WHY NEBRASKA NEEDS CIVIL COMMITMENT PROCEEDINGS FOR SEX OFFENDERS

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INTRODUCTION

David Burdette had a well-established career as a serial rapist in 1982 when he decided to begin raping the women who had been featured in a magazine article describing Omaha’s ten most “eligible women.” He was sentenced to twenty-two to thirty years in prison for those rapes on December 1, 1982, and was released on April 30, 1998. Burdette resumed his career by searching the obituary columns for young women recently widowed. Among his 1998 victims was a young Omaha widow with two daughters, ages seven and eight. Burdette tied one child to each of the woman’s arms, and forced them to watch the rape.¹

In many states, a sexual predator with Burdette’s criminal history and psychological profile would have been subject to civil commitment in a psychiatric institution upon his release from prison in 1998.² While many states have enacted stricter laws to provide for civil commitment of dangerous sexual predators, Nebraska’s Legislature has made it increasingly more difficult to keep repeat sex offenders confined beyond the end of their criminal sentences.

This article provides a brief history of Nebraska’s statutes governing the civil commitment of sex offenders; describes the deficiencies in Nebraska’s current statutory scheme; and proposes changes in Nebraska law to protect the public from repeat sexual predators such as Burdette.

¹ Attorney General for the State of Nebraska. The Attorney General wishes to acknowledge the substantial assistance of Deputy Attorney General Laurie Smith Camp in the preparation of this article.

A BRIEF STATUTORY HISTORY

From 1949 to 1979, Nebraska had a sexual sociopath law, which provided for the indefinite civil commitment of sex offenders who were "determined to be disposed to the repeated commission of sexual offenses likely to cause substantial injury to the health of others." The law provided for the indefinite confinement of the defendant at a regional center (if found to be treatable) or in a prison—if found not to be treatable. The defendant was not eligible for release from custody until a psychiatric evaluation was completed by regional center staff and one licensed psychiatrist in general practice, with the county attorney or deputy present at the evaluation and at the presentation of the evaluation to the district court. If the psychiatrists concluded that the defendant was no longer a sexual sociopath, the court could sentence the defendant on the original sex offense, release the defendant on probation, or schedule a new hearing before a jury to allow the jury to decide whether the defendant was still a sexual sociopath.

In 1979, Nebraska repealed its sexual sociopath law and enacted the Mentally Disordered Sex Offender Act ("MDSO"). Under MDSO, the sentencing court was required to appoint a panel of two physicians—or a physician and clinical psychologist with training in treatment of mental disorders—to evaluate defendants convicted of felony sex offenses. If the panel found that: (1) the defendant to be an individual covered under MDSO, i.e., a person with a mental disorder causing a disposition to commit repeated sexual offenses, which are likely to result in substantial injury to the health of others; (2) the disorder was treatable; and (3) the treatment was available in the state, then the defendant would be placed in a regional center. The defendant was to remain in a regional center until "no longer mentally disordered," or until "the maximum benefit of treatment," or until "the maximum length of such offender's [criminal] sentence." If a Sentencing Review Committee, appointed by the Governor, determined that the defendant no longer suffered from a mental disorder or had received the maximum benefit of treatment, the defendant would return to the sentencing court for "further disposition" which generally resulted in confinement in the Department of Correctional Services'

6. Id.
10. Id.
facilities for the remainder of the criminal sentence. The defendant would receive credit for time spent at the regional center.

MDSO required the Department of Correctional Services to give notice to the county attorney in the county of the defendant's commitment at least ninety days prior to the defendant's release from custody. MDSO also required the county attorney to initiate mental health commitment proceedings under the Nebraska Mental Health Commitment Act upon receipt of the notice.

MDSO was unpopular with the staff working at Nebraska's Lincoln Regional Center, where the defendants were confined. The regional center staff wanted to determine which defendants were appropriate for treatment and when the treatment and confinement at the regional center should end. As a result, the regional center provided very few beds for the MDSO program. Inmates who had been classified as MDSOs waited in prison for available space in the regional center program. The backlog of inmates waiting for placement was as many as thirty-four at a time.

