

Minnesota - once again - grapples with predatory offender issues

At a press conference yesterday, Governor Tim Pawlenty proposed a change in the state's criminal laws that would extend the sentences served by Minnesota sex offenders. The proposed change to the sentencing guidelines would raise the presumptive sentence for first-degree criminal sexual conduct from 12 years to 25 years.

This proposal follows the governor's \$89 million bonding request to expand the state's sex offender treatment facility at Moose Lake. This session's debates — over both criminal sentencing and the "civil commitments" that are sometimes imposed after the completion of a sentence — come after a long, complicated history of grappling with how best to deal with sex offenders.

Since the early 1990s, changes to sex-offender statutes have occurred on an ongoing basis, and have resulted in modifications to both criminal and civil laws. What follows is a brief overview of Minnesota's legal landscape as it relates to predatory and sex offenses.

Criminal penalties

Minnesota's criminal code currently recognizes a range of sex-related offenses, collectively defined as "criminal sexual conduct." These offenses range from fifth-degree to first-degree, with first-degree conduct resulting in the most serious penalties. These categories are distinguished by several factors. High-level offenses are differentiated by the use of force, the use of a weapon, and several other criteria. Lower level offenses involve actions such as non-consensual sexual contact, or genital exposure in the presence of minors.

The legislative history of Minnesota's sex offender laws shows successive rounds of alterations, with much activity occurring during the last two decades. Ramsey County Attorney Susan Gaertner has had extensive experience dealing with both the criminal and civil aspects of sex offender law. "The last twenty years," she noted, "have been a process of trying to fine-tune the criminal laws as they relate to sexual offenders."

For example, major changes to the criminal code occurred in 2005, in the wake of the abduction and murder of Dru Sjodin by convicted sex offender Alfonso Rodriguez. In response to the incident, the Minnesota legislature created a new crime known as “criminal sexual predatory conduct.” This crime is triggered when an individual commits a predatory offense motivated by sexual impulses.

Just last year, the legislature also enacted several changes specifically aimed at protecting children from sexual predators. Among other things, the 2009 laws expanded the crime of computer solicitation of children to include all electronic communication systems - including texting and cell phone video.

Longer sentences

In general, sentences for criminal sexual conduct have also increased – either by adjustments to the sentencing guidelines, or by the enactment of other statutes. Before the legislative changes of the last decades, sentences had been trending upward, although they had started from a low threshold. According to statistics compiled by the Minnesota Department of Public Safety, the average time served by convicted rapists increased from three-and-a-half to five years between 1985 and 1993. These years were followed by a series of adjustments to the sentencing guidelines that increased penalties across a range of sex offenses. For instance, today’s guideline sentences for first-degree criminal sexual conduct range from 144 months to 360 months – up substantially from a decade ago.

Several other sentence modifications occurred during the last decade, including adjustments that provided lifetime incarceration for offenders who engaged in egregious conduct - such as mutilation - in the course of certain sex crimes.

Susan Gaertner was personally involved with previous rounds of sentencing revisions at the legislature. She related that over time, she and her staff worked to “make the sentences more strategically aimed at the most dangerous sexual offenders.” The goal of the sentence modifications, she noted “was to hone in on those offenders that really posed a long-term risk to the public.

Registration laws

One significant statutory change that occurred during the early 1990s was the introduction of predatory offender registration. Minnesota’s registration

law is closely coupled with the state's community notification law. Both statutes work in an inter-related fashion. According to Minneapolis appellate attorney Jenneane Jansen, "One statute determines who has to register as a predatory offender." The other specifies who may be the subject of community notification once released from a state facility. "It's more of a regulatory statute," Jansen noted.

Minnesota's registration law created a database of offenders convicted of sex offenses, as well as other crimes. For the purposes of Minnesota's registration law, "the term is 'predatory' not 'sex' offender," said Jansen, thus encompassing a broader range of offenses such as kidnapping and indecent exposure.

A 1993 change to the registration law broadened the category of individuals required to register to include persons initially charged with a sex or predatory offense, but then convicted of another offense stemming from the same set of circumstances. This change has greatly increased the number of registered offenders in the system.

Minnesota's registration law carries reporting requirements, and subjects registered individuals to criminal penalties for failing to notify law enforcement agencies of their current whereabouts.

Community notification laws

Upon their release from a state facility, registered offenders generally become subject to the state's Community Notification Act.

Before an offender is released, an End of Confinement Review Committee (ECRC) assigns a risk level to the individual - ranging from level I to level III. "Level III" denotes an offender at the highest risk for re-offense.

The community notification law requires police agencies to disseminate different amounts of information about registered individuals to different parties. Information about level I offenders is generally available only to victims and law enforcement agencies. Information about level III offenders may be released to the public. This is done through the use of flyers and phone calls, as well as through community notification meetings. These meetings are generally held within fourteen days of a registered individual moving to a new location.

Minnesota law enforcement agencies hold notification meetings on a frequent basis. In January, for instance, the Saint Paul police department held two such meetings during the last two weeks of the month. According to Officer Sharon Ellison of the Saint Paul Police Department, the city currently has 900 registered offenders living within its borders, 25 of which trigger notification actions when they move.

Prior to holding community notification meetings, the Saint Paul police disseminate printed materials to homes, businesses, and schools near the registered offender's residence. According to Officer Ellison, this dissemination effort is intended to give nearby residents background information on an offender's past actions, so that they are aware of potentially problematic patterns of conduct.

