decision, you know, and if you have a good reason to

make it, then it's no problem." Some cited a pressure to present an "image to [the] public that [we're] tough on sex offenders." A few prosecutors noted the impact of potential media coverage in the presentation of the outcome of the case. In reference to this, one prosecutor noted that part of the decision-making process included considering media portrayal and asking him or herself, "Okay, what do the ... what would, you know, kind of a normal reasonable person in the community think about this resolution?" A rural prosecutor noted that one consideration was the potential community reaction in relation to the judge overseeing any given sex offense case, as noted by the observation that,

"...these judges have to stand for retention, and I've got a guy that's doing one year on that. He doesn't go to prison, there's going to be an outcry in the community you won't believe. People out here don't put up with that crap. Um ... and that, to some degree, I believe the Judges should be absolutely immune from individual pressure on individual cases. But, this is still a republic, and they are still responsible to the people, and that pertaining election is part of the responsibility. If the Judge starts `walking' child sexual abusers, they better hope they can retire out of office, because I don't think they'd stay in."

Along these lines, many prosecutors noted that an informal assessment of the judge or judges potentially involved in a case was a factor in plea negotiations. While still noting the existence of indeterminate sentence structures, one prosecutor suggested,

"Some judges are lenient sentencers, and so you have to be careful not to be too lenient with an agreement or a disposition, because you know you ... and then other Judges are, you know, they're harsh sentencers, and so you go, `Okay, I know this Judge is going to do this. That's my prediction.' So you don't need to worry so much about what the level of the offense is, because you've got the Judge who you can predict is going to do something on the case, and the Defense does the same thing"

Another prosecutor, while commenting on indeterminate sentencing, suggested, "...but some of the judges ...I mean, some of them are draconian, everybody goes to prison. Some of them - nobody goes to prison. The ones who can actually make decisions based on the case, that is the pre-ultimate way to go. Sentencing guidelines are not the optimum way to go, because the statute already delineates what they're supposed to do. It's finding Judges that will have the "balls" to do what they need to do." Many, though, noted that the final decision was of course in the hands of the judge, and a few noted instances where during adjudication a judge took the liberty of lowering the conviction one degree.

The resources available to the defendant and the defense attorney or defense team were considered by some to be an issue on plea negotiation. One urban prosecutor noted that while the Legal Defender's Office did "a pretty good job," they were unable to devote the time and resources to every single case, which in turn had an impact on the prosecutor's position in negotiation proceedings. Another noted that in many of these cases, the defense attorney was more likely to be private in nature as opposed to public and court-appointed. With such resources, defendants would often pursue treatment or counseling options a priori to the actual negotiation proceedings, and this would provide some leverage on the side of the defendant's in terms of plea leverage.

A few mentioned that the characteristics of the defense attorneys themselves had an impact on plea negotiations. As one prosecutor stated, "...you tell me who the judges and who the attorneys are, and I can tell you if the case is going to sell or not. I don't need to know the

facts of the case. I don't need to know what the guy did or the perpetrator or anything ...just the personality of the attorneys is a huge factor of what happens on a case." Another echoed this sentiment with,

"I recognize the courtroom is a room in which persuasive personalities could control the outcome of events; so for me, I actually do consider whether or not the opposing attorney is more persuasive or charming, and will have a better ability to persuade the Jury. On the other hand, if that Defense Attorney, across from me, is not debonair and all that, I'm looking forward to the chance to embarrassing he and his client ... in front of 8 people. So, that's one element that a lot of Prosecutors ...I would hope he would be honest with you and say, `Look, if you're going up against one of the premier top 10 defense lawyers in town, you better be ready for the fact that every moment you're in front of that Jury, you're being scrutinized, and that Defense Attorney, whoever it may be, may have 12-15 more years experience, and may be very, very, cunning in winning over a Jury."

The effect of the defense attorney presenting a defendant accused of a seemingly horrific crime to a jury was not underestimated by many prosecutors, as evidenced by,

"More of the personality characteristic of the Defense Attorney. I think most of these defendants can be made out to be pretty scummy, and very unappealing, but that can be offset if you've got this very charming young lady, who's putting her arm around this rapist. He...if he's not looking the part to the Jury, and he's got a young Defense lawyer, who is whispering in his ear, and confiding to him, and he's not the least bit ... or doesn't appear to be the least bit threatened by them, I think jurors look at that, and they say, `Well, he's not that ... threat that they thought he was."

Some prosecutors, in light of this, have attempted to develop a minimal sense of rapport with defense attorneys that they may come in contact with. This was particularly salient in rural communities.

There were a substantial number of prosecutors who identified variables and factors related to plea negotiations that had nothing to do with the logistics of the case, but more to do with personal and systemic prosecutorial dimensions. As one suggested, "You know, we all bring our backgrounds and biases to our jobs, and so I'm not going to say that wouldn't influence it, because it does, I'm sure." Several pointed to the delineation between their perceived responsibility to obtain convictions and to refrain from contemplating the ramifications of what would happen to a convicted sex offender after a disposition. Some took solace in partializing the process this way, as suggested by, "...But my job is convictions. My job is not to worry about his treatment later or anything like that, or even how long he spends in prison. That's not my job. That's somebody else's." A few pointed to the added stress of the legal maneuvering in such cases in reference to plea bargaining, with comments, such as, "because if you change your mind, then people will mess with you. The defense attorneys ... they'll know that you're going to change, and they'll ... it's just more work and it makes it more - it's just gamesmanship."

With some prosecutors there often seemed to be a dialectic tension between role expectations and what they felt was the "right" thing to do with plea negotiations in any particular case. As mentioned before, this was exacerbated by community response. Such a sentiment was echoed by one urban prosecutor who stated,

"My struggle ... my new struggle ... my main struggle ... as a prosecutor on these cases ... Some of these people ... on a "he-said, she-said," could do 15 years in prison, and it's very difficult, you know, to make that kind of a determination; and then once you make that determination, if you stick with ... you decide what plea bargain you're going to get, it's really, really hard.. .because like I said before, the evidence isn't there, so sometimes you kind of want to drop it down a little lower to get something to keep them off the streets, when you know that they deserve so much more punishment ... If your evidence starts getting "squirrely" our plea ... when you're evidence is "squirrely," your plea bargain is a whole different ball-game than when your case is solid. And there's no getting around that, just because of the legal system. You know,...plus...I mean, the pub ... our boss's expect us to win trials, the public expects us to win trials, you know. There's a difference between ...I mean, I can do all the trials in the world ... and I don't mind doing 'em, you know, but people put pressure on you for trial statistics. You're supposed to win 'em. You know. That's bull-shit. I mean, you know, where do you work? What does the public want? They can't have their cake and eat it too."

Additionally, the very nature of these cases takes their toll on prosecutors. "These are the most ... these are probably the single most difficult cases to prove, along with arson, in my opinion," one prosecutor stated. And there seemed to be inordinate pressure experienced by several prosecutors as to the responsibility they carried due to the nature of the cases. "So many factors weigh in to make a decision, that I have to tell you," another stated, "that's my least favorite part of this job is - trying to decide what a fair plea bargain is ... where I can protect society, I can get the victim justice, I can protect them from having to go through it again, and then weigh-in how good my case is, as well, and whether I want to try it or not. So, I stress constantly about..." Others continued with such statements as, "But most of our offenders don't have prior histories. They're the next door neighbor, that's been ... has a good job, and a good family, and never done anything wrong. And then you think, `Does this guy need to go to prison? How long. does he need to do?'" Yet another pointed to the direct consequences of prosecutorial action on the defendant's social network, and the stress that caused the prosecutor, with the statement, "And it's a lot ... and it affects a lot of people ... the outcome. I mean, certainly, because the penalties associated with sex abuse are so extreme, and the impact it has on children down the road. ...I don't know, I feel like I'm deciding people's lives more often than I need to."