Another deficiency in MDSO was the fact that the Mental Health Commitment Act provided—and still provides—for the involuntary commitment of persons who are "mentally ill" and dangerous. The term "mentally ill" is a medical/psychiatric term of art which may be interpreted to include pedophiles, but generally is not interpreted to include men who enjoy sexually assaulting adult women.

In 1992, MDSO was repealed and replaced with the Convicted Sex Offender Act ("CSO"). Under CSO, the regional center staff determines who is an appropriate candidate for treatment and when the treatment should end. In addition, the CSO provides that a defendant who receives the maximum benefit of treatment is to be returned to court for resentencing, which could include a sentence of probation for a period of time not greater than the remainder of the original sentence. The theory behind the CSO law was that after a defendant "received the maximum benefit of treatment" at a regional center, the defendant would participate in an "aftercare treatment program"
while at liberty in the community, rather than returning to the Department of Correctional Services to serve the remainder of a prison sentence.\textsuperscript{20} Regional center staff were of the opinion that incarceration of the defendant in a prison setting would undermine the therapeutic progress accomplished through regional center treatment.\textsuperscript{21} The statute in the CSO providing for resentencing by the court was declared unconstitutional by the Nebraska Supreme Court in 1995 because it invaded the province of the Nebraska Pardons Board and, therefore, violated separation of powers.\textsuperscript{22}

CSO provides no mechanism for the civil commitment of sex offenders upon the expiration of their criminal sentences. Regardless, psychologists at the Department of Correctional Services have made an effort to notify county attorneys of the approaching release date of sex offenders whom they consider to be extremely dangerous so that county attorneys may initiate mental health commitment proceedings, if they choose.\textsuperscript{23} Under the Mental Health Commitment Act, those proceedings are initiated in the county where the person is “found” rather than the county of the defendant’s crime and commitment.\textsuperscript{24} The notification of county attorneys by the Department of Correctional Services, and the initiation of mental health commitment proceedings by county attorneys, is purely discretionary at this time.\textsuperscript{25}

OTHER STATES ARE PROTECTING THEIR CITIZENS

In 1997, the United States Supreme Court upheld a Kansas law providing for the civil commitment of sex offenders after the completion of their criminal sentences.\textsuperscript{26} The Supreme Court found that the commitment of such dangerous sex offenders was not in violation of substantive due process, the Ex Post Facto Clause, or the Double Jeopardy Clause of the United States Constitution.\textsuperscript{27} The Court concluded that the civil commitment was not “punishment” for the crime committed, but was for the protection of the public and for the treatment of the offender.\textsuperscript{28}

At least seventeen states and the District of Columbia now have statutes in effect for the civil commitment of dangerous sex offenders

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\item \textsuperscript{21} Id. (statement of DeWayne Wolf, retired judge).
\item \textsuperscript{22} State v. Jones, 532 N.W.2d 293, 295 (Neb. 1995).
\item \textsuperscript{23} Letter from Harold Clarke, Director, Nebraska Department of Correctional Service to Don Stenberg (Jan. 18, 1999) (on file with author).
\item \textsuperscript{24} Neb. Rev. Stat. § 83-1025 (Reissue 1999).
\item \textsuperscript{25} Neb. Rev. Stat. § 83-1026 (Reissue 1999).
\item \textsuperscript{26} Kansas v. Hendricks, 521 U.S. 346, 371 (1997).
\item \textsuperscript{27} Hendricks, 521 U.S. at 371.
\item \textsuperscript{28} Id. at 363-65.
\end{itemize}
upon completion of their criminal sentences. The states include Arizona, California, Connecticut, Florida, Georgia, Iowa, Kansas, Minnesota, Missouri, North Dakota, New Jersey, Rhode Island, South Carolina, Texas, Virginia, Washington, and Wisconsin. In most other states, legislation is pending for the civil commitment of dangerous sex offenders.