Ellison stressed these points in front of sixty people at a January 26th notification meeting on Saint Paul's east side. During the meeting, Ellison and other law enforcement officials discussed the criminal history of level III offender Eric Taylor, who had recently moved into the neighborhood. "We're not telling you these things to scare you," Ellison told the assembled crowd, "We're telling you so you can be aware of your surroundings."

Ellison also noted that while caution was warranted, notification information should be viewed in the appropriate context, in order to reduce undue concerns. "Statistics indicate that in most cases, the offender already knows the victim," Ellison said.

Modifications to the notification law

One aspect of Minnesota's community notification law was altered over a decade ago, after the Minnesota Court of Appeals heard a challenge to its application.

In the late 1990s, an individual referred to in court documents as "CM" was subjected to community notification after serving prison time for burglary and property damage. The committee in charge of CM's risk level assignment used sexual assault charges that had been dropped as a basis for his level III classification. CM challenged the classification and resultant notification. Attorney Jenneane Jansen handled his appeal for the State Public Defender's Office.

"We raised a due process challenge in the CM case," said Jansen, "arguing

that the state could not impose level III notification based on an offense that had never been proven.”

The appellate court agreed, and held that CM had been deprived of due process when he was subjected to community notification based upon criminal charges that had been dropped. As part of its analysis, the court pointed to language in the notification law that immunized anyone who disseminated information under the statute – even if the disseminated information was untrue. According to the court, this portion of the law “deprived (CM) of his right to pursue a common-law defamation action for false statements.”

Jansen noted that after the court’s ruling, the Minnesota legislature modified the immunity clause in the notification law, but did not change the process by which risk assignments are made. At present, certain types of charges can still form a basis for community notification.

Civil commitment laws

Minnesota’s civil commitment laws provide yet another avenue for dealing with predatory sex offenders. These laws permit the state to commit an individual for ongoing treatment if that person is found to be a habitual sex offender, is mentally ill, and is likely to re-offend.

The civil commitment process generally begins when the Department of Corrections refers an incarcerated individual for commitment proceedings. These referrals are passed on to the state’s county attorneys. According to Susan Gaertner, “When someone is referred for civil commitment, our job as county attorneys is to decide whether or not there’s sufficient evidence to seek the civil commitment of the offender.” After a review process, a county attorney can choose to pursue or decline commitment proceedings.

The Linehan case and civil commitment

Minnesota’s first civil commitment law – the Psychopathic Personality Commitment Act - was enacted in 1939. Soon after its passage, the law was challenged on a variety of grounds, but was upheld by the United States Supreme Court. For many years, the law was hardly used. That changed in 1992, when the state sought the civil commitment of convicted offender Dennis Linehan.

In 1965, Linehan abducted a fourteen-year-old girl, attempted to rape her, and subsequently killed her. He served time in prison until 1992, when the state sought – and won - his civil commitment.

In 1994, the Minnesota Supreme Court overturned Linehan's commitment when it found that the state had not been able to prove that Linehan had an "utter lack of power" to control his sexual impulses, as required by the 1939 commitment law. In response to the court's ruling, the Minnesota legislature passed a new civil commitment law with a revised statutory standard. Linehan was subsequently committed under the updated Sexually Dangerous Persons Act.

Civil commitment controversy

Civil commitment laws have spurred numerous legal controversies, since they allow for detention after a criminal sentence has already been served. In 1997, a case involving a Kansas civil commitment law reached the United States Supreme Court due to concerns over double jeopardy. In its *Kansas v. Hendricks* decision, the Supreme Court upheld the civil commitment mechanism for states. However, the court is now weighing the question of whether the federal government can use the same power on its own.

Recent years have seen a dramatic rise in Minnesota's civil commitment cases. In large part, this was due to the publicity that surrounded the Dru Sjodin case. Sjodin's killer, Alfonso Rodriguez, had a history of sexual assaults, and had been turned down for civil commitment upon his release from prison. Sjodin's murder caused an uptick in civil commitment referrals that has continued to this day.

Ramsey County provides a concrete example of how the civil commitment caseload has increased in recent years. According to Susan Gaertner, "Since December of '03, we have received 185 (civil commitment) referrals. And of those referrals, 140 have been reviewed by my office under a very structured and intense review process. Of those 140 that were reviewed, we filed 50 petitions for civil commitment. We've withdrawn nine of those for a variety of reasons. And 33 individuals have been committed."

Predatory offenders and public policy

The scope of the Moose Lake bonding proposal has raised concerns in some quarters about the outer limits of the civil commitment mechanism. The

400-bed “phase II” addition assumes a commitment caseload that will continue to grow at a rapid rate. Such a rate poses questions about whether the commitment process is related to treatment, or whether the process is simply incarceration by another name. Ramsey County Attorney Susan Gaertner has raised such issues in the recent past.

“I have concerns,” said Gaertner, “that if we continue to use the civil commitment process to the extent that we’re doing it now, the court is just going to say, ‘this is not right. You’re putting too many people away under the umbrella of treatment.’”

Gaertner maintained that the civil commitment tool is important, but also said that she had actively sought its reduction through the appropriate application of criminal laws. She noted that in advocating for sentence modifications, she and her staff were trying to get the state to “move toward a system where the civil commitment of sexually dangerous persons is not necessary. That’s a long ways off, but it’s better, in our view, to use the correctional system to address dangerous offenders than the civil commitment process.”

“Overall,” said Gaertner, “public policy involving public safety should be based on facts, and not fear. The system has to do a better job of identifying those who really are a threat, as well as identifying the most cost effective way to deal with the threats that are there.”

Originally published at Minnpost.com | February 10, 2010