One rural prosecutor, while acknowledging the tremendous caseload that was required to be addressed on a daily basis, pointed out the necessity for prosecutors to watch their own biases, pride, and ambitions. This prosecutor commented, "You can't ... in this arena ... it's a very dangerous thing for a prosecutor to maintain a charge based on his pride. You know ... you have the ability to take away somebody's liberty forever, and ah...you know, that's no place for an ego."

There were some notable regional factors reported by prosecutors that seemed to play out in the typical urban/rural delineations. Rural prosecutors often cited the very personal nature of these cases, and often felt that urban policy makers, legislators, law enforcement personnel, and regulation designers failed to consider the unique needs of the rural areas, in spite of such areas constituting a majority of the state. One prosecutor calmly yet pointedly expressed, "The thing that Prosecutors and Police have to worry about, in the rural areas, is that they don't have in the urban areas ...I don't think ... are the very personal ... these are personal cases. You're prosecuting your neighbor down the street, you know. And everything, in a rural area, just takes on a very, very personal tone." Another suggested that, "It just puts a dimension that's really hard on rural law enforcement, that you don't see in the urban areas, I don't think as much."

However, some rural prosecutors acknowledged that there were some compensatory mechanisms that were often utilized by defense attorneys. One contended that, "...the first person to scream and yell that they're not going to get a fair trial in a rural county is the defendant, and the Judge listens very carefully to their concerns." This was supported by a prosecutor in another county who stated, "And there have been cases in [deleted] County where venues been changes, because the Judge felt that they weren't going to be able to get a fair shake in [deleted] County, because of the perception that Jurors might have. Or ... when we get to the Trial, the Judge will go through the list of prospective jurors very carefully, read them the list of names of witnesses, get information from them as to whether or not they know those witnesses, and whether they could be impartial in deciding the case, based upon their acquaintance with those witnesses."

A seemingly substantial component of the plea negotiation process was the prosecutor's assessment of the risk of the defendant. This was not only assessed informally by the prosecutor, but from a variety of other resources, so as to allow the prosecutor to "triangulate" results of sundry data to determine a general idea of offender risk. One prosecutor indicated, "You know, reports from family members, police investigation ... and then you just look at the facts and the kind of behavior that they're engaging in, and their ah...their other criminal history...if they show a lot of other types of criminal behavior, violent behavior, irrational behavior, impulsive behavior ...I mean, that all plays into the decision." Psychological, or psychosexual assessments, were seemingly relatively rare, and did not play a large role in the plea process, particularly in rural areas. Another, "One thing that I take into account is the person's history, and if this is a first offense ... they've never done anything bad before ... I'm far more willing to give them a break, to plea bargain a little bit, to be a lot less harsh with them ... so, yeah, I'm far more willing to plea bargain with a first-time offender than I am with a really hardened `bad guy."

This also seemed to lead into issues of offender contingencies that impacted the plea negotiation process, such as mitigating factors that prosecutors took into account in developing a plea offer. One rural prosecutor suggested that,

"I'm also interested in the attitude that the defendant is taking. If I've got a defendant who appears to be taking responsibility for their behavior, appears to be, you know, doing things to change their behavior ... for instance, in drug offenses ... if, even before sentencing ... even before the entry of plea ... that person has enrolled in substance abuse treatment, in substance abuse counseling ...ah...that works great for me. That impresses me. Because to me ... hey! Here's somebody who's realized they've got a problem, is taking steps to correct it. So somebody who's accountable ... who's responsible ... yeah, I tend to be a little more lenient with them, as well."

Other prosecutors looked for similar offender contingencies, as suggested by, "what might be the defendant's position too ... and attitude. I mean, if he was very cooperative with the Police, and isn't minimizing or trying to blame the victim, we take that into account, because that should be considered." Most offender contingencies reported had to do with the topography of the offense and the nature of the accountability shown by the defendant. Additionally, issues of consensuality between older parties were sometimes considered as well.

For many, registry on the sex offender registry was a factor in plea negotiation processes. This was most salient in the demarcation between felony and misdemeanor, and 1<sup>st</sup> Degree Felony and other felony classifications. "Sometimes there are cases where we're not really that concerned whether they plead to a felony or a misdemeanor," one prosecutor reported, "but we just want to make sure it's something that they have to register for ... if we think, you know, this person really needs help and they need to be under that whole, you know, umbrella of the sex offender registration and that whole system, then that's [a factor]" Another pointed to the observation that even on a given offense category sex offense registration was a negotiation factor:

"It does. It does. I haven't ...I don't have ... since I haven't been on the team long enough, I haven't had a lot of experience with that, but I've heard people talk about it a lot ... that you don't want to get them down to a Class A on certain kind of offenses; for example - the one the defense attorneys like to do is say, for example, if you had a 3rd Degree Felony - 'Unlawful Sex with a Minor,' instead of having it go down to 'attempted unlawful sex with a minor,' which is Class A, they like to try to get you to go 'sexual battery,' which is not on the register, so that would be right there where you might actually fight about... it's a Class A both ways, but the label would make the difference."

This seemed particularly salient with misdemeanor sex offense categories, where, "it usually just comes into play where you're having the cases of the 'unlawful sexual activity with a minor,' where you have the 18 or 19-year-old having sex with a 14-15-16-year-old, and your big determination is, 'Does this person need to be a registered sex offender?'"

A few others were more ambivalent about the registration issue in plea negotiation practices. Some felt that some offense categories did not warrant registration in their perception, as demonstrated by one prosecutor's comment that, "It doesn't quite make sense, but we ... basically, the kid's life is ruined for a 20-second offense ... and he admits to the offense. He admits to the 20 seconds. And that's what she said it lasted, also. So, you know, I have a hard time with taking someone saying, 'Up until the age of 29, you're going to pay for this 20 seconds.'" Others, while often reticent in discussing the topic, appeared to express dissatisfaction with the entire registration concept, usually citing civil/criminal delineation concerned. One prosecutor expressed this concern and further ambivalence with the comment,

"But, I don't think your driver's license should be suspended because of a DUI conviction. I think it ought to be completely separate. So I don't like civil consequences being imposed because of us ... and it just seems like everyone's just 'copping' out on their responsibilities, and throwing everything onto the Prosecutors; and 'If you convict this guy, then we're going to do these civil ramifications,' and the problem with that is, we have no control over those civil ramifications, and so the Defense wants us to come off of our charge, and we can't control. It ends up giving us way too much power, is what it ends up doing. It's our changing decisions, you know, sort of affecting this whole world of consequences that were never really intended to affect... [I also] just worry about them, you worry about the children. These guys usually have children, and oftentimes, one of the children is the victim. And so, you know, kids don't want to go to school, and know that there on the Internet there in the classroom, they

might see their Dad, or someone else is going to see their Dad on a computer terminal. It makes me a little nervous about how it affects the family."