In 1998, legislation was introduced in the Nebraska Legislature to provide for the civil commitment of dangerous sex offenders after completion of their criminal sentences. The bill was heard by the legislature’s Committee on Health and Human Services, and was referred out of committee but not enacted—partly due to the fact that it was introduced during a short legislative session. In 1999, legislation was again introduced in the Nebraska Legislature for the civil commitment of dangerous sex offenders. This time, the bill was heard before the Judiciary Committee, which did not refer the bill out of committee for consideration by the full legislature.

Although Nebraska has enacted legislation providing for the registration of certain sex offenders upon their release from custody and provided for limited community notification of the whereabouts of certain sex offenders, Nebraska has lagged far behind other states in the enactment of such statutes and has enacted laws weaker than

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33. Id.


35. Id. at 2585.

36. See NEB. REV. STAT. §§ 29-4004, -4013 (Cum. Supp. 1998) (requiring offenders to register with sheriff of domiciling county and imposing duty to notify the community where the risk of recidivism is high). Many other states have enacted laws for lifetime supervision of certain sex offenders; restrictions on probation or parole for certain sex offenders; enhanced penalties for drug-induced rapes; mandatory notification of school officials when juveniles commit certain sex crimes; restrictions on name changes for sex offenders; and internet accessibility of information about the whereabouts of sex offenders. CRIME PREVENTION SURVEY, supra note 29, at A8-11. The Nebraska State Patrol has promulgated its regulations for community notification of the whereabouts of sex offenders, but Nebraska was the second-to-last state in the nation to enact a community notification statute, e.g., Megan’s Law. Only New Mexico was later. Nebraska’s community notification law requires a tedious three-tier classification of sex offenders based on their degree of perceived “risk of recidivism.” The scope of notification depends upon on the perceived risk. NEB. REV. STAT. § 29-4013 (Cum. Supp. 1998); Title 272 NEB. ADMIN. CODE ch. 19 (2000). Community notification of the whereabouts of the sex offenders considered by the Patrol to pose the most danger to the community (“Level III offenders”) is available through the Patrol’s website at <http://nebraska.state.patrol.org>.
those in effect in many states. The registration of sex offenders and community notification of their presence may be helpful, but these are no substitute for the actual confinement of sexual predators who are intent on repeating their devastating crimes. David Burdette was registered under Nebraska’s sex offender registration law when he began his 1998 assaults.

NEBRASKA CITIZENS DESERVE PROTECTION, TOO

Minor changes in Nebraska statutes could provide invaluable protection for Nebraska citizens who may be future targets of serial rapists like David Burdette. Three changes are recommended. First, Nebraska statutes should mandate and should specify time frames: (1) for the evaluation of sex offenders who are scheduled to be released from the Department of Correctional Services; (2) for the sending of notice by the Department to county attorneys regarding the scheduled release date; and (3) for the initiation of mental health commitment proceedings by county attorneys.

Second, because Nebraska’s Mental Health Commitment Act uses the terminology “mental illness” which is a medical/psychiatric term of art, these commitment statutes need to be revised. A sexual predator, who has a mental abnormality or “personality defect,” which causes him or her to be likely to commit future sex offenses, must be subject to confinement for treatment and for the protection of the public.

Third, under the Mental Health Commitment Act, the county attorney in the county where the subject is “found” is responsible for handling the commitment proceedings. In general, the county attorneys in the counties where the sex offenders committed their offenses and were sentenced are the officials who have the greatest interest in conducting the mental health proceedings, because the victims of the crime are their constituents, the people of the county would most likely remember the crime, and, if the offender formerly resided in that county, the offender may be returning. In the case of civil commitment of a sex offender, the Mental Health Commitment Act should be revised for the initiation of commitment proceedings by the county attorney in the county where the offense occurred.

CONCLUSION

Victims of violent sex offenses can never be compensated for their injuries. Nebraska’s sex offender registration law
residing. Nebraska’s new community notification law\textsuperscript{38} may offer some residents of the community information about where sexual predators are residing. The enactment of a law providing for the civil commitment of sex offenders will help us all know where the most dangerous sexual predators in Nebraska are residing—they will be locked up.