Almost as a side-note, two prosecutors interviewed pointed to an oft-utilized loophole in the law, indicating a 2<sup>nd</sup> Degree Felony charge related to child abuse, with,

"...it's 109, I think. Yeah, it's a non-registerable offense, but it's a 2nd Degree Felony, if it causes substantially emotional harm or serious emotional harm. And so, it's kind of a nice trick, I guess, for Defense Attorneys, to say, 'Hey, we'll plead to your 2<sup>nd</sup> Degree Felony. We'll admit that we caused this child potential emotional harm,' but this way, it's not registered, and he's not going to be on this computer database forever for 10 years, or whatever."

Some, however, reported that they simply did not consider the registry in the plea negotiation process. This seemed more prevalent in rural areas than in urban contexts.

One urban prosecutor noted that the plea negotiation process was moderated by an overarching agency policy. This was suggested by the comment,

"If that's sort of what they want to do and the family agrees and, you know, we have what's called a Plea Agreement Review Committee here in our office. Any child sex cases, any 1<sup>st</sup> degree felonies have to be approved by that committee. It's comprised of [the District Attorney], and the Chief Deputy, and the Team Leaders ... it's sort of the upper level Administrative attorneys in the office."

Additionally, other prosecutors, both urban and rural, occasionally alluded to informal administrative "team" evaluations that occurred, but usually not on a consistent basis.

### *Maintaining a 1<sup>st</sup> Degree Conviction*

The vast majority of prosecutors interviewed indicated that they felt it important or very important to obtain a 1<sup>st</sup> Degree Felony conviction from an initial filing of at least one 1<sup>st</sup> Degree Felony charge so as to maintain a lifetime statutory maximum. In many respects the more serious offenses lent themselves less to plea negotiation than other offenses. As a rural prosecutor suggested, "This will make absolutely no sense at all to you, but my experience is that the more serious an offense, the less plea bargaining occurs, at least in this office." Not surprisingly, most felt that if they considered a defendant to be a threat to public safety, or if they felt the severity of offense warranted prison, they would actively pursue a 1<sup>st</sup> Degree Felony conviction. However, a few expressed concern that in spite of the legislative mandates, some judges did not follow the guidelines and offense structure in sentencing. As one prosecutor put it, "...before I came here, I thought it was a big deal, but I've seen judges on 1<sup>st</sup> Degree felonies sentence people to a year in jail."

A few other prosecutors found it helpful at times to pursue a 1<sup>st</sup> Degree conviction, then offer a 2<sup>nd</sup> Degree Felony conviction with the thought that the defendant would actually end up spending more time in prison than on an indeterminate 1<sup>st</sup>. Related to this, one prosecutor stated,

"Nobody's going to spend... if they're 35 years old, they're not going to spend until their 75 years old on a first degree, you know ... They're just not, so, you know, the beauty of indeterminate sentencing is on a second degree, you can get up to 15 years, and that's more than the average person serves on this kind of case anyway."

Several prosecutors also stated that even when pursuing a 1<sup>st</sup> Degree conviction, there were always safeguards in that if a defendant met what were often called "retention criteria" outlined in the statute, they could still avoid prison on a 1<sup>st</sup> Degree Felony conviction. This, they reported, was rare, but always a possibility. Two prosecutors expressed some frustration at the judge's ability to reduce the level of sentence category.

While one prosecutor interviewed indicated that it was not important to obtain a 1<sup>st</sup> Degree Felony conviction due to the wide latitude that the Board of Pardons had in the state's indeterminate sentencing structure, six other prosecutors qualified their response. Many felt it depended in large part on the nature of the case and the individual contextual aspects of the criminal behavior. While on the face of it two notably different offenses could be considered on the same sentencing level (e.g. 1<sup>st</sup> Degree Felony), the specifics of the case guided the voracity with which a conviction on that level was sought. One suggested this with the comment, "It depends on who you are. You know, if I have someone who's a pedophile, who's got priors, I'm going to push that a lot harder than someone who's, you know, maybe having sex with a sexually active 13 year-old, and he's 21 or something." Similarly, another stated, "It depends on the facts. If it was a stranger we'd hold to our guns on that. If it's a father in the home, ah, and it's a functional family, and taking the father out of the home would ruin the family anyway, we're actually hesitant. We don't - I don't - like to convict someone of that, and I would like to deal."

### *Attempted Aggravated Sexual Abuse of a Child*

Ten of the twenty-four prosecutors interviewed stated that they did not use the charge of Attempted Aggravated Sexual Abuse of a Child, which is a 1<sup>st</sup> Degree Felony with a non mandatory prison option but still retains the lifetime statutory maximum. Several of these ten indicated that they were unfamiliar with the charge category, but when they wanted to pursue non mandatory prison options they utilized the consideration of twelve "retention criteria" that if met allowed for probation even on 1<sup>st</sup> Degree Felony convictions.

Prosecutors in urban areas tended to indicate a high frequency of use of the charge, and seemed to indicate substantial approval of it. An urban prosecutor suggested, "...we often use that...at least they feel like they're getting a huge bargain, because they can now argue for probation," and another posited that "it's clearly a great tool..." Many felt it offered defense counsel a viable option to present to a defendant, and one posited this by stating, "So, if I have a carrot that I dangle to say, 'You know, you've got a shot if we do this. The other way, you don't have any chance. You're convicted, you go.'" However, a few who stated that they used the charge felt ambivalent as to its utility. As one prosecutor suggested, "I find that most of the time, that it's not going to matter. They're still going to go to prison," while another suggested that instead of using the charge, "I would rather lower the degree or the classification of the offense and leave it at sexual abuse, so that somebody sees that there was an act, and not just an attempt." Yet another suggested "it's not that effective because the defense attorneys figure out it's not much of a deal you're offering."

## **Offender Characteristics**

### *Common Characteristics or Personality Factors*

All who participated were asked if, in their experience, they have observed any common characteristics or personality factors associated with the sex offenders they have had contact with. While many were reticent in discussing the topic due to their perceived lack of expertise in the area, most did respond with some common themes.

The most often reported characteristic was that there *were* no common superficial characteristics, and that the sex offenders observed came from a wide spectrum of demographic variables. As one noted, "I've prosecuted people that are trust fund babies. I've prosecuted people that are, you know, living in a trailer park. I've prosecuted people that are illegal immigrants. I've prosecuted people that are, you know, from all walks of life - school teachers, janitors ...I mean, everyone." Another observed, "My experience is that it touches across all socioeconomic boundaries, touches all across ethnic boundaries. There are no boundaries in sex offenses." Some noted structural observations, like they tended to be employed in settings that had contact with children, or that in family settings they were often not a blood relative of the victim (e.g. step parent, boyfriend, etc). More than a few of the prosecutors noted that sex offenders seemed to "present well" in both pretrial and trial contexts, including physical attire and demeanor and psychological/emotional stance. Some observed that the sex offenders they had come in contact with seemed to be of above-average intelligence and with higher levels of education.

While offenders were reported as coming from widely disparate socioeconomic statuses, a few prosecutors noted that far more affluent individuals crimes did not get reported as often, the quality of defense counsel is markedly higher, they have stronger connections to the community and can often rally influential community members in their defense, and they often have resources where, "...once they get into the system, they're able to use those to influence the decision-makers and people who influence the decision-makers." Yet another expressed the uneasy and less-definable concern of some with,

"I also think there's sometimes just a subtle ... there's a subtle kind of ... not message, but ... sort of, you know, there's a different way of handling this, and sometimes that influences the criminal justice system ... it's kind of ... you know, there's nothing overt. There's nothing I could say, you know, I could prove this, but there're some cases where you think, 'You know, I wonder what's going on here? I think there's something happening that I don't know about.'"

Aside from a lack of identifying demographic characteristics, the second most reported theme was that of what might be called narcissistic traits and approaches to social situations. These included traits such as pronounced manipulation, the objectifying of their victim, need for a sense of control over others, minimization of the effect of their offense behavior, difficulties with maintaining appropriate boundaries with others, dishonesty, cowardice, and a marked lack of empathy toward others. A process of objectification seemed to be frequently associated with offenders. One urban prosecutor noted that, "It's more of a total objectification and just a real sense of selfishness ... they just don't see that person as a person." Another rural prosecutor reinforced this perspective by referring to a similar process in the sex offenders observed. "You dehumanize the object, and these people have the capacity of dehumanizing their victims..." Similarly, another noted that, "They've been able to compartmentalize their behavior and their life, and they don't want to go into this compartment when you're talking about, you know, 'good of me,' who's just like everybody else, and so there's just a ton of minimizing."

To some prosecutors, the manipulation they observed in sex offenders towards their victim was also prevalent in their ability to manipulate treatment personnel. "I don't know how you ever do anything different, but I feel like it's easy for guys...these guys are such good manipulators. They can waltz through treatment saying what they know their provider wants to hear." This sentiment seemed to have an impact on the efficacy of treatment options, although somewhat surprisingly those who indicated this perspective were more apt to consider treatment as a viable consideration.

A few prosecutors pointed to the presence of marked substance abuse as an associated feature. Additionally, others pointed to issues around unfulfilled and/or escalating sexuality. In this regard, some suggested inadequate sexual relations in marital contexts as problematic and facilitating offense behavior, while a couple of others indicated overly prominent masturbatory and sexually self-stimulating behavior. This view seemed correlated with an increased likelihood of considering treatment as an option for these offenders.

Curiously, several urban prosecutors (from disparate jurisdictions) seemed to point to an overwhelmingly common characteristic that was indefinable in nature. As some pointed out, most sex offenders exhibited an ambiguous physical trait that most described as "puffy." Some attempted to clarify this in terms of possible water-retention, or potential genetic dimensions to the etiology of these offenses.

For many, it was an indefinable and an "I-know-it-when-I-see-it" trait.

Many of those interviewed made a distinction between two general categories of sex offenders. As one put it,

"...you kind of have two classes. The remorseful group, who know they do it, what they did was wrong and really feel bad about themselves and want to get help. And then you find - these are not technical terms - the sociopath who, you know, they can be caught red-handed and have all the evidence in the world, and they'll say they didn't do it, and those are by far the most frightening people. They're the manipulative ones, the more intelligent - the more frightening, frankly ... the more calculated ones that have been doing it for years, that are really, really intelligent and totally manipulate their victims..."

Others who felt similarly described the complexity of sex offense cases and the conscious attempt to avoid "cookie-cutter" approaches to cases. Representative of these was the comment that,

"...the common myth is that your sex offender is this predator that jumps out of the bushes and molests somebody. The vast overwhelming majority of the cases are family members or friends ... and you're looking at the family dynamics, and what do you need to do to ... you know, you try and look at the big picture with all of the family, and what you need to accomplish. `Does the person need to go to prison? Can you handle it on some other basis? What is the severity and extent of the crimes?' And there's a lot of factors you have to weigh."

Prosecutors practicing in rural areas were keenly aware of common characteristics in light of the common familiarity involved with community members in such contexts. One prosecutor, after describing what was perceived as some common characteristics, stated, "It's not institutional. It's personal, and that's hard. It's really hard in a small community, cause you run into their parents, their grandparents, brothers and sisters." Similarly, another stated, "the thing that prosecutors and police have to worry about in the rural areas, that they don't have in the urban areas ...I don't think ... are the very personal ... these are personal cases. You're prosecuting your neighbor down the street, you know. And everything, in rural areas, just takes on a very, very personal tone." This affected what was viewed as pervasive characteristics in sex offense cases, and tended to mitigate more broad generalizations. This also seemed to correlate with what prosecutors viewed as causal factors and considerations.

### *Causal Factors*

When asked if they had, in their experience, observed factors or sets of factors that might cause people to become sexual offenders, most prosecutors overwhelmingly espoused a perspective that the etiology of most sex offenses was located in a history of abuse (particularly sexual) of the offender. One prosecutor noted that "...most sex offenders have been perpetrated upon in the past," and another concurred, stating,

"...I do think that most of your sex offenders have been somehow sexualized, either through that, through pornography, through something to get them that way." However, a rural prosecutor reflected a minority opinion by qualifying this perspective with "There's a myth out there that your sex offenders have all been victimized themselves, and that's why they victimize. Ah, I think that a lot of them have, and they've become sexualized that way. But the vast majority of your victims are females, and the vast majority of your perpetrators are male. If being a victim makes you a perpetrator, where're all the female perpetrators?"

Related to the condition of an abuse history was the presence of poor parenting as an associated causal factor. The few that cited this factor also suggested that this went somewhat beyond the possibility of abuse perpetrated by a parent or parents, and involved more general aspects of parenting that seemed to indicate problems with socialization.

Another prominent theme in exploring causal factors was that of pornography. Several suggested that the presence of pornography in offenders' lives went beyond simple association to a causal variable. Many noted that without exception pornography was observed in every sex offense case that they had had exposure to.

Other causal factors included the historical variable of growing up in a closed' community, and a psychological need for power, not as an associated feature but as a causal agent. Additionally, several prosecutors espoused ideological perspectives that seemed to indicate a perception of sex offenders in deterministic terms. This, it seemed, had an effect on the way they addressed plea negotiation practices. One reported "I always think of it like a sexual orientation. It's what they want. That's what they do ... It doesn't matter if they're a teacher, or a senator, or you know, whoever..."

A couple of others echoed this sentiment with,

"I think that sex offenders are sex offenders are sex offenders, and I don't think that they can change, because I think it's what they like. It would be like asking me to change my sexual orientation. It's not going to happen, you know. I mean, maybe I can learn to, you know, do something other than having those ... I don't think that I could every change my orientation, but I certainly think that I could learn to not act out on the orientation that I have, if I was required to. But I think that that's very difficult. It's like putting an alcoholic in a bar ...I don't think that most people are capable of it, and I know that therapists don't agree with me."

Another prosecutor posited a similar ideological perspective:

"I believe that every person is born into the world with weakness. Some are born with the tendency to be overly interested in sex, or in alcohol, or overly impatient. The goal of life is to overcome them. There are people who are generally predisposed to every vice that we have. If people walk down the path instead of trying to overcome their problems, they'll find themselves in a dark spot. Good people end up doing terrible things because they've given up. I don't view them as evil or sick (but get them the hell away from other people)."

While for some prosecutors their perspective on causality seemed to affect their practice in plea negotiation (most evident in their view of treatment as a viable option to pursue), for most there appeared to be only a moderate association between the two.

## **Sex Offender Registration**

### *Effect on the Sexual Offender Problem*

A slight majority of prosecutors interviewed indicated that they felt that the current registration laws were helpful in addressing the sex offense "problem," although many were dubious as to the long-term efficacy of the system. For the most part, the benefits of the current system centered on the ability of community members to access information. This not only was perceived to be empowering to community stakeholders but also as an innate right to information of all members of a given community, although its effect as a deterrent to sex offenses was questionable by some, as suggested by the statement,

"I think it's a good law if people want to know who's living around them. And I think people have a right to know who's living around them. I think I ought to know if my daughter visits the next-door neighbor's daughters, you know, that he was accused and maybe convicted of abusing his daughters. You know, I think I have a right to know that. But it's my responsibility to get on there and find out. So I don't know if it helps control population - I don't know if it helps prevent."

Many others cited examples of instances when the information on the sex offense registry was useful to a spectrum of community members.

A common complaint, however, was that the community was not aware of the nature, process, or logistics of the current registry system. "It's a nice law," one prosecutor mentioned, "if people in the community use it. But, if they don't get on their computer and look, the law is useless." Another interviewee noted a lack of awareness until recently when "there was an article in the Tribune I was reading, so I went to the link and followed it. But I'd never looked at the registry until then. That was about a month ago."

The deterrent effect was observed by a few of those interviewed. While some observed a notable "embarrassment factor" for individuals potentially offending, others identified the registry as playing a marked role in "offender avoidance" of offense behaviors as well as serving an effective punitive role. One of the participants interviewed suggested, "I think that's a real sanction against somebody who perpetrates, and they don't like to be labeled." Another suggested, however, "I don't think anybody says, 'Damn, I shouldn't do this because I'll be a registered sex offender now.' But I think after the fact, it becomes a huge thing, as nobody wants to be a registered sex offender."

One prosecutor suggested that registry compliance served a justice role. "I think that it's good that you have the criminal provision that if they don't register, it gives, you know, gives me some teeth that I can go after them, because if they're not going to register, that tells me there's not any good faith there. They know they have to register, bring them in, and hold them accountable that way."

There were many of those interviewed that questioned whether the registry had a positive effect on the frequency and severity of sex offenses. Several were dubious of the efficacy of the registry, and felt in practice it had no impact on future perpetration. Others expressed concern over the possible labeling aspect of the current registry system. With concerns over this and the

over-arching assumptions of the registry, one prosecutor expressed some common ambivalence with the contention,

"So, if the prison's letting somebody out on parole, requiring to register as a sex offender, I think ...I think there's some real problems with that. Because if the prison wants them to register as a sex offender, so everybody knows that they're there and to be wary of them ... why are they out in the first place? So, you know, there's some problems. Then the problem that you have is the neighbor that finds out they're a sex offender. Let's say they're 9 years paroled, they've never had another problems, they've been a model citizen during that time frame, but they've got a 10-year registry. Nine years down the road, all the neighbors hate him, all the neighbors ostracize him, you know. You invariably find the neighbor that harasses them. So I think there's definitely the right to the victims, and there's rights to society to know what threats are potentially out there for them, but the victim has rights - the defendant has the right to get on with their life."

Another suggested, "It might be counter-productive. It may target people and cause harassment, and hatred, and unfair persecution." But ambivalence was more firmly noted when this prosecutor continued with, "I don't know. I do kind of like the idea ... But I don't know how effective it is." A more broad civil rights concern was expressed with the comment, "...If the State deems that they've paid their price, [that they've] paid their debt to society, then maybe they ought to not get ... you know, if the prison deems them not to be a threat, then maybe they ought to not even be on a sex offender registry, because they're not a threat to anybody, so who cares what they've done in the past." Another purported,

"If you keep them away from situations where people are going to be at risk, they're going to function fairly well, so the biggest problem that I have with it is most of the time, when people are motivated to go out and look at those things, it's because they want to do some kind of 'railroading out of town' campaign, rather than saying, you know, warning their children, or whatever, and you know, taking appropriate steps to make sure that there's some safety."

Even more ambivalence was expressed by one prosecutor who attempted to reconcile conflicted perspectives over the possible impact of the registry on the offender and the potential societal impact, with,

"I don't know from a psychological standpoint for the offender whether it's good or not. To me, it's kind of like the scarlet letter that they wear on them, and I don't know if that's health or not from your standpoint, but to me, I sure think it's good for the community to be able to look at it. I don't know - it might be good for the offender. I don't know."

### *Areas of Improvement*

A small majority of prosecutors interviewed indicated that they would not change anything about the sex offender registry, regardless of their opinion on the efficacy of it. The rest, however, indicated a wide array of possible alterations and considerations. A few felt that the registry should be abolished altogether. The impetus for this perspective seemed to be the observation that the current strategy of identifying individuals as sex offenders was an issue of

labeling, and might often be counter-productive. Those who expressed this perspective identified three major concerns: that many individuals who are currently labeled should not be due to the mitigating factors and quality of their case and that the current system is a "one-size-fits-all" approach, that a sex offense cycle was perpetuated by overly shaming an individual, and that community reaction might be wildly inappropriate and often illegal. One prosecutor expressed concern over broader civil philosophical questions, as expressed by the comment, "I don't like the registry, generally speaking. I don't like how civil consequences are tied to criminal convictions. I think if someone gets put on a database, it ought to be for some other reason than I convict them of a crime." Similarly, another comment indicated,

"[Registry] ought to be because probation has interviewed them and determined them to be a risk, or they keep violating probation, or failing a lie detector test, pornography, or something like that. There ought to be something other than my convicting them of a crime. Because I looked on the database, and I see people and I know the crimes they were convicted of, and I think, 'I don't think that guy deserves to be on there for that.'"

Along close lines, some felt that the registry should include a discretionary mechanism that afforded judges and right to determine registry qualification, as opposed to the more systemic approach now employed. This, it was suggested, should not only apply to the front end of the process, but to a process of being removed from the registry as well. As one prosecutor mentioned, "I think, you know, there ought to be some kind of discretionary rider the judges, you know, take you off ... if you were to petition ... if you received a petition, rather than the strict rules that must apply."

Many others suggested that the nature of who gets registered should be reconsidered. Some recommended that all sexually related offenses, whether felonies or misdemeanors, be registered. One prosecutor echoed the response of several with the comment, "I think that I would probably have all of the offenses that even were remotely related to sexual conduct on the registry. I don't know why sexual battery isn't on there. Doesn't make any sense to me." Others suggested that all convicted felons should be registered. Some recommended this be isolated to sex offense felonies, while a very few contended that all felonies should be considered. In like vein, some suggested that all sex offense felony convictions require lifetime registration. As suggested by one of the participants in the study, "My personal opinion is they all ought to be on lifetime registration, and just make it easier, so that doesn't become an issue." Another pointed to the nature of sex offense cases with the statement,

"[They need] flat-time lifetime registration ... I, you know, just by virtue of the fact that plea negotiations often bring charges down into the 2<sup>nd</sup> Degree range anyway. It doesn't mean that this person's, you know, any better than a guy who may have been charge with 1<sup>st</sup> Degree Felonies. It's just the circumstances of that case require us to come down to the 2<sup>nd</sup> Degree..."

To five prosecutors interviewed, the nature of the information that the registry currently provides was an area of possible change. Most of these felt that the registry should include more detailed information, particularly a description of the offense or offenses committed by the perpetrator. As a clarification, one prosecutor suggested,

"I wish that they would put a synopsis, you know. The probable cause statement that we put is public information. It's in the file. I wish that they would put just a small little blip about the offense, so that we know what he's accused of. Is this a

19-year old who had consensual, you know, quote "consensual," because obviously it's not consensual under the law, but was she a willing participant ... with a 13-year old? Or is this a 19-year old who, you know, likes 5-year olds? I mean, clearly it's the same charge - rape of a child. But what he did was completely different."

Somewhat humorously, one prosecutor suggested, "I guess just from my experience ...I mean, there are grades of perpetrators. I don't know if they should be graded, you know, `Class I Perv, "Class II Perv,' or `Total Freak.'"

A few noted their perceptions that law enforcement did not have adequate access to offenders on the registry, or to information on registered offenders. One suggested that the registry information needed to be delivered more quickly. While this was related in part to law enforcement access, it also addressed the perceived sluggishness in the system in getting individuals registered and on the database in a timely manner.

Most of those who identified areas of change suggested that one major dimension of the current registry system that required attention was the lack of community outreach and education around the nature and the logistics of the registry. There were many comments indicating that a substantial number of prosecutors felt that the public was not even aware of the registry, or how to access it. Interestingly, this was purported roughly evenly in urban and rural areas. One prosecutor was vocal in expressing frustration with the comment, "If it's meant as a deterrent, if it's meant to make people aware of who the sex offenders are, then I'd say it's utterly failed, because most people have no idea how to gain it." Another stated similarly, "Personally, I don't think those people even know it exists. I don't think they know how to access it. I don't think that it's utilized as it should be." Suggestions for addressing this inadequacy included a concerted public marketing campaign, distributions of pamphlets, directed education for school administrators, and the facilitation of public forums to discuss what the registry is for and how to access the information. One prosecutor concluded, though, that it's "really more a matter of educating people to what's appropriate. It's not really the law that's the problem. It's people's attitude."

## **Gaps in the System**

### *Sex Offender Prosecution*

When asked about perceived gaps in the system related to sex offender prosecution, many prosecutors voiced a variety of sometimes-conflicting viewpoints. These did not always directly relate to prosecution, as many prosecutors spoke of concerns and observations with the system post-prosecution that they felt had an indirect impact on prosecutorial practices.

Of initial interest, there seemed to be some notably strong sentiments around the issue of minimum mandatory and indeterminate sentences. Many felt that the legislative direction around these types of sentences were at their best misguided. Some felt that a minimum mandatory sentence structure "takes a lot of the tools that we have away from us to try to sell the cases, and ah, it just makes it harder to plea bargain cases ...I just always feel like it's better to settle them if you can ... in this kind of case." In addition to such sentencing policies' effect on plea negotiation, a few felt that it took away prosecutorial and judicial discretion and power. As one stated,

"It just doesn't make sense that they should take that much control like from a judge. I think if they're taking control away from the judge, they ought to be giving more crime support through the probation department ... maybe instead of

just locking these guys away some of them need to be just given very intensive supervised probation, severe restrictions - stuff like that and lots of treatment."

And while some stated that they supported minimum mandatory sentences, a few qualified such support on the basis that the sentence structure did not take into account the complexity of the offense topography, as evidenced by such comments as,

"Those mandatory minimums are just wonderful for [worse case scenarios], but they're a little too obtuse for all other situations. But familial and those are the ones we get all the time ... So I wish there was something a little bit more refined for that situation ... minimum mandatories don't fit in that kind of situation. It just seems weird that the legislature, who never sees the defendant, never sees the victim, never sees the community, never sees any of that stuff [makes these decisions]"

Similarly, related to indeterminate sentencing, some felt it took discretion away from those individuals who knew most about a case. An urban prosecutor indicated, "I don't like indeterminate sentencing we have in Utah. I think it gives too much power in the hands of people who don't know, too much power in the hands of people who are essentially social workers, and want to believe that these people can change..." Another stated, "I am not a fan of indeterminate sentencing. Ah, I know Utah's used it for a while, but the judge is the one that hears the facts. The judge is the one that hears from the victim. The judge is the one that hears the trial. The Parole Board sees the guy in front of them, who wants nothing more than to get out of prison..." And yet another suggested that, "The Parole Board doesn't see the person standing in court pleading, 'not guilty,' watching the defense attorney hammer his child as being a liar, - while he sits there, and watches it occur. The Parole Board sees the guy crying, 'I love my family. I miss my family. I've done my treatment.'" Others observed that indeterminate sentencing was a response to state fiscal issues, as one suggested by,

"I don't think the legislature has to deal with the victims. I think that the legislature sits in its ivory tower ... if it's going to cost money ... bottom line is 'We're how far short are we now on the budget?' You know, and if it's going to cost them money, then in my opinion they're not going to be interested in change. The change will only come when the issue of societal safety and treatment for the offender is what comes first, and not just money. I mean ... our AP&P officers will tell us all the time - don't send somebody to the Diagnostic [Unit] at the Prison, because the Diagnostic is going to recommend probation regardless of what the person did, because there's no room at the prison."

And another noted that,

"If a judge has the right to say, 'You'll be 24 months,' then they have to house somebody for 24 months. But if the judge says, '0 to 5,' and they find the prison getting full, they start releasing people. So I think indeterminate sentencing is nothing more than money."

Along these lines, one prosecutor also noted, "I think the most important thing with these types of cases is to be able to keep a lot of options out there, because if we have very few options, in terms of sentences, it's very difficult to match, you know, the facts of this case up with what is in the interest of justice for that case ... whatever the legislature decides to do in the future, I just

hope that particularly with these type of offenses, we have a wide variety of options in terms of negotiating ... We need the ability to be flexible, but we also need the ability to hammer `em if we need to." A few suggested adding such sentence options as 1 to 15, or 15 to 30, for example, instead of indeterminate structures.

Other gaps in the system for effective prosecution included the need for a change in expungement statutes, which according to some currently prohibit "almost every category." Some felt changes in that would assist in plea negotiation processes.

Perhaps somewhat surprisingly, a substantial portion of those interviewed indicated that one of the gaps in the system for effective prosecution was the issue of the nature of the prosecutorial "position," particularly in sex offense cases. In more urban areas, several pointed to their observation that working with sex offense cases was not a "high status position," and this perceived lack of support and esteem in combination with the nature of the cases had an impact on their perspective of the relative worth of the job, as well as feelings of "bum-out" and overall dissatisfaction. Compounding this problem was the high caseloads that some experienced. More than a few reported that the lack of support and recognition for such work had, if not practically then theoretically, an impact on possible prosecutorial effectiveness.

Several noted that a prominent gap in the system was a lack of community support resources for those victims (and sometimes alleged offenders) going through the legal process. Cited most often was the lack of support to victims and families initially in the process, and as it came closer to perhaps trial involvement. As one urban prosecutor suggested, "Sometimes they don't get protected, and all we can do is our best, you know? Our hands are tied. We're the criminal justice system, you know. Other systems are going to have to take care of it, if we can't." Some cited the lack of support as a significant prosecutorial concern, as, "It makes families not want to cooperate with the prosecution, because it's just going to kill their son or daughter." One prosecutor suggested that along the lines of community support might be increased efforts to education community members as to the nature of sex offenses, which would ostensibly increase the possibility of victims reporting crimes, and subsequently affect effective prosecution. Issues related to this around current underreporting of sex offense cases were offered by several of the prosecutors interviewed as an area that needed to be addressed, primarily through community education.

Somewhat related to the needs of victims was the oft-cited need to relax the rules of evidence in the state. Some felt that the current rules were simply too complex, and did not take into consideration that "juries are far more smart than we give them credit for." A few felt that Utah should adopt the Federal Rules of Evidence, which according to them would make "a significant impact on the ability of prosecutors to file and prosecute certain sex offense cases." This perspective seemed to center on the issues of a defendant's previous history related to sex offenses, and the nature of children's testimonies in court proceedings. As one pointed out, "...what I find, generally, is that the more damaged a victim is, the more serious, the abuse, the less likely I am to have a good case." Particularly with children, some felt that the use of video evidence and closed circuit television options should be evaluated.

"They have tried to make laws that allow us to put the video tapes and stuff in, but the reality, as far as our experience in this office is, that you put them on video and it's TV. You really need to have the ability to have a live person ... you could probably make some of them do it, but it's not fair to them. And sometimes I think we cause more damage than we do help them, when we do those kinds of things."

Others concurred, stating that laws should be liberalized to allow child witnesses (and other witnesses in some cases) to either not face the defendant, or testify in some other way.

Three prosecutors saw a need to consider reoffending behavior on a misdemeanor level as a felony-level offense. They cited difficulties assuring public safety with current legislation that allows for repeat offenses to remain on a misdemeanor level.

Of note were a couple of suggestions to reevaluate the current state of psychotherapy privilege. One prosecutor mentioned this in context of victims' rights, with

"...I think that they're the hardest cases in the world to try, because it's the victim that's put on trial, and I would like to see tighter laws regarding that. The Utah Supreme Court has, you know, stuck their foot in the door to psychotherapist privilege now, and if you can show some reason why you should have some access to that, you can gain access to a victim's psychotherapist's records. I mean, she has nobody that she can talk to in confidence at all ... I think it's the hardest thing in the world to go through as a victim, and honestly, if my best friend got raped, I don't know if I would tell her to prosecute, because I know what it's like for victims."

More broadly speaking, several of those interviewed spoke of the need to reevaluate what is admissible from a victim's history.

A number of prosecutors spoke of training needs and increased resources for law enforcement agents. This, some felt, would dramatically affect prosecutorial effectiveness, particularly in reference to evidence collection. In addition to supporting law enforcement, a couple of prosecutors suggested a need to incorporate more multidisciplinary approaches to evidence gathering and victim/defendant support. A small part of this dimension cited by the two prosecutors interviewed dealt with educating multidisciplinary team members as to their appropriate role given the context of the case. Speaking of significant frustration with supportive personnel, one prosecutor stated,

"...I've got a little thorn in my side about some of the social workers I've worked with.. .cause it's ah, sometimes I feel like social workers tend to involve themselves emotionally, in person, too much in these cases ... I see the role of a victim's advocate and a social worker in these cases, to provide support to the family and the victim, but not to go after... not to do their own investigation, you know? And I have found, sometimes, they don't like what the police are doing. They don't like the decisions that they're making. They don't like the decisions that I'm making, and ... they come in and scream and yell and stomp their feet, and say, `You're doing this wrong. You need to do it this way, or you need to charge this. How come you're not charging this?' And I explain to them I don't think the evidence is there."

Included in many comments was the suggestion to allocate resources to team-building activities among disparate agencies involved with sex offense cases, including treatment staff and administration.

### *Sex Offender Treatment*

Far and away the most common theme voiced by prosecutors when asked about their perceptions of gaps in the system for more effective sex offender treatment was that of questioning the efficacy of treatment in general. Several were unconvinced that treatment was effective at all, and they tended to favor long-term incarceration as the only viable option for sex offenders. From statements such as "I don't believe that psychological treatment helps the

problem" and "I don't think it works," some were decidedly negative about treatment. Others took a more cautious and ambivalent stance, with such statements as

"I honestly don't think you can cure people. I think the treatment can probably help them maybe deal with the urges that they're going to get, and hopefully maybe find ways that they can deal with the frustration or whatever it is, without actually perpetrating. But I only think that's going to work for a certain amount of time. I think that at some point, if certain factors are present... I don't know, if they're drinking or using drug or whatever, they're just going to act out on it again. I don't think you can suppress the urge. I don't think you can ever rid the person of that defect."

Others echoed this sentiment, and often indicated a pronounced ambivalence around assessing the utility of treatment. Many related to the statement expressed by one that, "I certainly question whether or not we can actually rehabilitate a lot of the sex offenders that we have." However, this ambivalence and uncertainty often played out as questioning treatment's efficacy, but stating that treatment options were needed in light of the nature and extent of other options. One prosecutor seemed to express this seemingly conflicted perspective with the statement,

"I really think that counseling is going to make a difference? Sure, yeah. Jails stupid. Jail's a stupid place for people. All you do is ... you hang out with other bad people, you know, and learn other bad things, and develop a bad attitude. It has its place, you know, but there's folk who really definitely need to lock up, and it has its ... it's a very good negative reinforcer, because people hate it. Decent people hate prison/jail. But, it chooses more of a negative reinforcement. I don't believe that there's much counseling that's effective."

Several prosecutors, even some who stated disbelief in treatment's efficacy, suggested that a gap in the system was the lack of intensive inpatient and residential treatment options. Along these lines many felt that treatment should be more restrictive, confrontational, and "intense." Some suggested that treatment be more efficiently combined with increased supervision by AP&P. A few observed that in current treatment settings, many providers seemed to be "enabling" sex offenders in the treatment process. One prosecutor spoke guardedly of this with the statement, "...a lot of them I think are kind of - they're not necessarily 'enablers,' but they have a relationship with their clients, and so they don't want that client to go to prison, and that colors their recommendation, their evaluation. And then also, they're paid." Another spoke of frustration with the "business" aspect of treatment agencies. "Well, one of the problems is it's a business, so they get to go in and have the initial interview, and a lot of times we have local people here saying 'Well, yeah, I can treat 'em,' because they need the business..." Another suggested, "...we're trying to treat the person, and a lot of times the businesses are trying to help the business." A few noted that treatment with this population was inherently difficult, due to the manipulative nature that they observed associated with sex offenders. As an urban prosecutor suggested,

"They say the right thing and they do, when you get a person who's in treatment, and they do everything that they say they're ... you know, 'Do this, A, B, and C,' and they do A, B, and C, what is the psychologist going to say, but 'He's better,' you know. He did A, B, and C. Well, he's not better. You know, he did A, B, and C. That doesn't mean he's better."

Similarly, another suggested, "...these guys are such good manipulators. They can manipulate anything and anybody, and it seems like they waltz through treatment saying what they know their provider wants to hear." And yet another spoke of the frustration around the disparities among differing treatment personnel's clinical opinion. This prosecutor cited a need for more uniform training, with the statement, "I would wish there would be a little more guidance, I guess, for psycho-sexual evaluations. It's amazing how one psychiatrist or psychologist will look at a case one way, compared to another person..."

Changes in the structure by which offenders were supervised seemed, by some, to be an important issue to pursue in addressing gaps in treatment.

"Now, you take an AP&P officer, who is trained as a corrections individual, trained as a peace officer. They're not a psychologist, they're not a sociologist, and they're supposed to supervise everybody ... when you start talking about the psychological makeup of a sex offender, and how they're a unique group, how they think, and you're asking a probation parole agent to watch for, ah, clues, and red flags as to what they're doing - how is that probation officer trained on that? I mean, I think you almost need specialty probation officers who supervise nobody else but sex offenders."

Another suggested specifying a lower caseload for those AP&P agents who dealt with sex offenders. Several recognized that the current supervision structure was overwhelming, and contributed in part to a decreased level of treatment effectiveness. As the system stood, one prosecutor stated, "It just seems like they just have the same kind of probation as everybody else, except for they can't possess pornography." This prosecutor and others felt that to be woefully inadequate.

Additionally, four prosecutors spoke of the need for flexibility in treatment options for sex offenders. They suggested that all sex offenses were not the same, and that treatment options ought to reflect the spectrum of offense categories. All perceived that treatment was often a "cookie cutter" and "one-size-fits-all" option. This seemed especially relevant to rural areas, and a number of prosecutors spoke of the need for more funding and more resources related to treatment in rural geographies.

One prosecutor summed up an opinion of many with the comment that,

"...perhaps the best we can do right now is try and walk the middle ground. Obviously, people who commit those types of offenses aren't thinking clearly. They're thinking differently than law-abiding folks. Something needs to be done to change the way they think, to change the way that they behave. Ah, whether they're sick or whether they're acting badly, something needs to be done to change the way they're acting. Ah, so if there are gaps in treatment, I think the gap is present in the ability to really identify what's wrong."

### *Impact of Plea Negotiation on Treatment Options*

When asked if plea negotiation had an impact on treatment options, a minority of prosecutors interviewed felt that it was not. The rationale for most of this was that many considered treatment to be an integral component of prison sentences, in addition to probation requirements. As one individual stated, "Well, treatment is always 'a given.' You know, regardless where the charge ends up... whether they go prison, whether they're put on probation, they're going to ... treatment's going to be required." Another echoed this sentiment with,

"Well, I mean, basically, we have the same options available to us, whether they're felonies or misdemeanors. There's ...whatever's approved by Adult Probation and Parole ... and I think that the treatment is essentially the same ... depending on how they evaluate them ... regardless of whether it's a felony or a misdemeanor. The difference would be in the supervision. There is more supervision for felony offenders, than for misdemeanants."

Many, however, felt that treatment considerations did, in fact, play a prominent role in plea negotiation considerations. This was most often prevalent in cases that were in the somewhat ambiguous area between 1<sup>st</sup> Degree Felonies and lesser offense categories. Interestingly, many who noted this also observed the lack of adequate treatment options. One rural prosecutor noted,

"I think it does. I think ... especially in the ... sort of in-between cases, where you're not sure how ... look, if they're really, really dangerous, you can tell. Pretty quickly, that comes ... that most ... well, we might miss it of course, but a lot of times, there's a bunch of, you know, there's a lot of signs. If it's somebody's who's kind of in-between and we can't tell, and it's a matter of, you know, locking them up for a really long time or giving them a chance on probation, if there's a really, really solid sex offender program that they can go to - something ... especially the inpatient stuff ... if there were more in-patient sex offender treatment programs where they were quasi-locked up, I think that that, you know, for the in-between cases would be helpful."

Several others felt more strongly that treatment considerations were dimensions salient to plea negotiation options, but also expressed a dialectic tension between public safety and individual offender characteristics. While of primary importance to most prosecutors were the issues of insuring public safety and assuring criminal consequences, many also suggested that a component of both of these could ostensibly be the treatment of the sex offender. One prosecutor interviewed echoed much of this sentiment with,

"It does. Treatment ... treatment is a very important component in my consideration, but ...I don't know if it's the most important. I...you know, you got notions of retributive justice, that we punish people for certain crimes, and rehabilitate justice, that we sort of try to rehabilitate criminal actions, and the criminal person, so that they can contribute productively to society. Well, on a serious case, like sex offense cases the first thing I'm looking at is retributive justice. I think there needs to be a definite punishment, and they need to be in prison, in my opinion. I think sex offenders belong in prison for a time, and there are a couple reasons I think that. One reason is, I think they need to be punished. I think punishment is, in fact, part of the healing process, or can be part of the healing process. The second thing is, I think we need them out of our way for a while. We need them out of society until they can, hopefully, get some kind of treatment ... which is, I guess, comes in as a third component for me. We hope that there can be some treatment that will help them to face their potential problems or tendencies, and help them to overcome them. But, I have to tell you, I'm not a psychological expert, but from the little bit that I know, and have seen or read, recidivism is so high among sex offenders, that I honestly have serious doubts

about their rehabilitation... I mean, that's just so ... so, yes, treatment is a real consideration, cause I want everyone to have a chance at it..."

Rural prosecutors almost universally expressed frustration at the lack of treatment option, available to them for sex offense cases that were not egregious enough to warrant prison sentences and involvement in treatment through the Department of Corrections. For those offenders sentenced to prison, prosecutors felt it was a given that such individuals would receive treatment. But with some felony cases, and most misdemeanor cases, a paucity of treatment resources was noted in rural areas. Of course, some urban prosecutors expressed similar sentiments, but not to the extent of those practicing outside of the relatively resource-rich "Wasatch Front" regional area. A notable lack of prosecutor resources was a common theme throughout most aspects of the interview, and particularly marked in rural areas.

### **Conclusions**

While initially thought to potentially be a factor, registration on the sex offender registry is not a major consideration in prosecutorial practice around plea negotiations with sex offense cases. Where as some consider the registry's utility to be dubious, others see it as an important tool in decreasing the frequency of sex offenses. Most agree, however, that a major emphasis should be placed on educating the public on its existence and on increasing the public's awareness of its strengths and limitations.

Treatment options for convicted sex offenders are considered by many prosecutors to be marginally effective at best, but most agree that treatment is a necessary resource that is most often lacking in rural communities.

Plea negotiations are considered a necessary and multi-faceted process, and the system could not function without it. Since legislative changes in 1996, most prosecutors seem to have utilized the revisions as the Legislature intended, although there may be less awareness of some charge categories than others. While there are a myriad of subjective factors that play into plea negotiation factors on some level, most prosecutors refer to the specific evidence of the offenses they are presented with, evaluate appropriate statute, consider the specifics of each unique case, and defer to the ultimate decision of the Judge.

## Appendix A

How long have you been a prosecutor?

How long have you prosecuted sex offenders, and approximately how many cases have you been involved with?

How is a determination made as to what charges are initially filed for an alleged sex offender? (What factors are involved in determining an initial charge or charges?)

Are you aware of any assessments of alleged offender risk that play a role in the determination of initial charges?

What would account for a plea negotiation that would either dismiss higher level sex offense charges or reduce higher level sex offense charges to lower charges?

In terms of plea negotiations, do you feel it is more common practice to dismiss charges or to reduce initial charges?

Do you have a preference for reducing counts rather than level of offense in plea bargaining. why or why not? Perhaps their particular office has a policy on this issue.

What factors are involved in potential plea negotiation from an initial offense?

Does offender qualification for the sex offender registry play a role in determining charges?

Do the length of prison stay and the related treatment time associated with it play a role in what charges are initially filed in sex offense cases?

In your experience, why do some cases have all charges dismissed?

When considering a plea negotiation for a 1<sup>st</sup> degree felony sex offense, what importance do you place on getting a 1<sup>st</sup> degree conviction so the offender's sentence has a lifetime statutory maximum?

Are you aware of and do you use the offense of Attempted Aggravated Sexual Abuse of a Child which does not carry a mandatory prison sentence, but retains a lifetime statutory maximum sentence?

Are there any common characteristics or personality factors that you see associated with the sex offenders you have had contact with?

In your experience, have you observed factors or sets of factors that might cause people to become sexual offenders?

Do you think that current registration laws will help control the sexual offender problem? Why or why not?

What are the best aspects of the registration law, and what would you change if you could?

What do you see as the gaps in the system for more effective sex offender prosecution?

What do you see as the gaps in the system for more effective sex offender treatment?

In your opinion, do plea negotiations impact treatment options for the sex offender?

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